**FILED,** Clerk of the Appellate Division, October 22, 2024, **A-001459-23**, AMENDED

| IN THE MATTER OF S.L., DEPARTMENT OF CHILDREN AND FAMILIES | SUPERIOR COURT OF NEW JERSEY<br>APPELLATE DIVISION<br><br>DOCKET NO.: A-001459-23<br><br>On Appeal Of The Final Administrative Action Of The Civil Service Commission<br><br>CSC Docket No.: 2023-2089<br><br>CIVIL ACTION |
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# BRIEF ON BEHALF OF APPELLANT S.L.

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## PRELIMINARY STATEMENT

Appellant S.L. ("S.L.") appeals a Final Agency Determination dated September 20, 2023, by the Civil Service Commission ("CSC"), and its determination denying S.L.'s Request for Reconsideration, which denied S.L.'s appeal of a Letter of Determination issued by the Equal Opportunity Office ("EEO") of the Department of Children and Families ("DCF") dated March 6, 2023 ("LOD") finding that S.L. violated the State Policy Against Discrimination in the Workplace ("the State Policy") by purposefully misnaming the Complainant ("Complainant") on more than one occasion in September 2022. According to the Complainant and the LOD, the violations allegedly occurred outside of the Department of Labor and Workforce Development on the morning of September 9, 2022, during a local union electioneering incident and then later that afternoon at the local union's office. S.L. denied purposefully misnaming Complainant at any time.

After reviewing S.L.'s appeal of the LOD in a he-said/she-said case, the CSC denied S.L.'s request for a fact-finding hearing. The CSC further held that, as a matter of law, the local union's office was a "State Workplace" under the State Policy. The CSC's determination is erroneous and must be reversed. First, the CSC abused its discretion by denying S.L.'s request for a fact-finding hearing despite a dispute of genuine material facts. The CSC issued its determination, and rejected S.L.'s request for a hearing, without review of the DCF EEO's investigation report,

any sworn witness statements or any other purported evidence. The CSC held that because discipline was not at issue, no hearing was required.

This court's case law is clear: In the face of a clear dispute of fact between a complainant's allegations and an appellant's vigorous denial of complainant's allegations – and in the absence of substantial credible evidence of corroboration – the CSC abuses its discretion when it rejects an appellant's request that the matter be referred for a fact-finding hearing. That is precisely what occurred here. Further, a State department's determination that a local union president engaged in unlawful harassment of a transgender union member is a serious matter that with significant risk of harm to S.L.'s and the local union's reputation. Under those circumstances, the CSC's determination that it has no obligation to refer the matter for a fact-finding hearing because DCF was not seeking to impose disciplinary action in connection with the LOD was an abuse of discretion that must be reversed.

Second, the CSC erroneously held that it and State departments had jurisdiction to enforce and investigate allegations of State Policy violations that involved a non-State workplace where the allegations in the Complaint do not involve State business. The Complainant alleged that the second incident occurred at the local union office. However, local union office is not a "State workplace" under the State Policy. The CSC nonetheless held that because the union represents State workers, its private office is per se a workplace where "State business" is being

discussed for the purposes of the State Policy. No record evidence supports the CSC's conclusion. Nor would a contrary finding subject the State to a potential claim for vicarious liability by the Complainant if DCF had properly concluded that the allegations about the afternoon incident at the local union office were outside of its jurisdiction to investigate. The State is not liable for the creation of a hostile work environment where it does not have any obligation or authority to control the conditions of the workplace. Indeed, the CSC's jurisdictional ruling undermines that legal principle and suggests that the State may be liable had it failed to investigate and make determinations about the allegations at the local union office. Finally, the CSC's determination that the fact that the matter arose out of and entirely involved a union election was irrelevant failed to harmonize the statutory rights, protections and administrative scheme established by the Legislature for public employment labor relations with the policies animating the regulation that establishes the State Policy. Under the facts of this case, the CSC's determination that the local union office was a State workplace is arbitrary, capricious and unreasonable, and this court should reverse it.

Accordingly, for these reasons, discussed in more detail below, this court should reverse the CSC's Determination and remand the matter for an administrative fact-finding hearing.

## PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

### A. Background.

S.L. is the elected president of a local union that represents State workers, including those at the Department of Labor and Workforce Development DLWD ("DLWD") and DCF. (Aa2).[2] He has been on a union leave from his State employment with DCF since 2008. (Aa1). Complainant is a DLWD employee whom S.L. had represented in connection with a grievance years earlier. (Aa25, Aa28).

On or about September 14, 2022, Complainant filed a complaint against S.L. under the State Policy with her employer, DLWD. Because S.L.'s putative State employer is DCF, DLWD referred the complaint for investigation by that department's (DCF's) EEO office. (Aa19). The complaint arose from two incidents between Complainant and S.L. concerning an upcoming local union election that occurred on September 9, 2022. (Aa2, 4). The following facts are derived from the CSC's Determination, which largely relied upon DCF's LOD and its summary of statements collected in its investigation. (Aa1, Aa25).

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[1] The Procedural History and Statement of Facts are inextricably linked and combined here for the court's convenience.

[2] Citations to Appellant's Appendix are denoted as "Aa".

### B. <u>The Morning Incident.</u>

On the morning of September 9, 2022, S.L. arrived at the DLWD building in Trenton. (Aa2). Complainant was outside the building collecting signatures in support of a petition for a slate of candidates that included Complainant and a challenger to S.L. for president. (Aa4). S.L. went to the DLWD building because had been told that, on the prior day, Complainant had been outside of the building obtaining signatures under false pretenses. (Aa4). Specifically, S.L. had been told that Complainant had represented that the signatures were in support of S.L.'s slate, when in fact they were for a competing slate. (Aa4).

S.L. confronted Complainant about her signature-gathering tactics and a dispute ensued. (Aa3). Complainant reportedly felt threatened, sought assistance from a building security guard and then called both the Trenton and State Police, who calmed the situation by directing Complainant and S.L. to move to separate areas of the building. (Aa3). The record does not reflect that Complainant made a report to the responding police officers that S.L. had harassed her because of any protected status.

Nonetheless, according to DCF's summary of its interview with her, Complainant alleged that S.L. misnamed her by referring to her as "D[]" despite her repeatedly telling S.L. to refer to her as "D[a]". (Aa3). Complainant had recently

begun gender transition and had adopted a preferred name, "D[a]", which is the addition of a suffix "a" to her birth name. (Aa2-Aa4).

In his interview with DCF's EEO investigator, S.L. explained that he was aware of Complainant's transition, did not recall calling Complainant "D[]" and denied that Complainant told him that she preferred D[a] at any point during the morning incident. (Aa4). S.L. explained that if he referred to her by any name, it would have been the only name he had ever known her to use, D[]. (Aa4-Aa5). Indeed, Complainant had registered with the local union's election committee using that name, "D[]". (Aa2-4).

DCF obtained surveillance video of the incident, but the recording apparently did not capture audio. (Aa5). The video is not in the record, as DCF did not provide a copy of it to anyone.

DCF's investigation summary further indicates that Complainant "presented" a witness to the morning incident – "Witness One" – however, the record does not indicate that Witness One corroborated that S.L. misnamed Complainant. (Aa3). Rather, Witness One allegedly tried to create a distraction and later texted Complainant asking if she was okay. (Aa3). The text message is not in the record, as DCF did not provide a copy of it. Nonetheless, DCF's investigation summary does not report that Witness One's text message corroborated Complainant's allegation that he misnamed Complainant. (Aa3). Rather, it states that a screenshot

of the 9:17 a.m. text message from Witness One shows her ask Complainant "if she was okay because she observed [S.L.] bullying her," to which Complainant responded " 'It's bad' and that she called the police" on S.L.." (Aa30).

Notably, Witness One was also the individual seeking to run against S.L. to replace him as local union president, and for whom Complainant was soliciting petition signatures. (Aa4, n.3) Moreover, Witness One also filed a related State Policy complaint against S.L. alleging that he called two women "bitches." (Aa4, n3). DCF did not substantiate that complaint. (Aa4, n3).

**C. The Afternoon Incident.**

A few hours later, Complainant went to the local union office to turn in the petition signatures she gathered and requested to file a complaint against S.L. with the local union's election committee and with the National Labor Relations Board. (Aa3). According to DCF's investigative summary, Complainant alleged that S.L. heard her say she was going to file a complaint against him and yelled, "Do it D[], Do it D[]" and "Have a nice day, D[]." (Aa3). Complainant alleged that she told S.L. that he was "done misnaming me, I've told you multiple times to stop." (Aa3). Complainant sent Witness One a text stating "I just went to the office, and he [S.L.] is blatantly misnaming me." (Aa33).

S.L. acknowledged hearing Complainant state to a local union employee that she wanted to file a complaint against him and that he said that Complainant was

free to do so. (Aa4). S.L. reported that as Complainant was then leaving, she yelled, "I just want you to know I'm in a protected class, my name is D[a] and you will respect me." (Aa4). S.L. reported that this was the first time he learned that Complainant had a preferred name other than "D[]". (Aa4). S.L. told her he would call her whatever she wanted to be called, but that she could not come to his office and harass his staff. (Aa4).

Both Complainant and S.L. agreed that there was at least one witness at the local union office. However, DCF's EEO investigator did not speak with any witnesses to the alleged afternoon incident besides S.L. and Complaint. (Aa33). Indeed, DCF acknowledged that its investigator abandoned her effort to speak with them after counsel for the local union requested information about the complaint in advance of scheduling interviews with these employees, none of whom were State employees on a union leave. (Aa33-Aa34).

### D. DCF Issues a LOD.

On March 6, 2023, DCF's EEO Office issued a Letter of Determination ("LOD") finding that S.L. violated the State Policy by "purposely misnam[ing] the Complainant on more than one occasion," on one day in September 2022. (Aa19).

### E. S.L. Appeals the LOD to the CSC.

On March 29, 2023, S.L. filed a timely appeal of the LOD to the CSC. (Aa22). S.L. contended that DCF failed to follow procedural requirements, lacked

jurisdiction to investigate allegations at the union's office regarding an election dispute, and lacked a competent evidentiary basis for its determination. (Aa22-24). S.L. requested a fact-finding hearing because material facts were in dispute. (Aa24).

On June 7, 2023, DCF filed a Response Letter. (Aa25). The letter did not contain attached witness statements, text messages submitted, notes created or the surveillance video. Rather, DCF's letter from counsel summarized witness statements and described the contents of the other evidence. (Aa25-Aa36). DCF also relied upon what it referred to as "S.L.'s Prior Disciplinary History." (Aa35). However, the record indicates that no disciplinary action has ever been taken against S.L. Rather, DCF cited to three prior investigations by its EEO Office: 1) a 2012 complaint that was not substantiated; 2) a 2020 Complaint that DCF admitted was closed out in 2020 without any findings; and 3) and an August 2021 LOD that is the subject of a still pending unfair practice complaint pending before the Public Employment Relations Commission. (Aa35).

On June 27, 2023, S.L. filed a letter brief to the Commission in reply to DCF's Response Letter. (Aa39).

### F. The CSC Denies S.L.'s Appeal.

On September 20, 2023, the Commission issued a Final Agency Decision (the "CSC Decision") upholding the LOD and denying the appeal.[3] (Aa1). The Commission acknowledged that DCF failed to follow the procedural requirements of the State Policy, insofar as DCF failed to advise S.L. of his right to appeal the LOD to the CSC and failed to provide S.L. notice of its request to the CSC for an extension of time to complete its investigation, contrary to the express requirements of N.J.A.C. 4A:7-3.2(*l*). (Aa10). Nonetheless, the Commission concluded that S.L. did not suffer prejudice from these errors but warned that DCF could be penalized for similar failures in the future. (Aa10).

With respect to S.L.'s jurisdictional argument, the CSC relied upon the "doing business with the State" prong of the State Policy regulations. (Aa10). The CSC asserted that the State Policy "applies to S.L. under N.J.A.C. 4A:7-3.1(a)1," because "S.L. is a current employee who is on union leave performing union duties that involve doing business with the State. (Aa10).

The CSC further concluded that because "the alleged conduct took place at the DOL building and at the [local union office], **which is a facility where business regarding the representation of State Employees takes place,"** the local union's

[3] On October 5, 2023, the Commission issued a "Corrected Copy," which is included at "Aa1" of Appellant's Appendix in lieu of the incorrect original determination.

office was "as a matter of law, a facility **where State business is being conducted and discussed under N.J.A.C. 4A:7-3.1(a)1."** (Aa10 (emphasis added)). Therefore, the CSC reasoned, "the State Policy touched the allegations at both locations, and it was appropriate for the EEO to investigate the allegations at both locations." (Aa10). The CSC determined that it was irrelevant that the allegations arose from – and entirely involved – a union election dispute because the EEO was investigating an allegation of intentional discrimination by S.L. against a State employee. (Aa10).

On the merits of the appeal, the CSC upheld DCF's determination that S.L. was not credible with respect to the afternoon incident, and therefore was not credible with respect the morning incident. (Aa11). Further, the CSC determined – without any record basis – that S.L.'s credibility suffered because he failed to provide evidence on appeal to support his contention that he was at the DLWD building because he believed Complainant was soliciting signatures under false pretenses despite that "fact" not being the subject of any meaningful discussion or inquiry during the investigation. (Aa11).

Therefore, the CSC determined that DCF's LOD was based on "sufficient evidence to find that S.L. violated the State Policy in the morning," "regardless of the [lack of] afternoon witnesses' statements," and denied S.L.'s appeal. (Aa 11).

### G. S.L. Requests Reconsideration, Which Is Denied.

On November 2, 2023, S.L. filed a timely Request for Reconsideration, arguing that the Commission's Decision demonstrated that material factual disputes existed that required the matter to be transmitted to the Office of Administrative Law for a fact-finding hearing. (Aa46).

On December 18, 2023, DCF filed a Reply contending, in part, that S.L.'s Request for Reconsideration was untimely filed. (Aa50). On December 21, 2023, S.L. replied and explained that DCF's contention was plainly false as demonstrated by documentary evidence showing timely submission and receipt by the Commission. (Aa55).

