November 13, 2018

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AMENDED
LETTER DECISION & ORDER

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RE: HF No. 10G, 2017/18 – Jessica Davidson v. Davison County Commission

Dear Mr. Tornow and Ms. Marso:

This letter addresses the following submissions by the parties:

August 10, 2018	Respondent's Motion to Dismiss or Alternatively Motion for Summary Judgment
	Employer's Brief in Support of Motion for Summary Judgment
September 17, 2018	Grievant's Opposition to Employer's Motion for Summary Judgment with attachments
September 28, 2018	Respondent's Reply Brief

ISSUES PRESENTED:

1. MUST RESPONDENT FOLLOW THE PROVISIONS OF SDCL 15-6-56 FOR ITS MOTION?

2. DOES THE DEPARTMENT HAVE JURISDICTION TO HEAR GRIEVANT'S PETITION?

3. IS THE COUNTY ENTITLED TO SUMMARY JUDGMENT?

FACTS

Grievant, Jessica Davidson, appeals her termination as the Veteran's Service Officer (VSO) of Respondent Davison County by notice filed February 6, 2018. Grievant was hired as the VSO of Davison County December 8, 2015. Her appointment took effect January 3, 2016, and was to run until the first Monday in January, 2020. A great deal of acrimony developed between the parties over the next two years, the details of which will not be the subject of this decision. Suffice it to say, Davison County terminated Grievant on November 29, 2017. Grievant met with the Board of Commissioners on November 28, 2017, where the Respondent laid out its complaints against her. Respondent also received a letter from Secretary of Veteran's Affairs, Larry Zimmerman, in which Secretary Zimmerman recommended that Grievant be terminated. The letter was dated November 17, 2017.

On December 26, 2017, Grievant wrote a letter to Commissioner Dennis Kiner alleging that the November 28 meeting did not afford her due process. The full Davison County Commission held a post termination hearing on May 22, 2018. Grievant appeared at this hearing with her counsel and presented witnesses and exhibits. The full board upheld the November 2017 firing by letter to Grievant dated June 20, 2018. Grievant then filed an amended appeal to the Department dated June 20, 2018. On August 10, 2018, Respondent filed a motion for summary judgment and alternatively a motion to dismiss.

ANALYSIS

1. MUST RESPONDENT FOLLOW SDCL 15-6-56?

Grievant argues that Respondent's motion must be dismissed for failure to follow the procedure found in SDCL 15-6-56(c). This statute provides:

> The motion and supporting brief, statement of undisputed material facts, and any affidavits, and any response or reply thereto shall be served within the dates set forth in § 15-6-6(d).
>
> > (1) A party moving for summary judgment shall attach to the motion a separate, short, and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried. Each material fact in this required statement must be presented in a separate numbered statement and with appropriate citation to the record in the case.

Respondent argues that the procedures found in the rules of civil procedure do not apply to administrative hearings. For support it cites SDCL 3-18-15.2, which reads in relevant part: the department, upon the motion of any party, may dispose of any grievance, defense, or claim… [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 a party is entitled to a judgment as a matter of law" (emphasis added).

Our Supreme Court has noted "[w]hen the question is which of two enactments the legislature intended to apply to a particular situation, terms of a statute relating to a particular subject will prevail over the general terms of another statute. *Martinmaas v. Engelmann*, 2000 S.D. 85, ¶ 49, 612 N.W.2d 600, 611 (quoting *Moss v. Guttormson,* 1996 SD 76, ¶ 10, 551 N.W.2d 14, 17).

SDCL 3-18-15.2 deals specifically with the procedure for granting summary judgment in a grievance hearing. The use of the phrase "if any" with regard to affidavits

indicates that a motion for summary judgment may still be considered even if no affidavit is present. Likewise, this statute makes no mention of a statement of facts.

Grievant argues that since Respondent brought its motion under SDCL 15-6-56(c) it is bound by the rules of that statute. The Department rejects this argument. SDCL 3-18-15.2 being the more specific of the two statutes applies to grievance hearings. Since Respondent has met the requirements of this statute, the Department may consider its motion.

2. DOES THE DEPARTMENT HAVE JURISDICTION TO HEAR GRIEVANT'S PETITION?

A right to grieve is established by SDCL 3-18-15.1, which provides: "[t]he governing officer or board of each governmental agency shall enact, by agreement, ordinance, rule, or resolution, and make known to its employees a procedure which its employees may follow for prompt informal dispositions of their grievances. The Department's authority to hear grievances is established by SDCL 3-18-15.2:

> If, after following the grievance procedure enacted by the governing body, the grievance remains unresolved, except in cases provided in § 3-6D-15, the grievance may be appealed to the Department of Labor and Regulation by filing an appeal with the department within thirty days after the final decision by the governing body is mailed or delivered to the employee. The department shall conduct an investigation and hearing and shall issue an order covering the points raised, which order is binding on the employee and the governmental agency.

Further, SDCL 3-18-1.1 defines a "grievance" as

> a complaint by a public employee or group of public employees 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, or of the public schools, or any authority, commission, or board, or any other branch of the public service, as they apply to the conditions of employment. Negotiations for, or a disagreement over, a nonexisting agreement,

contract, ordinance, policy, or rule is not a "grievance" and is not subject to this section.

