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STATE OF NEW JERSEY

In the Matter of Kenneth Isky,
Department of Children and Families

CSC Docket No. 2015-1192

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

Request for
Reconsideration

ISSUED: JUL 17 2015 (JET)

Kenneth Isky, a former Supervising Administrative Analyst[1] with the Department of Children and Families, requests reconsideration of the attached final administrative decision rendered on September 17, 2014, which upheld his three-day suspension.

By way of background, the appellant was found to have violated the State Policy Prohibiting Discrimination in the Workplace (State Policy) which resulted in him receiving a three-day suspension. The appellant appealed the minor disciplinary action to the Civil Service Commission (Commission), arguing that the departmental hearing was improperly conducted and that the hearing officer should have recused herself. However, the Commission determined that since the appellant did not testify at his hearing or call any witnesses to testify on his behalf to further explain certain documents that they authored and were admitted into evidence, there was no basis on which to establish that the hearing officer erroneously drew an adverse inference from the appellant's decision not to testify. Accordingly, the Commission did not review additional submissions the appellant submitted on appeal to further explain the contents of documents reviewed during the departmental hearing.

In the instant matter, the appellant asserts, among other things, that the information that he submitted in the prior matter may have been misinterpreted by

[1] Isky retired from State service effective December 31, 2014.

the Commission. It is noted that the appellant does not provide any further arguments or specific evidence in support of his claims.

In response, the appointing authority maintains that the three-day suspension was correctly upheld in the prior decision. Moreover, the appointing authority asserts that the appellant has not satisfied the standard for reconsideration pursuant to *N.J.A.C.* 4A:2-1.6(b).

CONCLUSION

N.J.A.C. 4A:2-1.6(a) provides that within 45 days of receipt of a decision, a party to the appeal may petition the Commission for reconsideration. *N.J.A.C.* 4A:2-1.6(b) sets forth the standards by which the Commission may reconsider a prior decision. This rule provides that a party must show that a clear material error has occurred or present new evidence or additional information not presented at the original proceeding which would change the outcome of the case and the reasons that such evidence was not presented at the original proceeding.

In this matter, the appellant did not present any new evidence or additional arguments that would somehow change the outcome of the prior decision or show that a clear material error occurred. Other than the appellant's assertions, there is no evidence to show that the Commission misinterpreted any of the information that was submitted in furtherance of the prior matter. The fact that the witnesses may have provided additional information after the appellant's departmental hearing concluded does not change the outcome in this matter because the appellant had the opportunity to testify or call witnesses at the hearing to further explain his position but he chose not to do so. Thus, it would have been impermissible for the Commission to review the appellant's additional submissions concerning the content of the evidence that was provided at the hearing and the hearing officer properly drew an adverse inference based on his failure to testify or call witnesses to testify regarding the evidence he submitted at the hearing. Accordingly, the has failed to present a sufficient basis for reconsideration of the Commission's prior decision.

ORDER

Therefore, it is ordered that this request for reconsideration be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 15th DAY OF JULY, 2015

Robert M. Czech
Chairperson
Civil Service Commission

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Attachment

c: Kenneth Isky
Linda Dobron
Kenneth Connolly
Joseph Gambino

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STATE OF NEW JERSEY

In the Matter of Kenneth Isky,
Department of Children and Families

CSC Docket No. 2014-1243

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

Minor Discipline Appeal

ISSUED: SEP 2 2 2014 (JET)

Kenneth Isky, a Supervising Administrative Analyst with the Department of Children and Families, appeals his three-day suspension.

By way of background, a discrimination complaint was filed against the appellant on June 1, 2012 alleging that he violated the State Policy Prohibiting Discrimination in the Workplace (State Policy) based on race and sexual harassment. Specifically, M.P., a Principal Audit Account Clerk, claimed that the appellant spoke to African-American employees in the office using "street language," such as "Watch chu be eatin girl?" and "Watch chu be doin?" M.P. also claimed that after she enlarged a spreadsheet at the appellant's request, he said "Bigger is better, isn't it?", that he told her to "[y]ell for your [s]ecretary to get her fat ass in there" and stated that "Asians and Indians and foreigners are all the same." The Office of Equal Employment Opportunity and Affirmative Action (EEO/AA) investigated the matter and determined that these allegations were not corroborated. However, the EEO/AA's investigation did find that on occasion, the appellant spoke to Asian American employees in the Accounting Office in a "pseudo-Asian" accent and that he referred to female employees as "girl." Therefore, the EEO/AA determination indicated that the appellant "should refrain from making comments in a pseudo Asian accent in the workplace" and advised him that it was recommending disciplinary action be taken against him for his violation of the State Policy.

