



STATE OF NEW JERSEY

**FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION**

In the Matter of D.C-W.

CSC Docket No. 2018-1644

Discrimination Appeal

ISSUED: JUNE 8, 2018 (SLK)

D.C-W., an Instructional Technician Secured Facilities (Instructional Technician) with the Department of Corrections, appeals the decision approved by appointing authority's Commissioner, which did not substantiate her allegation to support a finding that she had been subject to a violation of the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy).

By way of background, D.C-W., an African-American female, filed a complaint with the Equal Employment Division (EED) alleging that J.J-B., a Director 1 Education, who is an African-American male, subjected her to race and color discrimination. Specifically, D.C-W. believed that she was performing out-of-title work as an Instructional Technician. Accordingly, she completed a Position Classification Questionnaire (PCQ) so that the classification of her position could be reviewed by the Division of Agency Services (Agency Services). Additionally, S.P-T., a then Principal Clerk Typist, who is a Caucasian female, also submitted a PCQ for a classification review of her position. D.C-W. claimed that J.J-B. subjected her to disparate treatment based on race. Specifically, D.C-W. stated that J.J-B. refused to sign her PCQ. However, although J.J-B. did not agree with S.P-T.'s request, he did sign her PCQ. Further, J.J-B. only signed D.C-W.'s PCQ after her union assisted her. Moreover, after J.J-B. signed D.C-W.'s PCQ, he directed that all of her out-of-title duties be removed, which no longer made her a candidate to have her position reclassified to a higher title. Additionally, after D.C-W.'s classification review was denied, she contends that J.J-B. then ordered all of her out-of-title

duties be reassigned back to her. However, Agency Services approved S.P-T.'s reclassification of her position to a higher title, Education Program Assistant 2. D.C-W. alleges that J.J-B's initial refusal to sign her PCQ and his signing of S.P-T.'s PCQ was an act of disparate treatment since she is African-American and S.P-T. is Caucasian. The investigation revealed that D.C-W. acknowledged during her interview that she had no documents, witnesses or other evidence that J.J-B.'s actions were based on race and her accusation was simply based on the fact that she is African-American and S.P-T. is Caucasian. Further, the investigation revealed that initially D.C-W. sought reclassification of her position to the title of Teacher 3. However, J.J-B. refused to sign D.C-W.'s PCQ because there were no Teacher 3 vacancies at her facility and therefore her position could have potentially been reclassified to a position that did not exist. Moreover, the investigation indicated that J.J-B. did not assign or approve of the out-of-title duties assigned to D.C-W. Instead, the out-of-title duties had been assigned by an Education Supervisor to assist that supervisor. Therefore, J.J-B. redirected that these duties be assigned to an employee next in the chain of command after the Assistant Supervisor of Education. Consequently, the EED found that J.J-B.'s actions were based on legitimate, non-discriminatory and non-retaliatory reasons.

On appeal, D.C-W. argues that since J.J-B. signed S.P-T.'s PCQ, who is Caucasian, and initially refused to sign her PCQ, and she is African-American, this is sufficient to prove her claim that she was disparately treated based on her race and she need not provide any other evidence to substantiate her claim. Further, she questions why did not J.J-B. just sign her PCQ and indicate that he disagreed with her request like he did with S.P-T. Additionally, D.C-W. states that she had to get her union involved in order to get J.J-B. to sign her PCQ. Moreover, D.C-W. asks why did J.J-B. only remove her out-of-title duties after he was forced to sign her PCQ. Further, D.C-W. questions why did the appointing authority not send an additional letter to Agency Services indicating that it did not support S.P-T.'s reclassification request like it did with her request and why were S.P-T.'s out-of-title duties not removed like they were with her.¹ Finally, D.C-W. asks if the appointing authority truly felt that her duties were appropriate to her current title, why did J.J-B. have her out-of-title duties removed and her Performance Assessment Report revised before Agency Services rendered a determination regarding her classification review.

Additionally, D.C-W. contends that even with the duties that have been removed, her duties are more consistent with an Education Programs Assistant 1 title than her current title. Therefore, she requests that her position be reclassified to this title and she receive back pay. Further, D.C-W. argues that the appointing authority's removal of her out-of-title duties and reassignment of those duties to an

¹ A review of S.P-T's appeal file indicates that the appointing authority did in fact send a letter to Agency Services indicating that it disagreed with S.P-T's request that her position be classified as an Education Program Assistant 1.

Assistant Supervisor position, which is in the process of being hired, is evidence of retaliation.

In response, the EED presents that D.C-W. and S.P-T. were not similarly situated since D.C-W. initially sought to have her position reclassified as Teacher 3, while S.P-T. sought reclassification to Education Program Assistant 2. Therefore, it asserts that their classification reviews were treated differently based upon individual circumstances and not race. Further, the EED indicates that the investigation revealed there were no teaching positions available at D.C-W.'s facility. Therefore, J.J-B. indicated that he did not initially sign D.C-W.'s PCQ because she sought to have her position reclassified into a position that did not exist.

