



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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August 19, 2020

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Re: *George Gonzalez vs. Bryan J. Hill, County Executive*, Case No. CL-2020-10290
Oscar Wells vs. Bryan J. Hill, County Executive, Case No. CL-2020-10291
Robert Kitchen vs. Bryan J. Hill, County Executive, Case No. CL-2020-10292
Bryan Nix, Jr. vs. Bryan J. Hill, County Executive, Case No. CL-2020-10293

Dear Counsel:

This matter came before the Court on August 14, 2020, for argument on Petitioners' Appeal of Adverse Grievability Determination. The questions presented are (1) whether the standard of review to be applied by the Circuit Court for an appeal of a grievability determination is arbitrary and capricious review or the probability (demurrer-like) standard; and (2) whether, under the applicable standard of review, the County Executive's determination should be reversed, such that Petitioners' grievances may be brought before the Civil Service Commission.

BACKGROUND

Petitioners are firefighters who hold the position of "Captain II" in Fairfax County. Petitioners believe the County changed the promotional policies to unfairly prevent the

OPINION LETTER

application of existing policies to Petitioners and then failed to fill vacancies for the next “Battalion Chief.” Record of Proceedings at 1, 5. Petitioners specifically assert that:

- i. the County did not fairly apply the Promotional Procedure policies contained in Fire and Rescue Department (FRD) Standard Operating Procedure (SOP) 02.06.04, also known as the “Select and Direct” process, when it failed to apply the policy to Petitioners, leaving several vacancies unfilled, and later when it rescinded that policy;
- ii. the County did not fairly apply General Order 2020-027 issued on March 27, 2020, when it failed to make promotions to the Battalion Chief positions, which are critical positions; and
- iii. the County unfairly declined to extend the current eligibility list for one year, or until exhaustion in the event that promotions may not be made due to the state of the County budget in relation to COVID-19.

Id. Petitioners’ complaints requested the following action be taken: (1) that they be promoted to the rank of Battalion Chief at the earliest allowable time; (2) that the Battalion Chief Exam scheduled in May 2020 be postponed; (3) that the current eligibility list be extended for one year in accordance with PERS. REGS. § 6.3-2, or until exhaustion in the event that promotions may not be made due to the state of the County budget in relation to COVID-19; and (4) that they be entitled to a binding hearing before the Civil Service Commission. R. at 1, 5.

Petitioners filed a Second Step Grievance on May 1, 2020, describing the circumstances set out above and alleging that the County and the FRD promotional procedures had been violated. On May 4, 2020, after meeting with Petitioners, Human Resources Generalist IV denied the Second Step Grievance. On May 5, 2020, Petitioners submitted a Third Step Grievance, setting out the same allegations. On May 21, 2020, after meeting with Petitioners, the Fire Chief denied the Third Step Grievance. On June 25, 2020, County Executive Bryan J. Hill concluded that Petitioners’ matter was a nongrievable issue pursuant to the County’s Personnel Regulations. This appeal followed.

ANALYSIS

I. Fairfax County Policies at Issue

A. Fairfax County Standard Operating Procedures (SOP) 02.06.04

SOP 02.06.04 sets forth the Uniform Staff Lateral & Transfer Process, which states:

1. The hiring manager will advertise the vacancy through an informational bulletin soliciting interested employees within the rank of the position to submit a letter of interest and resume.

2. The Fire Chief in conjunction with the respective assistant chief, deputy chief, and hiring manager, will review the submissions and all other employees within the rank to determine the most qualified person for the position and make a selection.
3. If there is no interest expressed for the uniformed staff position, the Fire Chief in conjunction with the respective assistant chief, deputy chief, and hiring manager will select a qualified person for the position.

SOP 02.06.04 § VI(A)(1)-(3).

B. General Order 2020-027

On March 27, 2020, by issuance of General Order 2020-027, the Fairfax County FRD set forth a change in its hiring policy in response to the pandemic caused by COVID-19. In relevant part, the Order states:

Effective immediately, hiring for vacant positions should be considered for only the most critical needs. Requests to advertise critical positions shall be approved by the Fire Chief, Deputy County Executive, Chief Financial Officer, and County Executive.

II. Grievance Procedures

A. Grievance Procedures Under the Virginia Code

Section 15.2-1507 of the Virginia Code set forth the grievance procedures that local governing bodies are required to adopt. *See* VA. CODE § 15.2-1507(A) (stating that “[e]ach [local government] grievance procedure *shall include* the following components and features) (emphasis added). Under § 15.2-1507, the Code states that, “[l]ocal governments shall retain the exclusive right to manage the affairs and operations of government,” VA. CODE § 15.2-1507(A)(2), and the General Assembly—in relevant part—outlines that the following issues are nongrievable by statute:

(iii) the contents of ordinances, statutes, or established personnel policies, procedures, rules, and regulations;

(iv) failure to promote except where the employee *can show that established promotional policies or procedures were not followed or applied fairly*;

(vii) the hiring, promotion, transfer, assignment, and retention of employees within the local government.

