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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF D'ANGELO,

Respondent,

-against-

No. 166

SCOPPETTA,

Appellant.

20 Eagle Street
Albany, New York 12207
September 7, 2012

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE CARMEN BEAUCHAMP CIPARICK
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE THEODORE T. JONES

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 166, Matter of
2 D'Angelo.

3 Counselor, would you like any rebuttal
4 time?

5 MS. RAVITCH: I would like to reserve two
6 minutes for rebuttal.

7 CHIEF JUDGE LIPPMAN: Two minutes. Sure,
8 go ahead.

9 MS. RAVITCH: Thank you. This case
10 presents the question - - - oh, I'm sorry. My name
11 is Ellen Ravitch. Good morning. I'm here on behalf
12 of the City of New York.

13 This case presents the question of how much
14 flexibility an employer, a public employer has in
15 addressing conduct of employees in the hopes of
16 training and improving behavior without having to be
17 subjected to - - -

18 CHIEF JUDGE LIPPMAN: Was this aimed at
19 improving behavior, when a letter comes from an
20 assistant commissioner who after a thorough
21 investigation - - - what was the purp - - - was this
22 just to say, gee, maybe you can do better? It's sort
23 of educational. Is that all it was?

24 MS. RAVITCH: I think that is what it was,
25 because if you look - - -

1 CHIEF JUDGE LIPPMAN: What leads you to
2 that conclusion? Yes.

3 MS. RAVITCH: If you look at both of the
4 letter - - -

5 CHIEF JUDGE LIPPMAN: Yes.

6 MS. RAVITCH: - - - and the advisory memo,
7 which are the two documents that were placed only in
8 the EEO file, and not the personnel file of the
9 petitioner - - -

10 CHIEF JUDGE LIPPMAN: Pretty serious when
11 you place a letter in an EEO file saying that you've
12 made a racially insensitive remark or taken an action
13 in that regard?

14 MS. RAVITCH: Well, it's placed in the EEO
15 file because it was the culmination of an EEO
16 investigation, which was initiated by a complaint
17 made by another employee.

18 JUDGE PIGOTT: You'd save yourself a lot of
19 time - - -

20 JUDGE READ: It also says - - -

21 JUDGE PIGOTT: - - - it seems to me, if you
22 didn't have individual EEO files. It made no sense
23 to me. If you're worried about equal employment
24 opportunities and how your department is doing, you
25 can have as big an EEO file as you want at

1 headquarters and talk about how employees are doing
2 or not doing, and take two and a half years to
3 investigate, if you want. But when you get to the
4 bottom line and you say we're going to stick this
5 right in his file where, as he says, all chances of
6 promotion, all chances of any advancement in the Fire
7 Department are gone, it seems pretty - - - I just
8 don't get it. I don't know why you'd have a separate
9 EEO file for every single employee in the Fire
10 Department.

11 MS. RAVITCH: Well, an EEO file is much
12 more confidential than a regular personnel file.

13 JUDGE READ: So it doesn't have any bearing
14 - - -

15 JUDGE PIGOTT: How can it be much more
16 confidential?

17 JUDGE READ: - - - it doesn't have any
18 bearing, then, on a personnel decision? Is that what
19 you're saying?

20 MS. RAVITCH: I'm not saying that it
21 couldn't affect a promotional decision within the
22 Fire Department. But it would not be told, for
23 example, to other employees - - - employers that he
24 could - - -

25 CHIEF JUDGE LIPPMAN: Yes, but wouldn't you

1 say that it has - - -

2 JUDGE CIPARICK: It says it serves - - -

3 CHIEF JUDGE LIPPMAN: - - - consequences in
4 terms of his career; is there really anything else to
5 look at here?

6 MS. RAVITCH: Well, absolutely there is.
7 First of all, in - - -

8 CHIEF JUDGE LIPPMAN: That's a pretty
9 serious consequence, no?

10 MS. RAVITCH: First of all, in Holt, which
11 is the leading case here, it comes from this court in
12 1981 - - -

13 CHIEF JUDGE LIPPMAN: This doesn't seem
14 similar to Holt at all in terms of the letter or who
15 it comes from or what the process was that led to the
16 letter.

17 MS. RAVITCH: Surely there are things
18 different here, the process, because in Holt - - -

19 JUDGE CIPARICK: That was a critical
20 evaluation of performance. This is - - - and it says
21 it very clearly in the letter - - - serves as a
22 formal notice of disposition of a filed complaint.

23 MS. RAVITCH: Yes. A notice of
24 disposition, not as the petitioner tries to say, a
25 notice of reprimand or a formal reprimand. That's

1 very different. A reprimand is, in and of itself,
2 just by the term, discipline. A notice of
3 disposition - - -

4 JUDGE PIGOTT: Well, you essentially said
5 you don't believe him. He said this didn't happen;
6 you say it did. And now you've got it in his file.
7 When you start out, it just seemed to me that it
8 makes sense - - - you know, every department's got to
9 be careful about this stuff. And so we're looking at
10 ourselves; were looking at the Fire Department vis-a-
11 vis the EMTs and what went on here. And was there
12 something we, as the fire commissioner, deputy
13 commissioner or anyone else ought to do. And that's
14 fine. And I think you can do that and should do
15 that, and better yourself, and you could even talk to
16 this guy, if you want to, and say this can't happen
17 again, and be done.