Respondent first argues that, according to Section 1.1 of the county procedures manual, Claimant is an at will employee. This section contains the following language: "The county, like the employee, is free to terminate the employment relationship at any time for any or no reason." The definition of an "at-will" employee is also found in statute. SDCL 60-4-4 provides "[a]n employment having no specified term may be terminated at the will of either party on notice to the other, *unless otherwise provided by statute*." (emphasis added). Claimant's position as a county veteran's administrator is defined by SDCL 33A-1-22. This statute provides in relevant part "[t]he appointment is subject to removal by the board or boards of county commissioners upon the recommendation of the state secretary of veterans' affairs or for cause." Because SDCL 33A-1-22 limits the ability of a board to terminate a county veteran's officer, Grievant was not an at will employee. The Department therefore has jurisdiction to determine whether either of the prerequisites established by SDCL 33A-1-22 has been met.

Respondent next argues that Grievant is not entitled to grieve her termination because the county has not established a grievance procedure. Under SDCL 3-18-15.5 "[t]he provisions of § 3-18-15.1 do not apply to employees of political subdivisions unless those employees are members of a public employee union or the governing body of a political subdivision has adopted an ordinance or resolution establishing a grievance procedure for all employees of the political subdivision."

Section 5.11 of the manual provides for a disciplinary interview for violation of county policies or procedures including the right to be informed in writing of the proposed action, the right of the employee to present reasons why the action should not be taken, and the right to be informed in writing of the final decision. Though Respondent concedes that an employee has a right to a hearing for an alleged infraction, it nonetheless argues that this right is not applicable for a termination. This argument is without merit. When presented with an employee who is facing discipline for some action, it is illogical to believe the county would exact a lesser punishment which could be grieved, when it could simply fire that employee with no threat of a grievance. Since the county has a grievance procedure in place, Grievant is entitled to due process. The county's initial decision is therefore reviewable by the Department.

3. IS THE COUNTY ENTITLED TO SUMMARY JUDGEMENT?

The Department is authorized to grant summary judgment pursuant to ARSD 47:03:01:08:

> A claimant or an employer or its insurer may, anytime after expiration of 30 days from the filing of a petition, move with supporting affidavits for a summary judgment. The division shall grant the summary judgment immediately if 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 a judgment as a matter of law.

Our Supreme Court has noted the proper standard for consideration of summary judgment:

> In reviewing a grant or a denial of summary judgment…, we must determine whether the moving party demonstrated the absence of any genuine issue of material fact and showed entitlement to judgment on the merits as a matter of law. The evidence must be viewed most favorably to the nonmoving party and

> reasonable doubts should be resolved against the moving party. The nonmoving party, however, must present specific facts showing that a genuine, material issue for trial exists.

Saathoff v. Kuhlman, 2009 S.D. 17, ¶ 11, 763 N.W.2d 800, 804 (citing *Pellegrino v. Loen,* 2007 SD 129, ¶ 13, 743 N.W.2d 140, 143)).

Here, Respondent concedes that in the event that Grievant was fired for cause, she is entitled to due process. However, it contends that the second condition, a recommendation from the secretary of veteran's affairs, forecloses the prospect of a genuine issue of any material fact regarding Claimant's termination. Grievant asserts that, during the May 22, 2018 hearing, Commissioner Brenda Bode made statements to the effect that she had not read the letter prior to the County's November 28 meeting. Further, Grievant asserts Bode stated that the letter was not the reason for the termination. The County disputes that Bode made any such statements. Thus, there is a question over what affect, if any, Secretary Zimmerman's letter had on the board's decision on November 29, 2017.

Had the November 28 meeting been the only meeting between the two, this question would be sufficient to overcome summary judgment. However, Respondent allowed Grievant to present her case to the full Board of Commissioners again on May 22, 2018. On May 29, 2018, Davison County State's attorney James Miskimins sent Grievant a letter in which he states that the commissioners terminated her "upon the recommendation of the State Secretary of Veteran's Affairs and for cause." SDCL 33A-1-22 does not condition a termination of a VOA on the contents of a letter from the Secretary of Veteran's Affairs. In other words, it is not necessary for the Secretary's recommendation to be based on cause. Regardless of whether Respondent had cause

to terminate Grievant, the recommendation from Secretary Zimmerman is sufficient for summary judgment. If Respondent was unaware of Secretary Zimmerman's letter on November 28, 2017, Miskimins's letter indicates that it was aware of the letter at the May 22, 2018 hearing.

CONCLUSION AND ORDER

Respondent's motion for summary judgment is GRANTED. Representative for Respondent shall submit Findings of Fact and Conclusions of Law and an Order consistent with this Decision. Grievant may submit proposed Findings of Fact and Conclusions of Law within 10 days after receipt of Respondent's submission. The parties may stipulate to a waiver of formal Findings of Fact and Conclusions of Law. If they do so, counsel for Grievant shall submit such stipulation together with an Order consistent with this Decision.

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION

/s/ Joe Thronson
Joe Thronson
Administrative Law Judge