



STATE OF NEW JERSEY

In the Matter of M.S., Department of
Labor and Workforce Development

CSC Docket No. 2024-322

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

Discrimination Appeal

ISSUED: November 22, 2023 (SLK)

M.S., an Assistant Chief, Wage and Hour Compliance (Assistant Chief)¹ with the Department of Labor and Workforce Development (Labor), appeals the determination of a Chief of Staff, which substantiated in-part, that she was subjected to violations of the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy).

By way of background, on August 3, 2022, M.S. who is female, filed an anonymous sexual harassment complaint against K.T., a male Chief, Bureau of Inspection and Enforcement. Thereafter, on September 23, 2022, she interviewed for the position of Assistant Chief (vacancy 2022-245). Subsequently, on September 26, 2022, M.S. expressed concern to the Office of Diversity and Compliance (ODC) that she may not have been appointed for the Assistant Chief position due to retaliation, and age, gender, and race discrimination. Therefore, on September 27, 2022, the ODC notified the Wage and Hour Division and Human Capital Strategies to submit the selection documents regarding job vacancy 2022-245 for review prior to the appointment. On October 4, 2022, M.S. contacted the ODC with concerns that she had been subjected to retaliation by K.T.

On December 7, 2022, the ODC issued a memo to the Office of Labor Relations (OLR) outlining its findings and substantiation of M.S.'s August 3, 2022, sexual

¹ M.S. had been a District Supervisor, Wage and Hour Compliance (District Supervisor) at the time she initiated the subject complaints. She was appointed to Assistant Chief, effective May 20, 2023.

harassment complaint, which led to the ODC issuing a December 13, 2022, determination letter to K.T. substantiating M.S.'s sexual harassment complaint. However, the ODC did not supply M.S. with the determination letter because she anonymously filed the complaint. Thereafter, the OLR notified M.S. that her complaint was substantiated and requested the release of her identify to pursue discipline against K.T., which she agreed. On January 13, 2023, M.S. met with an Equal Employment Opportunity (EEO) Officer to file a discrimination complaint against K.T. On February 6, 2023, the ODC emailed M.S. her discrimination complaint summary for review and signature. On March 8, 2023, the OLR notified the ODC that K.T. was suspended with pay, and he remains suspended with pay. After several emails to M.S., she confirmed her discrimination complaint summary on March 16, 2023. Further, in April 2023, M.S. requested to supplement her March 16, 2023, discrimination complaint statement with additional information, which resulted in a finalized statement on May 30, 2023.

The Chief of Staff issued a July 20, 2023, determination letter regarding M.S.'s discrimination complaint. The determination substantiated the allegation that M.S. was subjected to a third-party hostile work environment based on marital status and sex when K.T. said, "I liked [E] before she got married."

M.S. had also alleged (allegation two) that K.T. retaliated against her by shunning her from meetings, subjecting her to intimidating conduct, and failing to promote her due to her involvement in the EEO process. She alleged that K.T. conducted impromptu meetings with other District Supervisors to discuss specific topics and responsibilities pertaining to her role as a District Supervisor. However, the investigation revealed that witness statements did not demonstrate a consensus that the impromptu meetings pertained to M.S.'s job responsibilities, there was no evidence that M.S. was shunned from these meetings or that her attendance was necessary or required, and there was no nexus between M.S.'s exclusion from these meetings and the fact she anonymously engaged in the EEO process. Further, M.S. described an incident where K.T. acted with hostility towards her. Although witnesses corroborated that K.T. had a history of unprofessional and hostile behavior towards employees, there was no nexus between K.T.'s behavior in the incident and the fact M.S. anonymously engaged in the EEO process. Regarding a 2020 Assistant Chief vacancy, the investigation revealed that M.S. was not appointed because she did not have experience in Public Contract and Construction, which was pertinent to the position being filled, and the two candidates selected had higher scores based on their resumes and interviews. Additionally, K.T.'s scores regarding M.S.'s September 23, 2022, interview to be potentially appointed as an Assistant Chief in the fall of 2022 were consistent with the other panelists. Therefore, allegation two was not substantiated.