On January 17, 2024, the CSC issued a Final Agency Determination denying S.L.'s timely Request for Reconsideration (the "CSC Request Determination"). (Aa13). With respect to S.L.'s request for a fact-finding hearing, the CSC responded that S.L.'s matter did not implicate "heightened due process concerns" because DCF was not seeking to impose discipline against S.L. in connection with the LOD. (Aa17). The CSC noted that "the Appellate Division has, in innumerable cases, found that Commission decisions, in non-discipline cases, can be determined based on the written record." (Aa17). Finally, the CSC faulted S.L. for not presenting "any preponderating evidence," other than "unsupported denials of the allegations against him." (Aa17). The CSC concluded that "to find that his mere denials are

sufficient to find that there is a material fact in dispute that warrants a hearing would be to render N.J.A.C. 4A:2-1.1(d) meaningless." (Aa17).

On January 17, 2024, S.L. timely filed the instant appeal.

## LEGAL ARGUMENT

### I. STANDARD OF REVIEW (NOT RAISED BELOW)

Although reviewing courts generally "defer to an agency's expertise and superior knowledge of a particular field," courts reverse administrative agency decisions "upon a clear showing that (1) the agency did not follow the law; (2) the decision was arbitrary, capricious, or unreasonable; or (3) the decision was not supported by substantial evidence." In re Application of Virtua-West Jersey Hosp. Voorhees for a Certificate of Need, 194 N.J. 413, 422 (2008); In re Carter, 191 N.J. 474, 482-82 (2007) (citing Mazza v. Bd. of Trs., 143 N.J. 22, 25 (1995)); Henry v. Rahway State Prison, 81 N.J. 571, 579-80 (1980). Here, the CSC's denial of S.L.'s request for a hearing failed to follow the law and constitutes an abuse of its discretion. Further, CSC's jurisdictional determination, under the circumstances, that a local union office was a State Workplace was arbitrary, capricious and unreasonable.

### II. THE COMMISSION ERRED IN FAILING TO TRANSMIT THE MATTER TO THE OFFICE OF ADMINISTRATIVE LAW BECAUSE MATERIAL FACTS ARE IN DISPUTE (AA11-12; AA17).

The CSC abused its discretion when it failed to follow well-established law that requires a fact-finding hearing in where disputed material factual questions

exist. The record is clear that S.L. has always vehemently disputed the allegations and the conclusion that he engaged in an intentional act of discrimination or harassment. The allegation that S.L. purposefully misnamed the Complainant are serious and harmful to S.L. and the union he was elected to lead.

Requiring disciplinary action as a requirement for a fact-finding hearing, under these circumstances, permits a State department nearly unchecked freedom to use the State Policy as a tool to make determinations of serious misconduct against a union president it does not like, knowing that it will not be required to prove its findings in a fact-finding hearing. DCF's citation to alleged "Prior Discipline" demonstrates the nature of this risk.

Further demonstrating CSC's abuse of discretion is its reasoning that S.L. failed to produce "any preponderating evidence," other than "unsupported denials of the allegations against him." (Aa17). This is faulty and entirely improper in light of the nature of the allegations and defenses. The record is indisputable that no witnesses or other evidence exists that corroborated Complainant's allegations. S.L. denied the allegations. Yet, the CSC contends that, in a he-said/she-said case with no allegations against him to deny other than that he purposefully misnamed an individual, S.L. was obligated to produce tangible evidence that supported his denial that he did not say what he was accused of saying. However, the probative evidence here is the assessment of S.L. and Complainant's credibility. The CSC's reasoning

ignores this court's precedents that make clear that credibility determinations should be made by an independent factfinder and that this matter is precisely the situation where a fact-finding hearing is therefore required as a matter of law.

Accordingly, the CSC's decision not to refer this matter for a fact-finding hearing was an abuse of discretion and must be reversed.

**A. Case Law Establishes S.L.'s Right to A Hearing.**

It is axiomatic that "[n]otice and the opportunity to be heard are '[t]he minimum requirements of due process.'" U.S. v. Raffoul, 826 F.2d 218, 222 (3d Cir.1987) (citing Goss v. Lopez, 419 U.S. 565 (1975)). With respect to appeals to the Commission, N.J.A.C. 4A:2–1.1(d) provides that an appeal may be reviewed by the Commission on a written record unless the Commission finds that "a material and controlling dispute of fact exists that can only be resolved by a hearing." See Fraternal Order of Police Lodge # 1 Camden v. City of Camden Police Dep't., 368 N.J. Super. 56, 62 (Law Div. 2003) ("a hearing on a record consisting only of written documents is appropriate where there is no genuine issue as to any material fact"). With respect to the State Policy, although no "mandatory right" to a hearing exists on the face of the regulations, the reference to N.J.A.C. 4A:2-1.1(d) "is recognition

that in certain instances a hearing is required." In re T.M., No. A-4628-11T1, 2013 WL 2301090, at *4 (N.J. Super. Ct. App. Div. May 28, 2013)[4].

As a matter of fundamental fairness and administrative due process, "[a]n agency must grant a plenary hearing [ ] if material disputed adjudicative facts exist." Frank v. Ivy Club, 120 N.J. 73, 98 (1990), cert. denied, 498 U.S. 1073 (1991); see also Cunningham v. Dep't of Civil Serv., 69 N.J. 13, 19–26 (1975). "To rule otherwise would subject to the caprice of the agency the rights of individuals who make a prima facie showing of facts which, if established, would [entitle them to relief], . . . if the agency simply rejects those facts." B & J Realty, L.L.C. v. N.J. Dep't of Envtl. Prot., 381 N.J. Super. 52, 62 (App. Div. 2005). In a "[c]ontested case'" where "there exist disputed questions of [material] fact, it is an abuse of discretion for an agency to deny an appellant's request for a hearing. N.J.A.C. 1:1-2.1; I/M/O Wiggins, 242 N.J. Super. 342, 346 (App. Div. 1990). In re M.M., No. A-5949-12T1, 2015 WL 2184073, at *6 (N.J. Super. Ct. App. Div. May 12, 2015) (reversing the CSC's denial of a hearing request where the only documents the CSC had to review essentially stated only that "witnesses denied or failed to corroborate appellant's allegations," and the CSC had no "written record of the witnesses' interviews, and thus could not itself evaluate them").

[4] Copies of unpublished decisions cited are included in Appellant's Appendix, per R. 1:36-3.

In numerous cases with facts similar to the instant appeal, this court has reversed CSC determinations denying an appellant's request for a fact-finding hearing related to a State Policy violation determination. Indeed, this court has consistently recognized the serious concerns presented in appeals of findings of violations of the State Policy.

In one case, the court reversed and remanded for a hearing where the CSC effectively decided a material factual question – whether the appellant had engaged in sexually harassing conduct the appointing authority determined violated its anti-discrimination policy, which he disputed. In the Matter of F.P., Department of Corrections, Dkt No. A-1368-13, 2015 WL 3602607 (June 10, 2015). The CSC's determination "was based on the record of the investigation, without a hearing," and it found the investigatory conclusion was "thorough and impartial, and [that] a sufficient basis exists to find violations of the State policy." Id. at *2, *4. The Commission made that determination despite the appellant's claim that the "allegations against him were false and uncorroborated" and retaliatory, a claim he supplemented with written statements he gathered. Id. at *3.

This court vacated the CSC's decision and remanded the matter for consideration of whether it should be referred for a fact-finding hearing. Id. at *9. Remand was necessary because it was "clear from the limited record" that the appellant "directly disputed" the complainant's "most damaging factual assertions."

Id. *8. In the court's view, to be "consistent with basic due process," "the truth of those very crucial, competing factual assertions" could not be "decided on the papers." Id. *8. Indeed, the court found it "troubling in itself" that the determination may have been based on only a "summary of the investigation." Id. at *8. The court held that, "to the extent the Commission determined that a hearing was unnecessary, we find that decision arbitrary, capricious, and unsupported by the record on appeal." Id. at *7.

In another example, this court disagreed with the CSC's determination that no material issue of disputed fact existed where the appointing authority never held a hearing, but rather retained an "outside consultant" whose investigation concluded that "it was more likely than not" that the appellant made "derogatory comments and engaged in an unprofessional action." In Matter of J.L., No. A-2501-13T4, 2016 WL 512431, at *2–3 (N.J. Super. Ct. App. Div. Feb. 10, 2016). The court explained that "[i]f there was actual proof" the appellant "made such comments and engaged in an unprofessional action that evidence would support a finding of a violation of the State Policy." Id. *2. The court criticized the CSC for denying a fact-finding hearing where the appellant had denied the comments and actions alleged, the CSC "was not provided a written record of the witnesses' interviews and did not have any way to determine what they actually said," and the CSC merely relied upon a letter from the employer's counsel summarizing the EEO investigation report – which the

appellant disputed. Id. *2. The court explained that there were "plainly disputed material facts" where one side contended the other made inappropriate comments and acted unprofessionally, and the other side denied it. Id. *3. Thus, "[t]he plain language of N.J.A.C. 4A:2-1.1(d) requires a hearing in such circumstances," since it depended on credibility determinations that "can only be assessed by a fact-finder making first-hand observations and evaluations of the witnesses." Id. *3. The court held that the "Commission's reliance on the written record was a mistaken exercise of discretion." Id. at *3.

In still yet another example, this court reversed a CSC determination under the State Policy where the "factual landscape . . . plainly reveals a need for a hearing." In re T.M., No. A-4628-11T1 at *4. The court explained that a conclusion about the appellant's alleged statement "depends on which witness is believed, making it impossible to determine whether [appellant] violated the State Policy without first resolving which version is accurate." Id. Where the "most basic finding-what did [appellant] say?-is in sharp dispute, and the Commission never determined what he said," this court found that "the record is both incapable of effective review and insufficient to sustain a State Policy violation." Id. Therefore, the CSC's "reliance upon the written record in this case was a mistaken exercise of discretion." Id.

Here, the Commission's Determination commits the same error identified by the Appellate Division in all of the above discussed cases. Even on the limited record on appeal, it is plain that the core issue is whether S.L. intentionally misnamed Complainant. What name, if any, S.L. referred to Complainant as during the morning and afternoon incidents – and whether Complainant asserted during the morning incident that S.L. misnamed her – are material factual questions that are in dispute. S.L. contended that if, in the morning, he called Complainant by any name, it would have been the only name he had known her, D[]. S.L. further asserted that he did not know that she preferred D[a] until she was leaving the local union office at the end of the afternoon incident. This is not a case where S.L. was "merely denying evidence so undeniable that the Commission 'would have to ignore reality to credit [S.L.'s] denial. J.L., at *3 (citing Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 450 (2007). These could not be more obvious disputes of material facts that requires a hearing.

Further, the CSC did not review any witness statements; rather, it reviewed the letter submitted by DCF's counsel outlining the alleged witness statements and the purported evidence it received in its investigation. These are all indicia, as this court has repeatedly observed, that the CSC's review of the appeal was made without any credibility determinations by an independent factfinder. See J.L. at *2. Instead, the CSC upheld DCF's determination in which the Department attempted to buttress

its credibility determinations by misrepresenting, and inappropriately citing to, **its own** prior investigations of him under the label "Prior Discipline," that were either dismissed or are on appeal in a separate proceeding. That is not fact-finding the CSC could reasonably rely upon. The magnitude of the allegations required an independent assessment of credibility.

In addition, the CSC's attempt to rationalize its conclusion was premised on its resolution of another disputed question of material (according to the CSC) fact – whether Complainant had misrepresented her signature gathering efforts for a political opponent of S.L. The CSC concluded that S.L.'s failure to prove on appeal that threshold question meant that his "version of events" could not be "believed." (Aa11). That is, the CSC determined on the written record that S.L.'s denial of the State Policy was not credible because S.L. had failed to prove why he was at DLWD building in the morning.

Prior to its decision, no indication existed that the CSC or anyone else considered that a relevant fact with respect to credibility. It was undisputed that both parties were there and a dispute occurred. To determine that the veracity of S.L.'s stated reason for being at the DLWD building was a disputed material fact, such that S.L.'s failure to support it negatively affects his credibility about whether he purposefully misnamed Complainant, is a patently arbitrary decision unsupported by the record.

The CSC's contention that S.L. failed to meet his burden of proof on appeal, in part, by failing to support his appeal with witness statements from local union employees, makes no sense. (Aa11). The CSC's Determination is premised on the CSC's implicit finding that the Complainant **was not** "engaged in a scheme to obtain signatures for the election under false pretenses." (Aa11). To that end, the CSC asserts that S.L. failed to provide evidence that supports his statement to the DCF EEO investigator that he was advised that Complainant was doing just that. However, DCF's EEO investigator did not request witness statements from S.L.

Moreover, the F.P. case reveals that when the appellant there tried to support his appeal with self-gathered written statements, "the Commission expressed 'serious concern' regarding [appellant's] solicitation of witness statements as part of his appeal, contending that it violated the confidentiality provision of N.J.A.C. 4A:7–3.1(j)." F.P., supra, at *8. Regardless of the CSC's apparent face-turn on what an appellant can/should submit in support of an appeal, S.L. must have the opportunity to present evidence in a fact-finding hearing on a question the CSC determined to be material - the veracity of S.L.'s reason for being at the DLWD building.

On the other hand, the CSC adopts DCF's reliance upon arguably self-serving text messages Complainant allegedly sent to the individual for whom she was gathering signatures, i.e., S.L.'s political opponent. Again, the CSC did not review

the actual text messages, and instead faulted S.L. for not providing "preponderating" information on an issue that no one ever contended to S.L. was in dispute.

The Commission also excuses the DCF investigator's admitted abandonment of any effort to interview witnesses at the union's office, even though DCF's determination about the morning incident was expressly based on its credibility determinations about the afternoon incident. Instead, the Commission found that the "he-said, she-said" allegations about the morning incident **alone** constitute "sufficient evidence to find that S.L. violated the State Policy in the morning." (Aa10-Aa11 (emphasis added)). The bare record of what allegedly happened in the morning, and why, simply does not support the Commission's resolution of this material fact question. Even the DCF EEO investigator did not appear to believe that substantial credible evidence existed about what happened in the morning incident, which is why it relied on its conclusion about the allegations in the afternoon incident. Where nothing more was presented to the CSC, its bald conclusion that "sufficient evidence [existed] to find that S.L. violated the State Policy in the morning" was arbitrary, capricious and unreasonable.

