

State of Maryland
State Labor Relations Board

In the matter of:)	
<i>Jerome Lewis III,</i>)	
)	
)	
Petitioner)	
)	SLRB Case No. 2018-U-04
v.)	
)	
<i>J. Deweese Carter Youth Facility,</i>)	
<i>Department of Juvenile Services, &</i>)	
<i>AFSCME, Maryland,</i>)	
)	
Respondents)	
)	

Executive Director’s Investigative Report & Recommended Determinations

On August 18, 2017, Jerome Lewis III (Lewis) filed an Unfair Labor Practice (ULP) against the J. Deweese Carter Youth Facility (JDCYF) under the Maryland Department of Juvenile Services as well as the American Federation of State, County, and Municipal Employees (AFSCME). This ULP was filed pursuant to State Labor Relations Board (SLRB) regulations at COMAR 14.32.05, and after receipt of the ULP, the Executive Director notified AFSCME and the Center of the filing, and requested that both respondents file a response with the SLRB, which they did.

Pursuant to SLRB Regulations at COMAR §14.32.05.02G - H, the Executive Director must investigate allegations contained in a properly filed ULP petition to determine whether probable cause exists for the SLRB to proceed on the case. After having reviewed the pleadings, exhibits and documentary evidence from both parties, in addition to conducting my own investigation, I hereby find and recommend to the full membership of the SLRB that Mr. Lewis’ complaints against both AFSCME Maryland and the JDCYF are untimely and should be dismissed.

Undisputed Facts

The JDCYF functions under the auspices of the Maryland Department of Juvenile services. Lewis was an employee of the JDCYF for approximately three years.

Disputed Items

Petitioner and respondents disagree on the facts of the incident that ultimately led up to petitioner being terminated from the JDCYF.

Petitioner's Position/Information

Mr. Lewis alleges that he was forced to agree to a settlement, dated April 14, 2017, which included termination of his employment. By way of background leading up to this alleged forced termination, Mr. Lewis provides information about the various activities employees of the JDCYF are expected to undertake. Mr. Lewis states that employees are encouraged by the Recreation Specialists and Supervisors to “engage and motivate the female peers” to earn challenge program points. These points are earned by female peers based upon participation in all physical activities at the center—employees are encouraged to participate fully and encourage the peers to earn their points. Mr. Lewis notes that his supervisor was an active participant in this area every day.

On January 28, 2017, Mr. Lewis states that one of the Recreation Specialists initiated a game of dodgeball with the female peers. Mr. Lewis notes (supporting with photographic exhibits) that the dodgeball used was less than seven inches in diameter and made of light memory foam. Mr. Lewis states that he and his coworkers were instructed by a supervisor to engage in the regular game of dodgeball outside at the center. The game was played by three staff members and seven female peers, it was typical of the games played between staff and peers, the foam balls being thrown between staff and peer alike, and nothing was out of the ordinary until Mr. Lewis was hit with the dodgeball by three of the female peers at the same time. Mr. Lewis exited the game area to a nearby metal picnic table to catch his breath, but one of the female peers, Ms. McGowan, came charging from behind him with her hands raised. Mr. Lewis noted that McGowan had a known history of horseplay and of “jumping people from behind.” Mr. Lewis reacted as he had been trained, using McGowan’s momentum against her, and rolling her safely to the grass. Mr. Lewis noted that McGowan was laughing throughout the encounter, then got up and continued playing dodgeball with the other peers. A few minutes into the peers’ playing, McGowan saw that she had a minor bloody nose that was treated. Mr. Lewis reported on this incident to his supervisor, and asked him if a formal incident report needed to be done. He stated that his supervisor told him that he had to make a phone call.

In his petition, Mr. Lewis indicates that after this incident with Ms. McGowan, there were meetings he was forced to attend by the JDCYF and he alleges that his union representative refused to assist him at these meetings. In particular, Mr. Lewis stated that in February 2017, he was forced to meet the Maryland State Police, Child Protective Services, and an in-house investigator, and that his union representative had failed to be present at those meetings or assist him in any other way, including viewing a video tape of the incident or conducting any interviews or otherwise coming to Mr. Lewis’ defense. These meetings in February resulted in a final meeting with the JDCYF on April 12, 2017, at which Mr. Lewis states that his union representative failed to assist or represent him. At this final meeting, Mr. Lewis states that the union representative and the supervisor at the JDCYF, forced him to

sign a settlement agreement that terminated his employment.

Mr. Lewis alleges that he is being exploited by the JDCYF and AFSCME, Maryland. He states that the AFSCME Maryland representative is taking advantage of dues paying members in a number of ways: not holding meetings, not conducting shop steward training, not posting any information on the union information board in the building, and as in his case, not representing employees or assisting them as the collective bargaining law states should be done. Mr. Lewis states that the only presence the union has at his job site is a photo of the union representative over the copy machine.