18 But to target him and to say we've decided
19 that we're fine; it's you; we don't believe you; we
20 think you did this; but all we're going to do is put
21 it in your confidential EEO file, and therefore it's
22 not discipline; I don't get it.

23 MS. RAVITCH: The reason why the City
24 really believes that this does not constitute
25 discipline is because if you look at both of the

1 letter and the memo, everything in there is about
2 reinforcing policies. It's not you're reprimanded;
3 you're bad. It's this was our findings - - -

4 CHIEF JUDGE LIPPMAN: It's not that you're
5 bad? The kind of conduct that's alleged here is not
6 saying that you're bad or virtually that you're
7 reprimanded?

8 MS. RAVITCH: Your Honor, the kind of
9 conduct is what was alleged, not by the Fire
10 Department. The Fire Department did not bring - - -

11 CHIEF JUDGE LIPPMAN: Yes, but they're - -
12 -

13 MS. RAVITCH: - - - charges.

14 CHIEF JUDGE LIPPMAN: - - - saying that
15 it's true, you know. Isn't that basically what
16 you're finding?

17 MS. RAVITCH: The Fire Department found
18 that they believed it's true. It's also obvious from
19 the memo - - -

20 CHIEF JUDGE LIPPMAN: But that's a pretty
21 serious finding, isn't it? And it's made after a
22 quite extensive investigation, right?

23 MS. RAVITCH: It's a finding which
24 obviously the Fire Department actually didn't seem to
25 think was that serious, because they actually said in

1 - - -

2 CHIEF JUDGE LIPPMAN: Then the Fire
3 Department ought to get a new set of priorities if
4 they don't think that's serious.

5 MS. RAVITCH: Well, it depends how you
6 define serious. But the Fire Department - - - the
7 EEO office, in the report that was written to the
8 fire commissioner, specifically said that they did
9 not find it to be a severe infraction because it
10 didn't - - - there wasn't any evidence that it was
11 anything continuing. And - - -

12 JUDGE PIGOTT: He said it didn't happen.

13 MS. RAVITCH: He said it didn't happen,
14 right.

15 JUDGE PIGOTT: But you put a letter in his
16 file saying it did.

17 MS. RAVITCH: Correct.

18 JUDGE PIGOTT: And let me just - - - what
19 struck me when I'm following this is that somebody
20 may have made a determination that if they charged
21 him, that they've got to go through, I assume, a CBA
22 or some process that they chose not to do. And so
23 they figured this is the easy thing. We can stick it
24 in his file, call it a constructive criticism, and
25 he's still never going to get promoted, and we can

1 bring it up when we decide to fire him if it happens
2 again, and we don't have to go through all that
3 nonsense in the CBA.

4 MS. RAVITCH: I don't really - - -

5 JUDGE PIGOTT: I'm cynical, I admit.

6 MS. RAVITCH: - - - think there's any
7 evidence that the Fire Department sees going through
8 disciplinary charges as a nuisance.

9 JUDGE PIGOTT: Well, this seemed pretty
10 serious to me, if it was true. And for that Fire
11 Department to say we don't think it's serious, but
12 nevertheless, we're accusing you of using some pretty
13 harsh language with respect to an EMT, is
14 incongruous. I just couldn't figure it out.

15 JUDGE CIPARICK: Well, weren't there
16 simultaneous investigations going on? There was a
17 criminal investigation going on which went nowhere,
18 and wasn't there also an investigation as to whether
19 or not there was this conduct as contemplated under
20 75 of the Civil Service Law, and that was sort of
21 held in abeyance until the EEO?

22 MS. RAVITCH: Okay. The first thing that I
23 just want to say is that Civil Service Law Section 75
24 does not apply here. It's the administrative
25 section.

1 JUDGE CIPARICK: All right. Well, a
2 collective bargaining agreement. Whatever. I mean,
3 you know.

4 MS. RAVITCH: Yes. But there - - - he had
5 apparently made a criminal complaint and that went
6 nowhere. And then there was an investigation that
7 was initiated by a report of the - - - I believe it
8 was the supervisor of the EMT. And that was by BIT,
9 the Bureau of Investigation and Trials.

10 JUDGE CIPARICK: Right.

11 MS. RAVITCH: And they decided not to
12 pursue it pending - - -

13 JUDGE CIPARICK: So they closed it.

14 MS. RAVITCH: - - - pending the
15 investigation by the EEO. So that was eventually
16 closed, and they allowed EEO to - - -

17 CHIEF JUDGE LIPPMAN: How long was the EEO
18 investigation?

19 MS. RAVITCH: It was about two and a half
20 years - - - well, it was about two and a half years
21 from the incident until these letters - - - the
22 letter and the memo were issued. There was some
23 indication that the investigation was delayed at some
24 point. I really couldn't tell you - - -

25 CHIEF JUDGE LIPPMAN: Well, that's a pretty

1 long period for an investigation. And to - - -

2 MS. RAVITCH: It's a long time.

3 CHIEF JUDGE LIPPMAN: - - - then dismiss
4 what they find after that lengthy a period as
5 inconsequential, I guess, is what you're saying?