### B. The CSC's Determination that No Hearing Was Warranted Because DCF Did Not Seek To Impose Discipline Was Erroneous.

The CSC held that no hearing was required because S.L.'s matter did not implicate "heightened due process concerns" because DCF was not seeking to impose discipline against S.L. in connection with the LOD. (Aa17). The CSC noted

that "the Appellate Division has, in innumerable cases, found that Commission decisions, in non-discipline cases, can be determined based on the written record." (Aa17). The CSC's holding ignores the significant reputational harm that a substantiated State Policy determination can have.

The allegation that S.L. purposefully misnamed the Complainant are serious and harmful to S.L. and the union he was elected to lead. Requiring disciplinary action as a requirement for a fact-finding hearing, under these circumstances, permits a State department nearly unchecked freedom to use the State Policy as a tool to make determinations of serious misconduct against a union president it does not like, knowing that it will not be required to prove its findings in a fact-finding hearing. DCF's citation to alleged "Prior Discipline" demonstrates the nature of this risk.

In conclusion, it is evident that the Commission found material and controlling fact disputes existed but resolved them on a bare written record and without providing S.L. a fair and full opportunity to challenge the disputed allegations in a hearing, under oath, and with the requisite due process protections pursuant to N.J.A.C. 1:1-2.1. Cunningham v. Dep't of Civil Serv., 69 N.J. 13, 25 (1975). This court has consistently reversed Commission determinations concerning violations of the State Policy in nearly identical circumstances. The CSC abused its

discretion and the matter should be remanded and referred to the Office of Administrative Law for a fact-finding hearing.

## III. THE COMMISSION'S HOLDING THAT THE LOCAL UNION OFFICE WAS A STATE WORKPLACE FOR THE PURPOSES OF THE STATE POLICY WAS ARBITRARY, CAPRICIOUS AND UNREASONABLE BECAUSE IT ESTABLISHED JURISDICTION THAT EXTENDS TO NON-STATE WORKPLACES AND NOT INVOLVING STATE BUSINESS (AA10-AA11).

### A. The Commission Erred in Holding that a Private Union Office is a State Workplace Per Se.

The CSC held that the State Policy "applies to him under N.J.A.C. 4A:7-3.1(a)1, and therefore rejected what it described as S.L.'s "contention that the EEO did not have jurisdiction to investigate the matter, as S.L. is a current employee who is on union leave performing union duties that involve doing business with the State. (Aa10). The CSC likewise concluded that because "the alleged conduct took place at the DOL building and at the Local 1038 Office, **which is a facility where business regarding the representation of State Employees takes place,** CWA Local 1038's Office is, as a matter of law, a facility "**where State business is being conducted and discussed under N.J.A.C. 4A:7-3.1(a)1."** (Aa10 (emphasis added)). For those two reasons, CSC found that "the State Policy touched the allegations at both locations, and it was appropriate for the EEO to investigation the allegations at both locations." (Aa10). The record does not permit the CSC to conclude that State business was being conducted or discussed at the union local

office in connection with Complainant's presence there during the afternoon incident, let alone at any other time.

DCF's EEO investigation of Complainant's complaint was pursuant to its requirement to maintain an effective policy concerning claims of workplace harassment. A Civil Service regulation establishes the requirements of the policy, see N.J.A.C. 4A:7-3.1 "State Policy Prohibiting Discrimination in the Workplace."

The Policy prohibits "harassment or discrimination by anyone **in the workplace**" which includes "persons doing business with the State." N.J.A.C. 4A:7-3.1(a)1. Regarding location, the Policy "applies to conduct that occurs **in the workplace** and conduct that occurs at any location that can be **reasonably regarded as an extension of the workplace** (any field location, any off-site business-related social function, or any **facility where State business is being conducted and discussed**). N.J.A.C. 4A:7-3.1(a)1 (emphasis added).

The regulation requires that State agencies "annually distribute" the policy "to all of its employees," post it "throughout the buildings and grounds of each State agency," and the Department of Treasury distribute the policy to "Statewide vendors/contractors." N.J.A.C. 4A:7-3.1(f). Yet, the record does not indicate whether the Treasury Department deems the local union a vendor or contractor such that it ever, let alone annually, distributes the State Policy to the union.

Plainly, the State Policy is intended to prohibit discrimination and harassment in places the State has the obligation and authority to control – the Workplaces of State employees. Stated differently, the State Policy is intended to prohibit discrimination and harassment in workplaces for which it could face liability for failing to address such harassment. Where no such liability could result from a complainant's complaint under the State Policy to a state department, the State department should cease its investigation and refer the complainant to other external agencies such as the State Division of Civil Rights and the U.S. Equal Employment Opportunity Commission. See N.J.A.C. 4A:7-3.2(p) (providing agencies' contact information as part of the State's Model procedures).

Here, the Complainant did not work at the local union office. Although she was a member of the union, she was not an employee or volunteer of the Union. Rather, her stated purpose for being at the local union office when the afternoon incident occurred was to seek to change her name on the election petition and to file a complaint with the union against S.L. based on their interaction that morning at the DLWD building.

Nonetheless, the CSC held the State Policy applied because the local union office constitutes a "location that can be reasonably regarded as an extension of the workplace." N.J.A.C. 4A:7-3.1(a)1. Simply because the local union represents, among others, State employees in certain State departments cannot, without more,

convert its private offices into "an extension of the workplace" for all State employees. It was not an extension of Complainant's workplace. According to her, she was interacting with S.L. in the morning in front of the DLWD building in connection with a dispute about the union's election. She went to the local union office later that day in furtherance of her complaint about S.L.'s conduct in connection with the election dispute and to seek to change her name on the election petition. None of this is "State business."

This is not a situation where a State employee believed she was the subject of harassment by a State contractor at her regular workplace, as well as at the contractor's office, where she was required by her job to also report from time to time. That is precisely the scenario that the State Policy's language about expanding the scope of a State employee's workplace is reasonably drafted to cover – a situation where the State could face liability under the LAD for failing to investigate or address complaints of harassment at the contractor's private office because the State required the complainant to be there as a condition of her State employment and therefore could be vicariously liable. That risk is entirely absent at the local union's offices.

Accordingly, the Commission erred in holding that DCF had jurisdiction to investigation Complainant's allegations about S.L.'s conduct at the local union

office because that facility is not a State employee "workplace" for the purposes of the State Policy.

**B. The Commission Erred in Holding that the Instant Matter Involved "State Business"**

Just as the State Policy is rationally limited to State employee workplaces, its extension beyond a typical State Workplace is limited to places where State business is being conducted or discussed.

To the extent the State Policy addresses "persons doing business with the State," it does so in the context of such persons engaging in allegedly harassing conduct occurring "in the workplace." N.J.A.C. 4A:7-3.1(a)1. By holding, in this case, that DCF's EEO office had jurisdiction to investigation Complainant's allegations about conduct arising out of a union election at the local union's office the CSC arbitrarily conflated "union business" with "State business."

First, the CSC's determination that a union office is per se a State Workplace because State Business is being discussed or conducted had no basis in fact. The bare written record contains no indication that during the time Complainant was at the local office during the afternoon incident either she or anyone else was discussing or conducting State business. Rather, the record is undisputed that she was there in connection with union issues – turning in her election petition signatures, seeking to change her name on the petition, and threatening to file a complaint against S.L. with the union and/or the National Labor Relations Board. None of that has anything to

do with "State business," and the status of either S.L. or Complainant as State employees is therefore irrelevant. The CSC's determination that none of that mattered because the local union represents, in part, State employees, was patently arbitrary, capricious and unreasonable.

Second, it is entirely unclear what it means for State business to be conducted or discussed. The local union office is a private facility. It is where "Union Business" is conducted and discussed. But not all Union Business is State Business. Indeed, the record does not reflect whether the local union exclusively represents State employees. Given the undisputed facts about why Complainant was at the union office, the CSC's holding transforms every local union office in the State into a "facility where State business is being conducted or discussed" as a matter of law. That is a shocking overreach that this court cannot countenance.

It is obvious that these provisions of the State Policy are intended to ensure that State employees continue to be protected it when their State Workplace extends to a different location. For example, a State worker who is assigned to work at a third-party worksite does not become unprotected from workplace discrimination merely because the State does not own the worksite. Further, the analysis must look at why the State employee is at the workplace. Under the facts of this case, the CSC's determination that the local union office was a State Workplace means that all State Workplaces follow each State worker, like a movable zone of coverage.

Finally, research did not reveal any reported cases at either the administrative nor appellate review level that involved a finding of an allegation of a violation of the State Policy that occurred outside of a State workplace and did not involve State business, as are the facts presented here. Accordingly, the CSC's determination that, under the facts of this case, the local union office was a place where State business was being conducted or discussed such that DCF's EEO Investigator had jurisdiction under the State Policy is arbitrary, capricious and unreasonable, and must be reversed.

### C. Investigating State Policy Violations at Non-State Workplaces Is Not Necessary to Protect the State's Interests As an Employer.

The State Policy is not a general legislative effort to "eradicate the cancer of discrimination" anywhere within the State. See Jackson v. Concord Co., 54 N.J. 113, 124 (1969). That is what the New Jersey Law Against Discrimination seeks to accomplish. See N.J.S.A. 10:5-1 et seq. The State Policy is instead something promulgated by an executive department of the State to ensure all departments meet their legal obligations to maintain an effective policy to address and prevent claims of workplace discrimination and harassment. As the Court has recognized, employers, including the State, "are motivated to implement and enforce such policies" because "their policies provide a defense to a claim of vicarious liability." Aguas v. State, 220 N.J. 494, 517–18 (2015). In the face of an employment discrimination claim, "an employer is entitled to summary judgment if it (1)

'exercised reasonable care to prevent and correct promptly any [] harassing behavior' and (2) 'the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.'" Aguas, 220 N.J. at 524 (citing Faragher v. City of Boca Raton, 524 U.S. 775, 807-08 (1998); Burlington Industries v. Ellerth, 524 U.S. 742, 765 (1998).

However, the interest of the State as an employer in preventing unlawful workplace harassment is at its twilight when the allegations plainly involve non-State workplaces and non-State business. Such situations do not carry the risk of liability for failure to investigate and take remedial action that are present in the context of allegations of unlawful conduct at the workplace. It follows logically that if the State could not be held liable for conduct at a private office that does not involve "State business" because it has no authority or control over the conditions at the private office, its interest in investigating allegations of conduct at such locations is minimal and easily outweighed by legitimate privacy considerations of private businesses.

Nor is a State employee who believes they were the victim of discrimination or harassment at a non-State Workplace left without any recourse if the State Policy does not apply to that location. As the State Policy itself explains, multiple other avenues exist for an individual to seek to bring a claim, including the DCR and

EEOC, as well as the LAD. Thus, reversing the CSC's holding that, under the facts of this case, DCF and CSC had jurisdiction to investigate and make determinations about conduct alleged to occur on a non-State Workplace does not imperil the State with liability nor deprive a complainant of an avenue to address incidences of harassment and discrimination.

**D. The Commission's Determination That The Complaint Arose From a Union Election Dispute Was "Irrelevant" To The Jurisdictional Issue Was Arbitrary, Capricious and Unreasonable.**

Permitting the jurisdiction authorized by the Commission in this case raises significant risks of interference by State agencies in union operations, which is unlawful under the New Jersey Employer-Employee Relations Act ("NJEERA"). See N.J.S.A. 34:13A-5.3(a)(2).

Here, all undisputed facts demonstrate that the alleged State Policy violation arose out of, and involved exclusively, activity in connection with a union election campaign. Such campaign activity is protected union activity under the NJEERA, N.J.S.A. 34:13A-1, *et seq*., and is regulated by union bylaws. Under the undisputed facts in the record, DCF improperly involved itself in a dispute arising from an election campaign for the Office of President of a local union that represents DCF workers. Once it was clear to DCF that the allegations arose from and solely involved a union election campaign, it should have ended its investigation.

The CSC determined that it was irrelevant that the allegations arose from – and entirely involved – a union election dispute because DCF was investigating an allegation of intentional discrimination by S.L. against a State employee. (Aa10). That conclusion improperly elevates the investigation of allegations of State Policy violations, established pursuant to a CSC regulation, over the rights, protections and overall scheme established by the Legislature in the NJEERA. Indeed, the CSC makes no attempt to harmonize this statute with the policies animating the State Policy regulations.

When a State agency's EEO Office receives a complaint that appears on its face to involve union operations – such as a union election – and does not have any obvious connection to a "State Workplace" or "State business" – it should close its investigation without issuing any findings. That satisfies both the department's obligation to initially investigate complaints under the State Policy and protects the union from unlawful interference with its operations under the NJEERA.

The jurisdictional problems discussed above are exemplified and magnified by the facts of this case. It is not disputed that a department may investigate allegations of State Policy violations that occur in front of a State building. And with respect to those allegations, DCF's EEO investigator was not able to make a determination about what occurred because it was a he-said/she-said incident and the silent video surveillance (which has never been produced) did not provide

evidence of what S.L. and/or Complainant said to each other outside the DLWD building. Therefore, as DCF's submission expressly states, its determination that S.L. violated the State Policy is premised on its conclusions about what allegedly happened at the union office later that afternoon.

Thus, it is clear that had DCF appreciated the jurisdictional limits of the State Policy, it could not have determined that S.L. violated the Policy. DCF admits that its determination that S.L. violated the State Policy was premised solely on its credibility determinations about events that allegedly occurred **at** the local union office later that day. DCF could not substantiate the allegation that Ludwig "purposefully misnamed purposely misnamed the Complainant on more than one occasion" in connection with the morning incident. Indeed, DCF's Response admits that the video surveillance it relied upon as "corroborative evidence" of that incident was **silent.** Neither the conduct – verbal "misnaming" - nor the "purposeful" intent, could reasonably be derived from that source.