CONCLUSION

N.J.A.C. 4A:7-3.1(a) states, in pertinent part, that employment discrimination or harassment based upon a protected category, such as race and color, is prohibited and will not be tolerated.

N.J.A.C. 4A:7-3.1(h) provides that retaliation against employee who alleges that she was the victim of discrimination/harassment is prohibited by this policy.

N.J.A.C. 4A:7.3-2(m)4 states, in pertinent part, that the appellant shall have the burden of proof in all discrimination appeals.

The Civil Service Commission (Commission) has conducted a review of the record in this matter and finds that D.C-W.'s allegations that J.J-B. subjected her to race and color discrimination cannot be substantiated. The record indicates that D.C-W., an African-American, sought to have her position as an Instructional Technician reclassified to a Teacher 3 title or an Education Programs Assistant 1 title.² Around the same time period, S.P-T., a Caucasian, sought to have her position be reclassified to an Education Programs Assistant 1 title. Although J.J-B. disagreed with both requests, J.J-B. signed S.P-T.'s PCQ and indicated on the form that he disagreed with the request while he initially refused to sign D.C-W.'s request. However, the investigation revealed that D.C-W. and S.P-T. were not similarly situated as D.C-W. sought reclassification to a teaching title, which was not available at her facility, and then a higher level clerical title, while S.P-T., a clerical employee, only sought classification to a higher level clerical title. Regardless, as the Commission found *In the Matter of D.C-W.* (CSC, decided April 4, 2018), S.P-T. signed her PCQ on December 11, 2014 and the Program Manager, *i.e.*

² The record is unclear as to whether D.C-W. sought her position be reclassified as Teacher 3 or Education Program Assistant 1 at the same time or if she first sought a Teacher 3 classification and then sought an Education Program Assistant 1 classification when advised that her facility did not have any teaching positions available.

J.J-B., signed it on January 2015 (36 days). The appellant signed her PCQ on February 29, 2016 and it was signed by the Program Manager, *i.e.* J.J-B., on April 1, 2016 (32 days). Thus, in fact, J.J-B. signed the appellant's PCQ in a shorter time frame than S.P-T.'s.

The investigation also indicated that J.J-B. did direct that some of D.C-W.'s duties be removed. However, J.J-B. did not assign or authorize D.C-W.'s potential out-of-title duties. Therefore, when these duties came to his attention, he reassigned them to an employee next in the chain of command after the Assistant Supervisor of Education. Regardless, even if D.C-W. had won her classification appeal, under *N.J.A.C.* 4A:3.5(c)1, the appointing authority could have effected the required change in classification of her position; assign duties and responsibilities commensurate with her current title; or reassign her duties and responsibilities to which she has permanent rights. Consequently, J.J-B. and the appointing authority had the right to remove these potential out-of-title duties at any time prior to Agency Service's classification review. Moreover, the fact that S.P-T.'s out-of-title duties were not removed while D.C-W.'s potential out-of-title duties is not by itself evidence that D.C-W.'s was subject to disparate treatment based on her race. As noted earlier, the two employees were not similarly situated.

Further, D.C-W. has not made an allegation of retaliation under the State Policy as the alleged "retaliation" was not in response to her filing or involvement in a State Policy complaint. Moreover, D.C-W. has not presented any witnesses, documents or other evidence to support her claim that J.J-B. treated her differently due to her race. Mere speculation, without evidence, is insufficient to substantiate a violation of the State Policy. *See In the Matter of T.J.* (CSC, decided December 7, 2016). In fact, while J.J-B.'s delay in signing D. C-W.'s and S.P-T.'s PCQ was improper under *N.J.A.C.* 4A:3-3.9(c)3, the evidence revealed that his actions with respect to the appellant were based on non-discriminatory reasons. Nevertheless, the Commission recommends that the appointing authority take steps it deems necessary to ensure all supervisors and program/division directors comply with the required time frames when a subordinate files a classification appeal under *N.J.A.C.* 4A:3-3.9.

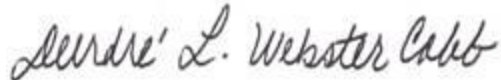
One other issue needs to be addressed. D.C-W. contends that even with the duties that have been removed, her duties are more consistent with the Education Programs Assistant 1 title. Therefore, she requests that her position be reclassified to this title and she believes she should receive back pay. However, this matter involves whether she has been subjected to a violation of the State Policy. If D.C-W. believes she is performing duties that are not consistent with her permanent title, she should file another classification appeal with Agency Services.

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 6th DAY OF JUNE, 2018



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