

**SOUTH DAKOTA DEPARTMENT OF LABOR**  
**Division of Labor and Management**

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**JEFFREY R. BECK,**  
Grievant,  
v.  
**CITY OF SIOUX FALLS,**  
Respondent.

**HF 10 G, 2005/06**

**DECISION GRANTING MOTION  
FOR SUMMARY JUDGMENT**

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This is a grievance appeal before the South Dakota Department of Labor pursuant to SDCL 3-18-15.2 and SDCL Chapter 1-26. Thomas K. Wilka, of Hagen, Wilka & Archer, P.C., represents Grievant Beck. Gail Eiesland, Assistant City Attorney, represents the City of Sioux Falls.

**Procedural Background**

Beck filed his petition for hearing on December 23, 2005. On January 20, 2006, Respondent filed its motion to dismiss. Grievant filed resistance to the motion to dismiss on March 1. Department converted the motion to dismiss to a motion for summary judgment on March 2. The parties were allowed the opportunity to make additional submissions on the motion for summary judgment. The City filed its additional submission on March 13. Beck filed resistance to the motion for summary judgment on April 3.

Beck failed to establish the existence of genuine issues of material fact for hearing. City is hereby granted summary judgment dismissing Beck's grievance appeal.

**The Grievance**

1. Beck alleges City violated Section 200, Subsection 212(2), (3) of the SFPD Policy and Procedure Manual. He argues that his November 16, 2005, "evaluation" was not in compliance with the evaluation procedures required by the police department policy manual which is covered by Article 20, Section 1 of the CBA, and that City's failure to follow this evaluation policy led to his "reduction in rank[.]" Grievant contends Respondent was required to perform the evaluation pursuant to the terms of the SFPD written policy, both as to the manner of the evaluation, and as to the timing of the evaluation.
2. Beck alleges City violated his right to seniority, contained in Article 11, Seniority, Section 7 of the CBA, by not allowing him to participate in bidding his work assignment on a seniority basis, following his "demotion" to the rank of patrol officer.

## **Facts**

The material facts are not disputed and are as follows:

1. Beck has been a member of the Sioux Falls Police Department (SFPD) for approximately 11 years.
2. On September 19, 2005, City promoted Beck from the rank of police officer to the rank of police sergeant. Beck began performing the duties of a sergeant and his weekly rate of pay was increased to that of a sergeant at the time of his promotion.
3. As a sergeant and as a patrol officer, Beck was a member of the bargaining unit represented by the Fraternal Order of Police (FOP), pursuant to the January 1, 2005, through December 31, 2006, collective bargaining agreement (CBA) between the City and Lodge No. 1 of the FOP.
4. Following his promotion to sergeant, Beck was subject to a six month probationary period in that position, pursuant to Article 28, Section 5 of the CBA.
5. On November 16, 2005, Beck received an assessment completed by his immediate supervisor, Sgt. Olson. This assessment covered a number of performance issues. Although Beck disputes “much of what is stated in this evaluation”, he admits the evaluation “was highly critical in almost every category.”
6. According to the November 16, 2005, assessment, Beck did not achieve the expected or required performance standards in “Dependability/Attendance”, in that he did not accurately document his actual hours worked and was dishonest with his supervisor concerning his hours worked and in completing his time sheet.
7. According to the November 16, 2005, assessment, Beck did not achieve the expected or required performance standards in “Quality of Work”, in that, in connection with two certain incidents on October 13 and 15, 2005, his “inability and/or refusal to follow directives is a violation of the insubordination policy of this department and it represents inefficiency in performance of duty.”
8. According to the November 16, 2005, assessment, Beck did not achieve the expected or required performance standards in “Quantity of Work–Productivity” in that he was “not attending his share of the calls”. When contacted by his supervisor concerning this deficiency, Beck’s response warranted this entry: “Once again, Sgt. Beck is attempting to personally justify his actions rather than accept directions or feedback from his supervisor[.]”
9. According to the November 16, 2005, assessment, Beck did not achieve the expected or required performance standards in “Cooperation–Personal Conduct”, in that several complaints were made to Beck’s supervisor concerning his “argumentative behavior.” The report provides a number of examples, and concludes, “Sgt. Beck continually demonstrates

that when he personally does not agree with directives, policies, or procedures, he will not follow them.”

10. According to the November 16, 2005, assessment, Beck did not achieve the expected or required performance standards in “Work Habits–Initiative” in that his “productivity is lacking” and he is “very passive in accepting job responsibilities.”
11. According to the November 16, 2005, assessment, Beck did not achieve the expected or required performance standards in the category labeled “Optional Factor”. This entry repeats the theme set out above, and concludes: “His reluctance to accept input from those knowledgeable in the area of supervision, and his subsequent inability to see the need for this, makes it nearly impossible for him to grasp or learn all the elements necessary to perform the role of a shift Sergeant.”
12. The November 16, 2005, assessment, under “Overall Performance”, concluded:

This performance evaluation shall constitute an overall evaluation that is deemed less than satisfactory. Sgt. Beck will not be allowed to complete his probationary period due to less than satisfactory performance and he shall be returned to the rank of Police Officer consistent with the terms of Article 28.

