

other retaliation. Following are examples of prohibited actions taken against an employee because the employee has engaged in activity protected by this subsection:

1. Termination of an employee;
2. Failing to promote an employee;
3. Altering an employee's work assignment for reasons other than legitimate business reasons;
4. Imposing or threatening to impose disciplinary action on an employee for reasons other than legitimate business reasons; or
5. Ostracizing an employee (for example, excluding an employee from an activity or privilege offered or provided to all other employees).

(i) An employee who knowingly makes a false accusation of prohibited discrimination/harassment or knowingly provides false information in the course of an investigation of a complaint, may be subjected to administrative and/or disciplinary action, up to and including termination of employment. Complaints made in good faith, however, even if found to be unsubstantiated, shall not be considered a false accusation.

(j) 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. In the course of an investigation, it may be necessary to discuss the claims with the person(s) against whom the complaint was filed and other persons who may have relevant knowledge or who have a legitimate need to know about the matter. 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 of all concerned. Failure to comply with this confidentiality directive may result in administrative and/or disciplinary action, up to and including termination of employment.

(k) Any employee found to have violated any portion or portions of this policy may be subject to appropriate administrative and/or disciplinary action which may include, but which shall not be limited to: referral for training, referral for counseling, written or verbal reprimand, suspension, re-assignment, demotion or termination of employment. Referral to another appropriate authority for review for possible violation of State and Federal statutes may also be appropriate.

(l) All State agencies shall provide all new employees with training on the policy and procedures set forth in this section within a reasonable period of time after each new employee's appointment date. Refresher training shall be provided to all employees, including supervisors, within a reasonable period of time. All State agencies shall also provide supervisors with training on a regular basis regarding their obligations and duties under the policy and regarding procedures set forth in this section.

New Rule, R.2002 d.10, effective January 7, 2002.

See: 33 N.J.R. 3281(a), 34 N.J.R. 261(a).

Former N.J.A.C. 4A:7-3.1, Appointing authority responsibilities, recodified to N.J.A.C. 4A:7-2.3.

Amended by R.2005 d.65, effective February 22, 2005.

See: 36 N.J.R. 4566(a), 37 N.J.R. 586(a).

Rewrote the section.

Amended by R.2007 d.244, effective August 20, 2007.

See: 39 N.J.R. 1340(a), 39 N.J.R. 3499(a).

Section was "Policy prohibiting discrimination, harassment or hostile environments in the workplace". Rewrote the section.

**Case Notes**

Prohibited conduct under the State Policy need not reach the level of "severe or pervasive" as under federal or state law to constitute a violation of the Policy because the goal of the Policy is to prevent and remediate all instances of discrimination/harassment to ensure a smoothly functioning and harmonious workplace. Correction sergeant's use of the term "fag" in an argument with a fellow employee violated the Policy as it was a demeaning term based on gender and sexual orientation, and a 10 working day suspension was appropriate. Moreover, although the sergeant argued that her statement was made in jest and not meant to cause harm, intent was irrelevant to a finding of a violation. In re Carter-Green, OAL Dkt. No. CSV 4272-07, 2008 N.J. AGEN LEXIS 1221, Final Decision (September 10, 2008).

Initial Decision (2007 N.J. AGEN LEXIS 831) adopted, which concluded that African-American professor who had excluded a Cuban-American from a meeting to express concerns over the departure of the university's African-American president was properly removed for discriminating against the Cuban-American at least in part because of her race or color. In re Davis, OAL Dkt. No. CSV 12220-05, 2008 N.J. AGEN LEXIS 599, Final Decision (January 30, 2008).

Department of Education Manager, who supervised auditors in the Office of Compliance and Investigations, did not violate the New Jersey State Policy Prohibiting Discrimination in the Workplace, N.J.A.C. 4A:7-3.1; finding the manager's testimony credible as to the non-discriminatory reasons for his actions, the ALJ had determined that although the witnesses believed the manager acted out of racial animus, the record did not support that his actions were motivated by race (adopting in part and rejecting in part 2007 N.J. AGEN LEXIS 177). In re Hearn, OAL Dkt. No. CSV 04991-05, Final Decision (October 10, 2007).

