



STATE OF NEVADA
EMPLOYEE-MANAGEMENT COMMITTEE
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Meeting Minutes of the Employee-Management Committee
April 21, 2015

Held at the Blasdel Building, 209 E. Musser St., Room 105, Carson City, Nevada, the Grant Sawyer Building, 555 E. Washington Ave., Room 1400, Las Vegas, Nevada, and the Nevada Department of Transportation, 1951 Idaho St., Conference Room, Elko, Nevada via videoconference.

Committee Members:

Management Representatives	Present
Mr. Mark Evans–Chair	
Ms. Mandy Payette–Co-Vice-Chair	
Ms. Bonnie Long	
Ms. Claudia Stieber	X
Ms. Allison Wall	X
Ms. Michelle Weyland	
Employee Representatives	
Ms. Stephanie Canter–Co-Vice-Chair	X
Ms. Donya Deleon	
Mr. Tracy DuPree	
Mr. David Flickinger	X
Ms. Turessa Russell	
Ms. Sherri Thompson	

Staff Present:

Mr. Robert Whitney, EMC Counsel, Deputy Attorney General
Ms. Carrie Lee, EMC Coordinator
Ms. Jocelyn Zepeda, Hearing Clerk

- 1. Co-Vice-Chair Stephanie Canter:** Called the meeting to order at approximately 9:00 a.m.

2. Public Comment

There were no comments from the audience or from the Committee Members.

3. Adoption of the Agenda – Action Item

Co-Vice-Chair Canter requested a motion to adopt the agenda.

MOTION: Moved to approve the adoption of the agenda.

BY: Committee Member Claudia Stieber

SECOND: Committee Member Allison Wall

VOTE: The vote was unanimous in favor of the motion.

4. Discussion and possible action related to the Motion to Dismiss of Grievance #3446 of Clarence Cassady, submitted by the Department of Transportation, supporting documentation, and related oral argument, if any – Action Item

A Motion to Dismiss was submitted to the Employee-Management Committee (“EMC” or “Committee”) by the agency employer Department of Transportation (“NDOT”) which was represented by Deputy Attorney General David Keene (“Mr. Keene”). Clarence Cassady (“Mr. Cassady” or “Grievant”) was present and was represented by Will Geddes, Esq. (“Mr. Geddes”).

NDOT argued in substance that many times in the past, the Committee had held that it did not have jurisdiction to consider Letters of Instruction. NDOT argued in particular, that Letters of Instruction were not disciplinary matters; rather, Letters of Instruction were management tools designed to help people comply with the terms and conditions of their employment. NDOT argued that Letters of Instruction were not placed in an employee’s personnel file because they were not disciplinary in nature and so they were not treated as such. Thus, NDOT argued, there was no way that the Committee could grant Mr. Cassady’s grievance remedy that the Letter of Instruction be removed from his file. Rather, NDOT stated, the Letter of Instruction would remain with Mr. Cassady’s immediate supervisor. NDOT concluded by asking that its request for dismissal be granted.

Mr. Geddes argued that Mr. Cassady’s supervisor, Eric MacGill, issued a memorandum in October 2014 which placed onerous restrictions on the use of Mr. Cassady’s sick leave time. Mr. Geddes stated that the memorandum indicated that beginning immediately, Mr. Cassady’s sick leave time would require a written explanation of the reason why he could not attend work which had to be from a certified physician and which was required to be presented the next working day following his absence. Mr. Geddes argued in substance that this requirement was not mere guidance or clarification of rules which were applicable to all NDOT’s employees. Rather, Mr. Geddes argued in substance, that the requirement placed on Mr. Cassady was a punishment imposed for perceived abuse of sick leave time.

Mr. Geddes further argued that a Letter of Instruction could sometimes be considered the first step of progressive discipline under state civil service. Mr. Geddes also stated in substance that one needed to look to the nature of the Letter of Instruction in order to determine if it was actually disciplinary. Furthermore, Mr. Geddes stated that the idea that the memorandum in this case was a Letter of Instruction was an argument raised in hindsight made in order to argue for the memorandum's deficiencies.