Subsequently, the appellant was charged with conduct unbecoming a public employee, discrimination that affects equal employment opportunity, including sexual harassment, and other sufficient cause. The specifications indicated:

> A complaint was made against you for violation of the [State Policy]. As a result of the investigation, the [EEO/AA] determined that you violated the [State Policy] by using inappropriate language to speak to and/or refer to an Asian American and African American employee in your unit. As a higher level supervisor, you are expected to be professional and act as a role model to employees in your office. Your use of inappropriate language violated [the] State Policy and demoralized other employees in the office. Your misconduct is not tolerated.

The appellant did not call any witnesses to testify at the departmental hearing. However, letters from G.B.Y., an Asian-American Senior Clerk Typist, and M.S., an Asian American Section Supervisor, Fiscal, both dated April 9, 2013, were provided by the appellant and admitted as evidence. G.B.Y.'s letter indicated that she was interviewed by the EEO/AA concerning the allegations against the appellant. The letter explained that when the subject came up concerning the appellant speaking to her in Chinese and/or pseudo-Chinese words:

> I tried to explain that this only happened on a few occasions and was not meant to be either demeaning or discriminatory to anyone, especially of the Asian race. It was also not deliberately said publicly and not meant for the rest of the office. [The appellant] had learned some things from his former office co-worker, M.S., and on certain occasions when the timing was appropriate, would make a discussion with me and I would respond as well.

Among other things, M.S.'s letter indicated that the appellant would "correct my English from time to time when I didn't pronounce the word correctly." In her determination, the hearing officer acknowledged that the appellant presented letters from Asian employees stating that they did not believe he wanted to offend them, but, since the State Policy is a zero tolerance policy, intent was not a consideration. Further, the hearing officer drew a negative inference in this matter since the appellant failed to testify at the departmental hearing. As such, the charges against the appellant were sustained and he received a three day suspension.

On appeal to the Civil Service Commission (Commission), the appellant requests that his three day suspension be overturned and back pay be awarded as he is not guilty of the charges. Specifically, the appellant explains that he did not speak pseudo-Asian to G.B.Y. In this regard, the appellant clarifies that he

conversed in Mandarin with G.B.Y. and he would show her how to speak English. The appellant also maintains that he did not refer to his staff as "girls,"[1] and that word is only offensive depending on the context in which it is used. In addition, the appellant avers that the complainant in the State Policy matter admitted that the allegations against him were not true and he contends that the appointing authority simply wanted to punish him because of a prior disciplinary matter. Further, the appellant contends that the EEO investigation was improperly conducted as evidenced by the testimony provided by the EEO investigator during his departmental hearing. The appellant adds that G.B.Y. stated to him that she became nervous during her interview and she only agreed with the EEO's investigator's questions in order to end the interview. The appellant also explains that he did not solicit any statements from the witnesses and he only asked certain individuals to write down their observations.

Additionally, the appellant contends that the departmental hearing was improperly conducted and that the hearing officer should have recused herself. In this regard, the appellant explains that the hearing officer was aware of the EEO matter before the departmental hearing was conducted.[2] The appellant explains that the hearing officer was present during a meeting which was indirectly about M.P., who was the complainant in the EEO matter. Further, the appellant asserts that the hearing officer's indication that "an adverse inference is drawn" by his failure to testify demonstrates that the purpose of the hearing was to cast on him a presumption of guilt. The appellant adds that the hearing officer did not properly consider the evidence that he submitted. In this regard, the appellant explains that he submitted a letter from G.B.Y. during the departmental hearing which indicated that he conversed with her in Mandarin and did not speak in a pseudo-Asian accent. Moreover, the appellant asserts that he contacted the Employee Advisory Service (EAS) for assistance as he believed that the appointing authority was out to "bring him down."[3]

In support of his appeal, the appellant provides additional correspondence from G.B.Y. and M.S. In G.B.S.'s November 27, 2013 letter, she states:

> [The appellant] was not being offensive, racist, or making fun of Asians or Chinese people. When [appellant] and M.S. were working in Revenue, she would teach him Chinese (Mandarin). In reverse, [appellant] would assist M.S. with proper English ... Sometimes [appellant[would say some Mandarin words to me and I would reply

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[1] The appellant also states that no one in his office can remember if he referred to anyone as "girls."
[2] In support, the appellant provides a July 5, 2012 e-mail from C.L. which summarized the results of a meeting held on or about that date. The meeting was held to address concerns between C.L. and M.P., the EEO complainant.
[3] The appellant also contends that EAS advised him that it "receives many complaints regarding DCF administration, maybe above and beyond that of any other [agency]."