6 MS. RAVITCH: Well, not inconsequential.
7 But they thought that it could best be addressed by
8 further training, reminding of policies. And
9 everything that's in the letter and in the advisory
10 memo is aimed at that. It's further training. It's
11 - - -

12 JUDGE PIGOTT: But if it was aimed at that,
13 wouldn't - - -

14 MS. RAVITCH: - - - here are the rights and
15 responsibilities.

16 JUDGE PIGOTT: I'm sorry. If it was aimed
17 at that, wouldn't the conclusion be we, the Fire
18 Department, have not properly trained our employees,
19 because look what is alleged to have happened here.
20 So we should take this criticism on ourselves and go
21 train our employees, rather than say we don't believe
22 you; we think you did this; and we're going to give
23 you an EEO letter, put it in your - - - I guess it's
24 a super - - - you said it's more confidential than a
25 personnel file?

1 MS. RAVITCH: Yes.

2 JUDGE PIGOTT: So it goes, what, in the
3 bottom drawer? I just don't know what could be more
4 confidential than your personnel file. But anyway,
5 we're going to put it in there and then if you want a
6 job someplace we're going to tell people about it, or
7 maybe not. But you're never getting promoted in this
8 place.

9 MS. RAVITCH: Well, Your Honor, I don't
10 think that it's a reasonable conclusion to think that
11 if one person utters a racial slur it's because the
12 Department did not train.

13 JUDGE PIGOTT: Well, then you say - - -

14 MS. RAVITCH: People are human.

15 JUDGE PIGOTT: - - - then you say that and
16 you're done. You don't then say we think you did
17 this; we think our EEO policy's perfectly fine.
18 We're not going to do any discipline; we think EEO
19 has done its job; but you're the one that's going to
20 get targeted. I'm - - - I just think you've - - -

21 MS. RAVITCH: Well, he - - -

22 JUDGE PIGOTT: - - -- got to bring a
23 discipline.

24 MS. RAVITCH: - - - he was not being
25 targeted. Somebody complained about him, and the EEO

1 office, as it had to, investigated. They interviewed
2 him; they interviewed witnesses that he named; they
3 interviewed the complainant.

4 CHIEF JUDGE LIPPMAN: Okay, counsel.

5 JUDGE SMITH: I'm sorry, can I - - -

6 CHIEF JUDGE LIPPMAN: Oh, I'm sorry. Judge
7 Smith.

8 JUDGE SMITH: - - - say one thing?

9 CHIEF JUDGE LIPPMAN: Sure.

10 JUDGE SMITH: Can you - - - I don't quite
11 understand the practical difference between the
12 personnel file and the EEO file. Can you explain
13 that?

14 MS. RAVITCH: The EEO file - - - and this -
15 - - the EEO process in general is particularly
16 confidential. This is in the EEO policy which is in
17 the record. And the findings - - -

18 JUDGE SMITH: What difference does it make
19 to Mr. D'Angelo which file it's in?

20 MS. RAVITCH: I'm not sure exactly what - -
21 - in what circumstances a personnel file is
22 disseminated to others or it can be accessed.

23 JUDGE SMITH: The EEO file, it's a file
24 that says D'Angelo, right?

25 MS. RAVITCH: I have not seen it myself,

1 but I would think so.

2 JUDGE SMITH: Okay.

3 MS. RAVITCH: But it's - - -

4 CHIEF JUDGE LIPPMAN: Counsel, you're
5 saying it's - - -

6 MS. RAVITCH: - - - part of the EEO office.

7 CHIEF JUDGE LIPPMAN: - - - another form of
8 a personnel file? It's a personnel file that - - -

9 MS. RAVITCH: It's part of the EEO - - -

10 CHIEF JUDGE LIPPMAN: - - - has a little
11 more confidentiality?

12 MS. RAVITCH: - - - part of the EEO office.
13 Everyone that's involved in the investigation is
14 supposed to keep everything involved in the
15 investigation confidential - - -

16 CHIEF JUDGE LIPPMAN: So - - -

17 MS. RAVITCH: - - - and - - -

18 CHIEF JUDGE LIPPMAN: - - - but it's like a
19 personnel file, right? So it's the EEO file about
20 this particular person?

21 MS. RAVITCH: Yes. But it would not be
22 accessed the way that a regular personnel - - -

23 CHIEF JUDGE LIPPMAN: Right. I understand.

24 MS. RAVITCH: - - - file would be.

25 JUDGE CIPARICK: What if the - - - what if

1 the conduct had been more egregious? Is it possible
2 that an EEO finding could morph into a specification
3 and charges that would be subject to a hearing?

4 MS. RAVITCH: Yes. If the EEO had
5 recommended and if the commissioner had approved that
6 he be subject to disciplinary charges, then the case
7 would be referred to BIT.