That leaves only the allegations of purposeful misnaming that allegedly occurred in the afternoon incident at the local union office. DCF relied on that conclusion to support its determination about S.L.'s credibility with respect to his conduct outside the DLWD Building earlier that day to find that S.L. purposefully misnamed Complainant "on more than one occasion."

This highlights the problem with permitting a State department to have virtually unlimited jurisdiction. If it could only substantiate a "workplace" complaint by drawing conclusions about a non-workplace incident – again based only on he-said/she-said evidence – then it was obliged to dismiss the complaint. Nevertheless, DCF's reliance on its "conclusion" about that incident, and CSC's affirmance of that conclusion, demonstrates a fundamental problem of permitting a State department to exercise jurisdiction outside the remit of the State Policy that demonstrates its determination was arbitrary, capricious and unreasonable and should be reversed.

## **CONCLUSION**

For the foregoing reasons, Appellant S.L. respectfully requests that this court reverse the CSC's determination rejecting his appeal of the LOD and request for a fact-finding hearing. Because the CSC's determination demonstrates a genuine dispute of material fact over what S.L. said to Complainant and why, the matter should be remanded and referred to the Office of Administrative Law. Further, the court should conclude that CSC's jurisdictional holding was arbitrary, capricious and unreasonable and should accordingly order that the allegations about the afternoon incident be dismissed because, under the circumstances, DCF lacked jurisdiction under the State Policy to investigate and premise a policy violation in connection with those allegations.

WEISSMAN & MINTZ LLC

s/Justin Schwam
Justin Schwam, Esq.

Dated: October 21, 2024

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: A-1459-23T2

CIVIL ACTION

IN THE MATTER OF S.L., DEPARTMENT OF CHILDREN AND FAMILIES

On Appeal from a Final Administrative Action of the Civil Service Commission

CSC Docket No.: 2023-2089

BRIEF ON BEHALF OF RESPONDENT
NEW JERSEY DEPARTMENT OF CHILDREN & FAMILIES
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## PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS[1]

S.L. appeals a final administrative action of the Civil Service Commission (Commission) finding that he violated the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy) stemming from a September 14, 2022 complaint by D[a].B.[2] (Ab1).[3] Though the Department of Children and Families (DCF or Department) concurrently investigated a September 9, 2022 complaint alleging that S.L. discriminated against two of its employees based on their sex and gender, that complaint was not substantiated and is not part of this appeal. (Aa1; Aa19-20; Aa25; Aa36).

D[a].B. is a New Jersey Department of Labor and Workforce Development (NJDOL) employee; D[a].B. is also a transgender female. (Aa19). S.L. is a DCF employee. (Aa19; Aa26). On or around September 14, 2022, D[a].B. filed a complaint with DCF's Office of Equal Opportunity/Affirmative Action against S.L. (Aa19-20; Aa25-26). At the time, S.L. was President of his

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[1] Because they are closely related, these sections are combined for efficiency and the court's convenience.

[2] "D[]" refers to Complainant's legal first name, while "D[a]" refers to Complainant's preferred first name.

[3] Ab refers to Appellant's brief, and Aa refers to his appendix. Ra refers to the appendix to this brief, which includes two Commission letters, which were identified in the Statement of Items Comprising the Record, but not included in Appellant's appendix.

local Communication Workers of America (CWA) union, and was on "DCF union leave" pursuant to Article 24 of CWA's contract with the State. (Aa26).

DCF investigated the allegations in D[a].B.'s complaint, which centered around S.L.'s alleged gender identity discrimination on September 9, 2022, when S.L. refused to refer to D[a].B. by her preferred name even after she corrected him several times. (Aa20; Aa26-28). Specifically, D[a].B. claimed that in August 2022, she agreed to help a friend run for CWA president against S.L., which included obtaining signatures for her friend's petition. (Aa26). On September 8, 2022, D[a].B. obtained signatures—after work hours and outside of the NJDOL building—as petitions were due to CWA the next day. Ibid. Still short on signatures, D[a].B. returned to the NJDOL property between 7:00 a.m. and 10:00 a.m. on September 9. Ibid. While D[a].B. was collecting signatures, S.L. approached her and said, "Hey, D[]." Ibid. D[a].B. immediately corrected S.L.: "Actually, it is D[a]." Ibid. After D[a].B. corrected S.L., he questioned what D[a].B. was doing; D[a].B. explained that she was obtaining signatures for the upcoming union election. Ibid. S.L. then made comments about D[a].B. being "anti-union" and being fired as a shop-steward; he also started yelling: "Don't sign this, he is against the Union, he is not a member, and he was fired." Ibid. S.L. repeatedly referred to D[a]. as D[]., and used masculine pronouns, which D[a].B. corrected each time. (Aa26-27). At one point, S.L. yelled, "D[],

D[], D[], D[]." (Aa27). S.L. also physically put his hands over D[a].B.'s papers so no one could sign the petition. Ibid.

Because she felt "threatened and bullied" by S.L., D[a].B. contacted building security for assistance. Ibid. Building security advised that it would not get involved because it was a "union issue," so D[a].B. called the Trenton Police Department (TPD). Ibid. Though TPD responded, they also recommended that D[a].B. call the New Jersey State Police (NJSP) since they were on State property. Ibid. NJSP arrived and diffused the situation by separating D[a].B. and S.L. Ibid. Despite the separation, S.L. continued to yell, "That's not true D[]." Ibid. D[a].B. responded, "I've corrected you several times not to say, 'this guy' and not to say 'D[].'" Ibid.

D[a].B. claimed that her coworker (Witness 1) observed S.L.'s harassment and sent D[a].B. a text message around 9:17 a.m. asking if she was ok. Ibid. During the incident, Witness 1 had also created a distraction and helped separate them by getting D[a].B. inside the building. Ibid. D[a].B. reported that there were additional witnesses outside, including other coworkers, who may have observed or heard the exchange between her and S.L. Ibid.

According to D[a].B., the discrimination continued that afternoon when she returned to the CWA office to submit her friend's petition and to file a complaint against S.L. with the Election Committee and the National Labor

Board. Ibid. When D[a].B. told Witnesses 4 and 5 that she was going to file complaints against S.L., S.L. yelled, "Do it D[], do it D[]." Ibid. D[a].B. "stood up" to S.L., stating, "[y]ou are done misnaming me, I've told you multiple times to stop." Ibid. S.L. replied, "[o]r what, are you threatening me in front of my staff, D[]." (Aa27-28). S.L. also asked D[a].B. what her legal name was, and what name she used on the petition. (Aa28). D[a].B. acknowledged that her legal name (D[].) was on the petition, but informed S.L. that it did not matter because the name she used was D[a]. and he needed to respect that choice. Ibid. Another CWA employee, Witness 6, "tried to push" S.L. into an office stop him from speaking to D[a].B. Ibid.

In his response to the complaint, S.L. acknowledged that he was familiar with D[a].B., as she was helping a friend run for union president against him, and that he interacted with D[a].B. at the NJDOL building on September 9 while collecting his own signatures. Ibid. He denied D[a].B.'s allegations. Ibid. According to his account, he spoke to D[a].B. about several members who told him that D[a].B. had been "falsely obtaining signatures" by claiming that the signatures were for S.L. when they were really for her friend (his opponent). Ibid. S.L. also reported approaching D[a].B. outside the NJDOL building, inquiring, "[h]ey, how are you making out?" and congratulating D[a].B. about her gender transition. Ibid. S.L. denied knowing her "new name" or saying:

"[h]ey D[];" he also denied that D[a].B. corrected him to call her D[a]. (Aa28-29). S.L. denied yelling "D[], D[], D[], D[]" or stating "[t]hat's not true D[]" when they were separated by the TPD and NJSP. (Aa29). After the morning incident, D[a].B. left the area, but S.L. stayed behind to "try and calm members down." Ibid. S.L. agreed that there were other people around, but he could not identify anyone. Ibid.

S.L. eventually returned to his union office. Ibid. D[a].B. appeared at the office later that afternoon to drop off her union petition, and explained to "someone" on the election committee—Witness 4 or Witness 5—that she wanted to change her name on the petition from D[] to D[a]; despite D[a]. not being her legal name, the election committee approved the request. Ibid. S.L. reiterated that he was not aware of D.[a].'s new name preference prior to seeing D[a].B. at the union office that afternoon. Ibid. S.L. also claimed that he heard D[a].B. tell Witness 5 that she was thinking about pressing harassment charges against him, to which he responded, "[y]ou can do whatever you want." Ibid. After that, he went to his office while D[a].B. went outside; he denied taunting D[a].B. Ibid.

According to S.L., D[a].B. soon came back inside and yelled, "[S.L.], I just want you to know I'm in a protected class, my name is D[a]. and you will respect me." Ibid. S.L. replied that this was the first time he heard D[a].B.'s

"new name," and that while he would call her "whatever [she] wanted to be called, it doesn't matter that you are in a protected class, you don't have the right to come to my office and harass people." Ibid. Contrary to his prior statement about D[a].B.'s interaction with Witness 5, S.L. then claimed that only Witness 4 was in the office that day; he also denied D[a].B.'s claim that Witness 6 tried to defuse the situation by guiding him into an office. Ibid.

S.L. asserted that if he had known D[a].'s preferred name, he would have used it. Ibid. He did not recall whether he addressed her by any name that day, but acknowledged that if he had, it would have been D[]. because he did not know she was changing her name to D[a]. Ibid. S.L. accused D[a].B. of being the "hostile" party, not him, and suggested that D[a].B.'s allegations related to the election and the fact that D[a].B.'s friend was running against him. (Aa29-30).

After the Commission granted an extension of time to complete its investigation of D[a].B.'s complaint, DCF provided S.L. with a written determination on March 6, 2024, finding that S.L. violated the State Policy and engaged in gender identity discrimination against D[a].B. (Aa19-21; Aa38). Specifically, DCF considered the allegations in D[a].B.'s complaint and S.L.'s response to determine that S.L. refused to refer to D[a].B. by her preferred name after she corrected him several times. (Aa20). Further supporting its decision

was DCF's review of video footage from outside the NJDOL building, which confirmed that an incident occurred on the morning of September 9, 2022, between D[a].B. and S.L. (Aa20; Aa32). Body language and arm movements showed that the interaction was contentious, and that S.L. followed D[a].B. when she moved away from him to obtain signatures. (Aa32). And finally, it showed the police response. Ibid.

DCF's investigation also confirmed that another incident took place later that afternoon at the union office. (Aa20; Aa32). While S.L. denied the specific allegations, he admitted to interacting with D[a].B. that day. (Aa32). He could not recall if he had called D[a].B. by any name, but acknowledged that if he had, it would have been "D[].," her legal name. Ibid. DCF found that S.L.'s contention that D[a].B. yelled, "[S.L.], I just want you to know I'm in a protected class, my name is D[a] and you will respect me" contradicted his other statements about the incident. Ibid. Yet D[a].B.'s allegations were specific, corroborated by D[a].B.'s text exchange with Witness 1,and depicted in the video footage. (Aa32-34). DCF concluded that S.L. violated the State Policy by purposely misnaming D[a].B. on more than one occasion. (Aa34).

On March 29, 2023, S.L. appealed DCF's determination to the Commission. (Aa22-24). S.L. argued that DCF's determination must be withdrawn for several reasons: (1) the determination was not final as DCF failed

to identify any appeal procedure; (2) even if final, the determination was untimely and failed to comply with the extension requirements of N.J.A.C. 4A:7-3.2(*l*)(2); (3) DCF lacked jurisdiction to issue the determination as the incident occurred outside D[a].B.'s workplace; and (4) the determination was not based on competent evidence as DCF did not interview witnesses to the afternoon incident and the video had no sound. Ibid. S.L. not only sought withdrawal of DCF's determination, but also requested an evidentiary hearing if the Commission believed any material facts were in dispute. (Aa24).

On April 18, 2023, the Commission acknowledged receipt of S.L.'s appeal, which it held in abeyance pending confirmation of whether DCF had pursued disciplinary action against S.L. (Ra1). On May 8, 2023, the Commission confirmed that DCF had not sought disciplinary action and the appeal could proceed. (Ra3).

On June 7, 2023, DCF submitted its response to the Commission, affirming its March 6, 2023 determination and providing additional support for its conclusions. (Aa25-38). At the outset, DCF questioned the validity of S.L.'s complaint about the appeal's finality and lack of an appeal process, given that S.L. had successfully and timely filed his appeal to the Commission. (Aa30-31). DCF also defended the timeliness of its final determination, which was rendered within the mandated time frames after the Commission extended its

time to complete the investigation in January 2023. Ibid.

DCF also articulated the basis of its jurisdiction and competent evidence supporting its determination about the core allegations against S.L. (Aa32-35). First, S.L. was a DCF employee and, as a public employee, subject to the State Policy even while on a union leave. (Aa31). Second, under N.J.A.C. 4A:7-3.1, the State Policy applies to "conduct that occurs in the workplace" or "at any location that can reasonably be regarded as an extension of the workplace," including any facility where State business is being conducted and discussed. (Aa31-32). Applying this rule, DCF found that all State employees are subject to the State Policy at offsite locations, including in front of a state building and at a local union office, as S.L.'s conduct was here. Ibid. Moreover, even if S.L. was not a DCF employee, he was still subject to the State Policy as an officer of the local CWA chapter, for two reasons: one, because the State Policy prohibits harassment and discrimination by anyone "doing business with the State," and two, because the CWA contract also includes a non-discrimination clause. (Aa32).

Finally, DCF relied on witness corroboration and video footage to substantiate D[a].B.'s allegations. (Aa32-33). Having summarized D[a].B.'s allegations and S.L.'s responses, DCF further described its efforts to interview union witnesses, who did not cooperate. (Aa33-34). DCF assessed the parties'

relative credibility and found that D[a].B.'s allegations were specific and that her version of the events was corroborated by a witness statement and the video footage, whereas S.L.'s account lacked specificity and consistency. (Aa34). DCF highlighted S.L.'s acknowledgment that D[a].B. yelled: "[S.L.], I just want you to know [I am] in a protected class, by name is [D[a]], and you will respect me;" DCF found that D[a].B. would not have made that statement if S.L. had not repeatedly misnamed her. Ibid. Under its preponderance burden, DCF found that S.L. violated the State Policy.[4] (Aa36).