The evaluation was then reviewed and signed on November 16, by Beck’s supervisor, as well as by the Division Commander, the Assistant Chief, and the Chief of Police.

13. Pursuant to this November 16, 2005, assessment, and the terms of Article 28, Section 5 of the CBA, City returned Beck to the rank of police officer.
14. Beck then filed his grievance at the local level.

### **Authority**

“Grievance” is defined as a complaint by a public employee “based upon an alleged violation, misinterpretation, or inequitable application of any existing agreements, contracts, ordinances, policies or rules of the government of the state of South Dakota or the government of any one or more of the political subdivisions thereof . . . as they apply to the conditions of employment.” SDCL 3-18-1.1.

The burden of proof is on the party alleging the grievance. Rininger v. Bennett Co. Sch. Dist., 468 N.W.2d 423 (SD 1991).

“If, after following the grievance procedure enacted by the governing body, the grievance remains unresolved . . . it may be appealed to the department of labor[.]” SDCL 3-18-15.2.

Pursuant to a perfected appeal to the department of labor, “[t]he department of labor shall conduct an investigation and hearing and shall issue an order covering the points raised, which order is binding on the employees and the governmental agency.” Id.

“Deference is not given to the [board’s] decision by the department in a grievance review under SDCL 3-18-15.2. . . . Rather, the department issues a binding order based upon its own investigation and hearing.” Cox v. Sioux Falls Sch. Dist. No. 49-5, 514 N.W.2d 868 (SD 1994), SDCL 3-18-15.2.

## **Analysis**

Summary judgment is authorized “[i]f the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” SDCL 1-26-18(1).

All reasonable inferences derived from the facts are viewed in the light most favorable to the nonmoving party. Northstream Invs., Inc. v. 1804 Country Store Co., 2005 SD 61, ¶11, 697 NW2d 762, 765 (citing Morgan v. Baldwin, 450 NW2d 783, 785 (SD 1990)). However, the nonmoving party must present facts showing that a genuine and material issue for trial exists. Cromwell v. Rapid City Police Dept., 2001 SD 100, ¶7, 632 NW2d 20, 23.

Based on the pleadings and submissions of the parties on the motion, it appears that there are no genuine issues of material fact and that the City is entitled to judgment as a matter of law.

## **The Department has jurisdiction over the parties and subject matter.**

City argues that Department lacks jurisdiction to hear Beck’s grievance claim because he was only a probationary employee in regard to his status as a sergeant. City argues that Beck has no recourse, citing Article 11, Section 3 of the CBA, and Section 30-42a of the revised ordinances.

Article 11, Sections 2 and 3 of the CBA, entitled Seniority, provide:

**Section 2. New employees will be considered probationary employees for one year from the date of employment.** Should a probationary employee be absent from the job for more than thirty (30) calendar days, the probationary period will be extended for the period of absence to enable the employee to complete their [sic] full probationary period. (emphasis added).

**Section 3. During the probationary period, a probationary employee** may be disciplined, laid off, or otherwise dismissed at the sole discretion of the City, and neither the reason for the disciplinary action, discharge, layoff, or dismissal [sic] may be the subject of the grievance or of a Civil Service Board proceeding. (emphasis added).]

Ordinance Section 30–42(a) of the Revised Ordinances of the City of Sioux Falls, provides, in relevant part:

An **interdepartmental promotion/transfer** is not complete until a six-month probation has elapsed unless otherwise specified in a collective bargaining agreement. . . . A

probationer may be discharged or demoted at any time within a probationary period upon the recommendation of the head of the department. (emphasis added).

City's reliance on Article 11, Section 3 of the CBA is misplaced. This provision applies to probationary new employees and is not applicable to the present facts. Beck was not a probationary new employee.

Similarly, City's reliance on Section 30-42a of the revised ordinances is misplaced. This ordinance refers to interdepartmental promotions and transfers and is not applicable to the present facts. Beck's promotion was not interdepartmental.

The provision of the CBA governing Beck's promotion is Article 28, "Promotions", Section 1, which provides:

A promotion shall occur when there exists an actual permanent vacancy **within the bargaining unit** which results in the movement of an employee from their [sic] present job classification to the vacant position with an increase in maximum biweekly rate of pay as provided in Article 32, Wages. (emphasis added).

The authority controlling Beck's probationary status as a sergeant is Article 28, Section 5 of the CBA, which establishes the probationary period on promotions within the police department:

**A promotion within the ranks of the Police Department shall not be deemed complete until a period of probation not to exceed six (6) months has elapsed. . . . If, at any time** during the probation period, a promoted employee is **appraised less than satisfactory in overall performance**, the employee shall be returned to the position from which they [sic] were [sic] promoted[.](emphasis added).

Beck had authority to grieve the City's interpretation or application of the CBA as it applied to his failed promotion under Article 20, Section 1, of the CBA:

**Grievances are defined to be disputes involving the interpretation or application of this Agreement** or changes in working conditions or rules or regulations governing terms or conditions of employment which are not cognizable under the Civil Service procedures. (emphasis added).