M.S. further alleged (allegation three) that she was subjected to retaliation and disparate treatment based on age, gender, and marital status and was denied

promotion in favor of a younger male. The investigation revealed that no candidates were hired from the September 2022 interviews. Thereafter, a fourth candidate, who initially declined to interview, reconsidered, and was interviewed on October 26, 2022. This candidate was offered the position but declined and found other employment. Subsequently, additional interviews were held on March 23, 2023, and M.S. was appointed as an Assistant Chief in the North Division in April 2023. Regarding a November 2020 interview that M.S. had for an Assistant Chief position, the investigation revealed that K.T. was not on the panel nor was there any evidence that he blocked her for the position. Instead, the investigation revealed that she was not appointed as Assistant Chief at that time due to her lack of Public Contracts and Construction experience and her lower interview scores. Further, regarding M.S.'s disparate treatment claim, two women were appointed, one who was married and one who was not. Also, there was no evidence that age played a role in the appointments. Therefore, allegation three was not substantiated.

M.S. additionally alleged (allegation four) that she was retaliated against for participating in the EEO process regarding a case in December 2022. She alleged that K.T. improperly sent her an email accusing her of certain failures on her part. However, the investigation revealed that M.S. failed to submit a summary report by a due date, explaining the accounts of the events when requested. Therefore, it was determined that K.T. had legitimate business reasons for the email. M.S. finally alleged (allegation five) that K.T. created a hostile work environment by making offensive, demeaning comments based on religion, when he said, "that guy just called me a Nazi." However, the investigation found that as K.T. was expressing a statement that was made about him, his statement did not violate the State Policy.²

On appeal, M.S. states that when she filed her sexual harassment complaint, she expressed concern that K.T. would retaliate against her and the EEO Officer indicated that a representative would be present during her Assistant Chief interview. However, although K.T. was present for her September 23, 2023, interview, there was no EEO representative. She asserts that K.T. directed control over the interview and he had made his authority known in the past. For example, she provides that K.T. had made it known to her that although L.D.³, a Senior Field Representative Wage and Hour Compliance, had been recommended for promotion, he would not promote her, and another candidate was promoted. Concerning allegation two, M.S. states that the determination does not accurately describe the impromptu meetings as these were social meetings where it was made known that she was not wanted. Further, B.C.,⁴ who was a provisional District Supervisor, was offered the Assistant Chief position and even after he turned it down, the position was not offered to her.

² The background was developed based on Labor's response in this matter and the subject determination letter.

³ Personnel records indicate that L.D. was appointed to District Supervisor on September 9, 2023.

⁴ Personnel records indicate that B.C. resigned, effective March 31, 2023.

Concerning allegation three, M.S. states that the investigation failed to investigate why the Assistant Chief position was offered to B.C., who was a newly appointed provisional District Supervisor, and therefore, she believed not eligible for an Assistant Chief examination since he was not permanent for at least one year as a District Supervisor. Further, she claims that the investigation was not accurate as B.C. did not immediately resign when offered the Assistant Chief position, but resigned months later because of the harassing environment towards M.S. Also, B.C. had expressed to her that now that K.T. was suspended, that she may get a fair chance. She believes that this harassment was in retaliation for her sexual harassment complaint.

Regarding allegation four, M.S. believes that the investigation was insufficient to show the progressive nature of K.T.'s behavior towards her. She states that the determination failed to address a claim that she made that K.T. engaged in groping action from the time after her August 2022 sexual harassment complaint until the middle of November 2022. Further, on April 21, 2022, she made a note to herself documenting the beginning of sexual harassment, which was rebuffed by her. She describes a conversation that she had with K.T. where she alleged that he made sexually harassing comments in response to her stating that she had to go to the bathroom. M.S. states that she was horrified, and she left work early due to it. She contends that the investigator advised her that he would not have to conduct many interviews because she provided so much detail. M.S. questions why these allegations were not addressed in the determination.

Additionally, M.S. presents, as she began to read the statement that the investigator wanted her to sign, it became apparent that she had been recorded. She then emailed the investigator asking if she had been recorded, and he indicated that she had not, but then later admitted that he did record her. She asserts that she was horrified that she was recorded, and then the investigator lied to about it when she asked. She also requests a copy of all statements taken, with the names redacted.

In response, Labor states that the ODC never promised to conduct interview observations because M.S. did not contact ODC regarding her concerns about the job vacancy until after she had already interviewed. Further, after the ODC reviewed the candidate selection documentation, there was no evidence that any interview panel member scored M.S. less favorably based on her membership in a protective class nor was there any evidence that K.T. exercised undue influence over the interview panel or the hiring decision. It notes that ODC did observe the subsequent interviews in March 2023 for the vacancy in question, and M.S. and another candidate were appointed.