In response, S.L. renewed his claims about the purported procedural deficiencies that should invalidate DCF's determination, to wit, that DCF did not advise him of his appeal rights or provide notice of its request for an extension. (Aa39-40). He also argued that DCF lacked jurisdiction because the alleged violation "arose out of, and involved exclusively, activity in connection with a union election campaign"—a protected union activity. (Aa40-41). And, though he conceded that the State may have authority to enforce the State Policy against State employees whose conduct occurs in front of a State building, he disagreed that its jurisdiction extended to conduct at a union office in the context of a union election campaign. (Aa41).

[4] Summarizing S.L.'s prior disciplinary history, DCF also found that S.L. displayed a pattern of inappropriate behavior. (Aa34-35).

S.L. also criticized DCF's credibility determinations, which relied on a "silent" video to corroborate its findings and did not consider union witness interviews even though those witnesses had referred DCF to their attorney (who also represented S.L.). (Aa41-42). S.L. also criticized DCF's characterization of his own statements as "inconsistent." (Aa42-43). S.L. argued that that his version of events—that he confronted D[a].B. about her misleading attempts to obtain signatures for S.L.'s opponent in the CWA election—was more logical and credible than D[a].B.'s. (Aa43).

On September 20, 2023, the Commission upheld DCF's determination that S.L. violated the State Policy. (Aa1-12). As an initial matter, the Commission found that DCF's technical violations, i.e., not advising S.L. of his right to appeal to the Commission or providing S.L. with notice of its extension request, did not invalidate DCF's determination as it did not affect the integrity of the investigation or conclusions. (Aa10). The Commission also highlighted that S.L. availed himself of the appeals process, and therefore did not suffer any material harm from any alleged technical violation. Ibid. That said, the Commission did not sanction the lapses but rather, warned DCF that future violations could result in fines or other appropriate action under N.J.A.C. 4A:10-2.1(a). Ibid.

The Commission also confirmed DCF's jurisdiction to investigate

D[a].B's complaint. Ibid. It agreed with DCF that as a current DCF employee "who is on union leave performing union duties that involve doing business with the State," S.L. was subject to the State Policy under N.J.A.C. 4A:7-3.1(a)1—which also governed his conduct at the NJDOL building and the union office, where business regarding the representation of State employees takes place. Ibid. The Commission rejected S.L.'s argument that, under the New Jersey Employer-Employee Relations Act (EERA), his alleged conduct was a protected union activity solely governed by union bylaws. Ibid. It reasoned that DCF was not investigating an election dispute but rather, investigating an allegation that S.L. was purposely misnaming another State employee in violation of the State Policy—and investigations of State Policy violations were not precluded by EERA. Ibid.

As to the merits, the Commission agreed with DCF that D[a].B.'s version of events was more credible than S.L.'s. (Aa10-11). According to S.L.'s account, he began his interaction with D[a].B. on the morning of September 9, 2022, by congratulating her on her gender transition. (Aa11). But during that exchange, he never learned D[a].B.'s new, preferred name. (Aa11). During the same exchange, S.L. also claimed to confront D[a].B. about falsely obtaining signatures for the union election campaign. Ibid. To believe these claims by S.L., D[a].B. would have had to engage in a scheme to falsely obtain signatures,

and call the police to report S.L. despite knowing it could expose her own purported wrongdoing. Ibid. D[a].B. would also have had to continue her ruse by later sending a false text message to Witness 1 claiming that S.L. was still "blatantly misnaming" her. Ibid. The Commission could not credit this version of events, finding D[a].B.'s account that S.L. referred to D[a].B. as D[]. even after she advised him of her preferred name in violation of the State Policy more plausible, as it was comprised not only of her own statements but also supported by the video footage of a contentious interaction between the parties and police involvement, and the text message exchange with Witness 1. Ibid.

The Commission considered S.L.'s arguments that DCF incorrectly found that the union witnesses failed to cooperate with the investigation and wrongly relied on his disciplinary history. Ibid. But regardless of the union witnesses' statements or lack thereof, the Commission found sufficient evidence to support that S.L. violated the State Policy. Ibid. Nor was consideration of any prior disciplinary history necessary to its determination. Ibid. Thus, the Commission upheld DCF's determination that S.L.'s conduct on September 9, 2022 violated the State Policy. (Aa11-12).

S.L. sought reconsideration, which the Commission denied on January 17, 2024. (Aa13-18; Aa46-49). In finding that S.L. did not meet the standard for reconsideration, the Commission reiterated that D[a].B.'s account of the

incident was consistent, credible, and supported by video and text evidence; in contrast, S.L.'s account was "even more questionable" on reconsideration than it was in his previous submissions. (Aa16). In his reconsideration motion, S.L. provided a different account for why he was at the NJDOL building on the morning of the incident: to confront D[a].B. over the alleged scheme to obtain false signatures. Ibid. Beyond noting that S.L. provided no support whatsoever for D.[a].B.'s alleged scheme to obtain signatures under false pretenses, the Commission reasoned that if S.L. truly went there to confront her about such a scheme, it was unlikely that he would have started their conversation by congratulating D[a].B. on her transition. Ibid. But, even if S.L.'s explanation was true, it would not necessarily excuse S.L.'s violation of the State Policy; S.L.'s reason for being outside the NJDOL building that day was not "fully dispositive as to his misnaming" of D[a].B. but rather, it would have only served to bolster S.L.'s credibility. (Aa16-17).

While S.L. contended that DCF did not ask him for witness statements to support his claim, nothing precluded him from offering such statements to DCF during its investigation; the Commission rejected his claims that providing "self-gathered" witnessed statements would have violated the State Policy's confidentiality provision. (Aa17). In short, S.L. forfeited his opportunities to provide supporting evidence.

Lastly, the Commission found unpersuasive S.L.'s reliance on In re F.P., Department of Corrections, No. A-1368-13T4, 2015 N.J. Super. Unpub. LEXIS 1375 (App. Div. June 10, 2015), which involved major discipline consisting of a suspension without pay for forty working days, demotion, reassignment, and mandatory training. (Aa17). First, the Commission noted that its decisions in non-discipline cases can be determined on the written record. Ibid. As S.L.'s case involved no disciplinary action, the Commission concluded that unlike the F.P. case, no heightened due process concerns requiring a hearing existed here. Ibid. Thus, because S.L.'s "mere denials" were insufficient to find that there was material fact in dispute requiring a hearing, the Commission denied his request for reconsideration. (Aa16-17). This appeal followed.

## ARGUMENT

## POINT I

### THE COMMISSION'S DECISION SHOULD BE AFFIRMED BECAUSE IT WAS REASONABLE, WELL SUPPORTED BY THE RECORD, AND CONSISTENT WITH THE PLAIN LANGUAGE OF THE STATE POLICY (Addressing S.L.'s Point II.A., and B.)

"[A] presumption of reasonableness attaches to the actions of an administrative agency." Smith v. Ricci, 89 N.J. 514, 525 (1982). Thus, an agency decision will only be reversed if it is arbitrary, capricious, or unreasonable, does not adhere to the law, or was not supported by the evidence

in the record. Zimmerman v. Sussex Cnty. Educ. Servs. Comm'n, 237 N.J. 465, 475 (2019); see also In re Hermann, 192 N.J. 19, 21 (2007) (Agency decisions are owed substantial deference "even if the court would have reached a different result in the first instance.").

Before an agency decision can be considered arbitrary, capricious, or unreasonable, it must be determined: "(1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors." In re Stallworth, 208 N.J. 182, 194 (2011) (quoting In re Carter, 191 N.J. 474, 482-83 (2007). The challenging party bears the burden of making this showing. In re J.S., 431 N.J. Super. 321, 329 (App. Div. 2013).

Here, the Commission's September 20, 2023 decision should be affirmed because it reasonably exercised its expertise when it affirmed DCF's determination that S.L. had discriminated against D[a].B. in violation of the State Policy. In finding that S.L. had violated the State Policy, both agencies acted in furtherance of their duties and obligations under the State Policy to provide State employees with a workplace free from discrimination and

harassment. N.J.A.C. 4A:7-3.1(a). And most importantly, the Commission's decision was supported by ample evidence and consistent with applicable law.

The State Policy prohibits employment discrimination or harassment based on gender identity and other protected categories. N.J.A.C. 4A:7-3.1(a). A State employee violates the State Policy when he or she makes a derogatory or demeaning reference about another's race, gender, age, religion, disability, affectional or sexual orientation, ethnic background, or any other protected category set forth therein. N.J.A.C. 4A:7-3.1(b). Examples of such prohibited activity include "[u]sing derogatory references with regard to any protected categories in any communication," N.J.A.C. 4A:7-3.1(b)1.v.; and "[e]ngaging in threatening, intimidating, or hostile acts towards another individual in the workplace because that individual belongs to, or is associated with, any protected categories." N.J.A.C. 4A:7-3.1(b)1.vi. See also In re K.R., Dep't of Military & Veteran Affairs, 2017 N.J. CSC LEXIS 339 (May 5, 2017) (denying appeal of employee who was found to violate the State Policy by referring to another employee as "Madame Africa" and telling that employee to "go back to where [she] belong[ed]."); In re B.G., Dep't of Human Servs., 2017 N.J. CSC LEXIS 220 (Mar. 24, 2017) (determination that employee violated the State Policy by using the "N word" was sustained, even though the employee who used the epithet was also African-American). And even though here S.L. was

found to have deliberately violated the State Policy when he repeatedly and intentionally misnamed D[a].B., it is worth emphasizing that because it is a zero-tolerance policy, an individual can violate the State Policy even if he or she did not intend to harass or demean another. N.J.A.C. 4A:7-3.1(b).

In this case, in accordance with its obligations under N.J.A.C. 4A:7-3.2, DCF investigated D[a].B.'s complaint that S.L. violated the State Policy. (Aa19-21; Aa25-36). DCF's investigation revealed that, on the morning of September 9, 2022, D[a].B. and S.L. engaged in a dispute outside the NJDOL that resulted in police intervention. (Aa26-27). It credited D[a].B.'s account that S.L. approached her as she collected signatures for a union petition and referred to her by a male name despite being corrected multiple times. (Aa20l Aa32-34). This purposeful and repeated misnaming, which the evidence supported continued at the union office later that afternoon, caused D[a].B. to feel "threatened and bullied." (Aa27). DCF found that S.L.'s denial, and his claim of having congratulated D[a].B. on her transition during the September 9 confrontation, lacked credibility when compared to D[a].B.'s account. (Aa32-34). In reaching this conclusion, DCF relied on the specificity and consistency of D[a].B.'s allegations, the text message exchange between D[a].B. and Witness 1 about D[a].B.'s interactions with S.L. that day, and the video footage, all of which corroborated D[a].B.'s account of the dispute outside the NJDOL

building—and it noted that despite having had opportunities to do so, S.L. had not provided any evidence to support his claims to the contrary. (Aa32-34).

On appeal, S.L. claims that the Commission's decision adopting DCF's determination was arbitrary, capricious, and unreasonable and that there are material facts in dispute which warrant a remand for an evidentiary hearing. (Ab13-15). He further claims that the "record is indisputable that no witnesses or other evidence exists that corroborated" D[a].B.'s allegations. (Ab13). S.L. is incorrect. As discussed above, the Commission considered D[a].B.'s consistent and specific statements alongside the text message exchange between D[a].B. and Witness 1 and the video footage taken outside the NJ DOL building. (Aa10-11). Importantly, shortly after 9:00 a.m. on September 9, 2022, Witness 1 texted D[a].B. to check on her after she saw S.L. bullying her outside the building; D[a].B. responded, "[i]t's bad," and advised Witness 1 that she had called the police. (Aa5). The text messages continued, with D[a].B. telling Witness 1 later that day, "I just went to the office, and [S.L.] is blatantly misnaming me." Ibid. And the video footage, though lacking audio, supported D[a].B.'s account of the incident that took place that morning; it revealed a contentious conversation between D[a].B. and S.L. (based on body language and arm movements), showed S.L. following D[a].B. as she walked away, and confirmed that several police officers responded to the scene. Ibid.

The Commission also correctly issued its decision on the written record. Under N.J.A.C. 4A:7-3.2, "[t]he Commission shall decide the appeal on a review of the written record or such other proceeding as it deems appropriate." See also N.J.A.C. 4A:2-1.1(d) (except "where the Civil Service Commission finds that a material and controlling dispute of fact exists that can only be resolved by a hearing, an appeal will be reviewed on a written record."); In re Wiggins, 242 N.J. Super. 342, 345 (App. Div. 1990) (whether a material or controlling dispute of fact exists is "committed to the discretion of the [agency], and its decision will be affirmed unless it goes beyond the range of sound judgment.").

Here, S.L. argues that there are material or controlling facts in dispute that warrant an evidentiary hearing—namely, what name, if any, S.L. called D[a].B. on September 9, 2022, and whether D[a].B. was involved in a scheme to falsely gather signatures for S.L.'s opponent in the Union election. (Ab20). But based on D[a].B.'s credible and consistent account of her interactions with S.L., coupled with video and text evidence, the Commission correctly found that S.L. misnamed D[a]. as D[]. on September 9, 2022 despite being corrected more than once. (Aa5; Aa10-11; Aa16-17). S.L.'s own statements also lend credence to D[a].B.'s allegations: (1) S.L. claimed that he congratulated D[a].B. on her transition during the morning incident; (2) S.L. admitted that during the union office exchange that afternoon, D[a].B. yelled at him, "[S.L.], I just want you to

know I'm in a protected class, my name is D[a] and you will respect me;" and (3) S.L. acknowledged he could not recall whether he has called D[a].B. by any name but if he had it would have been "D[]." as it was her legal name. (Aa11; Aa28).