New Jersey State Policy Prohibiting Discrimination in the Workplace, N.J.A.C. 4A:7-3.1, sets a lower threshold for finding a violation than that found in federal or State law; the goal of the State Policy is to prevent and remediate all instances of discrimination/harassment to ensure a smoothly functioning and harmonious workplace. In re Hearn, OAL Dkt. No. CSV 04991-05, Final Decision (October 10, 2007).

Although Department of Education Manager was found not to have violated the New Jersey State Policy Prohibiting Discrimination in the Workplace, N.J.A.C. 4A:7-3.1, he was not entitled to back pay or counsel fees; pursuant to N.J.A.C. 4A:2-1.5, the employee did not show that the actions of the appointing authority in finding a violation of the State Policy and terminating his unclassified position were made in bad faith (adopting in part and rejecting in part 2007 N.J. AGEN LEXIS 177). In re Hearn, OAL Dkt. No. CSV 04991-05, Final Decision (October 10, 2007).

Female worker had shown sexual harassment due to comments from a male co-worker where she and others had testified at hearing and ALJ found their testimony to be credible, but male co-worker had not testified. Disciplinary letter was placed in co-worker's personnel file because he had already retired at the time of the hearing. In re Afanador, OAL Dkt. No. CSV 10086-05, 2006 N.J. AGEN LEXIS 1036, Initial Decision (December 20, 2006), adopted (Merit System Board Jan. 31, 2007).

Removal of correction officer trainee was warranted after charges were proven that she had opened her towel to reveal her nude body, that

she had invited another officer to move her bed next to her own, and that she had made sexually explicit comments and gestures (adopting in part and rejecting in part 2006 N.J. AGEN LEXIS 408). In re Williams, OAL Dkt. No. CSV 12210-04, 2006 N.J. AGEN LEXIS 858, Final Decision (September 20, 2006), aff'd per curiam, No. A-2114-06T1, 2008 N.J. Super. Unpub. LEXIS 2136 (App.Div. April 25, 2008).

Initial Decision that corrections supervisor had used a racial slur toward an African-American employee was adopted, but because the supervisor had retired no punishment was levied. Instead a letter stating that the supervisor had violated State policy was placed in his file (adopting in part and rejecting in part 2005 N.J. AGEN LEXIS 654). In re Sharp, OAL Dkt. No. CSV 10540-04, 2006 N.J. AGEN LEXIS 1096, Final Decision (February 22, 2006).

Initial Decision (2005 N.J. AGEN LEXIS 430) adopted, which concluded that a Department of Corrections employee did not present sufficient evidence that she had been discriminated against based on her race, color, or gender where a thorough investigation into her allegations was made and it was determined that the reason she was not promoted had nothing to do with the fact that she was an African American woman. In re Van Jones, OAL Dkt. No. CSV 8541-03, 2005 N.J. AGEN LEXIS 1219, Final Decision (September 21, 2005).

#### **4A:7-3.2 Model procedures for internal complaints alleging discrimination in the workplace**

Each State department, commission, State college or university, agency and authority (hereafter referred to in this section as "State agency") is responsible for implementing this model procedure, completing it to reflect the structure of the organization, and filing a copy of the completed procedure with the Department of Personnel, Division of EEO/AA.

"(a) All employees and applicants for employment have the right and are encouraged to immediately report suspected violations of the State Policy Prohibiting Discrimination in the Workplace, N.J.A.C. 4A:7-3.1.

(b) Complaints of prohibited discrimination/harassment can be reported to either (name of Officer), the EEO/AA Officer, or to any supervisory employee of the State agency. Complaints may also be reported to (Authorized Designee).

(c) Every effort should be made to report complaints promptly. Delays in reporting may not only hinder a proper investigation, but may also unnecessarily subject the victim to continued prohibited conduct.

(d) Supervisory employees shall immediately report all alleged violations of the State of New Jersey Policy Prohibiting Discrimination in the Workplace to (Name of Officer), EEO/AA Officer. Such a report shall include both alleged violations reported to a supervisor, and those alleged violations directly observed by the supervisor.