8 CHIEF JUDGE LIPPMAN: But what about short
9 of disciplinary? How severe does the accusation have
10 to be? What if the accusation here was much worse?
11 That he used terrible language, that he did something
12 that was just beyond contempt, and they didn't impose
13 disciplinary charges. As long as they don't formally
14 do charges, then it's never - - - it would never
15 really constitute a disciplining of the individual?

16 MS. RAVITCH: The simple answer to that is
17 no. But if they were going to - - - that is the way
18 that it would happen, if there was going to be some
19 consequence like - - -

20 JUDGE CIPARICK: A suspension.

21 MS. RAVITCH: - - - be suspended or having
22 vacation days taken away or some kind of demotion or
23 something like that.

24 JUDGE READ: But that's an immediate - - -
25 that's an immediate consequence. I think in answer

1 to my question earlier there could be a delayed
2 consequence, the fact that this sat in the EEO file,
3 at some point could be considered if he were being
4 considered for promotion?

5 MS. RAVITCH: Well, first of all, the one-
6 in-three rule, which comes into play when somebody's
7 being promoted - - -

8 JUDGE READ: But it could be? Let's say
9 he's one-in-three.

10 MS. RAVITCH: It could be. But just
11 because someone's an employee of a public entity does
12 not insulate them from all criticism on the job.

13 JUDGE PIGOTT: No, of course not.

14 MS. RAVITCH: And certainly - - -

15 JUDGE PIGOTT: Is there a statute of
16 limitations on disciplinary? Because this is two and
17 a half years later. Could - - - you're indicating
18 that once they concluded that, had the commissioner
19 chosen, he could have filed disciplinary charges
20 against him?

21 MS. RAVITCH: Yes. And in answer to Judge
22 Ciparick's earlier question - - -

23 JUDGE PIGOTT: Two and a half years later?

24 MS. RAVITCH: I really don't know about the
25 - - - yes. I think probably. I don't know that

1 there's a limitation on filing the disciplinary
2 charges from when the conduct - - -

3 JUDGE PIGOTT: I promise to leave you
4 alone. I was going to ask one other question. If he
5 applied for a job in the EEO office of the City of
6 New York, is this so confidential that it would never
7 come up?

8 MS. RAVITCH: I don't know the answer to
9 that.

10 CHIEF JUDGE LIPPMAN: Okay, counsel.
11 Thanks.

12 MS. RAVITCH: Thank you.

13 CHIEF JUDGE LIPPMAN: Counselor?

14 MR. BLOCK: Good morning. May it please
15 the court, my name is Michael Block and I represent
16 Firefighter D'Angelo.

17 CHIEF JUDGE LIPPMAN: Counsel thinks that
18 you shouldn't be really too excited about this, that
19 it's a basic attempt to educate, to inform. Why is
20 it not that? What's wrong about her analysis of what
21 this is?

22 MR. BLOCK: What's wrong is that, first of
23 all, the very language of the letter of June 5, which
24 we seek to expunge, is far more than a mild rebuke.
25 It's a finding that the firefighter exercised

1 unprofessional conduct, made offensive racial
2 statements, made an inappropriate and offensive
3 comment of a racial nature in the workplace. In my
4 view, very, very serious charges. And when you look
5 at the file underlying it, the report from Assistant
6 Commissioner Phillips to Fire Commissioner Scoppetta,
7 which we never saw until we started the Article 78
8 proceeding, it's even far more detailed.

9 JUDGE READ: So what should happen, in your
10 view?

11 MR. BLOCK: In this case, had they really
12 wanted to proceed with this, they should have brought
13 charges - - - there is a statute of limitations, Your
14 Honor. It's eighteen months from the date of the
15 conduct, unless the conduct is criminal. And I don't
16 think there's any issue of this being criminal.

17 JUDGE READ: So they should have brought
18 charges when? Immediately after - - -

19 MR. BLOCK: Within eighteen months - - -

20 JUDGE READ: Within eighteen - - - okay.

21 MR. BLOCK: - - - of the action. They had
22 plenty of time.

23 JUDGE CIPARICK: But didn't they attempt
24 to?

25 CHIEF JUDGE LIPPMAN: But do you think that

1 they didn't bring charges because of the time limit?

2 MR. BLOCK: I don't know. That would be
3 speculation on my part. I have no idea why it took
4 so long to investigate. I repre - - -

5 JUDGE CIPARICK: But didn't they attempt to
6 - - - it was before the Bureau of Investigation and
7 Trials?

8 MR. BLOCK: Well, they brought it to the
9 Bureau of Investigation and Trials, which interviewed
10 my client on the exact same day that the EEO
11 interviewed him. And then the BITS (sic), the Bureau
12 of Investigation and Trial, decided to suspend their
13 investigation "pending the outcome of EEO". They
14 still had, at that point - - -

15 JUDGE CIPARICK: But charges were never
16 filed, so - - -

17 MR. BLOCK: Because EEO never got back to
18 them.

19 JUDGE CIPARICK: - - - so the statute
20 hasn't been tolled?

21 MR. BLOCK: No. No, Your Honor. The
22 statute was never tolled.

23 JUDGE CIPARICK: So it's not as if charges
24 were filed and you started and then you suspended it.

25 MR. BLOCK: No.

1 JUDGE CIPARICK: They.

2 MR. BLOCK: The police threw this complaint
3 out, saw nothing there. The BITS (sic) department
4 looked at whatever evidence. They interviewed my
5 client. I think they interviewed other firefighters
6 - - - they don't tell us - - - and decided to hold
7 everything in abeyance. Why it took EEO all this
8 time to come up with this report, is a mystery to me.