VA. CODE § 15.2-1507(A)(2)(iii),(iv),(vii) (emphasis added). The Code also provides that:

The chief administrative officer, or his designee, at his option, may require a clear written explanation of the basis for just cause extensions or exceptions. The chief administrative officer, or his designee, shall determine compliance issues. Compliance determinations made by the chief administrative officer shall be subject to judicial review by filing petition with the circuit court within 30 days of the compliance determination.

VA. CODE § 15.2-1507(A)(7)(b). Additionally, the Code specifies the time timing requirements, scope of review, and appealability of such decisions beyond the Circuit Court as follows:

Within 30 days of receipt of such records by the clerk, the court, sitting without a jury, shall hear the appeal on the record transmitted by the chief administrative officer or his designee and such additional evidence as may be necessary to resolve any controversy as to the correctness of the record. The court, in its discretion, may receive such other evidence as the ends of justice require. The court may affirm the decision of the chief administrative officer or his designee, or may reverse or modify the decision. The decision of the court shall be rendered no later than the fifteenth day from the date of the conclusion of the hearing. The decision of the court is final and is not appealable.

VA. CODE § 15.2-1507(A)(9)(b).

B. Fairfax County Grievance Procedures

The grievance procedures for Fairfax County employees are set forth in Chapter 17 of the Fairfax County Personnel Regulations. The procedures adopted by the County are consistent with the procedures set forth under VA. CODE § 15.2-1507. Under § 17.3-1 of the Personnel Regulations, complaints are classified into three categories: (1) Grievable, with a binding decision from the Civil Service Commission; (2) nongrievable, but eligible for a hearing and an advisory decision from a hearing officer; and (3) nongrievable with no hearing. Section 17.3-2 sets forth the types of grievable complaints, which include the “[t]he application of specific County personnel policies, procedures, rules and regulations.” PERS. REGS. § 17.3- 2(b). Section 17.4 lists the types of nongrievable complaints, which—in similar fashion to Va. Code § 15.2-1507—include:

- i. the contents of ordinances, statutes, or established personnel policies, procedures, rules and regulations;
- ii. Management of County employees including the right to make personnel appointments in accordance with adopted selection policies and techniques, to establish rules and regulations governing work performance and performance

evaluations, to transfer and assign employees within the County, to determine the need for shift operation and rotation of the workweek, to assign overtime, to determine job training and career development, and to determine duties or actions in emergency situations; and

- iii. situations involving a “failure to promote, except where the employee contends that established promotional policies or procedures were not followed or applied fairly.”

PERS. REGS. § 17.4-1(c),(d),(f).

III. Standard of Review

The first issue in this case is to determine what standard of review this Court should apply when reviewing the County Executives’ grievability determination, as outlined under VA. CODE § 15.2-1507(A)(7)(b). While the Court is aware that there is a split among various Circuit Court Judges as to which standard should be applied, for the following reasons, this Court holds that the applicable standard of review is whether the County Executive’s determination was arbitrary or capricious.

As noted above, a grievability determination by the County Executive may not be further appealed beyond the Circuit Court, and whatever ruling the Circuit Court makes with regard to the determination is final. *See* VA. CODE § 15.2-1507(A)(9)(b).

Trial courts throughout the Commonwealth have employed differing standards when reviewing grievability determinations in the absence of binding appellate precedent. *See Ferguson v. City of Chesapeake*, 92 Va. Cir. 180 (Chesapeake Cir. Ct. 2015) (*quoting Clark v. Roanoke Cnty.*, 89 Va. Cir. 228, 229 (Roanoke Cir. Ct. 2014) (“assertions in fact in the grievance complaint must be treated as true, the employee must be given the benefit of all inferences that fairly can be drawn from the facts alleged, and one must also assume the truth of all assertions of fact that can be fairly and justly inferred from the employee’s complaint.”); *Asbury v. City of Roanoke*, 63 Va. Cir. LEXIS 185, at *4 (Roanoke Cir. Ct. 2003) (holding that the standard of review is like a demurrer); *Drewery v. City of Roanoke*, 63 Va. Cir. 609 (Roanoke Cir. Ct. 2001) (citing *York County School Board v. Epperson*, 246 Va. 214, 220-22 (1993) (noting—in a case involving police officers alleging unfair promotional policies—the Court was persuaded to apply a standard where the employees “must allege facts from which a right to relief can be inferred [but] conclusory statements (for example statements that a particular rule, regulation, or procedure was violated) are insufficient.”). *But see Grievance of Scott Larson, Appeal of Determination of Grievability*, Misc. No.: 03-674, at *4-5 (Arlington Cir. Ct. 2004) (Alper, J.) (citing *Tazewell County School Board v. Gillenwater*, 241 Va. 166 (1991)) (holding that the arbitrary and capricious standard of review applied in a case involving a police officer’s termination based on the Supreme Court of Virginia’s decision in *Tazewell*, which involved the School Board’s nearly identical provision regarding judicial review of grievability

