



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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July 6, 2023

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Re: Wesley Shifflett v. Bryan J. Hill, et al.
CL-2023-8048

Dear Counsel:

This case came before the Court on June 23, 2023, for a hearing on Wesley Shifflett’s Petition for Judicial Review of Grievance Process Compliance. The Court affirms the County Executive’s determination that the Fairfax County Police Department (“FCPD”) complied with the substantial procedural requirements of the County’s Step 1 grievance procedure (“Step 1 meeting”). The Petition is denied.

BACKGROUND

Petitioner Wesley Shifflett is a former FCPD employee involved in a fatal shooting incident on February 22, 2023. Pet. ¶¶ 4, 8. Following the incident, investigators from the FCPD’s Major Crimes Bureau (“MCB”) and Internal Affairs Bureau (“IAB” or “IA”)

OPINION LETTER

interviewed Mr. Shifflett. Pet. ¶ 9. On March 23, 2023, Police Chief Kevin Davis issued an advance notice memorandum informing Mr. Shifflett that he would be “unsatisfactorily separated from service” in accordance with Chapter 9 of the Fairfax County Personnel Regulations (“Personnel Regulations”). Pet. Ex. A. Mr. Shifflett’s counsel responded by contending that the advance notice memorandum gave insufficient notice of the basis for the unsatisfactory service separation. Pet. ¶ 12. Chief Davis sent a second memorandum with further detail on March 30, 2023. Pet. Ex. B.

The basis for the unsatisfactory service separation relates to purportedly inconsistent statements Mr. Shifflett made to MCB and IAB investigators and an inability to articulate the rationale for discharging his firearm during the incident. Pet. Ex. B. The memorandum stated the following:

The principal reason for your separation from the FCPD centers on the conflicting statements that you made among your statements to MCB detectives and your IA interviews. On multiple occasions in each of your administrative interviews you said you were unsure if you shot Timothy Johnson intentionally or unintentionally. You alternatively insisted that you intentionally discharged your firearm because you perceived a threat, but then in the same interview, explained that you did not want to rule out that the shooting could have been accidental . . . . Additionally, the extensive details of your recollection in the moments prior to the discharge of your firearm are incongruent with your limited recollection during the discharge itself. As such, your explanation as a whole fails to establish that you complied with the FCPD’s use of force policy during the incident.

Pet. Ex. B. On April 14, 2023, Mr. Shifflett filed a written grievance pursuant to Chapter 17 of the Personnel Regulations regarding the March 30, 2023 advance notice memorandum and his separation from employment. Pet. ¶ 21.

On April 20, 2023, Mr. Shifflett participated in a Step 1 meeting as outlined in Chapter 17 in the Personnel Regulations. Pet. ¶ 22. Major Todd Billeb represented the FCPD at the meeting. Pet. ¶ 23. Mr. Shifflett did not object to Major Billeb being the FCPD’s representative at the time. *See* Pet. ¶¶ 23-24.

On April 25, 2023, Mr. Shifflett’s counsel notified County Executive Bryan Hill in writing that the FCPD was noncompliant with Chapter 17 of the Personnel Regulations at the Step 1 meeting because Captain Carolyn Kinney should have represented the FCPD instead of Major Billeb. Pet. Ex. C. The regulation states, “[a]n employee who has a complaint shall discuss the problem directly with his/her supervisor within twenty (20) business days of the date the employee should have reasonably gained knowledge of the event giving rise to the complaint.” Fx. Cnty. Pers. Reg. § 17.5-1.

The letter also alleges noncompliance regarding the information Mr. Shifflett received at the Step 1 meeting. Pet. Ex. C (citing Fx. Cnty. Pers. Reg. § 17.7). The relevant portion of that

regulation states, “[a]t all steps, appropriate witnesses also may be asked to provide information. Witnesses shall be present only while actually providing testimony.” Fx. Cnty. Pers. Reg. § 17.7-2.

The letter to the County Executive alleges violations beyond noncompliance with Chapter 17 of the Personnel Regulations, *i.e.*, Chapters 9 and 16 of the Personnel Regulations, FCPD General Order 310, Virginia’s Law Enforcement Officers Procedural Guarantees Act (“LEOPGA”) (Va. Code § 9.1-500 *et seq.*), and the U.S. Constitution. Pet. Ex. C.