9 CHIEF JUDGE LIPPMAN: How much were you a
10 participant in this investigatory process?

11 MR. BLOCK: My client - - -

12 CHIEF JUDGE LIPPMAN: How much did they
13 allow you to - - -

14 MR. BLOCK: Not - - -

15 CHIEF JUDGE LIPPMAN: - - - your complaint
16 is there was no real due process.

17 MR. BLOCK: - - - not at all.

18 CHIEF JUDGE LIPPMAN: You had no connection
19 during - - -

20 MR. BLOCK: We never even saw the complaint
21 from EMT Harris until this proceeding began. We were
22 called in - - -

23 CHIEF JUDGE LIPPMAN: So during the two and
24 a half years, nothing?

25 MR. BLOCK: Nothing.

1 JUDGE CIPARICK: Did he have counsel at the
2 interview?

3 MR. BLOCK: Yes, I represented him at the
4 interview, Your Honor.

5 JUDGE READ: Okay. So what should have
6 happened?

7 MR. BLOCK: At that point, if they had
8 decided that he committed this act, within a
9 reasonable time, they should have brought char - - -
10 if they intended to put a letter in his file, or
11 substantiate the charges, and affect his career in
12 the future, they should have given him an opportunity
13 for a full hearing. This is not some minor scolding,
14 some minor evalua - - -

15 JUDGE SMITH: Well, why is this different
16 from Holt? I mean Holt, the letter said
17 "incompetence and insubordination". It doesn't sound
18 so minor to me.

19 MR. BLOCK: Well, except Judge Jason, in
20 the majority opinion, said it was a minor breach of
21 policy.

22 JUDGE SMITH: Relatively minor. But - - -

23 MR. BLOCK: Relatively minor.

24 JUDGE SMITH: - - - everything's relative.
25 I mean, this is relative, compared to killing

1 somebody, it's minor. I mean, incompetence and
2 insubordination doesn't sound trivial.

3 MR. BLOCK: Well, I don't think it is. I'm
4 not sure I agree with the finding of this court in
5 the Holt case. I agree with the policy - - -

6 JUDGE SMITH: You think Holt is wrongly
7 decided?

8 MR. BLOCK: I think Holt, in terms of the
9 severity of the letter, that the employee just
10 doesn't - - -

11 JUDGE SMITH: Is there a way that we can
12 adhere to Holt and still rule - - - if you say we
13 have to limit Holt to relatively minor infractions?

14 MR. BLOCK: Well, I think you have to look
15 at - - - each case is very fact-specific.

16 JUDGE PIGOTT: Well, one of the big
17 differences I noticed was that in Holt it was issued
18 by a single administrator.

19 MR. BLOCK: Yes.

20 JUDGE PIGOTT: You know, it was a kind of
21 one-on-one - - -

22 MR. BLOCK: And there was no formal
23 investigation - - -

24 JUDGE PIGOTT: - - - shape up - - -

25 MR. BLOCK: - - - Your Honor.

1 JUDGE PIGOTT: Yes. But there wasn't this
2 hierarchy going all the way to the top that
3 eventually concluded that your client was guilty of
4 this.

5 MR. BLOCK: Exactly. I mean, this was a -
6 - -

7 JUDGE CIPARICK: But basically, you're
8 saying - - -

9 MR. BLOCK: - - - in effect, a finding,
10 where my client had no right to say anything - - -

11 JUDGE CIPARICK: - - - you say this is the
12 functional equivalent - - -

13 MR. BLOCK: - - - and my client didn't know
14 anything.

15 JUDGE CIPARICK: - - - of a disciplinary
16 proceeding, and a disciplinary reprimand, what's
17 happened - - -

18 MR. BLOCK: I'm sorry, Your Honor.

19 JUDGE CIPARICK: That it's a functional
20 equivalent to a disciplinary reprimand, what's
21 happened here?

22 MR. BLOCK: Absolutely, Your Honor.

23 JUDGE CIPARICK: Without the due process
24 rights that he'd be entitled to.

25 MR. BLOCK: Without anything. I can assure

1 the court that from the time this investigation began
2 till the time this letter was produced, on June 5th,
3 2008, the only involvement my client was allowed to
4 have was being questioned by both BITS (sic), which
5 closed its file - - -

6 JUDGE CIPARICK: And he wasn't allowed to
7 question the complainant? You weren't allowed to
8 question the - - -

9 MR. BLOCK: We never even know what the
10 complaint was. They didn't show us anything.

11 JUDGE GRAFFEO: Can I ask you about the
12 letter? If there had been a letter that just
13 suggested that your client go to training and
14 indicated you'd be notified of a training date - - -

15 MR. BLOCK: That probably would have been
16 fine, Your Honor.

17 JUDGE GRAFFEO: - - - would that, in your
18 mind, be closer to the - - -

19 MR. BLOCK: Absolutely.

20 JUDGE GRAFFEO: - - - Holt case?

21 JUDGE SMITH: What if it had begun by
22 saying, we think you have acted inappropriately, and
23 therefore, you should go to training?

