



B-36

STATE OF NEW JERSEY
DECISION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of A.G, New Jersey
City University

CSC Docket No. 2015-2381

Discrimination Appeal

ISSUED: JUN 05 2015 (SLK)

A.G., a professor with New Jersey City University, represented by Candice L. Deaner, Esq., appeals the decision of the appointing authority's Equal Employment Opportunity/Affirmative Action/Diversity (EEO/AA) Director which substantiated that she violated the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy).

By way of background, a student alleged that the appellant discriminated against her on the basis of religion. Specifically, the student claimed that during the course of a meeting, the appellant made a comment about the student's headscarf which she found to be offensive. The EEO/AA conducted an investigation into this matter and found that the appellant admitted she made the comment to the student. Therefore, the EEO/AA determined that the appellant violated the State Policy. It is noted that the determination letter was signed by the EEO/AA Director.

On appeal, the appellant presents that *N.J.A.C. 4A:7-3.2(j)* requires the investigatory report to provide sufficient information so that the university President can make a determination as to whether the allegation of a violation can be substantiated and she asserts that the report in this case failed to provide sufficient information on which to make a determination. Additionally, the appellant states that *N.J.A.C. 4A:7-2.3(b)9* and *N.J.A.C. 4A:7.3.2(k)* and (l) require that the President issue a final letter of determination that provides a sufficient background and explanation of the determination as to whether or not the allegations were substantiated and that in this case, the President did not issue the

letter. Rather, the appellant asserts that the EEO/AA Director issued the determination letter and that the letter does not adequately inform her of the complaint or the analysis used to form the conclusion that she violated the State Policy. Thus, she maintains that these inadequacies hinder her ability to appeal the determination.

With respect to the merits of her case, the appellant states she met with a student who was displeased with the final grade she received. During that meeting, the appellant claims that the student said to her “[y]ou told us in class that we had to think like you” in an attempt to justify why she did not earn a higher grade. The appellant explains that she tries to help students think for themselves. Therefore, she took this criticism very seriously. As such, in an attempt to convey to the student the severity of her accusation, the appellant decided to use an analogy to help the student understand that a harmful personal attack was not the proper tool to address her dissatisfaction with her grade. Thus, the appellant states that she asked the student, “[i]f there is something in your identity that is precious to you, that you hold dear, that helps define who you are?” and that the student replied “Yes, my religion.” The appellant indicates that she responded “Perfect! My teaching is sacred to me, so religion is a perfect example.” Accordingly, she explained that her teaching and methods are an important part of her identity, just as religion is to the student. To illustrate her point, the appellant stated “the scarf you’re wearing is an outward manifestation of your religion just like [my] teaching methods are an outward manifestation of [my] beliefs about educating students.” The appellant indicates she then stated:

What if I insisted that the reasons why you’re wearing that scarf (out of modesty, out of desire to please God, out of your remembrance and observation of the law of your religion) are not the actual reasons? That you’re just wearing it because you think it’s pretty or you like it. And what if I insisted, no matter how many times you explained to me why, exactly, you were wearing it, that my conclusions were the correct ones about your intentions, your practices, your identity?

The appellant contends that the student seemed to grasp that she was trying to convey the seriousness of her allegation, and although the student still disagreed with her position, there was no indication that the analogy was in any way offensive. She also presents that the student filed first and second level grievances with the university in order to have her grade changed, but was not successful. Thereafter, the appellant argues that the student claimed that she was discriminated against by her in retaliation for the grade she received. In short, the appellant maintains that her use of the student’s religion in an analogy was not a violation of State Policy as the student brought religion up, she did not treat the student less favorably due to her religion, the analogy was not derogatory toward

her religion, and the student's discrimination complaint was only filed as retaliation after losing her grade grievance.