Regarding JDCYF, Mr. Lewis alleges that management “arbitrary and capriciously practice a pattern of abuse.” (complaint, p. 6). He compares his situation to one involving another employee who had her collarbone broken by another employee, Tiran Miller, who was able to keep his job without further report or incident. That incident happened in 2016. Mr. Lewis alleges that that the comparison of his situation with the situation of Mr. Miller is only one more example of the arbitrary defrauding and exploitation that the JDCYF commits.

As remedy for his situation, Mr. Lewis requests that the JDCYF restore him to the position he occupied before his termination, and that the JDCYF compensate him with back pay for the loss of salary, to include proper payment for overtime and promotion/ advancement. From AFSCME Maryland, Mr. Lewis requests that the SLRB find that, with prejudice, the union has breached its statutory duty of fair representation. In support, Mr. Lewis cites *Steele v. Louisville & Nashville R. Co.*, 1944, and *Vaca v. Sipes* 1967.

Respondents' Position/Information

AFSCME, Maryland responded to this complaint in a letter dated August 23, 2017. In its response, AFSCME provided a description (from the Department of Juvenile Services, based on a video) of the incident involving McGowan that was very different from Mr. Lewis' description. According to DJS' description, Mr. Lewis was horse-playing with McGowan during the peer recreation period, after which McGowan was sitting on a picnic table. While she was seated, Mr. Lewis ran up to her and “forcefully threw a ball at her.” (AFSCME letter, page 2, quoting from the Notice of Termination attached to the letter). McGowan got up and ran toward Mr. Lewis, who then turned, grabbed her, and threw her to the ground where she landed face down in the grass a few inches away from the sidewalk. Mr. Lewis then walked away. According to DJS, per AFSCME's response, there was no evidence on the video that any DJS approved techniques were used to restrain McGowan. AFSCME's letter stated that Mr. Lewis was terminated effective February 24, 2017.

AFSCME representative Jack Hughes grieved Mr. Lewis' termination, and after the grievance followed the normal course and procedures, was referred to the Department of Budget and Management for a settlement conference. Mr. Hughes attended the conference along with Mr. Lewis. AFSCME states that Mr. Lewis agreed to a resolution of his grievance, which included his resignation effective February 24, 2017, and in return JDCYF and DJS would “treat his separation as a resignation and provide a neutral reference.” (AFSCME letter, page 2). AFSCME states that all appropriate parties signed off on the

agreement and the grievance was resolved with no further incident. AFSCME states that Mr. Lewis' presentation of the facts are inaccurate and his allegations (Weingarten rights being violated; DJS forcing him to speak to Maryland State Police, Child Protective Services, and to a DJS investigator; Mr. Lewis having to travel to Mr. Hughes and explain his innocence; Mr. Hughes' refusal to start a grievance; and being coerced into signing the settlement agreement) are meritless. However, AFSCME notes in its letter, there need not be a debate of facts, as Mr. Lewis' complaints on their face, are untimely. SLRB regulations at COMAR 14.32.05.01A requires petitions requesting relief from the Board must be filed within 90 days of knowledge of the occurrence. Further, COMAR 14.32.05.01C allows more: that the 90 day timeline is based on the later of the alleged violation, or 90 days following a time when a reasonable person "exercising due diligence" would have discovered the occurrence of the violation. AFSCME points to well established case law in which the SLRB has dismissed untimely complaints. Regarding the timeline of Mr. Lewis' complaint, AFSCME points out that all of the allegations made by Mr. Lewis were known to him on and before April 12, 2017 (the date of the settlement conference), and ninety days after that date is July 11, 2017. Since this complaint wasn't filed until August 18, 2017, more than a month after the 90 day window, AFSCME argues that this matter must be dismissed.

JDCYF, via DJS, responded to Mr. Lewis' complaint on September 12, 2017 by way of filing a Motion to Dismiss. In its motion, DJS gives a narrative background about its facility, a narrative of the incident between Mr. Lewis and Ms. McGowan (supported by an employee affidavit), and a timeline of the grievance undertaken by AFSCME on behalf of Mr. Lewis. Based on the timelines given from the perspective of DJS, it argues that Mr. Lewis' complaint must be dismissed due to untimely filing based on SLRB regulations. Further, DJS argues that Mr. Lewis' complaint should be dismissed for failure to state a claim upon which the SLRB may grant relief. DJS states that Mr. Lewis' claim that he was denied union representation on three occasions while DJS investigated the incident involving Ms. McGowan was brought up during the appeal of his termination through the grievance process, and since it was resolved through that process (DJS agreed to rescind the termination and allow Mr. Lewis to resign and DJS agreed to give him a neutral reference), it was not appropriate that Mr. Lewis file the same complaint (that DJS denied him union representation in the three meetings) before the SLRB. As regarding Mr. Lewis' claim that DJS coerced him to settle his termination appeal, DJS states that Mr. Lewis fails to allege any facts to support this claim, and argues that conclusory statements cannot survive a motion to dismiss.