24 MR. BLOCK: Well, if it said only that, and
25 it didn't refer to comments of a racial nature, it

1 didn't refer to the fact that the - - -

2 JUDGE SMITH: Aren't you really hinging a
3 lot on the difference between comments of a racial
4 nature and incompetence and insubordination?

5 MR. BLOCK: Well, I'm - - - I believe that
6 the charge is serious enough. And each case, I
7 think, has to be considered on its own facts. Where
8 it can affect somebody's career, where in the Fire
9 Department - - -

10 JUDGE SMITH: They said in Holt, it could
11 affect the person's career.

12 MR. BLOCK: Well, I understand - - -

13 JUDGE SMITH: Don't agencies have to have
14 some flexibility even when - - - you know, everything
15 you do every day, everything you say, every
16 perception you form, could affect someone's career.
17 Don't the agencies have to be able to run themselves
18 from day to day without holding a hearing every time
19 someone's career prospects are going down?

20 MR. BLOCK: Well, absolutely, Your Honor.
21 But if they really were interested in instructing or
22 warning in this case, they could have limited their
23 letter to simply: sign this advisory memo, and
24 you're advised about the EEO policy - - -

25 JUDGE SMITH: That could have - - - the

1 letter in Holt in could have been more limited too,
2 couldn't it?

3 MR. BLOCK: It certainly could have, Your
4 Honor. I agree with that.

5 CHIEF JUDGE LIPPMAN: Well, let me ask you
6 - - - I'll put this a different way. What if the
7 same letter with the same language came from his
8 supervisor; would that make a difference? And
9 relative - - - let's say - - - let's add to that
10 maybe relatively soon after, so it wasn't this
11 lengthy investigation.

12 MR. BLOCK: Well, if - - -

13 CHIEF JUDGE LIPPMAN: Would that have been
14 more like a reprimand or - - -

15 MR. BLOCK: It would have been more like a
16 reprimand. But if it went into his personnel file
17 and was there to affect his career, I think even then
18 we would have said - - -

19 CHIEF JUDGE LIPPMAN: So what happens if he
20 seeks a promotion? Is the EEO file open to the
21 people? Or if it's a one-in-three situation?

22 MR. BLOCK: Clearly, that's the fire
23 commissioner. The fire commissioner here is the one
24 who approved this. He knows completely about it.

25 CHIEF JUDGE LIPPMAN: So they're going to

1 have the EEO when you - - - let's say it's a one-in-
2 three - - -

3 MR. BLOCK: Right.

4 CHIEF JUDGE LIPPMAN: - - - they're going
5 to have the record before them, and even with the
6 confidentiality?

7 MR. BLOCK: And as far as that
8 confidentiality, one thing that seems to be
9 overlooked, and it's on page 59 of the record, when
10 they found substantiation, they also informed the
11 complainant, a Fire Department employee, that they
12 substantiated the complaint. So it's not such great
13 confidentiality.

14 CHIEF JUDGE LIPPMAN: But isn't it really,
15 in practical terms, a dead end for your client?

16 MR. BLOCK: Absolutely, Your Honor.

17 CHIEF JUDGE LIPPMAN: I mean, if you get a
18 one-in-three and this thing is in the file, it's not
19 going to be a good - - -

20 MR. BLOCK: It's certainly not going to be
21 helpful, Your Honor. You know - - -

22 CHIEF JUDGE LIPPMAN: Ultimately, yes.

23 MR. BLOCK: - - - I can't guarantee that he
24 won't be promoted, but certainly it's going to affect
25 - - - if I were appointing somebody to supervise

1 members, particularly in light of everything going on
2 in the Fire Department, with the issues of
3 integration of the Fire Department of greater numbers
4 of minorities, this is going to be devastating.

5 CHIEF JUDGE LIPPMAN: I know from my own
6 experience that when you do these kind of one-in-
7 three situations, something negative really is - - -
8 in that kind of, when there are three people, and you
9 can pick two others, and one has a - - - it can be,
10 obviously, have a negative impact.

11 MR. BLOCK: Yes, Your Honor. I mean, I
12 think if I were a supervisor and had to appoint
13 somebody to lead men - - -

14 CHIEF JUDGE LIPPMAN: Why appoint the guy -
15 - - yes.

16 MR. BLOCK: - - - why would I take a risk
17 and appoint this fellow with this kind of thing in
18 his file. And that's really the main concern we have
19 here.