The appointing authority, represented by Kyle E. Gruber, Deputy Attorney General, responds that the appellant met with a student to discuss her grade and she said, "How would you like it if I said 'I do not like the way you wear your headscarf.'" The student was wearing a religious garment on her head at the time the appellant made the statement. Based on the witness statements, the investigation concluded that the appellant made the alleged comment. The appointing authority claims that it correctly determined that she violated the State Policy as the appellant admitted to making the comment, the comment was derogatory and referenced religion, and that it does not matter if she did not intend to harass or demean the student. The appointing authority asserts that its investigative report met all of the requirements under *N.J.A.C. 4A:7-3.2(j)* and that the President did review the report and the final determination. However, it admits that the President did not issue a final letter of determination in this matter as the President determined that the appellant's conduct was minor and therefore did not warrant the President issuing a final, formal letter. The appointing authority requests that if its determination is going to be reversed on the basis that the President did not issue a final letter of determination, that matter be remanded to allow the President to issue one before the Civil Service Commission (Commission) renders a decision.

In response, the appellant states that the investigative report prepared by the EEO/AA Director failed to meet the requirements of *N.J.A.C. 4A:7-3.2(j)*. Additionally, she believes that the President did not read the investigative report because the President would have found deficiencies in the report. Further, the appellant asserts that under the *N.J.A.C. 4A:7-3.2(k)* and (l) it is mandatory for the President to issue a final letter of determination that contains sufficient detail to ensure that the investigation was done properly in order to ensure that an appropriate decision is reached. She argues that without a sufficient determination letter from the President, the determination cannot be adequately evaluated by a third-party or herself on appeal.

CONCLUSION

N.J.A.C. 4A:7-2.3(b)(9) provides that in accordance with procedures established by the Division of EEO/AA for handling internal discrimination complaints, each State agency shall issue final letters of determination signed by the State agency head or designee who shall be a deputy or assistant commissioner or a chief of staff or equivalent.

N.J.A.C. 4A:7-3.1(a) provides, in pertinent part, that employment discrimination or harassment based upon religion is prohibited under the State

Policy. *N.J.A.C.* 4A:7-3.1(a)(1) provides that the State Policy applies to persons doing business with the State.

N.J.A.C. 4A:7-3.2(i) provides that at the EEO/AA Officer's discretion, a prompt, thorough, and impartial investigation into the alleged harassment or discrimination will take place.

N.J.A.C. 4A:7-3.2(j) provides that an investigatory report will be prepared by the EEO/AA Officer or his or her designee when the investigation is completed. The report will include, at a minimum:

1. A summary of the complaint;
2. A summary of the parties' positions;
3. A summary of the facts developed through the investigation; and
4. An analysis of the allegations and the facts. The investigatory report will be submitted to (State agency head) who will issue a final letter of determination to the parties.

N.J.A.C. 4A:7-3.2(k) provides that the (State agency head or designee) will review the investigatory report issued by the EEO/AA Officer or authorized designees, and make a determination as to whether the allegation of a violation of the State Policy has been substantiated.

N.J.A.C. 4A:7-3.2(l) provides that the (State agency head or designee) will issue a final letter of determination.

1. The letter shall include, at a minimum:
 - i. A brief summary of the parties' positions;
 - ii. A brief summary of the facts developed during the investigation; and
 - iii. An explanation of the determination, which shall include whether:
 - (1) The allegations were either substantiated or not substantiated; and
 - (2) A violation of the State Policy did or did not occur.

The Commission finds that it is unable to determine if the EEO/AA conducted an adequate investigation in this matter. Initially, the appellant asserts

that the EEO/AA's investigative report was deficient because it did not comply with the requirements outlined in *N.J.A.C. 4A:7-3.2(j)*. However, the investigative report is *not* provided to the parties during the course of a State Policy investigation. In this regard, the investigative report details the findings of an investigation and is provided to the agency head or designee so that that individual can assess the facts contained therein in order to make a determination if a violation of the State Policy has been substantiated. The conclusions made by the agency head or designee regarding the complaint are briefly documented in a final letter of determination that is issued to the parties in accordance with *N.J.A.C. 4A:7-3.2(l)*. In this case, the appointing authority is arguing that the final letter of determination is *also* the investigative report. If the EEO/AA's January 14, 2015 letter determination is also the investigative report, as asserted by the appointing authority in its response, it is clearly deficient as explained below as it does not provide a sufficient basis on which the agency head could make a determination. Further, the final letter of determination is also deficient as it was not signed by the agency head or designee and it does not provide a sufficient basis on which the appellant could challenge the conclusion that she violated the State Policy.