Mr. Geddes stated in substance that the *Steele* case indicated that Letters of Instruction could be disciplinary in nature; and the *Johnson* case indicated that the standard for determining whether a Letter of Instruction was disciplinary in nature was a liberal, lenient standard. Furthermore, Mr. Geddes in substance argued that the memorandum in question did indeed impose a qualitative change upon Mr. Cassady's employment and therefore constituted an adverse action. Finally, Mr. Geddes added that it did not matter what one called the document in question, when looking at what the document did in this case it changed the qualitative nature of Mr. Cassady's employment and presented a burden on him so it was a disciplinary matter, and therefore, the Committee had the power to rule on the grievance.

Mr. Geddes asserted that in this case, the qualitative change was found in the fourth line of the Letter of Instruction which stated that beginning immediately Mr. Cassady's sick leave would require him to bring in a written explanation from a certified physician that needed to be presented the next workday following his absence. This requirement, according to Mr. Geddes, imposed additional burdens on Mr. Cassady which were not imposed on other NDOT workers and which were not mere guidance or offered clarification. Mr. Geddes pointed out that not every legitimate use of sick leave time required an employee to see a doctor and that it was costly to do so. Mr. Geddes additionally argued that the requirements imposed a burden and financial cost on Mr. Cassady because the requirement for a doctor's note was open ended, and as such was an improper use of the NAC in question. Mr. Geddes also argued that looking at public policy, it would be perverse to deprive the Committee of its opportunity to serve as a check and balance on the employment of State workers simply by the labeling of a document.

Mr. Geddes argued that with respect to the previous decisions made by the Committee concerning it not having power to hear grievances involving Letters of Instruction, it was not known whether those Letters of Instruction were truly letters of clarification or mere guidance, or whether those letters imposed any discipline. Additionally, Mr. Geddes argued, it was not known if the workers who challenged those Letters of Instruction had attorneys to challenge the premise offered in this case. Mr. Geddes concluded by asking that NDOT's Motion to Dismiss be denied.

On rebuttal, NDOT argued that requiring someone to provide a doctor's note after that person was out on sick leave was not onerous, and that there was a provision in both NRS and NAC that provides for this in certain circumstances. NDOT also argued in substance that it was management's duty to ensure that employee sick leave was being used for appropriate reasons, and that just

because it might turn out to be somewhat of a burden to require a note from a doctor, this requirement did not equal discipline. Furthermore, NDOT argued that it was not arguing in hindsight, and that the memorandum was very clear in instructing Mr. Cassady how he was to go forward in the use of sick leave time and in the provision of a note. NDOT stated in substance that there was nothing that made it difficult for Mr. Cassady to comply with this requirement, and there was no change in the terms and conditions of his employment; rather, NDOT was simply going to enforce a provision of NRS and NAC that already existed. Furthermore, NDOT noted that the cases attached to its motion stood for the proposition that the Committee did not consider Letters of Instruction because they were non-disciplinary in nature and that the cases Mr. Geddes cited in opposition to this were from outside of Nevada and were all court cases that had nothing to do with what went on before the Committee. NDOT concluded by again asking the Committee to grant its Motion to Dismiss.

Mr. Geddes began to argue in response to NDOT's rebuttal however, NDOT objected on the basis that the burden of proof was on NDOT and, therefore, it had the last opportunity to speak. The objection was sustained based on prior Committee practice.

The Committee, after having read and considered all of the documents filed in this matter and having heard oral arguments, deliberated on the issues presented. Committee Member Claudia Stieber stated that based on prior EMC decisions on Letters of Instruction, she was prepared to grant the Motion to Dismiss. Committee Member Allison Wall stated in substance that with previous Committee decisions, the Committee looked at the Letter of Instruction to see if it was disciplinary in nature. It was also noted by Committee Member Wall that there was no review period included in the Letter of Instruction given to Mr. Cassady, and that traditionally, a corrective document should have a review period, whether it was three months, six months or a year. The way the Letter of Instruction read in this matter, according to Committee Member Wall, from the date it was issued forward, if Mr. Cassady did not comply with its terms he would be in AWOL status, which was a cause for discipline, and that the time period was indefinite, forever. Co-Vice-Chair Canter stated that she was in agreement and that she thought the memo had gone beyond a Letter of Instruction and was disciplinary. It was also voiced in substance by Committee Member David Flickinger that without an end date to the requirement of bringing in a doctor's note there was no real attempt to guide Mr. Cassady, and that instead the Letter of Instruction said that this is what he would do, this is what the consequence was if he did not, and that was discipline.