On April 28, 2023, the County Executive responded to Mr. Shifflett’s noncompliance notification and determined that (1) the FCPD was in compliance with Chapter 17 of the Personnel Regulations as to the Step 1 meeting and, in the alternative, the FCPD had just cause for any noncompliance because of Mr. Shifflett’s immediate supervisor being prohibited from speaking about the case due to a pre-existing confidentiality order issued upon him; (2) the FCPD’s failure to provide witness statements did not violate Chapter 17 of the Personnel Regulations because Mr. Shifflett did not request that witnesses appear during the Step 1 meeting; (3) claims that the FCPD violated Chapters 9 and 16 of the Personnel Regulations, FCPD General Order 310, LEOPGA, and the U.S. Constitution were not proper claims in a noncompliance determination because the Personnel Regulations only require that agencies comply with Chapter 17’s grievance procedures; (4) the FCPD was not required to issue a written reprimand prior to Mr. Shifflett’s unsatisfactory service separation pursuant to Chapter 9 of the Personnel Regulations and the March 23, 2023 memorandum complied with the requirements of Chapter 9; and (5) Chapter 16 of the Personnel Regulations is inapplicable to Mr. Shifflett’s grievance because he was subject to an unsatisfactory service separation under Chapter 9 of the Personnel Regulations and not a disciplinary action pursuant to Chapter 16 of the Personnel Regulations. Pet. Ex. D.

On May 30, 2023, Mr. Shifflett filed this Petition for judicial review of the County Executive’s compliance determination. The Petition contains three main arguments. First, the County Executive’s determination that the FCPD complied with all substantial procedural requirements was erroneous because the FCPD did not allow Mr. Shifflett to meet with his immediate supervisor at the Step 1 meeting, and the FCPD did not provide him with witness statements or other documents within IAB’s investigation file. *See* Pet. ¶¶ 24, 29; Mem. Law Supp. Pet. 2, 4-5. Second, Mr. Shifflett should have been separated from employment pursuant to the disciplinary procedures of Chapter 16 of the Personnel Regulations rather than separated for unsatisfactory service under Chapter 9. Pet. ¶¶ 36-46; Mem. Law Supp. Pet. 5-7. Finally, the County Executive erred when he stated that asserting statutory and constitutional violations in a grievance compliance determination was improper. Pet. ¶ 31; Mem. Law Supp. Pet. 7-9.

## ANALYSIS

Petitioner brings this action under Virginia Code § 15.2-1507 and Chapter 17 of the Fairfax County Personnel Regulations. A local government “may adopt its own employee grievance procedure . . . or be deemed to have adopted the grievance procedure applicable to

state employees [in] Code § 2.2-3000 *et seq.*” *Alexandria Redevelopment & Hous. Auth. v. Walker*, 290 Va. 150, 158 n.9 (2015) (citing Va. Code § 15.2-1507(A)). Grievance procedures adopted by local governments “shall include not more than four steps for airing complaints at successively higher levels of local government management, and a final step providing for a panel hearing.” Va. Code § 15.2-1507(A)(5)(a). Fairfax County adopted its employee grievance procedure, set forth in Chapter 17 of the Personnel Regulations, with a similar four-step process for airing complaints and a final step involving an appeal to the Civil Service Commission. Fx. Cnty. Pers. Reg. § 17.5.

Under Fairfax County’s structure, the County Executive, or a designee, determines all compliance issues with the grievance process. Fx. Cnty. Pers. Reg. § 17.10-2. The Circuit Court is authorized to review procedural compliance determinations of the County Executive. Va. Code § 15.2-1507(A)(7)(b); Fx. Cnty. Pers. Reg. § 17.10-3. Mr. Shifflett’s notification of noncompliance to the County Executive on April 28, 2023, addressed alleged procedural noncompliance related to the Step 1 meeting. Pet. Ex. C. That is the focus of the Court’s review.

## **I. Standard of Review**

In *Loftus v. County of Fairfax*, this Court considered the standard of review for compliance determinations. *See* CL-2014-12370, at 3-4 (Va. Cir. Ct. Oct. 31, 2014). The Court relied upon grievability determination cases to conclude that the standard of review for compliance determinations is whether the decision is arbitrary and capricious, which includes an agency acting in bad faith or abusing its discretion. *Id.* However, “[w]here [the County Executive] interprets state law or regulations that are not within [his] specialized knowledge, the Court can interpret such laws or regulations *de novo*.” *Id.* at 4. At the hearing on June 23, 2023, the parties did not disagree with this standard of review.

Under the arbitrary and capricious standard, Mr. Shifflett must prove the County Executive made his decision without any “reasoned basis, only by [his] will or . . . whim.” *Robinson v. Commonwealth*, 36 Va. Cir. 509, 509 (Richmond City 1995). This Court must uphold the County Executive’s decision if there is a reasonable basis for his decision and some credible evidence to support the determination. *Palmer v. Commonwealth Marine Res. Comm’n*, 48 Va. App. 78, 87 (2006) (“A decision is arbitrary and capricious only if there is no credible evidence . . . to support [it] . . . . The reviewing court may reject the agency’s findings of fact only if, considering the record as a whole, a reasonable mind would necessarily come to a different conclusion.”). Therefore, the Court will now consider whether the County Executive’s compliance determination was arbitrary and capricious.