Further, Labor presents that M.S. did not provide any evidence that she was not initially appointed to the subject job vacancy due to retaliation. It provides that

M.S. submitted an anonymous sexual harassment complaint against K.T. in August 2022, she initially interviewed for the subject vacancy in September 2022, and K.T. was not aware that there was an anonymous complaint filed against him until October 12, 2022. Further, the record did not indicate that K.T.'s scoring of M.S.'s interview was based on something other than her responses or that he had influence on the other panelists, which included the Assistant Commissioner of Wage and Hour. Also, the final appointment was made by an employee in a director title with authority over K.T. Regarding a prior job vacancy, the record did not reveal that K.T. had undue influence, he was not on the panel, and he did not have any involvement in the interview panel or selection. Concerning M.S.'s statements about L.D.'s alleged prior non-appointment, Labor states that she did not include this allegation in her January 2023 complaint and, therefore, this allegation was not investigated. Further, it asserts that she did not provide any potential evidence that can be investigated which could possibly substantiate this claim. Also, M.S. did not indicate what membership in a protected class was the basis for the alleged discrimination.

Labor states that M.S. did not inform the ODC that she had continued to be subjected to K.T. groping/adjusting himself between August 3, 2022, through November 2022. Additionally, she did not provide any specific incident, information or witness that would have directed further investigation into alleged sexual harassing behavior. It presents that she did not submit to the ODC the cellphone screen shot of the text message to herself about the alleged April 2022 "bathroom conversation" incident. Labor notes that the only other potential witness is K.T., who is on suspension.

Labor emphasizes that the ODC used standard investigatory procedures to identify and interview employees with relevant information about M.S.'s allegations. However, the investigation did not reveal persuasive evidence that K.T. shunned her or excluded her from meetings because she engaged in the EEO process. It notes that there was conflicting evidence regarding the impromptu meetings as one witness corroborated that she was excluded from meetings that were relevant to her position, while another witness denied this. Further, none of the witnesses indicated that M.S. was excluded from social gatherings. Additionally, the ODC used standard practice by interviewing relevant witnesses and not every witness in her division or unit. Moreover, Labor highlights that M.S. had five months to review her complaint and make changes. It states that there are no statutes of limitations regarding State Policy complaints, and she may file a new complaint making allegations that she left out.

In reply, M.S. states that it is not true that she did not express to the ODC her concerns regarding the interview for the Assistant Chief position prior to the interview. Instead, she reiterates her contention that the ODC promised representation at the interview. M.S. indicates that she met the ODC after the interview to inquire as to why there was no ODC representation at the interview.

Concerning the finding that the evidence did not reveal that K.T. failed to promote her based on retaliation or undue influence, she asserts that the ODC just accepted the scoring of her interview at face value. She claims that it is known that K.T. had disdain for her. She emphasizes her greater experience than B.C., who was offered the position, despite him lacking the required permanent experience as a District Supervisor to be permanently eligible for the Assistant Chief position. She claims that K.T. did have undue influence and was told that he would lie to the Assistant Commissioner all the time. Also, she notes that K.T. had direct supervisor responsibility and a close relationship with the other panel members so he did have undue influence. M.S. highlights that she was only offered the position when there was a new interview panel in March 2023. She submits her resume to demonstrate her qualifications. M.S. reiterates that K.T. previously told her that L.D. was not going to get a position, which she did not, as an example of his influence on the selection process. M.S. indicates she did not accuse K.T. of groping and adjusting himself, but just groping. She claims that she did advise the ODC regarding the groping and the “bathroom conversation” incident, including her text message. She also states that she asked a secretary if she ever saw K.T. groping himself and she said “yes.” Referring to Labor’s statements that the ODC used standard procedures, she presents that the witnesses have not been revealed to her. While she understands, she believes that there are employees that are still present that were influenced by K.T. and presents one witness, M.D. Additionally, M.S. presents that her interview with the ODC was recorded, which conflicts with its policy, and she asserts that this issue needs to be addressed. Finally, she requests a copy of the December 13, 2022, determination letter.

CONCLUSION

N.J.A.C. 4A:7-3.1(a) provides, in pertinent part, the State is committed to providing every State employee and prospective State employee with a work environment free from prohibited discrimination or harassment. Under this policy, forms of employment discrimination or harassment based upon age, gender and marital status will not be tolerated. *N.J.A.C.* 4A:7-3.1(c) provides that it is a violation of this policy to engage in sexual harassment of any kind. *N.J.A.C.* 4A:7-3.2(n)1 provides that the burden of proof shall be on the appellant.

N.J.A.C. 4A:7-3.1(g)1 provides that all investigations of discrimination/harassment claims shall be conducted in a way that respects, to the extent possible, the privacy of the persons involved. The investigation shall be conducted in a prompt, thorough, and impartial manner.