determinations); *Lasus v. George Mason Univ.*, 29 Va. Cir. 51 (1992) (Klein, J.) (holding that the arbitrary and capricious standard of review applied in a case where a professor brought an appeal of a grievance determination regarding an employee evaluation because the relevant section of the Virginia Code at the time (§ 2.1-114:5:1(D)(4)) was amended to remove the words “*de novo*” from the description of the hearing to be conducted by the Circuit Court).¹

After thoroughly reviewing the case law set forth above, this Court agrees with the reasoning of Judge Alper in the *Scott Larson* case and holds that—based on the persuasive remarks made by the Supreme Court of Virginia in *Tazewell*—that the appropriate standard to apply to the County Executive’s determination is the arbitrary and capricious standard. *See Grievance of Scott Larson, Appeal of Determination of Grievability*, Misc. No.: 03-674, at *4-5 (Arlington Cir. Ct. 2004) (Alper, J.). In relevant part, the *Tazewell* decision states as follows:

Even though Gillenwater identified Regulation R5-11 as one of three Board policies, procedures, regulations, ordinances, “being grieved,” her statement of facts . . . does not contain any facts from which the trial court could have inferred that the School Board failed to comply with this regulation. *See Bristol Virginia School Board*, 235 Va. at 119, 366 S.E.2d at 89 (school board’s decision “will not be disturbed by the courts unless the board acted in bad faith, arbitrarily, capriciously, or in abuse of its discretion, or there is no substantial evidence to sustain its action”).

Tazewell, 241 Va. 166, 170-71. Relying on this precedent is particularly convincing to this Court because, even where the Supreme Court of Virginia acknowledged that there were no facts upon which the Court could “infer” the School Board failed to comply with its regulations—which might give credence to applying a demurrer-like standard—the Court went on to cite opinions outlining that such grievability determinations are not to be disturbed absent a finding that the School Board acted in bad faith, arbitrarily, capriciously, or abused of its discretion, or rendered a decision where there was no substantial evidence to sustain its action. *See id.* Accordingly, the Court will apply that standard to the present case to determine whether the County Executive’s determination should be reversed.

IV. The County Executive’s Determination Is Entitled to Deference Under the Governing Standard of Review and Is Therefore Affirmed

The County Executive’s determination that Petitioners’ complaints are nongrievable was neither made in bad faith, arbitrarily, or capriciously, and there is evidence in the Record to support the determination.

¹ Other Judges sitting in Fairfax County have also applied the arbitrary and capricious standard in similar situations. *See Williams v. Long*, No. CL-2013-12459 (Fairfax. Cir. Ct., 2013) (Smith, J); *Hall v. Long*, No. CL-2013-7755 (Fairfax. Cir. Ct., 2013) (Maxfield, J.); *Hartman v. Long*, No. CL- 2012-6421 (Fairfax. Cir. Ct., 2012) (Devine, J.).

First, the Court acknowledges that, much like the case in *Tazewell* where the petitioner cited School Board regulations that she contended were not applied fairly, Petitioners' in this case have asserted the unfair application of SOP 02.06.04 and General Order 2020-027 in their official complaints. R. at 1, 6. Notwithstanding these assertions, the County Executive determined that these issues were nongrievable because the Petitioners failed to show—beyond making conclusory assertions—how these policies were applied unfairly. R. at 6. As the County Executive noted, Petitioners' complaints effectively support one main contention: that Petitioners were not promoted to position of Battalion Chief, and—absent the implementation of SOP 02.06.04 and General Order 2020-027—there would have been vacant Battalion Chief positions that Petitioners could have been selected for off the eligibility list. *Id.*

To further set forth how the County Executive's determination was not arbitrary or capricious, the Court has reviewed each of Plaintiff's contentions made in their Complaints and examines them in relation to the County Executive's determination.