The Department has jurisdiction over the parties and subject matter of Beck's grievance appeal.

### **Whether the City violated the CBA when it returned Beck to the rank of patrolman.**

In interpreting the language of the CBA, it is not necessary to go beyond the language of the agreement. There are certain well-settled principles of contract interpretation:

We must first determine whether the provision is ambiguous. A contract is ambiguous when application of rules of interpretation leave a genuine uncertainty as to which of two or more meanings is correct. Alverson 1997 SD 9, ¶8, 559 NW2d 234, 235), 1997 SD 9,

¶8, 559 NW2d at 235 (quoting City of Watertown v. Dakota, Minnesota & E. R.R. Co., 1996 SD 82, ¶13, 551 NW2d 571, 574) (additional citations omitted). In determining the question of ambiguity,

[a] contract is not rendered ambiguous simply because the parties do not agree on its proper construction or their intent upon executing the contract. Rather, a contract is ambiguous only when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement.

Moreover, the proper interpretation of a contract must give effect to the intention of the contracting parties. This Court need only look to the language that the parties used in the contract to determine their intention. If that intention is clearly manifested by the language of the [agreement], it is the duty of this [C]ourt to declare and enforce it.

Ziegler Furniture & Funeral Home, Inc. v. Cicmanec, 2006 SD 6, ¶16. (internal quotations and citations omitted).

Article 28, Section 5 of the CBA is not ambiguous. It is not necessary to look beyond the clear terms of that provision. Beck's promotion within the ranks of the police department was subject to a six month period of probation. If, "at any time during the probation period" Beck was "appraised less than satisfactory in overall performance", City was within its authority to return him to the rank of patrolman. Beck's November 16, 2005, assessment rated his performance as less than satisfactory in several areas, as well as in overall performance, and was the reason City returned him to his former rank.

Beck argues that the evaluation process that led to his "demotion", as he characterizes it, from sergeant to police officer did not follow the Sioux Falls Police Department policy on evaluations.

Beck bases this aspect of his grievance on Section 200, Subsection 212(2), (3) of the SFPD Policy and Procedure Manual which outlines annual and other periodic evaluations of personnel. He argues that the City could evaluate him only pursuant to the schedule and methods dictated by this policy and procedure manual. This conclusion is not supported by the CBA as a whole, or by Article 28, Section 5, in particular. Article 28, Section 5 allows the City to appraise a probationary promotee "at any time" during the six month probationary period, and, when necessary, to return the employee to the position from which the employee was promoted. The City must have the latitude to determine when a probationary promotee's conduct or job performance is sub-standard and need not wait until the employee's next scheduled performance evaluation.

Beck cannot place any particular significance on the fact that the City used the performance evaluation form provided by the policy and procedure manual in making its November 16, 2005, assessment of his performance. The performance evaluation manual itself provides "Directions for Completing the Performance Evaluation Form, IV. The evaluation form will be used **whenever a review becomes necessary** (i.e. merit, nonmerit, deficiencies, etc.)" (emphasis

added). Use of the evaluation form is therefore not limited to annual or other scheduled evaluations.

Beck failed to establish the existence of any genuine issues of material fact. City is entitled to judgment as a matter of law. City did not violate the CBA when it assessed Beck's performance as less than satisfactory during his probationary period and returned him to the rank of police officer.

**Whether City violated the CBA when it did not allow Beck to bid on his next work assignment, according to his accumulated seniority, following his return to his rank of patrolman.**

Beck bases this aspect of his grievance on Article 11, Section 7, of the CBA, "Seniority", which provides:

**For the purposes of bidding vacations and days off**, seniority shall be considered according to the employee's appointment date to his current rank and duty assignment, so long as it does not impede the normal operation of the department. (emphasis added).

Article 11, Section 7 of the CBA is not ambiguous. It is not necessary to look beyond the clear terms of that provision. Article 11, Section 7 is limited by its terms to bidding only "vacations and days off" and does not provide for shift bidding.

City has retained certain management rights, under Article 35, Subsections A, C, H, and I of the CBA which are sufficient to provide the necessary authority to assign a patrolman to a certain shift.

Beck failed to establish the existence of any genuine issues of material fact. City is entitled to judgment as a matter of law. City did not violate the CBA when it did not allow Beck to bid his shift assignment on his return to the rank of patrolman.

Counsel for City shall submit proposed Findings of Fact and Conclusions of Law, and an Order, consistent with this Memorandum Decision, within 10 days of the receipt of this Memorandum Decision. Counsel for Beck shall have 10 days from the date of receipt of City's proposed Findings of Fact and Conclusions of Law to submit objections or submit proposed Findings of Fact and Conclusions of Law. The parties may stipulate to a waiver of formal Findings of Fact and Conclusions of Law. If they do so, counsel for City shall submit such stipulation together with an Order consistent with this Memorandum Decision.

Dated: April 20, 2006.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Randy S. Bingner  
Administrative Law Judge