As to whether D[a].B. was engaged in a misleading signature-gathering effort, S.L.'s argument (Ab21) fails in two respects. First, as the Commission aptly noted, S.L.'s claim that D[a].B. engaged in a scheme to obtain signatures for the union election under false pretenses was a mere allegation without any supporting evidence. (Aa16-17). Having failed to produce any evidence to bolster his position below, he is not now entitled to a "mulligan." Second and more importantly, even if true, S.L.'s claim is not dispositive to the core issue here: whether S.L. violated the State Policy by purposely misnaming D[a].B. despite being informed of her preferred name. (Aa17). Even if D[a].B. was engaged in a scheme as S.L. suggests, S.L.'s malfeasance towards D[a].B. would still constitute a State Policy violation. The Commission correctly denied S.L.'s request for an evidentiary hearing based solely on his mere allegation, as without more, such a decision would render N.J.A.C. 4A:2-1.1(d) meaningless—and in any event, it would not impact the outcome of the issue before the tribunal. (Aa17).

S.L.'s reliance on non-precedential decisions—F.P., 2015 N.J. Super. Unpub. LEXIS 1375; In re T.M., No. A-4628-11T1, 2013 N.J. Super. Unpub. LEXIS 1283 (App. Div. May 28, 2013); In re M.M., No. A-5949-12T1, 2015 N.J. Super. Unpub. LEXIS 1086 (App. Div. May 12, 2015); and In re J.L., No. A-2501-13T4, 2016 N.J. Super. Unpub. 292 (App. Div. Feb. 10, 2016)[5]—does not compel a different result. (Ab15-19; Aa60-78). In each of those cases, the court remanded for an evidentiary hearing as the agencies relied upon limited or "thin" records and the matters involved factual disputes that controlled the outcome of the final determination. See F.P., *17-20 (remanding where the agency relied upon a larger record that was not provided to the Commission); T.M., 2013 N.J. Super. Unpub. LEXIS 1283, *12-13 (remanding for more specific factual findings); M.M., 2015 N.J. Super. Unpub. LEXIS 1086, *8-10 (finding sufficiently specific names, dates, and times for the alleged violation of the State Policy to warrant remand for a hearing to determine credibility); J.L. 2016 N.J. Super. Unpub. 292, *6-7 (remanding for agency to provide Appellant proper notice of the specific allegations and opportunity to respond). But here, aside from holding no precedential value, these unreported cases are

[5] While S.L. provided copies of these unpublished decisions in his appendix (Aa60-78) under Rule 1:36-3, he fails to indicate whether there are any contrary published opinions required by the same rule.

distinguishable as DCF shared its record with the Commission. (Aa15-17; Aa54).

Additionally, these cases also resulted in either disciplinary or remedial action. See F.P., *5 (suspension without pay for forty work days; demoted and reassigned; required to attend training); T.M., *5-6 (letter of apology; banned from acting as agency representative at future events; counseling on the State Policy); J.L., *3 (remedial training on the State Policy). Here, no such action was sought against S.L. (Aa15; Ra3). Thus, nothing in this line of unpublished and factually-distinguishable cases supports disturbing the Commission's determination that S.L. misnamed D[a].B. by calling her D[]. even after she corrected him and informed him that her preferred name was D[a].

S.L.'s attempt to blame both the Commission and DCF for his own failure to provide any evidentiary support whatsoever for his version of events rings hollow. (Ab20-22). Relying again upon the unreported F.P. decision, S.L. baldly asserts that the Commission frowns upon "self-gathered" written statements as such solicitation would violate the confidentiality provision of the State Policy. (Ab22). But unlike in F.P., *9-10, where the solicited witness statements amounted to an "impermissible interrogation" involving the underlying allegations, S.L.'s solicitation of witness statements would have been focused on D[a].B.'s alleged scheme to falsely obtain signatures for his

union election opponent, which (beyond their irrelevance to the discrimination claim) would not implicate the State Policy. (Aa17). And while S.L. attempts to blame DCF for his failure to provide any witness statements because it did not specifically ask him for them, this argument falls flat. (Ab23). DCF not only attempted to interview other union witnesses—namely, Witnesses 4, 5, and 6 who were uncooperative with the investigator—but nothing precluded S.L. from providing DCF with any and all evidence he felt would benefit his defense. (Aa17; Aa33-34). As noted above, S.L. had more than one opportunity to provide such information: first to DCF during its investigation, and then again to the Commission on appeal. (Aa17). His choice not to do so does not invalidate the Commission's decision.

For these reasons, the Commission's decision was not arbitrary, capricious, or unreasonable and was fully supported by the credible evidence in the record. Having found that the CWA office was a workplace for purposes of enforcing the State Policy, as discussed in Point II below, the Commission's decision is also consistent with the State Policy's overarching goal of providing a workplace free from discrimination and harassment. N.J.A.C. 4A:7-3.1(a). Accordingly, the September 20, 2023 final agency decision should be affirmed.

## POINT II

**THE COMMISSION PROPERLY FOUND THAT DCF HAD JURISDICTION TO INVESTIGATE (Addressing S.L.'s Point III.A., B., C. and D.)**

S.L. argues that the Commission erred by finding DCF had jurisdiction to investigate D[a].B.'s allegations for two reasons: (1) the alleged conduct did not occur at a location subject to the State Policy; and (2) "all undisputed facts demonstrate that the alleged State Policy violate arose out of, and involved exclusively, activity in connection with a union campaign," which is protected by EERA, and regulated by union bylaws." (Ab33). These arguments miss the mark.

Under N.J.A.C. 4A:7-3.1(a)1, the State Policy applies to conduct that occurs in the workplace or "at any location that can be reasonably regarded as an extension of the workplace," including "any facility where State business is being conducted and discussed." (emphasis added). Thus, all State employees are subject to the State Policy at qualifying offsite locations, and here, the front of a state building and a local Union office certainly qualify as off-site locations "where State business is being conducted and discussed." N.J.A.C. 4A:7-3.1(a)1.

As an initial matter, despite being on leave under the CWA contract to hold an elected union position, S.L. remains a DCF employee bound by the State

Policy. See CWA Contract & State of New Jersey, Art. 24 §§ A. and B.1, July 1, 2019 to June 30, 2023, https://wpsite.cwa1038.org/public_html/PDF_Files/CWA_NJ_2019_2023_Contract.pdf (last accessed Jan. 15, 2025). And S.L. himself concedes that, as to the morning incident on September 9, 2022, "a department may investigate allegations of State Policy violations that occur in front of a State building." (Ab34). He nonetheless contends that DCF lacked competent information to determine what really happened outside the NJDOL building. Ibid. But as noted in Point I above, the Commission upheld DCF's determination based on D[a].B.'s consistent statements, along with video and text message support. (Aa10-11; Aa15-17). As well, S.L.'s actions against another State employee at a qualifying off-site location would be analyzed in light of the State Policy regardless of whether the act alleged is ultimately found to violate it.

As to the local union office, contrary to S.L.'s position (Ab25-29), the Commission correctly found that it was a location that could reasonably be regarded as an extension of the workplace, especially when viewed against the backdrop of the union's relationship with the State. See CWA Contract & State of New Jersey, pmbl. July 1, 2019 to June 30, 2023, https://wpsite.cwa1038.org/public_html/PDF_Files/CWA_NJ_2019_2023_Contract.pdf (last accessed Jan. 15, 2025) (The CWA contract's purpose is "the

improvement and promotion of harmonious employee relationships between the State and its employees represented by the Union."). Indeed, under the CWA contract, the union "recognizes its responsibility as exclusive collective negotiations agent and agrees to represent all employees in the unit without discrimination." Id. at Art. 2 § D.3. Thus, as S.L. clearly represents other State employees in his position as an officer of the union, the Commission reasonably concluded that the union office was a qualifying off-site location where State business was being conducted. See also Blakey v. Cont'l Airlines, Inc., 164 N.J. 38, 57 (2000) ("[C]onduct that takes place outside the workplace has a tendency to permeate the workplace.").

Additionally, the CWA contract with the State includes its own anti-discrimination clause: "the State and the Union agree there shall be not any discrimination, including harassment, based on . . . gender identity or expression . . . or any other legally protected status." CWA Contract & State of New Jersey, Art. 2 § A, July 1, 2019 to June 30, 2023, https://wpsite.cwa1038.org/public_html/PDF_Files/CWA_NJ_2019_2023_Contract.pdf (last accessed Jan. 15, 2025). The CWA contract further provides that unless specifically "abridged, limited or modified" by the terms of its contract, the State retains its right "to enforce reasonable rules and regulations governing the conduct and activities of employees." Id. at Art. 1 § B.2. Because there is nothing in the CWA contract

that abridges, limits or modifies the State Policy, DCF had jurisdiction to investigate S.L.'s alleged violations of the State Policy under N.J.A.C. 4A:7-3.1(a)1.

Nor, as S.L. contends, did the alleged State Policy violation arise out of, or involve exclusively, an activity in connection with a union campaign. (Ab33). While true that the alleged conduct took place during union electioneering activity, D[a].B.'s allegations are unrelated to any union activity or the election itself. (Aa19-20; Aa25-26). Rather, D[a].B. claimed that S.L. (a State employee) continuously misnamed her (another State employee), despite being informed about D[a].B.'s preferred name, in violation of the State Policy's prohibition against discrimination based on gender identity. Ibid. Because DCF was not investigating an election dispute, but rather, alleged gender identity discrimination, it had jurisdiction to investigate here.

Finally, though S.L. is correct that EERA governs protected union activities under N.J.S.A. 34:13A-5.4a(1), it does not provide carte blanche protection from being investigated for discriminatory conduct unrelated to such activities. See, e.g., In re Bridgewater, 95, N.J. 235, 237 (1984) (despite EERA protections, public employers still retain the right to take adverse action against an employee for a legitimate business reason, unrelated to the employee's union activities.). Thus, because DCF was investigating claims of gender identity

discrimination, and not union business, the Commission appropriately found that EERA did not preclude DCF's investigation of S.L.'s conduct, and its final determination should be upheld.

## CONCLUSION

For these reasons, DCF respectfully submits that this court should affirm the Commission's September 20, 2023, final agency decision.

Respectfully submitted,

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**FILED,** Clerk of the Appellate Division, January 29, 2025, **A-001459-23**

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1459-23T2

| IN THE MATTER OF S.L., DEPARTMENT OF CHILDREN AND FAMILIES | Civil Action<br><br>On Appeal from a Final Administrative Action of the Civil Service Commission<br><br>CSC Docket No. 2023-2089 |
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STATEMENT IN LIEU OF BRIEF ON BEHALF OF
THE NEW JERSEY CIVIL SERVICE COMMISSION
Date Submitted: January 29, 2025

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On the Statement

The Civil Service Commission files this Statement in Lieu of Brief pursuant to Rule 2:6-4(c). Appellant, S.L., appeals a September 20, 2023 final administrative action of the Commission, and a subsequent January 17, 2024 determination by the Commission denying S.L.'s reconsideration request, finding that he violated the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy) stemming from a September 14, 2022 complaint made by D[a].B.[1] (Aa1-12; Aa13-18).[2]

D[a].B., a New Jersey Department of Labor and Workforce Development (NJDOL) employee and a transgender female, filed a complaint against S.L., a Department of Children and Families (DCF) employee,[3] with DCF's Office of Equal Opportunity/Affirmative Action on or around September 14, 2022. (Aa19-20). D[a].B.'s complaint alleged S.L. had discriminated against her on the basis of gender identity on September 9, 2022, when S.L. repeatedly misnamed D[a].B. by calling her D[] rather than her preferred named despite D[a].B. correcting S.L. multiple times. (Aa20; Aa26-28). Specifically, D[a].B.

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1 "D[]" refers to Complainant's legal first name, while "D[a].B" refers to Complainant's preferred first name.

2 "Aa" refers to Appellant's Appendix. "Ab" refers to Appellant's Brief.

3 At the time of the events in question, S.L. was President of his local Communication Works of America (CWA) union and was on "DCF union leave" pursuant to Article 24 of CWA's contract with the State. (Aa26).

alleged that, while collecting signatures for a friend's petition to run for CWA president against S.L. outside of the NJDOL building, S.L. approached her and called her D[], to which D[a].B. immediately corrected S.L. by informing him of her preferred name. (Aa26). Despite being corrected by D[a].B., S.L. continued to refer to her as D[] and used masculine pronouns. (Aa26-27).

As a result of their interaction, police were called to the building. (Aa27). D[a].B.'s colleague (Witness 1) observed S.L.'s behavior and sent D[a].B. a text message asking if D[a].B. was okay. Ibid. Later that day, D[a].B. went to the CWA office to submit her friend's petition and file a complaint against S.L. with the Election Committee and the National Labor Board. Ibid. While at the CWA office, D[a].B. informed Witnesses 4 and 5 that she was going to file a complaint against S.L. Ibid. In response to overhearing this, S.L. called D[a].B. D[] multiple times and encouraged her to file a complaint. (Aa27-28).

In response to the complaint, S.L. acknowledged that he knew D[a].B. but denied her allegations. (Aa28). Per S.L., he had been informed by other union members that D[a].B. had been falsely obtaining signatures by misrepresenting on whose behalf the petition was for. Ibid. When he attempted to confront D[a].B. about this outside of the NJDOL building, S.L. stated that he began their interaction by first congratulating D[a].B. on her gender transition. Ibid. S.L.,

however, denied not only knowing her preferred name but that he referred to her as D[]. (Aa28-29).

Regarding the events at the union office, S.L. reported overhearing D[a].B. tell Witness 5 that she was thinking about pressing harassment charges against S.L. to which S.L. responded that D[a].B. could do whatever she wanted. (Aa29). S.L. stated that D[a].B. went outside for a period but then returned inside the office, yelled at him, and told him that she was in a protected class, what her preferred name was, and that S.L. would respect her. Ibid. S.L. alleged that this interaction was the first time he had heard D[a].B.'s preferred name and that he would call her by whatever name she wanted, but that, regardless of whether she was in a protected class, she did not have the right to come into S.L.'s office and harass people. Ibid. S.L. did not recall whether he addressed D[a].B. by any name on that date, but stated that if he had, he would have referred to D[a].B. as D[] given that was the only name he knew her by. Ibid.