> back in Mandarin. For example, [appellant] would say in Mandarin, "Hi, how are you?" I would reply, "I'm good." There is nothing offensive about that.

M.S. indicated in her undated letter:

> Sometimes [appellant] would overhear my conversations in Chinese and would be interested to learn some new words and phrases which I would try to teach him. Chinese can be a difficult language to speak properly and as hard as he honestly tried his pronunciation and sounds were not always correct. Chinglish ... is the use of both Chinese and English words when a person does not know the full words to say of either one or you would substitute what you do not know. That manner of speaking should be understood and accepted and not be held as detrimental by anyone when it is done in the sincerest manner to learn the language and make yourself understood.

In response, the appointing authority asserts that the EEO investigation was properly conducted and the EEO investigator competently testified during the appellant's departmental hearing, which supports its disciplinary action against the appellant. In addition, the appointing authority contends that although the appellant does not recall referring to his staff as "girls," he does not specifically deny using that term. The appointing authority also explains that the appellant has previous conduct which mitigated the hearing officer's decision. In this regard, it reasons that a three day suspension was appropriate since in 2007, the appellant was previously charged with conduct unbecoming a public employee for which he received an official written reprimand.[4] Further, the appointing authority expresses concern regarding the appellant soliciting exculpatory statements from G.B.Y. and other staff members after his departmental hearing was concluded. The EEO explains that it considers the original statements submitted at the departmental hearing to be more credible than the information provided by the appellant on appeal. As such, the EEO requests that any statements obtained after the departmental hearing concluded should be disregarded. Moreover, the appointing authority asserts that the appellant incorrectly characterized the information that was provided to him by EAS, as it would not have indicated that anyone at the appointing authority wanted to "bring him down."

CONCLUSION

N.J.A.C. 4A:2-3.7(a) provides that minor discipline may be appealed to the Commission. The rule further provides:

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[4] The appointing authority claims that the appellant allegedly threatened the life of the Chief of Staff.

1. The [Commission] shall review the appeal upon a written record or such other proceeding as the [Commission] directs and determine if the appeal presents issues of general applicability in the interpretation of law, rule or policy. If such issues or evidence are not fully presented, the appeal may be dismissed and the [Commission's] decision will be a final administrative decision.

2. Where such issues or evidence under (a)1 above are presented, the [Commission] will render a final administrative decision upon a written record or such other proceeding as the [Commission] directs.

This standard is in keeping with the established grievance and minor disciplinary procedure policy that such actions should terminate at the departmental level. In the present matter, while this appeal provides an issue of general applicability in the interpretation of law, rule, or policy, which is further discussed below, there is no basis on which to grant the appellant's appeal.

In considering minor discipline actions, the Commission generally defers to the judgment of the appointing authority as the responsibility for the development and implementation of performance standards, policies and procedures is entrusted by statute to the Department of Children and Families. The Commission will also not disturb hearing officer credibility judgments in minor discipline proceedings unless there is substantial credible evidence that such judgments and conclusions were motivated by invidious discrimination considerations such as age, race or gender bias or were in violation of Civil Service rules. *See e.g., In the Matter of Oveston Cox* (CSC, decided February 24, 2010).

N.J.A.C. 4A:7-3.2(n)3 provides that in a case where a violation of the State Policy has been substantiated and disciplinary action recommended, the procedures for the appeal of disciplinary action shall be followed. In this case, since disciplinary action was recommended based on the asserted violation of the State Policy, the appellant's departmental hearing was the proper venue to challenge the findings of the EEO/AA's investigation.

The appointing authority expressed its concern with the appellant's solicitation of post-hearing exculpatory statements from subordinate staff, maintaining that G.B.Y's original statement in the hearing record, *i.e.,* her April 9, 2013 letter, is more credible than the post-hearing exculpatory statement. It is unclear if the appointing authority's concern in this regard is based on potential violations of the confidentiality provisions of the State Policy as indicated in *N.J.A.C.* 4A:7-3.1(g)(1) and (j) or if the Commission's review of such evidence impermissibly calls into question a hearing officer's credibility determination based on clarification or further explanation of documentary evidence presented at the hearing at which the authors of such documents were not called to testify.

With respect to any potential concerns regarding the confidentiality provisions of the State Policy, *N.J.A.C.* 4A:7-3.1(j) states, in pertinent part:

> All complaints and investigations shall be handled, to the extent possible, in a manner that will protect the privacy interests of those involved. To the extent practical and appropriate under the circumstances, confidentiality shall be maintained throughout the investigatory process ... All persons interviewed, including witnesses, shall be directed not to discuss any aspect of the investigation with others in light of the important privacy interests concerned. Failure to comply with this confidentiality directive may result in administrative and/or disciplinary action, up to and including termination of employment.