Contention 1: The County did not fairly apply the Promotional Procedure policies contained in Fire and Rescue Department (FRD) Standard Operating Procedure (SOP) 02.06.04, also known as the "Select and Direct" process, when it failed to apply the policy to Petitioners, leaving several vacancies unfilled, and later when it rescinded that policy

In response to this contention, the County Executive first noted that, "[f]ailure to promote" is nongrievable, "except where the employee contends that established promotional policies were not followed or applied fairly," and that Petitioner had not pointed out any policy that requires a promotion be made to fill a vacancy. R. at 6. Indeed, this determination is consistent with PERS. REGS. § 17.4-1(f), which states management of county employees "including the right to make personnel appointments in accordance with adopted selection policies and techniques" is not a grievable issue. Further, with regard to the change in policies, the County Executive reviewed the language of the changed SOP and noted:

You also complain the that the procedure for filing vacant staff positions, which has an effective date of August 20, 2019, was established months after the eligible list was created. However, you do not identify any policy or procedure that restricts the Fire Chief's ability to change SOPs or that dictates when changes can and cannot be made. In fact, SOP 02-06-04 states in Section 1(B) that "[a]ny component contained in this SOP may be changed at the discretion of the Fire Chief with concurrence of the Director of DHR." The version of SOP 02-06-04 that was in effect prior to August 20, 2019, contained a similar provision Therefore, you have failed to substantiate your claim that policies and procedures in SOP 02.06.04 were not followed or were unfairly applied.

R. at 6. Considering that the County Executive provided a rational basis for this aspect of the determination after engaging the contention made in Petitioners' complaints and the relevant

language of the SOP at issue, the Court finds that the determination was neither made in bad faith, arbitrarily, or capriciously.²

Contention 2: The County did not fairly apply General Order 2020-027 issued on March 27, 2020, when it failed to make promotions to the Battalion Chief positions, which are critical positions

Regarding the contention that General Order 2020-027 was not fairly applied to Petitioners because Battalion Chief positions were not deemed critical, the County Executive once again reviewed this argument and the relevant Personnel Regulations to determine that this was a nongrievable issue. R. at 6.

Specifically, the County Executive once again noted PERS. REGS. § 17.4-1(f) in determining that this was a complaint regarding the management of county employees, “including the right to make personnel appointments in accordance with adopted selection policies and techniques.” *Id.* The Court agrees that this COVID-19 related policy decision is solely within the authority of the County to make. The General Assembly would not have written Va. Code § 15.2-1507—which local governing bodies are *required to adopt*—in a way that makes decisions relating to “the contents of ordinances, statutes, or established personnel policies, procedures, rules, and regulations” and “the hiring, promotion, transfer, assignment, and retention of employees within the local government” nongrievable if they intended to make every policy decision—even in times of national crisis—reviewable upon conclusory allegations that such policy has been applied unfairly. Despite Plaintiff’s contention that “[s]everal directors of other departments within the County were able to subsequently fill vacant positions considered critical,” the Court cannot find that the County Executive’s determination that this is a nongrievable management decision was made in bad faith, arbitrarily, or capriciously.

Contention 3: The County unfairly declined to extend the current eligibility list for one year, or until exhaustion in the event that promotions may not be made due to the state of the County budget in relation to COVID-19

Finally, the County’s determination that it was unable to afford the relief sought regarding the requested extension of the current eligibility list was not arbitrary or capricious. The County Executive reviewed the relevant authority concerning the Fire Chief’s authority to extend an eligibility list pursuant to PERS. REGS. § 6.3-2, which states that the Human Resources

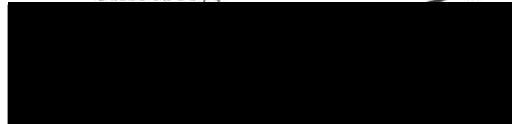
² The Court’s reasoning here also applies to the argument made by Petitioners that SOP 02-06-05, which took effect July 2020 after Petitioners’ grievability determination, is unfairly directed at the personnel remaining on the promotional policies. The County Executive clearly stated his basis for determining that policies can be changed, and—without alleging more than a conclusory statement—that Petitioners failed to demonstrate how this policy was applied unfairly toward them in comparison to other employees affected by the policy. As clearly identified in the Personnel Regulations, “the contents of ordinances, statutes, or established personnel policies, procedures, rules and regulations” are nongrievable. Here, it appears Petitioners take issue with the substance of the policy changes without showing that the policy changes were applied unfairly to them specifically.

Director, at the request of a department head, “may extend the duration of an open competition list to a maximum of two years and that of a promotion eligibility list to a maximum of three years,” as well as PERS. REGS. § 17.6-3, which states that no relief granted by the Commission hearing the appeal can affect the rights of other employees. The County Executive reasonably concluded that the Fire Chief and Human Resources Director are not required to extend an eligibility list just because they have the authority to do so. Nor was it unreasonable for the County Executive to determine that this was not an unfair application of that policy by virtue of the County’s failure to invoke this exception, as this issue once again falls within the scope of nongrievable management of county employees. PERS. REGS. § 17.4-1(d).

CONCLUSION

For the foregoing reasons, the County Executive’s grievability determination is affirmed, and the Petitioners’ request to have the issues set forth above heard by the Civil Service Commission is denied. Counsel shall prepare an Order reflecting the Court’s ruling and forward that Order to the Court for entry.

Sincerely,

A large black rectangular redaction box covers the signature of the County Executive.

Bruce D. White