On September 13, 2017¹, a representative from AFSCME Council 3 filed a letter with the State Labor Relations Board joining in the motion to dismiss filed by DJS. In this letter, AFSCME argues that reasons for dismissal should be that the applicable statute of limitations for matters before the SLRB is ninety days. Further, AFSCME argues that Mr. Lewis' complaint fails to state a claim since he failed to exhaust his administrative remedies under the grievance procedure. Finally, AFSCME argues that "public employees cannot being

¹ Please note that this letter was received by this office on January 29, 2018 from another agency who had received it mistakenly in its mail. The employee delivering the letter stated that the reason for the unusual delay is that certain agencies have no staff at 45 Calvert Street until the legislative session of each year, which in 2018 began on January 10.

claims under NLRA and LMRA provisions,” and that the case matters that Lewis relies on in his reply, discussed below, are inapplicable.

Petitioner’s Reply

Mr. Lewis replied to the AFSCME Maryland response on September 8, 2017. In his reply Mr. Lewis reiterates his position as to what happened in the incident with Ms. McGowan, he reiterates his position regarding the allegations that Mr. Hughes had refused to investigate the grievance, and reiterates his position regarding his allegation that he was coerced, by both Mr. Hughes and DJS representatives, into signing the settlement agreement on April 12, 2017.

Regarding the statute of limitations argument set forth by AFSCME, Mr. Lewis cites *DelCostello v. Int’l Bhd. Of Teamsters*, 462 U.S. 151 (1983), in which Mr. Lewis notes that the Court allows a six month limitations period because “state limitations period fails to provide an aggrieved employee with a satisfactory opportunity to vindicate his rights under the NLRA”.

Mr. Lewis reasserts that AFSCME representative Hughes acted capriciously and arbitrarily by failing to view the video tape, investigate, or interview witnesses regarding Mr. Lewis’ grievance.

Mr. Lewis argues that encouraging and requiring employees to engage in physical recreation activities with the peers should not be permitted as it could subject employees to injury. Mr. Lewis indicates that Mr. Hughes also represents correctional employees, and questions whether Mr. Hughes would allow the correctional employees he represents to participate in recreational activities like dodgeball with inmates. Mr. Lewis asks, in argument, why his employment with the JDCYF would be treated differently.

Mr. Lewis argues that it should be noted that on the same day of his incident with Ms. McGowan, there was also videotape of a JDCYF supervisory employee being “assaultive and body slamming” a peer to the ground, but nothing was done about that. Mr. Lewis again argues against the arbitrary and capricious behavior that Mr. Hughes and AFSCME showed in the way Mr. Lewis was represented in the later meetings regarding the incident with himself and Ms. McGowan.

Although Mr. Lewis filed a reply to AFSCME’s response to his petition, he did not similarly reply to the DJS motion to dismiss.

Analysis

Based on the complaint timeline, as noted by Mr. Lewis, it appears on its face that Mr. Lewis well knew of the incident involving Ms. McGowan and the date of that incident, the allegations against him based on video evidence, the termination of his employment, the grievance of that termination, and the appeal of that grievance; all of which culminated in the settlement meeting with DBM in April of 2017. Per Board regulations at COMAR

14.32.05.01, there is a ninety day window within which a petitioner may file a claim against a union or employer. Upon review of Mr. Lewis' information, a reasonable filing of a claim would have happened much closer to when one would have felt coerced to sign a settlement agreement ending one's employment at a date nearly two months before that settlement meeting. Filing a claim well beyond three months from that date, and over a month after COMAR's ninety day limitations period, is a valid reason for the SLRB to dismiss the matter.

Recommendation

Based on the evaluation of the evidence gathered during the course of this investigation, and discussed in the above analysis, the Executive Director finds and recommends that Mr. Lewis' complaint should be dismissed due to untimely filing.

Pursuant to SLRB Regulations at COMAR §14.32.05.02G - H, this report will be sent to the full membership of the SLRB as well as to the parties. Any party aggrieved by the Executive Director's Report and Recommended Determinations is permitted to request reconsideration by the full board **no later than fifteen days** after the issuance of this report.



Erica L. Snipes, Executive Director
State Labor Relations Board

1/31/18
Date