After the Commission granted DCF an extension of time to complete its investigation, DCF provided S.L. with a written determination on March 6, 2024, concluding that S.L. had violated the State Policy and engaged in gender identity discrimination against D[a].B. (Aa19-21; Aa38). In reaching this conclusion, DCF relied upon D[a].B.'s allegations and S.L.'s response to them, along with a review of the video footage from outside the NJDOL building

which confirmed that an incident had occurred between D[a].B. and S.L. on the date in question. (Aa20). The body language in the video showed that the interaction was "contentious," that S.L. followed D[a].B. after she moved away from him to continue obtaining signatures, and that police responded to the building. (Aa20).

DCF also confirmed that a second incident between S.L. and D[a].B. occurred later that same day at the union office. Ibid. While S.L. had denied the allegations, he acknowledged interacting with D[a].B. on the date in question. Ibid. DCF found S.L.'s statements as a whole to be inconsistent with his report that D[a].B. had shouted to him during the incident at the union office that she was in a protected class and told him her preferred name was D[a].B. Ibid. On the other hand, DCF found D[a].B.'s allegations to be specific, corroborated by D[a].B.'s text exchange with Witness 1, and consistent with the video footage. Ibid. As such, DCF concluded that S.L. had violated the State Policy by purposely misnaming D[a].B. on more than one occasion. Ibid.

On March 29, 2023, S.L. appealed DCF's determination to the Commission on the following grounds: (1) DCF's determination was not final given its failure to identify any procedure to appeal the determination; (2) even if the determination was final, it was untimely and did not comply with the extension requirements of N.J.A.C. 4A:7-3.2(l)(2); (3) DCF lacked jurisdiction

to issue the determination given the incident occurred outside D[a].B.'s workplace; and (4) the determination was not based on competent evidence given DCF did not interview witnesses to the second incident at the union office and the video of the first incident did not have any audio. (Aa22-24). S.L. alternatively requested an evidentiary hearing if the Commission determined there were material facts in dispute. (Aa24). On June 7, 2023, DCF submitted its response to S.L.'s appeal to the Commission. (Aa25-36). On June 27, 2023, S.L. submitted to the Commission its reply to DCF's response. (Aa39-45).

On September 20, 2023[4], the Commission upheld DCF's determination that S.L. had violated the State Policy. (Aa1-12). The Commission reasoned that the lack of notice to S.L. of the extension request and not informing him of his right to appeal, did not invalidate DCF's determination given these violations did not impair the integrity of the investigation and its conclusions. (Aa10). The Commission further concluded that DCF had jurisdiction to investigate D[a].B.'s complaint given that, despite being on union leave, S.L. was still subject to the State Policy under N.J.A.C. 4A:7-3.1(a)1 as S.L.'s union duties involved doing business with the State. Ibid. The Commission also rejected

[4] Although the Commission's Final Administrative Action was originally issued on September 20, 2023, the Commission subsequently issued a corrected Final Administrative Action dated on October 5, 2023. (Aa1).

S.L.'s claims that his alleged conduct was protected union activity as it reasoned that DCF was not investigating a union election dispute. Ibid.

Regarding the merits, the Commission agreed with DCF's credibility determination finding D[a].B.'s version of events to be more credible than S.L.'s. (Aa10-11). Specifically, the Commission noted that, according to S.L., his initial interaction with D[a].B. began with him congratulating her on her gender transition but that during this interaction he never learned D[a].B.'s preferred name. (Aa11). The Commission additionally noted that, in S.L.'s version of events, D[a].B. was fraudulently collecting signatures but called the police to falsely report on S.L. knowing that involving police in the matter would potentially expose her alleged fraudulent behavior. Ibid. Moreover, the Commission noted that D[a].B. would have also had to send a false text message to Witness 1 claiming that S.L. was misnaming her. Ibid. As such, the Commission determined that D[a].B.'s account was more credible than S.L.'s. Ibid. The Commission also rejected S.L.'s challenge to the lack of statements from the union witnesses noting that there was sufficient evidence in the record to support that S.L. violated the State Policy. Ibid.

Thereafter, S.L. sought reconsideration of the determination, which the Commission denied on January 17, 2024. (Aa13-18; Aa46-49). The Commission determined S.L. had not met the standard for reconsideration given

that his version of events were even more unbelievable in his reconsideration request given that S.L. had initially stated that he began his interaction with D[a].B. by first congratulating her on her gender transition but on reconsideration was alleging he went to the NJDOL building to confront D[a].B. about the allegation that she was attempting to fraudulently obtain signatures. (Aa16). The Commission reasoned that if S.L. was at the NJDOL building to confront D[a].B., it was unlikely that he would have begun the conversation by congratulating her on her gender transition. Ibid. Moreover, the Commission noted that, even if S.L.'s allegations were true, that did not excuse his violation of the State Policy. (Aa16-17). Further, while S.L. stated that DCF did not ask him to provide witness statements supporting his claim, the Commission reasoned there was nothing preventing him from providing such statements to DCF and, therefore, he had forfeited his opportunity to provide such evidence. (Aa17). Finally, the Commission rejected S.L.'s contention that his denial of the allegations constituted a dispute of material fact and concluded that same did not warrant a contested hearing in the OAL. (Aa16-17).

This appeal followed.

Having reviewed the merits briefs filed by the primary parties, the Commission has determined that the factual and legal issues involved in this appeal do not warrant the filing of a separate brief. The primary issues raised

in this appeal are: (1) whether it was arbitrary and capricious for the Commission not to transmit the matter to the Office of Administrative Law (OAL) based on S.L.'s denial of the allegations in the complaint; and (2) whether it was arbitrary and capricious for the Commission to conclude that a local union office is a State workplace for the purposes of the State Policy. (Ab14; Ab25). This matter does not involve a challenge to the validity of the Civil Service statutes, or the rules promulgated thereunder, because the essence of S.L.'s arguments is that his denial of the allegations contained in the complaint constituted a dispute of material fact warranting a contested hearing in the OAL pursuant to N.J.A.C. 4A:2-1.1(d) and that a local union office is not a State workplace under the State Policy. (Ab14; Ab25). Therefore, a separate brief on the merits from the Commission is unnecessary. The primary parties to this appeal have adequately addressed these issues, and the public interest does not require the Commission's participation.

Nevertheless, the Commission's decision should be affirmed. It is well-established that an agency's determination will not be upset unless it is affirmatively shown that it is arbitrary, capricious or unreasonable or that it lacks fair support in the record as a whole. Karins v. City of Atl. City, 152 N.J. 532, 540 (1998). A strong presumption of reasonableness attaches to the Commission's decision. In re Carroll, 339 N.J. Super. 429, 437 (App. Div.

2001). Thus, a court must affirm the decision if the evidence supports it, even if the court may question its wisdom or would have reached a different result. Campbell v. N.J. Racing Comm'n, 169 N.J. 579, 587 (2001).

The Commission's decision should be affirmed given that it is supported by ample evidence in the record and consistent with applicable law. Here, DCF determined that S.L. had engaged in purposeful and repeated misnaming based on DCF's evaluation of the credibility of both D[a].B.'s and S.L.'s respective version of events, a text message exchange between D[a].B. and a witness to the incident outside the NJDOL building, and video footage of that incident. (Aa1-12).

Further, under N.J.A.C. 4A:7-3.2(m)(3), appeals from State agency discrimination complaint determinations are decided by the Commission on the written record, which is consistent with the Commission's general practice of determining other types of appeals on the written record except where "a material and controlling dispute of fact exists that can only be resolved by a hearing." N.J.A.C. 4A:2-1.1(d). S.L. had the opportunity to submit evidence in his defense at multiple points in the process but never did, (Aa32-34; Aa11; Aa17), despite being the party bearing the burden of proof. N.J.A.C. 4A:7-3.2(m)(4) (appellants in discrimination appeals have the burden of proof). Therefore, the Commission correctly determined this appeal on the written

record and affirmed DCF's determination based on the substantial evidence in that record.

The Commission's determination that DCF had jurisdiction to investigate the complaint is also consistent with applicable law. (Aa10). The State Policy applies to conduct occurring in the workplace or "any location that can be reasonably regarded as an extension of the workplace," including "any facility where State business is being conducted and discussed." N.J.A.C. 4A:7-3.1(a)(1). Given that S.L., as local union chapter president, represents other State employees, the Commission correctly determined that the State Policy applied not only to the immediate vicinity of a State building but to the union office as well. (Aa10). The Commission also correctly reasoned that the investigation, despite S.L.'s claims, was not related to union election activity but rather to whether "S.L. was purposefully not referring to a State employee by that employee's preferred name, in violation of the State Policy." Ibid. As such, the Commission correctly determined that DCF had jurisdiction to investigate the complaint.

For these reasons, the Commission's September 20, 2023 decision should be affirmed.

Respectfully submitted,

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February 12, 2025

**<u>Via eCourts</u>**
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**Re: In The Matter Of S.L., Department of Children And Families Docket No. A-1459-23T2**

**On Appeal from a Final Administrative Determination of the Civil Service Commission, CSC Docket No. 2023-2089**

**<u>Reply Letter Brief of Appellant S.L.</u>**

Dear Clerk:

This law firm represents Appellant S.L. in connection with the above-referenced matter. Kindly accept this letter brief as S.L.'s reply to the opposition brief filed by the New Jersey Department of Children and Families ("DCF") dated January 22, 2025 ("Rb"), and the Statement in Lieu of Brief filed by the New Jersey Civil Service Commission ("CSC") dated January 29, 2025 ("R2b").

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## PROCEDURAL HISTORY AND STATEMENT OF FACTS

Appellant relies upon the statement of facts set forth in his merits brief. (Ab4-12).

## LEGAL ARGUMENT

### I. RESPONDENTS' OPPOSITION PAPERS CONFIRM THAT THE COMMISSION ERRED IN FAILING TO TRANSMIT THE MATTER TO THE OFFICE OF ADMINISTRATIVE LAW BECAUSE MATERIAL FACTS ARE IN DISPUTE (AA11-12; AA17).

As S.L. argued in his opening brief, the CSC's denial of S.L.'s request for a hearing failed to follow well-established law and constitutes an abuse of its discretion. A material dispute of fact exists on the core question – whether S.L. intentionally misnamed the Complainant ("Complainant" or "D[a].B."), as DCF concluded. S.L. denied the allegations and offered a credible explanation of what

happened on the subject date. Specifically, a heated incident occurred outside the NJDOL building on the morning of September 9, 2022, when S.L. confronted the Complainant about allegations she had been falsely soliciting signatures in support of a challenger to S.L. in an upcoming union election. DCF concluded that the Complainant's allegations were more credible than S.L.'s explanation, based on its review of silent video surveillance and a text message exchange between the Complainant and the individual who was seeking to challenge S.L. in the election. DCF also relied upon S.L.'s non-existent "prior disciplinary history." The CSC denied S.L.'s appeal of DCF's determination and request that the matter be transmitted to the Office of Administrative Law for a fact-finding hearing, as well as his request for reconsideration.

S.L.'s opening brief cited multiple cases establishing persuasive authority wherein this court criticized the CSC for denying a fact-finding hearing in nearly identical situations, including where the appellant had denied comments and actions alleged, the CSC "was not provided a written record of the witnesses' interviews and did not have any way to determine what they actually said," and the CSC merely relied upon a summary of the EEO investigation report which the appellant disputed. <u>See, e.g.</u>, <u>In Matter of J.L.</u>, No. A-2501-13T4, 2016 WL 512431, at *2–3 (N.J. Super. Ct. App. Div. Feb. 10, 2016) (Aa76-Aa78); (Ab17-19) (discussing cases). S.L. argued that the CSC's determination that no material facts are in dispute was

"arbitrary, capricious, or unreasonable" and "not supported by substantial evidence." In re Application of Virtua-West Jersey Hosp. Voorhees for a Certificate of Need, 194 N.J. 413, 422 (2008).

In opposition, DCF bases its argument that these persuasive precedents are distinguishable a faulty premise – that "DCF shared its record with the Commission." (Rb22-23). This is false. The record on appeal shows that DCF based its credibility determinations in this he-said/she-said case entirely upon two pieces of evidence: 1) silent video surveillance from outside the NJDOL building; and 2) two text messages provided by D[a].B. to the DCF investigator. A cursory review of the CSC's determinations being appealed – and the Statement of Items Comprising the Record filed by CSC – plainly demonstrate that DCF never "shared" the video or text exchange with the CSC, let alone any written witness statements, any notes by the investigator of interviews with the parties or witnesses, or documents purporting to establish S.L.'s "disciplinary history." Rather, DCF "shared" a letter brief in which it summarized the above elements of the record. That is precisely the type of record this court has repeatedly held to be insufficient to dismiss a request for a fact-finding hearing in cases involving similar facts.

Nonetheless, both DCF and the CSC insist their determinations were based upon the "ample evidence" that DCF relied upon in reaching its credibility determinations, which CSC adopted. (Rb17 (DCF describing the CSC's decision as

supported by "ample evidence"); (R2b10 (CSC stating same); (Rb19 (DCF asserting that the CSC "considered D[a].B.'s consistent and specific statements alongside the text message exchange . . . and the video footage"). Again, those assertions are simply contrary to the record. Neither the CSC, nor this court, has ever been presented with either piece of evidence. Nor has S.L. Yet, DCF asks this court to blindly accept both its representations about what the video shows as well as the reasonableness of the findings and conclusions it drew from them.

This is a critical problem in this case. DCF's representations about how it used these two pieces of evidence to make credibility determinations and conclude that S.L. purposely misnamed D[a].B. demonstrate that its failure to produce them in connection with S.L.'s appeal to the CSC, and CSC's failure to either seek to review them or transmit the matter for a fact-finding hearing, obviate any argument that they constitute "substantial evidence."