Under *N.J.A.C. 4A:7-3.2(j)*, the EEO/AA is to prepare an investigatory report that provides sufficient detail so that a State agency head can make a determination as to whether the allegation of a violation of the State Policy has been substantiated. In this matter, the only evidence on the record is a determination letter issued by the EEO/AA, not the President, which is not an investigative report. The letter only vaguely described that the appellant made reference to a student's headscarf and that she acknowledged making the comment during the course of a meeting with the student when making an analogy. It is only on appeal that the appointing authority presents that the alleged comment was "How would you like it if I said 'I do not like the way you wear your headscarf'" and that the student was wearing a religious garment on her head at the time the appellant made the alleged statement.

In contrast, the appellant alleges that she used the analogy in the context of a situation where a student accused her of unfair grading because the student did not "think" like the appellant. The Commission notes that the fact that appellant referenced religion in an analogy is not necessarily a *per se* violation of the State Policy and, if the comments were made, they must be evaluated in the context of the situation. *See In the Matter of J.J., Department of Transportation* (CSC, decided November 19, 2014). In this case, the appellant claims that during the discussion, the student indicated that her religion was precious to her in response to the appellant's question, and the appellant replied to the student's accusation by using an analogy to demonstrate that her teaching methods were as precious to her as religion was to the student. As such, the appellant's position was that her comments were not derogatory toward religion and therefore not a violation of State Policy. However, the determination letter only indicates that the appellant's

position was that she did not intend to offend the student with her comments and not that the comments were not derogatory. Significantly, the appointing authority has not disputed the appellant's version of the context of the situation. Additionally, the determination letter does not provide any information that indicates how it was determined that the appellant made the alleged comments, which the appellant now denies, or any analysis as to how it determined that the appellant violated the State Policy.

Moreover, as noted above, under *N.J.A.C. 4A:7-2.3(b)(9)*, the President or appropriate designee is required to issue the final determination, but failed to do so. The Commission notes that the appointing authority's failure to comply with this provision is not a mere technical violation of the rules. Instead, the procedures are designed to ensure that the investigation was thorough and impartial by having an executive leader review the investigative report in order to make an informed final determination if a violation of the State Policy was substantiated. Additionally, the requirement for agency head review underscores the importance of the State Policy and provides the agency head with the information he or she needs to fulfill the responsibility of ensuring a workplace free of discrimination and harassment.

Accordingly, it is appropriate to remand this matter in order for the EEO/AA Director to prepare an investigative report with sufficient detail in compliance with *N.J.A.C. 4A:7-3.2(j)* so that the President or appropriate designee can review the matter and make an informed determination as to whether the allegation has been substantiated. Thereafter, the President or appropriate designee shall issue a final letter of determination with sufficient detail that explains the basis for the determination in compliance with *N.J.A.C. 4A:7-3.2(l)*. Furthermore, the Commission orders that the President or appropriate designee issue a final letter of determination within 60 days from the issuance of this decision. If the President or appropriate designee issues a determination that substantiates the allegations and finds that the appellant did violate the State Policy, the appellant shall be provided with appeal rights to the Commission.

ORDER

Therefore, it is ordered that matter be remanded to the EEO/AA in order for it to prepare an investigative report consistent with this decision. Additionally, it is ordered that the President or appropriate designee issue a final letter of determination consistent with this decision within 60 days from the issuance of this decision.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 3rd DAY OF JUNE, 2015



Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Henry Maurer
Director
Division of Appeals
and Regulatory Affairs
Civil Service Commission
Written Record Appeals Unit
P.O. Box 312
Trenton, New Jersey 08625-0312

Attachment

c: A.G.
Candice L. Deaner, Esq.
Kyle E. Gruber, DAG
Lisa Norcia
Mamta Patel
Joseph Gambino