## **II. FCPD Representative at Step 1 Meeting**

Mr. Shifflett contends that the FCPD did not comply with the grievance procedure requirements because his immediate supervisor was absent during the Step 1 meeting. Pet. ¶ 29; Mem. Law Supp. Pet. 2, 4-5. Under the Virginia Code, “[t]he first step shall provide for an informal, initial processing of employee complaints by the immediate supervisor through a

nonwritten, discussion format.” § 15.2-1507(A)(8)(a). Consistent with this requirement, Chapter 17 of the Personnel Regulations provides, in relevant part, that “[a]n employee who has a complaint shall discuss the problem with his/her supervisor.” Fx. Cnty. Pers. Reg. § 17.5-1.

The Virginia Code further states that, “failure of either party to comply with *all substantial procedural requirements* of the grievance procedure . . . *without just cause* shall result in a decision in favor of the other party on any grievable issue.” § 15.2-1507(A)(7)(a) (emphasis added). The County adopts this standard as well. Fx. Cnty. Pers. Reg. § 17.10-1.

Neither the Virginia Code nor the Personnel Regulations defines “substantial procedural requirements.” The Supreme Court of Virginia has defined “substantial procedural requirements” as those that “encompass[] time limitations and . . . are so essential to the grievance procedure that the uncorrected failure to comply with them will prevent a grievance from being heard and necessarily result in a decision in favor of the opposing party.” *Murphy v. Norfolk Cmty. Servs. Bd.*, 260 Va. 334, 338-40 (2000) (holding that a deadline for the grievant to identify his employee representative and the witnesses he intended to present at a panel hearing was a substantial procedural requirement).

No case law considers whether an immediate supervisor’s presence at the Step 1 meeting is a substantial procedural requirement under Va. Code § 15.2-1507 or Chapter 17 of the Personnel Regulations. However, while analyzing an analogous statute to Va. Code § 15.2-1507, one court stated that “[a]lthough subsection (D)(1) provides for an investigation by the grievant’s immediate supervisor . . . this is the first of a four step grievance process, and . . . the Court does not feel that this discrepancy qualifies as a violation of a ‘substantial’ procedural requirement.” *Suddarth v. Slane*, 539 F. Supp. 612, 620 (W.D. Va. 1982) (applying Va. Code § 2.2-3003’s statutory predecessor to a case in which the grievant’s immediate supervisor did not conduct the Step 1 meeting).

In Mr. Shifflett’s case, the County Executive determined that the presence of Mr. Shifflett’s immediate supervisor at the Step 1 meeting was not a substantial procedural requirement. Pet. Ex. D. This determination was consistent with the above case law. The Court finds that his determination was, therefore, proper.

Even if the presence of Mr. Shifflett’s immediate supervisor constituted a substantial procedural requirement, it was proper for the County Executive to find just cause for noncompliance. Although Mr. Shifflett’s April 25, 2023 notice to the County Executive identified his immediate supervisor as Captain Kinney, it was, in fact, Second Lieutenant William Arnest. *See* Pet. Exs. C-D. The County Executive explained the absence of both Lieutenant Arnest and Captain Kinney, along with the selection of Major Billeb, as follows:

Due to his involvement in the underlying incident and Internal Affairs investigation, Lieutenant Arnest was, and remains, under a confidentiality order by the FCPD. As such, Lieutenant Arnest cannot discuss the incident, or his involvement therein, with Mr. Shifflett. Captain Carolyn Kinney, who you contend should have appeared at Mr.

Shifflett's Step 1 meeting, is Mr. Shifflett's former Captain, however, she has no factual information associated with Mr. Shifflett's Unsatisfactory Service Separation, which was the result of the Internal Affairs investigation that began after Mr. Johnson's death. Captain Kinney was not involved in the Internal Affairs investigation, nor is she aware of the information contained therein due to its confidentiality.

Due to the inability of either Lieutenant Arnest or Captain Kinney to participate meaningfully in the grievance process, the FCPD designated Major Todd Billeb to conduct the Step 1 meeting. Major Billeb is a ranking FCPD official with knowledge of the substance of the Internal Affairs investigation. Major Billeb attended the Step 1 meeting, which was held in person, and provided a substantive written response to the Step 1 meeting within five days based upon his knowledge of the investigation and the factual information underpinning Mr. Shifflett's Unsatisfactory Service Separation.

Pet. Ex. D. The County Executive's determination was neither arbitrary and capricious, nor made in bad faith. In contrast, the determination was well-grounded in fact and proper.

### III. Witness Statements and Other Evidence

Mr. Shifflett contends that the FCPD must provide him with the entire investigation file, including several witnesses' statements. *See* Pet. ¶¶ 24, 29; Mem. Law Supp. Pet. 2, 4. He appears to argue that failing to do so constitutes noncompliance with a substantial procedural requirement in Chapter 17 of the Personnel Regulations. *See* Pet. ¶¶ 24, 26(b).