Co-Vice-Chair Canter requested a motion.

MOTION: Moved to deny NDOT's Motion to Dismiss Mr. Cassady's grievance based on the fact that the memorandum issued to Mr. Cassady appeared disciplinary in nature and therefore did not fall under the Committee's previous precedents of not reviewing Letters of Instruction.

Committee Member Wall noted in substance that participation in a resolution conference was a valuable opportunity to effectively resolve an issue at a lower level than formal proceedings and benefitted both a grievant and their agency.

BY: Committee Member Allison Wall

SECOND: Committee Member David Flickinger

VOTE: The vote was unanimous in favor of the motion.

5. Adjustment of Grievance #3315 of Kristina Crow, Department of Transportation – Action Item

The agency employer Department of Transportation (“NDOT”) was represented by Deputy Attorney General David Keene (“Mr. Keene”). Kristina Crow (“Ms. Crow” or “Grievant”) was present in proper person. There were objections to the submitted exhibits. Mr. Keene objected to Grievant’s Exhibits 3, 4 and 7. Exhibits 3 and 4 were redacted and Exhibit 7 was entirely removed. Ms. Crow objected to Mr. Keene’s witness list; this objection was overruled. Ms. Crow, NDOT IT Professional II Mark Pate (“Mr. Pate”), Supervisor II Associate Engineer Joanne Sherwood (“Ms. Sherwood”) and Equipment Mechanic II Kenneth Rizzi (“Mr. Rizzi”) were sworn in and testified at the hearing.

Ms. Crow is a Fleet Service Worker III in Elko, NV. Ms. Crow alleged in substance that on August 13, 2014, while returning from a restroom break, Mr. Rizzi drove up close to her with the passenger window of his truck down and told her to get in the truck, as it was “sprinkling” or lightly raining at the time. Ms. Crow further stated that when she did not, Mr. Rizzi stated more loudly than before, “Get in the f----- truck,” to which Ms. Crow stated she had said, “No thank you.” Ms. Crow testified that Mr. Rizzi continued to follow alongside her in his truck and repeated what he had previously said, to which Ms. Crow stated she had responded with, “No, I’m good, thank you.” Ms. Crow testified that she then went into her shop. Ms. Crow also testified that Mr. Rizzi had told her she was, “Just a trouble maker and a f----- b----.” Ms. Crow stated in substance she felt that she did not deserve to be treated in such a manner or spoken to in such a way, and that it scared her when someone spoke to her that way because of her past history.

In response to questioning, Ms. Crow testified that she wrote an 11:38 a.m., August 14, 2014, email after the alleged incident with Mr. Rizzi had occurred. Ms. Crow testified in substance that the reason she did not say anything specific in the email about the incident that allegedly occurred on August 13, 2014, was because she knew she was going to file a grievance about the matter and that by sending the email, she just wanted to stop any further incidents from happening.

Ms. Crow additionally testified that on August 14, 2014, she had met with Ms. Sherwood and that she had told Ms. Sherwood about the alleged incident involving Mr. Rizzi from the previous day. Ms. Crow also stated in substance that Ms. Sherwood had agreed with her that writing an email to Mr. Rizzi would suffice in preventing any further incidents until her grievance was heard.

In the documents submitted for her grievance, Ms. Crow requested as a proposed resolution for his alleged conduct that Mr. Rizzi be given the maximum discipline granted in the penalties and prohibitions section, as well as the penalties section of the Workplace Violence Prevention Policy. Ms. Crow further requested in substance that if Mr. Rizzi was retained by NDOT that he not be allowed to have personal contact with her except via telephone and email, and that Mr. Rizzi not be allowed to be physically present in the same location as she was without a third person present. Ms. Crow also asked that video cameras be installed in her workplace which would record 24 hours a day, 7 days a week.