(e) If reporting a complaint to any of the persons set forth in subsections (a) through (d) above presents a conflict of interest, the complaint may be filed directly with the Department of Personnel, Division of EEO/AA, PO Box 315, Trenton, NJ 08625. An example of such a conflict would be where the individual against whom the complaint is made is involved in the intake, investigative or decision making process.

(f) In order to facilitate a prompt, thorough and impartial investigation, all complainants are encouraged to submit a Discrimination Complaint Processing Form (DPF-481). An investigation may be conducted whether or not the form is completed.

(g) Each State agency shall maintain a written record of the discrimination/harassment complaints received. Written records shall be maintained as confidential records to the extent practicable and appropriate. A copy of all complaints (regardless of the format in which submitted) must be submitted to the Department of Personnel, Division of EEO/AA, by the State agency's EEO/AA Officer, along with a copy of the acknowledgement letter(s) sent to the person(s) who filed the complaint and, if applicable, the complaint notification letter sent to the person(s) against whom the complaint has been filed. If a written complaint has not been filed, the EEO/AA Officer must submit to the Division of EEO/AA a brief summary of the allegations that have been made. Copies of complaints filed with the New Jersey Division on Civil Rights, the U.S. Equal Employment Opportunity Commission, or in court also must be submitted to the Division of EEO/AA.

(h) During the initial intake of a complaint, the EEO/AA Officer or authorized designee will obtain information regarding the complaint, and determine if interim corrective measures are necessary to prevent continued violations of the State's Policy Prohibiting Discrimination in the Workplace.

(i) At the EEO/AA Officer's discretion, a prompt, thorough, and impartial investigation into the alleged harassment or discrimination will take place.

(j) 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.

(k) The (State agency head or designee) will review the investigatory report issued by the EEO/AA Officer or authorized designee, and make a determination as to whether the allegation of a violation of the State's Policy Prohibiting Discrimination in the Workplace has been substantiated. If a violation has occurred, the (State agency head or designee) will determine the appropriate corrective measures necessary to immediately remedy the violation.

(l) The (State agency head or designee) will issue a final letter of determination to both the complainant(s) and the

person(s) against whom the complaint was filed, setting forth the results of the investigation and the right of appeal to the Merit System Board as set forth in subsection (m) and (n) below. To the extent possible, the privacy of all parties involved in the process shall be maintained in the final letter of determination. The Division of EEO/AA, Department of Personnel shall be furnished with a copy of the 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 Policy Prohibiting Discrimination in the Workplace did or did not occur.

2. The investigation of a complaint shall be completed and a final letter of determination shall be issued no later than 120 days after the initial intake of the complaint referred to in (h) above is completed.

3. The time for completion of the investigation and issuance of the final letter of determination may be extended by the State agency head for up to 60 additional days in cases involving exceptional circumstances. The State agency head shall provide the Division of EEO/AA and all parties with written notice of any extension and shall include in the notice an explanation of the exceptional circumstances supporting the extension.

(m) A complainant who is in the career, unclassified or senior executive service, or who is an applicant for employment, who disagrees with the determination of the (State agency head or designee), may submit a written appeal, within twenty days of the receipt of the final letter of determination from the (State agency head or designee), to the Merit System Board, PO Box 312, Trenton, NJ 08625. The appeal shall be in writing and include all materials presented by the complainant at the State agency level, the final letter of determination, the reason for the appeal and the specific relief requested.

1. Employees filing appeals which raise issues for which there is another specific appeal procedure must utilize those procedures. The Commissioner may require any appeal, which raises issues of alleged discrimination and other issues, such as examination appeals, to be processed using the procedures set forth in this section or a combination of procedures as the Commissioner deems appropriate. See N.J.A.C. 4A:2-1.7.

2. The Merit System Board shall decide the appeal on a review of the written record or such other proceeding as it deems appropriate. See N.J.A.C. 4A:2-1.1(d).

3. The appellant shall have the burden of proof in all discrimination appeals brought before the Merit System Board.

(n) In a case where a violation has been substantiated, and no disciplinary action recommended, the party(ies) against whom the complaint was filed may appeal the determination to the Merit System Board at the address indicated in (m) above within 20 days of receipt of the final letter of determination by the State agency head or designee.

