

**SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT**

JOHN A. VAN BEEK,

HF No. 10 G, 2008/09

Grievant,

v.

DECISION

CITY OF LEMMON,

Respondent.

The above-entitled matter comes before the Department of Labor pursuant to a grievance petition by the Petitioner, John Van Beek, pursuant to SDCL 3-18-15.2. A Hearing was held in the matter on June 3, 2009, at Lemmon, South Dakota. Petitioner, John A. Van Beek (Petitioner), represents himself pro se. City Attorney, Shane C. Penfield represents Respondent, City of Lemmon (City). The Department having heard the evidence presented in this matter and having received legal argument from both parties, being duly advised in the premises and good cause appearing thereon, does hereby make this Decision.

ISSUES:

Was City, pursuant to City Ordinance and the Negotiated Contract, required to advertise for applications for the position of Assistant Police Chief?

FACTS:

1. Petitioner is an employee of City. He has been employed with City since 2004.
2. Petitioner brings this Petition for Hearing pursuant to the grievance procedure found in City's Personnel Policy Manual and SDCL §3-18-15.2.
3. City's employees are bound by the Personnel Manual. All employees receive a copy of the Personnel Manual or have access to the Manual.
4. Petitioner's current position with City is that of a blade operator. Petitioner also works in the maintenance department and is a self-described "jack-of-all-trades" for the City.
5. Prior to his position with City, Petitioner was employed in the road construction industry. Petitioner also has held jobs as a farmer and a truck driver.
6. Petitioner had not been looking for other jobs until receiving an on-the-job injury in August 2008. Petitioner wanted a job that was less stressful on his physical condition.

Petitioner did not apply for any jobs at that time, but wanted to apply if something appropriate became available.

7. City follows SDCL §§ 9-14-1 to -3 with respect to the appointment of City Officials.
8. City Personnel Policy #12 sets out that the positions of Police Chief and Policeman are appointed officials within City. The Policemen and Police Chief are appointed each year by the Mayor.
9. The Mayor also appoints a committee of council members to oversee each department, including the police department. The committee makes suggestions regarding personnel to the department head and the Mayor.
10. In the past, City has advertised the position of Policeman and has retained officers as a result of collecting resumes from people interested in the advertised position. City has also retained police officers without advertising the position.
11. On October 6, 2008, the City Council met. A member of the City Council, representing the Police Committee, reported that a licensed police officer was willing to take a job with City. The Council voted to approve the “hiring” of the officer as Assistant Police Chief.
12. The person retained by City was a 7-year veteran officer of the SD Highway Patrol. He was licensed by the SD Police Academy and the SD Highway Patrol Academy. He previously worked for City as a patrolman.
13. City did not advertise the position in any public newspaper or publication.
14. The job description for Assistant Chief of Police has the requirement of four years of experience as a police officer as well as holding a certificate from a police academy.
15. Petitioner had not spoken with the Police Chief about being a police officer. Petitioner has no experience in police work. Petitioner is not qualified to hold the position of Assistant Chief of Police or Policeman.
16. The Personnel Policy #4 regarding recruitment and selection of City employees sets out three methods of recruiting qualified applicants to fill job vacancies: promotion from within, transfer from within, and open announcement and advertisement.
17. Personnel Policy #12 states that Personnel Policy #4 does not apply to Appointed Officials.
18. Petitioner has not applied for any jobs either prior to or since October 2008, the date of the incident triggering this grievance.

ANALYSIS

SDCL §60-9A-1(5) defines a grievance as any complaint of an employee based upon an alleged violation, misinterpretation, or inequitable application of any existing agreements, contracts, ordinances, policies or rules of the employer, as they apply to the conditions of employment. Petitioner relies upon the City's Personnel Policy in filing this grievance.

City's Policy #4 sets out that recruitment of City employees will either come from within or the position will be advertised. However, Policy #12 clearly states that #4 does not apply to appointed officials. In other words, the City can appoint someone to or hire someone for an appointed position without following Policy #4. That is exactly what happened in this case. City was approached by a veteran police officer and highway patrolman who wanted to move back to Lemmon due to personal reasons. City took this occasion to appoint the individual as an Assistant Police Chief.

The City Council minutes state that a motion was made to "hire" the officer instead of "appoint". City's personnel policy states that all police officers or police chiefs are appointed officials of the City. It makes no difference whether the Council Minutes state that the individual was "hired" or "appointed" by the Council, as he was still an appointed official. The Council did not change the nature of the "appointed" official by using different language during a Council meeting.

According to City's Personnel Policy, City was not required to advertise the position of Assistant Police Chief. City did not violate, misinterpret, or inequitably apply the employment policy and agreement between Petitioner and City. Petitioner's grievance is denied.

City shall submit Proposed Findings of Fact and Conclusions of Law and a Proposed Order, consistent with this Decision, within 10 days from the date of receipt of this Decision. Petitioner will then have 10 days to make written objections. The parties may stipulate to waiver of Findings of Fact and Conclusions of Law and if they do so, the parties will submit such Stipulation, along with an Order in accordance with this Decision.

Done this 27th day of August, 2009 in Pierre, South Dakota.

SOUTH DAKOTA DEPARTMENT OF LABOR

Catherine Duenwald
Administrative Law Judge