With respect to the video surveillance, the CSC accepted DCF's written representation that its "review of video footage from outside the NJDOL building . . . confirmed that an incident occurred" between the parties on the morning of September 9, 2022. (Rb7). DCF frames the conduct captured as "[b]ody language and arm movements" that demonstrated "the interaction was contentious, and that S.L. followed D[a].B. when she moved away from him to obtain signatures," as well as showing "the police response." (Rb7). DCF asserts that D[a].B.'s "allegations

were specific, corroborated by D[a].B.'s text exchange with Witness 1, and depicted in the video footage." (Rb7). DCF's reliance on the silent video surveillance to support its credibility findings against S.L., and its ultimate conclusion that he committed intentional verbal discrimination, is misplaced – S.L. never denied that he was involved in a heated incident with D[a].B. to which police responded. S.L. has consistently maintained that he was at the NJDOL building that morning because he was told that D[a].B. had been soliciting signatures for a potential challenger in an upcoming local union election on a prior day. The record does not present a factual basis to conclude that his assertion was either post-hoc or false. Even accepting DCF's representation of what the video shows, the video does nothing but corroborate the undisputed fact that an incident occurred outside the NJDOL building.

Yet, DCF and the CSC contend that SL's explanation for why he was at the NJDOL building that morning and interacted with D[a].B. were "inconsistent" and non-specific. (Rb19). This makes no sense. But their arguments in this regard demonstrate the existence of a material factual dispute – why S.L. was at the NJDOL building that morning. Again, the investigator's notes of her interview with S.L. are not part of the record reviewed by CSC or this court.

With respect to the other piece of allegedly "corroborating" evidence – the text exchange between D[a].B. and Witness 1 (i.e., the person who was seeking to

challenge SL in the upcoming election), DCF's opposition papers gloss over the most relevant element – the timing of the text exchanges. (Rb19). According to DCF – the only party who has actually seen the text messages – Witness 1 texted the Complainant "shortly after 9:00 a.m." to "check on her after she saw S.L. bullying her outside the building." (Rb19; Aa5). The Complainant allegedly responded "[i]t's bad]" and said she had called the police. Nothing in that exchange is evidence that is contrary to any statement S.L. is reported to have made to the investigator. Nothing in that exchange supports a determination that S.L. misnamed Complainant during the earlier incident in front of the NJDOL building.

What happened next – which is not in dispute – is that a few hours later Complainant went to the local union office to drop off signatures she had gathered in support of Witness 1 for the upcoming union election and to request her name be changed from D.B. to D[a].B. on election documents, which was granted. Another interaction then occurred between S.L. and D[a].B.

What was said during that interaction is disputed and uncorroborated by any witness testimony. Only after she left the Union office did the Complainant allegedly then text Witness 1 that she "just went to the office, and [S.L.] is blatantly misnaming me." (Aa5). Contrary to DCF's gloss in its opposition brief (Rb19), this is the only text exchange that purports to corroborate Complainant's allegation that is probative of her allegations against S.L. But, if it corroborates anything, it is that another

incident occurred later that day at the union's office. The point is that neither the video surveillance nor the first text exchange are probative of the critical question whether S.L. purposefully, repeatedly misnamed Complainant on **two** separate incidents. In a he-said, she-said case, one arguably self-serving text message by the Complainant to the individual seeking to challenge S.L. in the union election cannot be deemed "ample evidence" that tips the scales in a he-said/she said case. The CSC's conclusion that it was is contrary to the record, arbitrary, capricious and unreasonable.

Further, DCF's assertion that its June 7, 2023 response to the CSC in opposition to S.L.'s appeal "provid[ed] additional support for its conclusions" is a misrepresentation. (Rb8). It does not explain what this means, but review of the response includes DCF's reference to S.L.'s "prior disciplinary history." (See Aa35 (DCF's June 7, 2023 response)). That is a false representation, as S.L. does not have a disciplinary history with DCF. (See Aa35 (DCF stating that "discipline was not recommended" for three alleged prior DCF EEO investigations of State Policy violations because S.L. "was on a Union leave.")). As S.L. argued in his June 27, 2023 response to DCF's assertion, the first cited incident occurred in 2012 and **was not substantiated**; the second was a complaint from 2020 that DCF admits **was closed without any findings**; and the third was a 2021 complaint it substantiated concerning an alleged inappropriate comment to a DCF labor relations

representative, which is a determination that itself is the subject of a legal challenge that remains pending before the Public Employment Relations Commission. (Aa45). Even though the CSC (properly) did not rely upon DCF's false allegations, that DCF would continue to assert **to this court** that its "summary" of "S.L.'s prior disciplinary history displayed a pattern of inappropriate behavior" is shocking and further demonstrates that DCF was not acting as an independent investigator whose credibility determinations deserved the degree of deference the CSC afforded it. (Rb10 n.4).

This is important because this matter arises from a department's investigation of an incident under the State Policy. It is not a departmental hearing or other adjudicative arena where the subject of the investigation is presented with the purported evidence against him or has the opportunity to directly challenge his accuser. Rather, a State department's EEO Office investigates a complaint of a State Policy violation, makes a recommendation, and a department official issues a letter of determination. The department may direct some remedial action, which for department employees could mean disciplinary action.

DCF and the CSC argue that because no disciplinary action was taken against S.L., DCF's findings and conclusions can be adopted and upheld without any need for review of the purported evidence by an impartial factfinder. (R2b10 (CSC stating its "general practice of determining other types of appeals on a written record")).

That position works a manifestly unjust result in this case because it permits DCF – which the record shows has an axe to grind against S.L. – to make formal determinations about him that are damaging to his character without any meaningful due process protections.

Further, the notion that the lack of discipline somehow diminishes S.L.'s interest in clearing his name of spurious determinations such that a fact-finding hearing is unwarranted diminishes the ideals that animate the State Policy itself. A determination that an individual violated the State Policy by engaging in intentional, repeated discrimination is extraordinarily serious. Yet, the CSC's failure/refusal to refer the matter to a fact-finding hearing merely because no discipline was imposed effectively deems the allegations and determination not to be important enough to warrant independent review to confirm whether they were credible or correct. That is an absurd and unjust result.

Likewise, DCF attempts to minimize the consequences of its determination that S.L. "deliberately violated the State Policy when he repeatedly and intentionally misnamed D[a].B." by "emphasizing" that a State Policy violation can occur even if the accused person did not intend to do so. (Rb18 (citing N.J.A.C. 4A:7-3.1(b)). That notion is irrelevant to this appeal. DCF found that S.L. engaged in multiple acts of intentional discrimination against a State worker. In the face of such a serious and maligning determination – made by a department that routinely clashes with S.L. by

way of his position with a union that represents many of that department's workers, as demonstrated by its "Prior Disciplinary History" nonsense – it is manifestly unjust not to permit, let alone require, the merits of that determination to be reviewed by an impartial factfinder.

Moreover, the CSC's independent rationale for finding that S.L.'s statement to the DCF investigator, as reported by DCF, damaged his credibility is illogical and unsupported by the record. (R2b6). Specifically, the CSC supposes that D[a].B. would not have called the police, or perhaps even have filed a complaint against S.L., because doing so could expose her to potential criminal liability for soliciting petition signatures under false pretenses. (Id.). However, the record does not reflect whether, after DCF's investigator interviewed S.L., she went back to D[a].B. to see whether she challenged or contested any of the statements S.L. made about why he was at the NJDOL building and became involved in the heated incident captured in some manner on the silent video. Rather, the CSC determined for itself whether D[a].B. actually engaged in the conduct S.L. alleged, concluded she did not, and then used that conclusion as a basis to undermine S.L.'s credibility. That is precisely the type of arbitrary and capricious fact-finding and reasoning that poisons an administrative agency's determination and warrants remedial action by this court.

Finally, DCF and the CSC attack S.L.'s appeal on the basis that he allegedly failed to submit evidence in connection with his appeal. (R2b7, 9) (Rb23-24). This

argument ignores the significant, undisputed errors by DCF that prejudiced S.L.'s ability to understand clearly whether DCF's LOD was a final determination, which was necessary to understand what his appeal rights were. (R2b5; Rb11; Aa10). Both DCF and the CSC concede that DCF's determination letter failed to provide or explain S.L.'s right to appeal the LOD. (Id.). That CSC accepted S.L.'s appeal letter does not excuse DCF's failure.

As demonstrated by his initial appeal, S.L. did not know whether the CSC was even the proper avenue to file the appeal, given DCF's lack of notice. (Aa23). And DCF confused the matter further in its June 7, 2023 response to S.L.'s appeal wherein DCF stated that it "does not disagree" with S.L. that the LOD was not a final determination and immediately cited to N.J.A.C. 4A:7-3.2 – the regulation that provides when an appeal of a "final letter of determination" of a State Policy violation may be filed with the CSC. (Aa30). Under those circumstances – which the CSC did not address in a written determination until it issued the Final Agency Determination that is the subject of the instant appeal to this court – DCF's undisputed failures prejudiced S.L. by placing him in a position where he had to assume how the CSC would rule on his procedural arguments – which could have resulted in the issuance of a "final" letter of determination by DCF that clearly stated his appeal rights.

In any event, as discussed in S.L.'s merits brief, given that this was so obviously a he-said/she-said case that warranted a fact-finding hearing, S.L. had no way to know that the CSC would make credibility determinations about him based on DCF's written summary of its investigation and then fault him for not producing "evidence" about why he was at the NJDOL building that morning. S.L. is not looking for a "mulligan" as DCF charges; he is looking for an opportunity to have the credibility of his testimony, and that of his accuser, evaluated for the first time by a neutral factfinder in the context of a hearing with proper due process protections. That testimony – not a single, self-serving text message composed by the Complainant and sent to S.L.'s political opponent – is the only substantial evidence upon which these allegations can be fairly determined in this he-said/she-said case.

Accordingly, the CSC abused its discretion when it failed to follow well-established law that requires a fact-finding hearing in where disputed material factual questions exist. The record is clear that S.L. has always vehemently disputed the allegations and the conclusion that he engaged in an intentional act of discrimination or harassment. The claim that S.L. purposefully and repeatedly misnamed the Complainant are serious and harmful to S.L. and the union he was elected to lead. The CSC's determination that these circumstances did not warrant a

fact-finding hearing is patently arbitrary, capricious and unreasonable. It must be reversed.

## II. RESPONDENTS' OPPOSITION FAILS TO RATIONALLY JUSTIFY THE CSC'S ARBITRARY, CAPRICIOUS AND UNREASONABLE DETEMINATION THAT THE STATE POLICY EXTENDS TO NON-STATE WORKPLACES UNDER CIRCUMSTANCES NOT INVOLVING STATE BUSINESS (Aa10-Aa11).

The CSC's reasoning that the State Policy applies in this case to conduct that allegedly occurred at the local union office because it is "a location that can be reasonably regarded as an extension of the workplace . . . where State business is being conducted and discussed" is overbroad and plainly erroneous as applied to the facts of this case. (R2b10 (quoting N.J.A.C. 4A:7-3.1(a)(1). The CSC's Statement explains that because S.L. "represents other State employees, the Commission correctly determined that the State Policy applied not only to the immediate vicinity of a State building *but to the union office as well*." (R2b10 (emphasis added)).

Initially, no one disputes that the State Policy applies to the immediate vicinity of a State building. That suggestion, repeated by DCF in its opposition brief, is a red herring. (Rb25 (describing the "front of a state building" as "off-site locations 'where State business is being conducted and discussed'").

The question is whether DCF's jurisdiction under the State Policy extends to an off-site location under circumstances where no State business is being conducted or discussed. The answer must be No. The record does not support the CSC's

determination that State business was being conducted or discussed at the local union office when the second incident allegedly occurred between D[a].[B]. and S.L. Rather, *D[a].[B]'s* allegation is that she went to the local office in connection with the union election petitions she had gathered and to change her name on the petition. That activity had nothing to do with vague "business" between the State and the union. It is not evidence of State business being discussed or conducted. It has nothing to do with S.L.'s representation of State workers as an officer of the local union generally. Under those circumstances, the CSC's determination that the local union office was an extension of the State workplace is plainly erroneous, not based on any evidence in the record, and patently arbitrary, capricious and unreasonable. Affirming the CSC's determination on that basis renders the requirement of a nexus to a State workplace in N.J.A.C. 4A:7-3.1(a)(1) utterly meaningless.

With respect to DCF's opposition on this point, its contention that a collective negotiations agreement with the State (the "CNA") creates a sufficient nexus to consider a local union office to be "an extension of the workplace" fails for multiple reasons. (Rb26-28). First, the CNA is irrelevant to this matter. It is not part of the record and was not a basis upon which the CSC relied in either of its determinations. It simply has no bearing on this appeal.

Second, and most troubling, DCF appears to argue that the National Union – which is the party to the CNA with the State (and not a party in this appeal) –

contractually agreed that the State Policy applied to any and all of its private offices as well as those of charted local unions. DCF fails to support that sweeping contention with anything more than out-of-context language from the CNA's management rights clause and statements that State workplaces should be free from discrimination. Such aspirational statements are, of course, important and may be meaningful bases for a grievance under the processes established in the CNA. But they do not constitute a contractual agreement that the State Policy applies to the union's private offices. Nor does the State's reservation of its managerial rights to enforce reasonable workplace rules "governing the conduct and activities of employees." (Rb27 (partially quoting Art. 1 § B.2 of the CNA)). DCF's argument is entirely meritless.

## CONCLUSION

For the foregoing reasons, and those set forth in Appellant's merits brief, Appellant S.L. respectfully requests that this court reverse the CSC's determination rejecting his appeal of the LOD and request for a fact-finding hearing. Because the CSC's determination demonstrates the existence of a genuine dispute of material fact over what S.L. said to Complainant and why, the matter should be remanded and referred to the Office of Administrative Law. Further, the court should conclude that CSC's jurisdictional holding was arbitrary, capricious and unreasonable and should accordingly order that the allegations about the incident at the local union

office be dismissed because, under the circumstances, DCF lacked jurisdiction under the State Policy to investigate and premise a policy violation in connection with those allegations.

Respectfully submitted,

s/Justin Schwam
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cc. All Counsel of Record (via eCourts)