1. The burden of proof shall be on the appellant.
2. The appeal shall be in writing and include the final letter of determination, the reason for the appeal, and the specific relief requested.
3. If disciplinary action has been recommended in the final letter of determination, the party(ies) charged may appeal using the procedures set forth in N.J.A.C. 4A:2-2 and 3.

(o) The Director of the Division of EEO/AA shall be placed on notice of, and given the opportunity to submit comment on, appeals filed with the Merit System Board of decisions on discrimination complaints, regardless of whether or not the complaint was initially filed directly with the Director of EEO/AA.

(p) Any employee or applicant for employment can file a complaint directly with external agencies that investigate discrimination/harassment charges in addition to utilizing this internal procedure. The time frames for filing complaints with external agencies indicated below are provided for informational purposes only. An individual should contact the specific agency to obtain exact time frames for filing a complaint. The deadlines run from the date of the last incident of alleged discrimination/harassment, not from the date that the final letter of determination is issued by the State agency head or designee.

1. Complaints may be filed with the following external agencies:
  - i. Division on Civil Rights  
N.J. Department of Law & Public Safety  
(Within 180 days of the discriminatory act)
  - ii. US Equal Employment Opportunity Commission (EEOC)  
(Within 300 days of the discriminatory act)"

New Rule, R.2002 d.10, effective January 7, 2001.

See: 33 N.J.R. 3281(a), 34 N.J.R. 261(a).

Former N.J.A.C. 4A:7-3.2, Discrimination appeals: State service, was repealed.

Amended by R.2007 d.244, effective August 20, 2007.

See: 39 N.J.R. 1340(a), 39 N.J.R. 3499(a).

Section was "Model procedures for internal complaints alleging discrimination, harassment or hostile environments in the workplace". Rewrote the section.

#### Case Notes

Where disciplinary action had been recommended against an employee for committing an act of criminal sexual contact and was, in fact, the subject of the employee's pending departmental hearing, the employee did not have the right to file an appeal of the finding of discrimination against him with the then Merit Service Board. In re Lemieux, OAL Dkt. No. CSV 12285-07, 2008 N.J. AGEN LEXIS 603, Final Decision (February 13, 2008).

Retired State Police lieutenant met his burden of proving by the preponderance of the evidence that he did not violate the New Jersey State Policy Prohibiting Discrimination, Harassment or Hostile Environment, where the investigation was not thorough; only a limited number of witnesses were interviewed by telephone and there was no attempt to try to discern motives or to interview other members of the lieutenant's unit. In re Chierchia, OAL Dkt. No. CSV 618-04, 2006 N.J. AGEN LEXIS 401, Initial Decision (June 9, 2006), adopted (Merit System Board November 1, 2006).

#### 4A:7-3.3 (Reserved)

Amended by R.1994 d.618, effective December 19, 1994.

See: 26 N.J.R. 3507(a), 26 N.J.R. 5000(a).

Amended by R.1997 d.437, effective October 20, 1997.

See: 29 N.J.R. 3104(a), 29 N.J.R. 4457(a).

Deleted (a)4, (b), (b)1 and (b)2; recodified existing (b)3 as (a)4; added (a)5; and substituted "Merit System Board" for "Division of EEO/AA" throughout the section.

Recodified from N.J.A.C. 4A:7-3.4 and amended by R.2002 d.10, effective January 7, 2002.

See: 33 N.J.R. 3281(a), 34 N.J.R. 261(a).

Rewrote the section. Former N.J.A.C. 4A:7-3.3, Departmental review: State service, was repealed.

Repealed by R.2007 d.244, effective August 20, 2007.

See: 39 N.J.R. 1340(a), 39 N.J.R. 3499(a).

Section was "Department of Personnel proceedings: State service".

#### 4A:7-3.4 (Reserved)

Recodified to N.J.A.C. 4A:7-3.3 by R.2002 d.10, effective January 7, 2002.

See: 33 N.J.R. 3281(a), 34 N.J.R. 261(a).

Section was "Department of Personnel proceedings: State service".