20 CHIEF JUDGE LIPPMAN: That's your - - -
21 that's why you're bringing this proceeding.

22 MR. BLOCK: He's been stigmatized from
23 this. And he's entitled to - - -

24 JUDGE SMITH: But isn't there also a
25 concern that if we hold for you here, if an incident

1 was a provision in the law that allowed the teachers
2 to complain to the Commissioner of Education. The
3 firefighter here has no rights whatsoever when the
4 EEO puts this in his file. He's stuck with it.

5 CHIEF JUDGE LIPPMAN: Okay, counselor.
6 Thanks.

7 MR. BLOCK: Thank you.

8 CHIEF JUDGE LIPPMAN: Counsel, why isn't
9 this a total dead end for the firefighter's career in
10 a situation where he has no real opportunity to state
11 his situation or his version of the events? Why
12 isn't this devastating to the - - -

13 MS. RAVITCH: Well - - -

14 CHIEF JUDGE LIPPMAN: - - - to the
15 firefighter? And are you saying it doesn't matter,
16 because it wasn't formal discipline?

17 MS. RAVITCH: No, I'm not saying that.

18 CHIEF JUDGE LIPPMAN: So what are you
19 saying?

20 MS. RAVITCH: But I'm saying that, first of
21 all, it's not true that he didn't have an opportunity
22 to state his position. He did. He was brought in.
23 He was interviewed. He was told of all the
24 allegations in the complaint - - -

25 JUDGE SMITH: Would the case - - -

1 MS. RAVITCH: - - - against him.

2 JUDGE SMITH: - - - be different if that
3 had not occurred?

4 MS. RAVITCH: I'm sorry, I didn't hear.

5 JUDGE SMITH: Suppose that hadn't happened.
6 Your position is, you still have a right to write him
7 a letter, right? Even if you just had the allegation
8 and you believed it. And he doesn't have, according
9 to you, statutory due process protections. You're
10 just writing a letter.

11 MS. RAVITCH: If the letter - - - yes. If
12 the letter was not disciplinary, then that would be
13 our position. And really, that's a question that
14 comes up here. Is that preferable that we not
15 conduct an investigation? And that's one of the
16 things that the petitioner complains about is that,
17 oh, this was a formal process. There was - - -

18 JUDGE PIGOTT: No, my - - - the point I
19 made - - -

20 MS. RAVITCH: - - - an investigation.

21 JUDGE PIGOTT: - - - I think, and maybe you
22 should give this some thought, is your EEO program
23 isn't working. I mean, if you believe what happened
24 here and you believe that this incident occurred, you
25 ought to be instructing everybody. I mean, if it's

1 this person and he's the odd one out, well, then
2 charge him, or do something in the middle and say we
3 don't know the truth of this, but don't let this
4 happen again and do something like that.

5 But I looked at this - - - I mean, you guys
6 have taken two and a half years to resolve this. You
7 don't give - - - I mean, you question one and the
8 other and decide, yeah, I believe this one I don't
9 believe that one, without any interaction between the
10 two. And then you decide that your EEO policies are
11 okay. You just got an odd duck. And who knows?

12 MS. RAVITCH: Well, Your Honor, first of
13 all, it wasn't questioning one, questioning the
14 other, and coming to a conclusion. It was looking at
15 the reports, and it was interviewing - - -

16 JUDGE PIGOTT: No. My purpose in saying
17 that is that - - -

18 MS. RAVITCH: - - - many other witnesses,
19 as well.

20 JUDGE PIGOTT: - - - Mr. D'Angelo didn't
21 have a chance to cross-examine the person who says
22 that all of this happened.

23 MS. RAVITCH: Right. And well, it's the
24 same issue. He would have that right if he was going
25 to be disciplined. And we are saying he's not being

1 disciplined. And just - - -

2 CHIEF JUDGE LIPPMAN: Yes, but you agree it
3 turns on whether your letter is the equivalent - - -

4 MS. RAVITCH: The equivalent of discipline.

5 CHIEF JUDGE LIPPMAN: - - - of discipline.
6 And we don't think that it turns on was it a single
7 administrator. Not to say that some of these things
8 aren't important in reaching a conclusion.

9 CHIEF JUDGE LIPPMAN: Well, a letter does
10 have more input if it - - - more effect if it comes
11 from the commissioner or the assistant commissioner
12 than if it comes from - - -

13 MS. RAVITCH: Right. Well - - -

14 CHIEF JUDGE LIPPMAN: - - - the immediate
15 supervisor.

16 MS. RAVITCH: - - - approved by the
17 commissioner, not comes from the commissioner. The
18 commissioner was not involved in the whole
19 investigation. It was the EEO - - -

20 CHIEF JUDGE LIPPMAN: No, but it's risen to
21 the level of - - -

22 MS. RAVITCH: - - - the EEO office.

23 CHIEF JUDGE LIPPMAN: - - - the
24 commissioner.

25 MS. RAVITCH: Yes.

1 CHIEF JUDGE LIPPMAN: When a teacher gets
2 an evaluation in the classroom, the letter doesn't
3 necessarily go to the principal, or does it?