In *In the Matter of V.L.* (CSC, decided October 8, 2008), the Commission determined that an appellant is not precluded from approaching witnesses to an investigation *after* a determination has been issued in order to challenge the results of an investigation in the appeal process. In *V.L.*, the Commission underscored that if an appellant is not permitted to request that witnesses to an investigation provide information or statements to the Commission during the appeal process, then it would essentially be impossible for her to challenge the sufficiency of the investigation. The Commission emphasized that this does not mean that persons interviewed *during* the investigation are permitted to discuss any aspect of the investigation in light of the privacy issues of all parties or that parties are permitted to share confidential submissions from the EEO with other parties during the appeal process. However, since *N.J.A.C.* 4A:7-3.2(m)3 places the burden of proof in all discrimination appeals brought before the Commission on the appellant, it is necessary that an appellant have a fair opportunity to substantiate a claim or vindicate himself or herself. Indeed, to cloak every encounter between an appellant and a witness who is attempting to appeal an EEO determination as a violation of the State Policy's confidentiality policy may have a chilling effect on the appeal process and preclude an appellant from having a meaningful appellate review of the investigation. Thus, the Commission found in *V.L.* that one way in which to do this would be for an appellant to approach a fact witness *after the investigation determination has been issued* and request that person provide the Commission with a written statement concerning the matter at issue *without* providing that person with confidential information concerning other parties. In the instant matter, although done as part of his appeal of a minor disciplinary action based on a violation of the State Policy, this is essentially what the appellant has done. Therefore, in this case, the appellant's providing of such statements, after the conclusion of the State Policy investigation in support of an appeal, was proper.

However, the provision of these statements, in this case, cannot be used to pose a meaningful challenge to the hearing officer's assessment of the evidence at

the time of the hearing. As previously noted, the appellant did not testify at the hearing and he did not call any witnesses to testify on his behalf or to further explain the documents they authored that were admitted into evidence. Therefore, the appellant's assertion that the hearing officer erroneously drew an adverse inference from his decision not to testify at the hearing is without merit. No such preclusion exists at an administrative hearing in this State. *See Duratron Corporation v. Republic Stuyvesant Corp., et al.*, 95 *N.J. Super.* 527 (App. Div. 1967), *cert. denied*, 50 *N.J.* 404 (1967), and *State Department of Law and Public Safety v. Merlino*, 216 *N.J. Super.* 579 (App. Div. 1987), *aff'd*, 109 *N.J.* 134 (1988). In *Merlino*, the court held that in administrative and civil proceedings, it is permissible for the trier of fact to draw adverse inferences from a party's plea of self incrimination, but the inference may be drawn only if there is other evidence supporting the adverse finding. In this case, it is clear that the hearing officer did not base her findings merely on the appellant's refusal to testify, but on substantial evidence in the record which provides ample support for the determination as to the charge and the penalty – specifically, the appointing authority's witness explaining the investigation process, the EEO/AA determination *and* the documents provided by the appellant from G.B.Y. and M.S. at the time of the hearing. The documents provided at the hearing did not vindicate the appellant. Moreover, he had the opportunity to testify or call witnesses at the hearing to further explain his position and contents of the letters but he chose not to do so. Thus, it is impermissible for the Commission to review the appellant's additional submissions concerning the content of the April 9, 2013 evidence and the hearing officer properly drew an adverse inference based on his failure to testify or call witnesses to testify regarding the evidence he submitted at the hearing.

In the instant matter, the appellant was provided with a departmental hearing and it was determined that he was guilty of conduct unbecoming a public employee based on a violation of the State Policy. Accordingly, it was determined that the three day suspension was appropriate. The appellant did not provide any substantive evidence to show that the departmental hearing was improperly conducted. In this regard, the appellant did not provide any substantive information to show that the hearing officer did not consider all of the testimony that was presented. The fact that the witnesses may have provided additional information after his departmental hearing had been concluded, for the reasons stated above, does not change the outcome of this matter. Additionally, the appellant does not provide any substantive evidence to show that a conflict of interest existed or to dispute the appointing authority's contention that he did not raise that concern at the time of the departmental hearing. The fact that the hearing officer was present during a meeting with the EEO complainant regarding a separate matter does not establish that there was a conflict of interest. Accordingly, no further review will be conducted in this matter.

ORDER

Therefore, it is ordered that this appeal be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 17th DAY OF SEPTEMBER, 2014

Robert M. Czech
Chairperson
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