THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MICHAEL URBAN, et al.,
Grievants,

v. **Docket No. 2018-0739-CONS**

GENERAL SERVICES DIVISION,
Respondent.

DISMISSAL ORDER

Grievants[1] are employed by Respondent, General Services Division. On November 13, 2017, Grievants filed this grievance against Respondent stating, "Agency director refused to meet with employees at their request." For relief, Grievants seek "[t]o be made whole in every way including meeting with affected employees to discuss their proposal."

Following the November 29, 2017 level one hearing, a level one decision was rendered on December 12, 2017, denying the grievance. Grievants appealed to level two on December 14, 2017. Following unsuccessful mediation, Grievants appealed to level three of the grievance process on March 3, 2018. On March 13, 2018, Respondent, by counsel, filed *General Services Division's Motion to Dismiss Grievance*. On March 21, 2018, Grievants, by representative, filed *Response to Respondent's Motion to Dismiss*. Grievants are represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent was represented by counsel, Mark S. Weiler, Assistant Attorney General.

[1] James Debolt, Randall Hazlewood, James Huffman, David Jarrell, Terry Parsons, Gary Pennington, Leonard Spencer, Michael Urban, and Carl Westfall.

Synopsis

Grievants are employed by Respondent, General Services Division. Grievants grieved the agency director's refusal to meet with their union representative to discuss a policy the employees proposed regarding employee compensation. Respondent moved to dismiss the grievance alleging Grievants had failed to state a claim upon which relief can be granted. Grievants assert Respondent violated the Petition Clause of the West Virginia Constitution. Grievants have failed to state a claim upon which relief can be granted as the agency director's refusal to meet with Grievants' union representative was not a violation of the Petition Clause because it was not regarding a matter of public concern and Grievants have alleged no other statutes, policies, rules or written agreements the agency director violated by his refusal. Accordingly, the grievance is dismissed.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:[2]

Findings of Fact

1. Grievants are employed by Respondent, General Services Division.

2. By email dated November 7, 2017, Gordon Simmons, Grievants' union representative, requested a meeting with General Services Division Director Gregory L.

[2] Several findings of fact were made based on exhibits attached to Respondent's motion to which Grievant did not object. The exhibits appear to be those referred to in the level one decision. The Grievance Board may properly consider exhibits attached to a grievance form or motion. *See* Syl. Pt. 1, *Forshey v. Jackson*, 222 W.Va. 743, 671 S.E.2d 748 (2008).

Melton, stating, “I am requesting a brief meeting with you and a select number of FEMTs in order to present a proposal to the agency.”

3. Although not specifically stated in the email, Mr. Simmons had requested the meeting to discuss with Director Melton a policy the employees proposed regarding employee compensation.

4. Director Melton responded by email on the same date, stating,

> I’ll have to respectfully decline the meeting requested so as not to appear to be engaging in collective bargaining. My door remains open to all GSD employees, in general I ask them to run issues through their management structure before [bringing] it to my attention. In cases where the manager may be the issue I will consider meeting with them without going through their management chain.

5. On November 13, 2017, Grievants filed this grievance against Respondent stating, “Agency director refused to meet with employees at their request.” For relief, Grievants sought “[t]o be made whole in every way including meeting with affected employees to discuss their proposal.”

Discussion

“Grievances may be disposed of in three ways: by decision on the merits, nonappealable dismissal order, or appealable dismissal order.” W. VA. CODE ST. R. § 156-1-6.19. “Nonappealable dismissal orders may be based on grievances dismissed for the following: settlement; withdrawal; and, in accordance with Rule 6.15, a party's failure to pursue.” W. VA. CODE ST. R. § 156-1-6.19.2. “Appealable dismissal orders may be issued in grievances dismissed for all other reasons, including, but not limited to, failure to state a claim or a party's failure to abide by an appropriate order of an administrative law judge. Appeals of any cases dismissed pursuant to this provision are

to be made in the same manner as appeals of decisions on the merits." W. VA. CODE ST. R. § 156-1-6.19.3. "Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence." W. VA. CODE ST. R. § 156-1-3 (2008).

Respondent argues the grievance must be dismissed for failure to state a claim upon which relief can be granted. Respondent argues that there was no statutory authority requiring Mr. Melton to meet with Grievants and their union representative to bargain and that an agency's decision not to recommend a discretionary pay increase generally is not grievable.[3] Grievants assert that the requested meeting was not an attempt at collective bargaining and that, as a public official, Mr. Melton was constitutionally required to hear Grievants' proposal.

"A grievance may be dismissed, in the discretion of the administrative law judge, if no claim on which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested." W. VA. CODE ST. R. § 156-1-6.11.