4 MS. RAVITCH: I think in most of these
5 cases with the teachers, they are from the
6 principals.

7 CHIEF JUDGE LIPPMAN: Or CC'd to the
8 principal.

9 MS. RAVITCH: No, I think they're from the
10 principals. In Holt it was certainly from the
11 principal.

12 CHIEF JUDGE LIPPMAN: It says that your
13 supervisor says so and so, and - - -

14 MS. RAVITCH: No, the principal had a board
15 - - -

16 CHIEF JUDGE LIPPMAN: Oh, yes. What I'm
17 saying is if your supervisor is the one who has had
18 the interaction with you and writes you a letter, it
19 may or may not come to the attention of the - - -

20 MS. RAVITCH: I suppose every - - - every
21 case is different. So I - - -

22 JUDGE SMITH: But the letter - - -

23 MS. RAVITCH: - - - really can't say.

24 JUDGE SMITH: - - - in Holt did go into the
25 personnel file?

1 MS. RAVITCH: I'm sorry? In Holt.

2 JUDGE SMITH: In Holt - - -

3 MS. RAVITCH: Yes.

4 JUDGE SMITH: - - - the letter went into
5 the personnel file?

6 MS. RAVITCH: Yes, it did. In most of
7 these cases, even the ones that were - - - that have
8 been upheld as critical evaluations, they were in the
9 personnel file.

10 JUDGE CIPARICK: Could it be cured by a
11 letter to him, but that it not goes into the
12 personnel file?

13 MS. RAVITCH: Well, then the whole EEO
14 policy would have to be changed because this is part
15 of the process.

16 JUDGE CIPARICK: Maybe you should look at
17 that.

18 MS. RAVITCH: And I do want to also just
19 address the issue about - - - that Judge Pigott
20 brought up a couple of times about if one person - -
21 - if we believe that one person made a racial slur,
22 that it indicates that all of our training is bad.
23 And I would just say that that's not reasonable - - -
24 that's really not a reasonable conclusion, because -
25 - -

1 JUDGE PIGOTT: No, no. I apologize if
2 that's the impression - - -

3 MS. RAVITCH: - - - it's human behavior.

4 JUDGE PIGOTT: - - - you got. What I was
5 aiming at is that this whole investigation seemed to
6 be did our EEO policy work. And in this instance, it
7 didn't. But that doesn't necessarily indict the
8 whole policy; I agree.

9 MS. RAVITCH: People are human, so you
10 can't - - -

11 JUDGE PIGOTT: Exactly.

12 MS. RAVITCH: - - - control their behavior.

13 JUDGE PIGOTT: But you can be satis - - -

14 MS. RAVITCH: You can do the best you can.

15 JUDGE PIGOTT: Right. You can be satisfied
16 that it works, but in this case, it didn't. But then
17 dumping it all - - -

18 MS. RAVITCH: And then you seek to address
19 it.

20 JUDGE PIGOTT: Yes, with a letter of
21 instruction as opposed to a letter - - -

22 MS. RAVITCH: And more training, and a
23 review of - - -

24 JUDGE CIPARICK: But that could have been
25 effectuated - - -

1 MS. RAVITCH: - - - the responsibility.

2 JUDGE CIPARICK: - - - without a letter
3 going into the file. He could have been brought in
4 and said listen, this happened; and we don't believe
5 you; and we think you should do A, B, and C. But
6 once you put the letter in the file, and you possibly
7 impact his promotional opportunities, that's very
8 different.

9 MS. RAVITCH: It's different. But I don't
10 think that it's illegal. And just because you work
11 for a public entity, doesn't mean you don't sometimes
12 suffer some negative consequences of things without
13 everything being subjected to a disciplinary hearing.

14 Here you have the notice of disposition,
15 which is like a finding of liability in a lawsuit.
16 It's not the damages. It's just the finding. And so
17 there's all this discussion about - - -

18 CHIEF JUDGE LIPPMAN: Yes, but usually
19 you're given the right to put something in that
20 contradicts what's being said. Isn't that the case?
21 You're an employee and someone can put a letter in
22 your file without any investigation, right? But
23 usually, wouldn't you have the opportunity to give
24 your side of the story?

25 MS. RAVITCH: I know that in this case

1 there was some communication after the letter was
2 issued between plaintiff - - - plaintiff's attorney,
3 I believe, and the - - - I don't know if it was the
4 EEO office, I think. I don't know if those letters
5 are put into the file or not. But maybe - - -

6 CHIEF JUDGE LIPPMAN: Well, that would be
7 important, wouldn't it?

8 MS. RAVITCH: No, I don't think it is
9 important. Because at the end of the day, the
10 letters do not discipline him. They make a finding.

11 CHIEF JUDGE LIPPMAN: Okay.

12 MS. RAVITCH: And they refer for training.

13 CHIEF JUDGE LIPPMAN: Okay, counselor.

14 Thanks.

15 MS. RAVITCH: Thank you.

16 CHIEF JUDGE LIPPMAN: Thank both of you.

17 (Court is adjourned)

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of D'Angelo v. Scoppetta, No. 166 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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