STATE OF NEW JERSEY

In the Matter of J.P. Department of Labor and Workforce Development

CSC Docket No. 2021-1802

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

Discrimination Appeal

ISSUED: May 2, 2022 (SLD)

J.P., an Assistant Commissioner, Department of Labor and Workforce Development, (DOL) appeals the determination of the Assistant Commissioner, Human Capital Strategies, DOL, stating that the appellant violated the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy).

The Office of Diversity and Compliance (ODC) received a complaint alleging that the appellant had violated the State Policy by making comments based on race and nationality. Specifically, it was alleged that during a bi-weekly recruitment compliance meeting, the appellant had requested staff members of the Division of Human Capital Strategies (HCS) search through previously obtained resumes for applicants with "Chinese-sounding" and "Korean-sounding" names. The complaint further stated that the appellant had been informed that HCS could not execute the request, but a variant could be added to future job postings to allow applicants to indicate any fluency in languages other than English. It was also alleged that the appellant had stated that some staff members in the Division of Wage & Hour (W&H) had "Spanish names," but were not fluent in Spanish.

In response to the complaint, the ODC conducted an investigation and substantiated that the appellant violated the State Policy in making the alleged statements. In this regard, ODC noted that during his interview, appellant had stated that it was requested that resumes of individuals who could speak Chinese be

provided, and he had asked if "there had been any way they could identify individuals who may speak Chinese by their resumes." ODC noted that the appellant stated that he did not recall asking HCS staff members to search through resumes for Chinese or Korean sounding names. The appellant also stated that although he did not recall making the comments about Spanish or Hispanic names, he noted that he could have said it as it was "true since there are people with Spanish names who don't speak Spanish, or any other ethnicity." ODC found that sorting through resumes with the intention of utilizing candidates' names that "sounded" like they belonged to a specific nationality or race, was unacceptable as it relied of utilizing biases and stereotypes pertaining to a candidates' perceived identification with a protected category. As such, it found that the appellant had violated the State Policy and referred the matter for appropriate action.[1]

Finally, the ODC noted that during the investigation, it was alleged that the appellant had sent an email that could be perceived as a sexual innuendo. Specifically, the appellant sent an email with the content, "Boing!," which he explained was meant to convey "that explains it." The ODC noted that although the word could be perceived in a sexual manner, it was unable to substantiate a violation of the State Policy. However, the ODC recommended that the appellant be mindful in his communication to ensure a message is not misconstrued or received in a different manner than intended as a violation of the State Policy can occur even where there was no intention to harass or demean another.

On appeal, the appellant maintains that the "charges" are an "outrageous overreach of the State Policy," and that the investigation was not fair or consistent with his explanations. Moreover, the appellant asserts that he was never asked if he had any witnesses, and he is unaware if anyone else was even interviewed. The appellant asserts that there was a "predetermination made to sustain an accusation, regardless of its merits or the circumstances surrounding the incident." In this regard, the appellant maintains that at no time did he discriminate against anyone, and that the alleged incident took place in the normal course of his duties as an Assistant Commissioner.

With regard to the email incident, the appellant reiterates that although he sent the email, he only meant it to mean that the answer was obvious and the situation was resolved. The appellant argues that as he did not even know the person who wrote the email that he responded to, and he did not mean to offend, that should count for something when interpreting his words and actions.

The appellant argues that his intent should also matter for the other incident. In this regard, the appellant maintains that no one in the history of his division has had a more inclusive and diverse record of hiring than he has, and the division is the most diverse it has ever been. Moreover, he contends that he has been an outspoken

[1] It is noted that no discipline was recommended for the appellant. Rather, he was required to attend a counseling session.