Mr. Pate testified in substance that he recalled Ms. Crow's emotional state on the day of the alleged incident. Mr. Pate testified that Ms. Crow was extremely distraught and that it had taken several hours for her to calm down and that she had had a panic attack. Mr. Pate additionally testified in substance that Ms. Crow had stated that she should have called the police because of the way she was treated. Mr. Pate also testified that he recalled seeing Ms. Sherwood speaking with Ms. Crow on August 14, 2014, but that he was not part of the conversation and he had not heard what was discussed.

NDOT moved for the grievance to be dismissed as Ms. Crow had done nothing to prove her case and there was nothing to substantiate her claim. Co-Vice-Chair Canter overruled the motion.

Ms. Sherwood testified in substance that she is the local EEO counselor for the Elko Sub District, and that if an employee had any potential EEO issues, the employee would go to her, and that Ms. Crow had gone to her with potential EEO issues. Ms. Sherwood testified that she did not remember speaking with Ms. Crow specifically on August 14, 2014, although she did remember speaking with Ms. Crow informally. Ms. Sherwood testified in substance that both she and Ms. Crow sat down together and looked at the requirements of an EEO complaint versus a grievance and that Ms. Crow had told her that she was going to file a grievance. Additionally, Ms. Sherwood testified that at some point Ms. Crow came to her and said, "He can't make me ride in that truck," and that they had informally discussed that allegation.

Ms. Sherwood testified in substance that Ms. Crow had told her about the alleged incident involving Mr. Rizzi of August 13, 2014, probably in September 2014, and not the day after the alleged incident. Ms. Sherwood also testified that she had not encouraged Ms. Crow to write an email to Mr. Rizzi, that she was unaware that Ms. Crow had written and sent such an email, and that she typically would not advise someone to send such an email.

Mr. Rizzi testified in substance that he had worked for NDOT for over 22 years and that he was never involved in any incident like the one alleged by Ms. Crow, even outside of August 13, 2014. In response to questioning, Mr. Rizzi testified in substance that he was not aware that he had spoken to Ms. Crow inappropriately and that he had not cursed at Ms. Crow. Mr. Rizzi stated that he was not aware that he had ever raised his voice to Ms. Crow other than what was necessary to speak above background noise. Mr. Rizzi testified in substance that

he recalled that one day when it was raining he had asked Ms. Crow to get in his truck and Ms. Crow had responded that she was happy in the rain and that he had said, "Ok," and drove off, but he was not certain of the date of that occurrence. Additionally, Mr. Rizzi testified in substance that although the NDOT shop workers try and keep swearing down, it did occur to a degree. Mr. Rizzi further testified in substance that he had never heard Ms. Crow say anything about cursing bothering her nor had he remembered Ms. Crow making any expression to indicate that cursing bothered her.

The EMC reviewed the evidence, considered the statements of the witnesses and the arguments of counsel and the parties, and deliberated on the record. All EMC Members indicated in substance that NDOT had done its part in investigating Ms. Crow's grievance and that it was open to taking information and investigating allegations. Committee Member David Flickinger and Co-Vice-chair Canter stated that there was not enough evidence presented by Ms. Crow to grant the grievance. Committee Member Wall stated that no ill relationship was proven, but there was obviously an issue since a grievance was filed. Committee Member Stieber echoed what the other Members stated and added in substance that the EMC did not have the authority to grant Ms. Crow's proposed resolutions.

Co-Vice-Chair Canter requested a motion.

MOTION: Moved to deny the grievance because the Grievant had failed to prove that NDOT violated any NRS or NAC with regard to the alleged incident on August 13, 2014.

BY: Co-Vice-Chair Stephanie Canter

SECOND: Committee Member Claudia Stieber

VOTE: The vote was unanimous in favor of the motion.

6. Public Comment

There were no comments from the audience or Committee members.

7. Adjournment

MOTION: Moved to adjourn.

BY: Committee Member Allison Wall

SECOND: Committee Member David Flickinger

VOTE: The vote was unanimous in favor of the motion.