> "Grievance" means a claim by an employee alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules or written agreements applicable to the employee including:
>
> (i) Any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination;
> (ii) Any discriminatory or otherwise aggrieved application of unwritten policies or practices of his or her employer;
> (iii) Any specifically identified incident of harassment;
> (iv) Any specifically identified incident of favoritism; or
> (v) Any action, policy or practice constituting a substantial detriment to or interference with the

[3] Grievants did not grieve a failure to recommend a discretionary increase. Grievants grieved only Mr. Melton's refusal to meet with their union representative. Therefore, this argument will not be addressed further.

> effective job performance of the employee or the health and safety of the employee.

W. VA. CODE § 6C-2-2(i)(1). Grievants grieve Mr. Melton's refusal to meet with their union representative at his request and request Mr. Melton be directed to meet with Grievants to discuss their proposal. The relevant question is then whether Mr. Melton's refusal to meet with Grievants' union representative was "a violation, a misapplication or a misinterpretation of the statutes, policies, rules or written agreements applicable" to Grievants.

Respondent argues Mr. Melton was not required to bargain with Grievants and their union representative, thus Grievants have failed to state a claim on which relief can be granted citing *Jefferson County Board of Education v. Jefferson County Education Association* 183 W. Va. 15, 393 S.E.2d 653 (1990). In *Jefferson*, the Court examined whether public employees had the right to strike. Of relevance to the instant grievance, the Court found: "'While some constitutional protection is extended under the First Amendment to public employees to organize, speak freely and petition, it is clear that a public employer is not required to recognize or bargain with a public employee association or union in the absence of a statutory requirement.' Syllabus Point 2, *City of Fairmont v. Retail, Wholesale, & Dep't Store Union, AFL-CIO*, 166 W. Va. 1, 283 S.E.2d 589 (1980)." *Id.* 183 W. Va. at 17, 393 S.E.2d at 655.

Grievants assert *Jefferson* is not applicable because the request for a meeting was not an attempt at collective bargaining. In support, Grievants cite the definition of "collective bargaining" found in the glossary of the United States Bureau of Labor Statistics: "Method whereby representatives of employees (unions) and employers negotiate the conditions of employment, normally resulting in a written contract setting

forth the wages, hours, and other conditions to be observed for a stipulated period (e.g., 3 years). . . ." Respondent offers no definition of "collective bargaining" nor explanation of how Grievants union representative's request was an attempt to engage in collective bargaining. It is not clear whether the request can be considered an attempt to collectively bargain, therefore, it is not clear that *Jefferson* applies to the instant grievance.

However, Respondent further generally asserts that "Mr. Melton did not engage in any conduct that would present a grievance issue. . . ." Grievants point to no statute, policy, rule or written agreement that Mr. Melton violated, but instead assert they had a constitutional right to meet with Mr. Melton as a public official under the Petition Clause of the West Virginia Constitution. "The right of the people to assemble in a peaceable manner, to consult for the common good, to instruct their representatives, or to apply for redress of grievances, shall be held inviolate." W.VA. CONST. art III, § 16.

The West Virginia Supreme Court of Appeals has not specifically addressed a public employee's right to petition his/her employer under the Petition Clause. However, the Court's analysis of a public employee's right to free speech is instructive, as the Court has specifically found that "[t]he right to petition the government found in Section 16 of Article III of the West Virginia Constitution is comparable to that found in the First Amendment to the United States Constitution. . . ." Syl. Pt. 1, *Harris v. Adkins*, 189 W. Va. 465, 466, 432 S.E.2d 549, 550 (1993).

In an appeal from a grievance in which an employee alleged he was terminated in violation of his right to free speech, the Court found:

> There are some general restrictions on a public employee's right to free speech. First, an employee's speech, to be

> protected, must be spoken as a citizen on a matter of public concern. If the employee did not speak as a citizen on a matter of public concern, then the employee has no First Amendment cause of action based on the employer's reaction to the speech.

Syl. Pt. 5, *Alderman v. Pocahontas Cty. Bd. of Educ.*, 223 W. Va. 431, 434 675 S.E.2d 907, 910 (2009). In *Alderman*, the Court looked to the Supreme Court of the United States' analysis in *Pickering v. Board of Education*, 391 U.S. 563 (1968). In *Borough of Duryea v. Guarnieri*, 564 U.S. 379 (2011), the Supreme Court of the United States applied the same standard announced in *Pickering* to public employee rights under the Petition Clause; that the public employee's petition must be a matter of public concern. The Court specifically stated: "The right of a public employee under the Petition Clause is a right to participate as a citizen, through petitioning activity, in the democratic process." *Id*. at 399. As the West Virginia Supreme Court of Appeals has already chosen to follow the Supreme Court of the United States' analysis in *Pickering* regarding free speech, it appears prudent to follow the similar analysis of *Duryea* regarding the right to petition.