advocate for diversity in hiring and to say that he would discriminate against anyone is insulting and preposterous. The appellant explains on the date at issue, he and his staff had met with HCS to fill two additional positions. He maintains that they had asked for additional resumes so that they could interview for those positions and had expressed a desire to hire someone who spoke either Chinese or Korean. In response, the HCS staff member primarily responsible indicated that there were 450 resumes and since the position had not been posted with that specific language preference, there was no way to tell if there were resumes with those specific language skills. The appellant maintains that, with the intent to help HCS staff identify individuals with Chinese or Korean language skills, he suggested that the HCS staff member could limit her search to applicants with possible Chinese or Korean surnames to see if they indicated on their resumes if they possessed the preferred language skills. The appellant asserts that no one at the meeting voiced a concern that the suggestion was improper, except to point out that having a Chinese or Korean surname was not necessarily an indication that the individual spoke either language. The appellant contends that he was only "trying to suggest" an alternative to having to repost the positions with a specific skill variant. The appellant asserts that the if he is guilty of anything, it is just that he "lacks expertise in the intricacies of the hiring practices and personnel procedures," not that he has or intended to discriminate against anyone. Furthermore, the appellant argues that no one was hired as a "consequence of this innocuous suggestion as a way to screen for candidates with Chinese or Korean Language skills" from a much larger pool of applicants. Finally, the appellant contends that during such conversations "there must be the ability to discuss matters openly and frankly" and since there was no intent to discriminate and no discrimination happened, he should not have been found to have violated the State Policy.

Additionally, the appellant argues that the "determination by HCS staff who conducted the investigation, whether intentional or not, is a gross misrepresentation of my intention to assist HSC in their hiring process." The appellant contends that the "suggestion" he voiced was on a matter, not raised by him, but instead by a member of his staff. The appellant maintains that he does not understand why this became a complaint against him personally, but suggests that "someone was resentful of [his] intention to suggest a way to streamline their process, or it may be a manifestation of some other resentment." Furthermore, the appellant argues that, although he does not know who filed the complaint, if it was an HCS staff member, then someone unaffiliated with that division should have conducted the inquiry, as it is unrealistic to assume that someone who answers to the Director and Assistant Commissioner in their own department, could render a truly impartial evaluation.

In response, the ODC reiterates that its investigation was thorough and impartial. It also noted that several witnesses[2] and various documents were reviewed with regard to the allegations and that as a result, two of three allegations were

[2] ODC specified that three witness, along with the appellant, confirmed his comments regarding individuals with Chinese, Korean and Spanish names.

substantiated. ODC reiterated that the appellant acknowledged that he made the statements regarding using Chinese and Korean sounding names to canvass for individuals who spoke the languages, and the statement with regard to individuals with Spanish or Hispanic sounding names not speaking Spanish. ODC maintains that the appellant's request allows for bias and stereotypes to cloud the overall goals and needs of DOL in seeking qualified candidates. ODC further notes that the appellant's response during his interview that Chinese-sounding and Korean-sounding names being "the same thing," lent credence to the concern that the appellant did not understand that the suggested approach had been discriminatory in nature. It also notes its concern that the appellant's commentary regarding Spanish names also supports stereotypes regarding a person's name and their assumed identification with a protected category.

ODC asserts that the appellant's repeated statements that since there was no intent to discriminate, and no discriminatory action occurred, he should not have been found to violate the State Policy is without merit. In this regard, ODC notes that under the State Policy, a violation can occur even if there was no intent on the part of the individual to harass or demean another. ODC argues that the appellant's statements were inappropriate in and of themselves as they reflect bias and stereotypes of individuals with certain sounding names. In this regard, ODC explains that the appellant's suggestion uses bias and stereotypes based on race and nationality, and is simply unacceptable under the State Policy.

With regard to the appellant's claims that he "unknowingly" made the suggestion, ODC notes that each employee is required to annually receive training concerning the State Policy. Moreover, under the State Policy, all State employees are held responsible for abiding by and following the guidelines and regulations in the State Policy, regardless of the employee's positions within a State department.

Additionally, ODC notes that although there are certain situations in which a matter could be referred to an outside entity for investigation, that this agency's Division of Equal Employment Opportunity/Affirmative Action (EEO/AA)[3] reviewed the matter and determined that an investigation by ODC was appropriate, and would not be a conflict. Moreover, the ODC notes that it is responsible for conducting impartial investigations for DOL as a whole, and there is no indication in the record that it failed to do so in this matter. In particular, it indicates that the investigation of this matter was handled in a manner that protected both the integrity of the investigation and the confidentiality of all involved parties to the extent practicable. Therefore, based on the foregoing, the ODC contends that the appellant's appeal should be denied as he has failed to meet his burden of proof.