Under the Virginia Code, disclosure of documents and evidence is only required during the grievability determination and final hearing, both of which occur after the initial Step 1 meeting. *See* §§ 15.2-1507(A)(9)(b), (A)(10)(b). The same requirements for disclosing documents and other evidence are within Chapter 17 of the Personnel Regulations. *See* Fx. Cnty. Pers. Reg. §§ 17.5-4(c), 17.6-2(d)(i), add. 1.

In contrast, the Virginia Code states that "appropriate witnesses" may attend each management step, but "[w]itnesses shall be present only while actually providing testimony." § 15.2-1507(A)(8)(c). Consistent with Virginia law, the Personnel Regulations state that "[a]t all steps, appropriate witnesses also *may be asked* to provide information." Fx. Cnty. Pers. Reg. § 17.7-2 (emphasis added).

As stated by the County Executive in his April 28, 2023 determination, Mr. Shifflett "did not request that any witnesses provide information during the Step 1 meeting." Pet. Ex. D. Based upon this, the County Executive found that "there can be no violation of Personnel Regulation 17.7." Pet. Ex. D.

The Court finds that the County Executive had a reasonable factual basis for his determination and did not make his decision in bad faith. The determination was not arbitrary and capricious. Neither the Virginia Code nor the Personnel Regulations afford Mr. Shifflett access to an IAB file at a Step 1 meeting. Moreover, because he did not request witnesses at the

Step 1 meeting, the absence of witnesses does not constitute noncompliance with a substantial procedural requirement.

#### IV. Scope of Review Under Virginia Code § 15.2-1507(A)(7)


Mr. Shifflett also asserts violations of Chapters 9 and 16 of the Personnel Regulations, FCPD General Order 310, LEOPGA, and the Due Process Clause of the U.S. Constitution. However, as the Supreme Court of Virginia has stated, “[j]udicial review of the grievance procedure is sharply limited by Code § 15.2-1507.” *Walker*, 290 Va. at 159. At the hearing on June 23, 2023, counsel for Mr. Shifflett candidly indicated that he could find no authority to support the proposition that these are proper claims in a noncompliance review.

The Virginia Code states that “failure of either party to comply with all substantial procedural requirements of the grievance procedure . . . shall result in a decision in favor of the other party.” § 15.2-1507(A)(7)(a) (emphasis added). The chief administrative officer “shall determine compliance issues.” *Id.* (A)(7)(b). If the grievant objects to the compliance determination, he may seek judicial review “by filing [a] petition with the circuit court within 30 days of the compliance determination.” *Id.* Thus, compliance review under Va. Code § 15.2-1507 focuses on whether the FCPD followed the grievance procedures outlined in Chapter 17 of the Personnel Regulations. Neither the County Executive nor the Circuit Court has the authority to determine constitutional questions, other statutory and regulatory issues, or FCPD policy matters as part of the review.

For these reasons, the Court may not consider Mr. Shifflett’s arguments regarding other Chapters of the Personnel Regulations, FCPD General Order 310, LEOPGA, and the U.S. Constitution.<sup>1</sup> The County Executive’s determination that these arguments are not proper claims in a noncompliance allegation was correct.

#### CONCLUSION

The Court affirms the County Executive’s determination that the FCPD complied with the County’s grievance procedure and denies the Petition. A copy of the Circuit Court’s Order is enclosed.

  
Stephen C. Shannon  
Judge, Fairfax County Circuit Court

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<sup>1</sup> At the June 23, 2023 hearing, the Senior Assistant County Attorney noted that Mr. Shifflett had recently received his grievability determination from the County Executive. His panel hearing before the Civil Service Commission is forthcoming. The Court’s ruling on his Petition does not address what arguments beyond compliance with Chapter 17 of the Personnel Regulations he may make before the Civil Service Commission.

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

WESLEY SHIFFLETT )  
 )  
 Petitioner, )  
 )  
 v. ) Case No. CL-2023-8048  
 )  
 BRYAN J. HILL, ET AL. )  
 )  
 Respondents. )

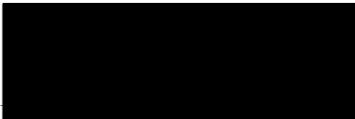
**ORDER**

THIS MATTER came before the Court on June 23, 2023, for Petitioner Wesley Shifflett's Petition for Judicial Review of Grievance Process Compliance.

IT APPEARING that the Court has written a Letter Opinion dated July 6, 2023, on its decision affirming the County Executive's determination that the Fairfax County Police Department complied with the County's grievance procedures; it is, therefore,

ORDERED that the Petition is DENIED.

ENTERED this 6<sup>th</sup> day of July, 2023.

  
Judge Stephen C. Shannon

**ENDORSEMENT OF THIS ORDER IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA.**