Grievants' union representative requested a meeting with Mr. Melton as the director of Grievants' employing agency to make a proposal regarding their wages. Grievants' petition was clearly not made to Mr. Melton in his role as a public official on a matter of public concern. Mr. Melton's refusal to meet with Grievants was not a violation of the Petition Clause. As Grievants have alleged no other statutes, policies, rules or written agreements Mr. Melton violated when he refused to meet with their union representative to discuss the proposed compensation policy, Grievants have failed to state a claim upon which relief can be granted and this grievance should be dismissed.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. “Grievances may be disposed of in three ways: by decision on the merits, nonappealable dismissal order, or appealable dismissal order.” W. VA. CODE ST. R. § 156-1-6.19. “Nonappealable dismissal orders may be based on grievances dismissed for the following: settlement; withdrawal; and, in accordance with Rule 6.15, a party's failure to pursue.” W. VA. CODE ST. R. § 156-1-6.19.2. “Appealable dismissal orders may be issued in grievances dismissed for all other reasons, including, but not limited to, failure to state a claim or a party's failure to abide by an appropriate order of an administrative law judge. Appeals of any cases dismissed pursuant to this provision are to be made in the same manner as appeals of decisions on the merits.” W. VA. CODE ST. R. § 156-1-6.19.3.

2. "Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence." W. VA. CODE ST. R. § 156-1-3 (2008).

3. “A grievance may be dismissed, in the discretion of the administrative law judge, if no claim on which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested.” W. VA. CODE ST. R. § 156-1-6.11.

4. “Grievance is defined as:

> [A] claim by an employee alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules or written agreements applicable to the employee including:

> (i) Any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination;
> (ii) Any discriminatory or otherwise aggrieved application of unwritten policies or practices of his or her employer;
> (iii) Any specifically identified incident of harassment;
> (iv) Any specifically identified incident of favoritism; or
> (v) Any action, policy or practice constituting a substantial detriment to or interference with the effective job performance of the employee or the health and safety of the employee.

W. VA. CODE § 6C-2-2(i)(1).

5. "'While some constitutional protection is extended under the First Amendment to public employees to organize, speak freely and petition, it is clear that a public employer is not required to recognize or bargain with a public employee association or union in the absence of a statutory requirement.' Syllabus Point 2, *City of Fairmont v. Retail, Wholesale, & Dep't Store Union, AFL-CIO*, 166 W. Va. 1, 283 S.E.2d 589 (1980)." *Id.* 183 W. Va. at 17, 393 S.E.2d at 655.

6. "The right of the people to assemble in a peaceable manner, to consult for the common good, to instruct their representatives, or to apply for redress of grievances, shall be held inviolate." W.VA. CONST. art III, § 16.

7. "The right to petition the government found in Section 16 of Article III of the West Virginia Constitution is comparable to that found in the First Amendment to the United States Constitution. . . ." Syl. Pt. 1, *Harris v. Adkins*, 189 W. Va. 465, 466, 432 S.E.2d 549, 550 (1993).

8. In applying the Supreme Court of the United States' standard from *Pickering v. Board of Education*, 391 U.S. 563 (1968), the West Virginia Supreme Court of Appeals found:

> There are some general restrictions on a public employee's right to free speech. First, an employee's speech, to be protected, must be spoken as a citizen on a matter of public concern. If the employee did not speak as a citizen on a matter of public concern, then the employee has no First Amendment cause of action based on the employer's reaction to the speech.

9. Although the West Virginia Supreme Court of Appeals has not specifically addressed whether a public employee's right to petition his/her employer must also be limited to matters of public concern, in *Borough of Duryea v. Guarnieri*, 564 U.S. 379 (2011), the Supreme Court of the United States did extend the same standard stating, "The right of a public employee under the Petition Clause is a right to participate as a citizen, through petitioning activity, in the democratic process." *Id*. at 399.

10. Grievants have failed to state a claim upon which relief can be granted as the agency director's refusal to meet with Grievants' union representative was not a violation of the Petition Clause because it was not regarding a matter of public concern and Grievants have alleged no other statutes, policies, rules or written agreements the agency director violated by his refusal.

Accordingly, the grievance is **DISMISSED.**

Any party may appeal this Dismissal Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Dismissal Order. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE §

29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should

be included so that the certified record can be properly filed with the circuit court. *See also* W. VA. CODE ST. R. § 156-1-6.20 (2008).

DATE: May 10, 2018

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Billie Thacker Catlett
Chief Administrative Law Judge