[3] The EEO/AA is charged with ensuring that all State departments and agencies comply with all applicable laws, rules and regulations.

In response, the appellant reiterates that the ODC has failed to provide any evidence of bias or discrimination. The appellant acknowledges that while he made the suggestion to review resumes of individuals with Chinese or Korean sounding names, he never demanded that they do so. Moreover, he contends that if HCS had been willing to review all of the resumes in their possession or had implied his suggestion was improper, he would have never made the suggestion. The appellant notes that he even agreed with HCS staff who suggested that merely having a Chinese or Korean sounding name was not an indication that a prospective candidate possessed the looked for language skills, and he noted that it was obviously true as "there were certainly people with Spanish and other ethnic sounding names who could not speak that language of their implied ethnicity." The appellant contends that this statement also did not constitute discrimination, as it was merely a way of affirming what had already been stated by others. Further, the appellant contends that despite ODC saying that intent does not matter, ODC is "inferring" his intent by stating that his statement was "evidence" of his bias and stereotyping. However, he argues that ODC has provided no evidence to establish that was his intent. The appellant also argues that the ODC determination that his suggestion allows for bias and stereotypes and clouds the overall goals of the Department in seeking qualified candidates is "not only absurd, but factually incorrect." The appellant also claims that if his suggestion was actually illegal or discriminatory, then that should have been made clear to him in the meeting. In this regard, the appellant maintains that his suggestion did not affect anyone nor did his suggestion discriminate, intentionally or otherwise, against any individual. The appellant argues that there was simply a failure to understand personnel policy, and he questions whether posting for a position with a Chinese language variant is not also discriminatory and reflecting of bias.

The appellant additionally contends that the allegations concerning his email response are completely without merit and should have been dismissed out-of-hand, since it should have been obvious that he meant that the matter had been taken care of. The appellant contends that there is no reason why he would have written a sexual innuendo to someone he did not know and on an email he was only copied on. The appellant asserts that the fact that this email is even mentioned is incredulous, and was only added in an effort to discredit him and to bolster the unsubstantiated assertion that he engaged in a pattern of discrimination. Furthermore, the appellant maintains that although he understands that "merely intent alone is not a defense for engaging in any prohibited activity," he "raised reasonable doubt" as to whether his words, in context, demeaned or harassed another. The appellant complains that ODC has "failed to show where any of [his] words or actions 'harassed or demeaned' anyone." The appellant contends that he is not an "HR specialist" nor is he "very familiar" with the State's complex rules regarding recruitment and hiring, and he does not believe that this one incident warrants a determination by ODC of a pattern of bias and discrimination.

In response, the ODC reiterates its arguments and emphasizes that sorting resumes, with the intention of using biases regarding candidates' names is search of those individuals, who may identify within certain protected categories, is unacceptable under the State Policy. However, the posting of a position with a language variant is not discriminatory as the candidates themselves would identify their language skills. Additionally, the ODC points out that witnesses' corroboration indicated that the appellant made the request to utilize Chinese and Korean sounding names more than once. Moreover, ODC argues that although the appellant asserts that one of the other meeting participants should have corrected him is irrelevant as it bore no relevance as to whether or not the appellant made the statement. With regard to the contention that the appellant was not an "HR specialist," the ODC notes that there is no expectation that the appellant understands intricacies or roles outside his Division. However, as a State employee, the appellant is responsible for abiding by the State's policies and regulations, including the State Policy.

CONCLUSION

N.J.A.C. 4A:7-3.1(a)3 provides that it is a violation of the State Policy to engage in any employment practice or procedure that treats an individual less favorably based upon any of the protected categories: race, creed, color, national origin, nationality, ancestry, age, sex/gender (including pregnancy), marital status, civil union status, domestic partnership status, familial status, religion, affectional or sexual orientation, gender identity or expression, atypical hereditary cellular or blood trait, genetic information, liability for service in the Armed Forces of the United States, or disability. *N.J.A.C.* 4A:7-3.1(a)3 further provides that the policy pertains to all employment practices such as recruitment, selection, hiring, training, promotion, transfer, assignment, layoff, return from layoff, termination, demotion, discipline, compensation, fringe benefits, working conditions and career development. *N.J.A.C.* 4A:7-3.1(b) provides in relevant part that:

> It is a violation of this policy to use derogatory or demeaning references regarding a person's race, gender, age, religion, disability, affectional or sexual orientation, ethnic background, or any other protected category set forth in (a) above. A violation of this policy can occur even if there was no intent on the part of an individual to harass or demean another.
>
> 1. Examples of behaviors that may constitute a violation of this policy include, but are not limited to:
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> i. Discriminating against an individual with regard to terms and conditions of employment because of being in one or more of the protected categories referred to in (a) above;

ii. Treating an individual differently because of the individual's race, color, national origin, or other protected category, or because an individual has the physical, cultural, or linguistic characteristics of a racial, religious, or other protected category;

iii. Treating an individual differently because of marriage to, civil union to, domestic partnership with, or association with persons of a racial, religious, or other protected category; or due to the individual's membership in or association with an organization identified with the interests of a certain racial, religious, or other protected category; or because an individual's name, domestic partner's name, or spouse's name is associated with a certain racial, religious, or other protected category;

* * *

The Civil Service Commission (Commission) has conducted a review of the record in this matter and finds that the appointing authority's conclusion that the appellant violated the State Policy is substantiated by the record. In this regard, the appellant acknowledges that he requested that staff look for Chinese and Korean-sounding names in order to look for candidates with Chinese and Korean language skills. Although the appellant maintains that his statement, "in context" did not demean or harass anyone, and therefore, he could not have violated the State Policy, the Commission does not agree. In this regard, the appellant repeatedly acknowledges that under the State Policy, intent does not matter in determining whether or not a violation occurred, but he argues that no one was actually discriminated against nor did he intend for any discrimination. However, the appellant's suggestion, that utilizing Chinese or Korean-sounding names to determine language skills, objectively treats candidates differently on the *assumption* that only certain names, associated with certain racial and/or national origins, would possess the necessary language skills. *See N.J.A.C.* 4A:7-3.1(b)1(iii). Therefore, whether or not the appellant's suggestion was followed is irrelevant as his suggestion itself was based on those biases.

Additionally, the Commission does not agree with the appellant, that just because he is not an "HR specialist," he is somehow exempt from abiding by the State Policy, or that the individuals from HRC or his own subordinates should have told him that his suggestion was improper. In this regard, on appeal the appellant acknowledges that he was told by HRC staff that they could not go through the resumes using his suggestion, but that they could announce the position with a language variant requirment. Moreover, as an Assistant Commissioner, the

appellant is held to higher standard under the State Policy as a supervisor's role under the State Policy is to make every effort to maintain a work environment that is free from any form of prohibited discrimination and harassment. *See e.g., In the Matter of Richard A. Sheppard* (MSB, decided December 17, 2003); and *In the Matter of Paul Grayson* (CSC, decided October 6, 2010). Further, all State employees, including the appellant, are required to review the State Policy yearly and ensure their own compliance with it.

Furthermore, the Commission does not agree that there was a conflict for ODC to investigate the matter simply because it reports to the same Assistant Commission as HRC staff. In this regard, ODC notes that this matter was reviewed by this agency's EEO/AA to determine whether or not a conflict existed. It was determined that no conflict existed and it was appropriate for ODC to investigate. Furthermore, despite the appellant's mere allegations, he has presented no evidence of a conflict.

Finally, with regard to the allegation concerning the appellant's email response, the Commission notes that since the ODC was made aware of the allegation it was required to review it to determine whether or not a violation of the State Policy occurred. Moreover, despite the appellant's assertions that ODC only used the allegation to claim that he engaged in a pattern of discrimination, no such claim was made by ODC and ODC did not substantiate a violation with regard to the appellant's email response. Rather, it simply cautioned the appellant to be careful in the future, as despite his intention or meaning, statements and/or words that also have another connotation, can support a finding of a violation of the State Policy. However, in this matter, it did not rise to that level.

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 27TH DAY OF APRIL 2022

Deirdré L. Webster Cobb

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