N.J.A.C. 4A:7-3.1(h) provides, in pertinent part, that retaliation against any employee who alleges that she or he was the victim of discrimination/harassment in the workplace, is prohibited by this policy. Failing to promote an employee or

ostracizing an employee are two examples of prohibited actions taken against an employee because the employee has engaged in activity protected by this subsection.

In this matter, concerning M.S.'s allegations of retaliation, the Civil Service Commission (Commission) finds that there is no corroborating evidence to support this allegation. Specifically, concerning her non-promotion in the fall of 2023, the record revealed that K.T. was not aware of the sexual harassment allegation against him until after M.S. interviewed. Further, even when he became aware, M.S.'s identity was still anonymous. Additionally, the investigation revealed that the other candidates scored higher on the interview, K.T.'s scoring of M.S.'s interview was in line with the other panelists, one of the panelists was a superior to K.T., and there was no other corroborating evidence to support the allegation that her non-appointment was based on retaliation or her membership in a protected class. Moreover, even if M.S. was more experienced than B.S., the candidate who was initially offered the promotion, this alone does not substantiate that M.S. was not offered a promotion in the fall of 2023 based on her membership in a protected class or her filing a State Policy complaint. Also, the investigation did not find that M.S. was excluded from impromptu/social meetings where it was necessary for her to attend, and the investigation did find that K.T.'s email to her about one of her assignments, which she deemed hostile, was based on a legitimate business reason. Regardless, even if K.T. had "disdain" for M.S. as she alleges, had pre-determined not to promote her and otherwise treated her unfairly, M.S. has not presented any documentary evidence or signed statements from any witnesses that any actions taken by K.T. against M.S. were based on her membership in a protected class or in retaliation for her filing a State Policy complaint. Mere speculation, without evidence, is insufficient to support a violation of the State Policy. *See In the Matter of T.J.* (CSC, decided December 7, 2016). Similarly, disagreements between co-workers cannot sustain a violation of the State Policy. *See In the Matter of Aundrea Mason* (MSB, decided June 8, 2005) and *In the Matter of Bobbie Hodges* (MSB, decided February 26, 2003). Also, while the record is unclear if M.S. asked the ODC to provide representation during her September 2023 before the interview took place, which did not happen, even if she did, there is nothing in the record that indicates that there was anything improper about the interview, the scoring, and her non-appointment. Additionally, while K.T. asserts that the offer to B.C. to be Assistant Chief is evidence of a State Policy violation because he was only a provisional District Supervisor and, therefore, she believed not eligible for an Assistant Chief examination, a review of the announcement for examination (PS9809N), where M.S. was appointed as an Assistant Chief in the spring of 2023, indicates that it was open to those with one year of continuous permanent services as a District Supervisor or to applicants who met the education and experience requirements. Therefore, B.C. could have been potentially eligible for a position as an Assistant Chief based on his education and experience even if he lacked one year of continuous permanent services as a District Supervisor.

M.S. also alleged that the investigation was insufficient regarding her sexual harassment claims. Specifically, she alleged that K.T. was groping himself through the middle of November 2022. M.S. states that there was a secretary who observed K.T. groping himself. Further, she presents a “bathroom conversation” incident where she alleges that K.T. made sexually harassing comments in response. She notes that due to the incident, she left work early that day, and she sent a text to herself to document the incident. She states that she provided the ODC the text. M.S. also presents M.D.⁵ as a potential witness. Labor responds that M.S. had not presented these issues or potential evidence, which was why these allegations were not investigated. Regardless, the Commission remands M.S.’s allegations of sexual harassment regarding K.T.’s alleged groping himself and the “bathroom conversation” incident for further investigation.


Finally, M.S. indicates that the ODC recorded her interview statement without her consent. Labor has not responded to this allegation. Therefore, the ODC is directed to not record any statements from anyone involved in a State Policy investigation without that individual’s consent. Also, the ODC is directed to send M.S. a copy of the December 13, 2022, determination letter to M.S. as she requests. However, as investigations are confidential to the extent possible, M.S. is not entitled to witness statements, even with the names redacted.

ORDER

Therefore, it is ordered that this appeal be denied and the above described allegations be remanded for further investigation.

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 22ND DAY OF NOVEMBER, 2023



Allison Chris Myers
Chairperson
Civil Service Commission

⁵ The record is unclear as to whether M.S. presents M.D. as a potential witness for her sexual harassment allegations and/or her retaliation allegations.

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