

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

**AFSCME Local 59**

**HF No. 11 G, 2009/10**

**Petitioner,**

**v.**

**DECISION**

**CITY OF SIOUX FALLS,**

**Respondent.**

This matter came before the Department of Labor when Petitioner, AFSCME Local 59, filed a Petition for Hearing on Grievance pursuant to SDCL 3-18-15.2. The Department conducted a hearing on June 10, 2010, in Sioux Falls, South Dakota. Steven D. Sandven appeared on behalf of Petitioner, AFSCME Local 59. Gail D. Eiesland represented Respondent, City of Sioux Falls.

***Issue:***

This case presents the following legal issue:

Whether the City of Sioux Falls violated, misinterpreted or inequitably applied the terms of the parties' negotiated agreement when it denied "emergency call-in pay" to certain employees of the Street Division for snow removal work performed December 7, 2009?

***Facts:***

Based upon the testimony at the hearing, the exhibits and the record, the following facts are found by a preponderance of the evidence:

1. The following individuals (Employees) are members of AFSCME Local 59 (Grievant): Chad Sundvold, Phillip Daggett, Brian Rypkema, Charles Putzier, Newell Chambers, Ryan Sinding, Brian Busse, Ryan Heald, Troy Ueke, Kurt Johnson, and Ron Droge.
2. The Employees are either equipment operators or lead equipment operators who work for the Street Division within the Public Works Department of the City of Sioux Falls (City).

3. The Employees job duties include the operation of both light and heavy equipment used to plow and remove snow and ice from the City's streets. The Employees also operate equipment to sand and spread de-icing chemicals on those streets.
4. One of the job requirements for the City's equipment operators and lead equipment operators is the ability "to work extended hours when directed to do so."
5. The City's work schedule during the winter months is set up to accomplish 24-hour, seven days per week coverage.
6. During the winter months, the City's Street Division maintains two work schedules. One is the normal operating schedule. The other is implemented during snow events. The snow event schedule splits the employees into two shifts: midnight to noon and noon to midnight.
7. The employees are placed on the midnight to noon shift of the snow event schedule on a voluntary basis prior to the snow season.
8. During December of 2009, the Employees regularly worked Monday through Friday, 8 a.m. to 4 p.m. on their normal schedule. However, all had also volunteered to work the midnight to noon shift on the snow event schedule.
9. On Thursday, December 3 and Friday, December 4, the City's staff was in frequent contact with the National Weather Service (NWS) regarding weather predictions for the upcoming weekend.
10. At the end of the day shift on Friday, December 4, there was no indication that extra people were needed on staff because the NWS told the City that they had "nonexistent weather conditions coming in through the weekend with a chance of some weather maybe on Sunday." Therefore, the Employees who worked 8 a.m. to 4 p.m. on Friday were allowed to go home without notification that they were going to be called in later in the week.
11. A schedule change was not posted by the City before the Employees left work on Friday.
12. The NWS told the City on Saturday, December 5, that there was some potential of snow coming in on Sunday, December 6.
13. On Sunday, December 6, the NWS told the City that a front coming through Sioux Falls was building and the City was going to get some snow Sunday afternoon. Because of that prediction, the City had a crew come in to work on Sunday afternoon to sand and plow snow off the streets. Those employees are not involved in this grievance.

14. On Sunday, December 6, the City called the NWS four times regarding the snow front. At one point the NWS told the City that this snow event was going to be “a small event.” However, once the snow front got over Sioux Falls, it stalled and the snow kept falling.
15. After talking with the NWS at 10:13 p.m. on Sunday, December 6, the City made the decision to bring in the employees on the midnight to noon shift of the snow event schedule to work snow removal.
16. The City began calling those employees on the midnight to noon shift of the snow event schedule, at 10:20 p.m. and ending at 10:39 p.m. The Employees were told to report at midnight on Monday, December 7; they were not told to report “as soon as possible.” The Employees were free to decline working the midnight to noon shift had they not wanted to work when the City called them.
17. At the time the Employees were called, the streets were open and relatively free of snow. However, snow and ice would have built up on the streets had the Employees not been called in to work the midnight shift.
18. The need for the City to call in the midnight snow event crew is not an unusual situation and has happened frequently over the years.
19. On December 16, 2009, Grievant filed a group grievance with the City Public Works Department, alleging a violation of Article 11 of the Agreement between the City and Grievant, in effect January 2007 through December 31, 2009 (Negotiated Agreement). The City, through Director of Public Works, Mark Cotter, denied the grievance on December 23, 2009.
20. Grievant then appealed Cotter’s denial to then Mayor Dave Munson on December 30, 2009, pursuant to the grievance procedures set out in Article 6 of the Negotiated Agreement. Mayor Munson reviewed Grievant’s appeal and denied the grievance on January 21, 2010.
21. Grievant’s Executive Director subsequently appealed the denial of the grievance to the South Dakota Department of Labor, Division of Labor & Management (Department), on February 16, 2010. On March 5, 2010, the City filed its Answer to Grievant’s Petition for Hearing on Grievance.
22. Relevant portions of the Negotiated Agreement will be set forth in the analysis below.

## **Analysis**

### **Grievance:**

In this case, the analysis begins with the statutory definition of “grievance”. SDCL 3-18-1.1 states:

SDCL 3-18-1. The term “grievance” as used in this chapter means 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.

The Department’s role in grievance cases is set forth in SDCL 3-18-15.2. That statute states in part:

If, after following the grievance procedure enacted by the governing body, the grievance remains unresolved . . . it may be appealed to the Department of Labor. The 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.

SDCL 3-18-15.2. In this case, the Department must ultimately determine whether the City violated, misinterpreted or inequitably applied the provisions of the Negotiated Agreement. The burden of proof falls on Grievant. Rininger v. Bennett County School District, 468 NW2d 423 (SD 1991).

### **Negotiated Agreement:**

In this case, the Negotiated Agreement is a collective bargaining agreement. “Trade agreements or collective bargaining agreements are contracts under South Dakota law.” Hanson v. Vermillion Sch. Dist., 727 N.W.2d 459, 467 (S.D. 2007). Disputes over collective bargaining agreements are to be settled by general contract principles. Id. at 468.

Under South Dakota contract law is clear that extrinsic evidence such as past practice is only considered when contract language is ambiguous and does not speak to a subject it would normally be expected to. AFSCME Local 1922 v. State of South Dakota et al., 444 N.W.2d 10, 12 (S.D. 1989). “It is a fundamental rule of contract interpretation that the entire contract and all its provisions must be given meaning if that can be accomplished consistently and reasonably.” Prunty Const., Inc. v. City of Canistota, 682 N.W.2d 749, 756 (S.D. 2004). “We must give ‘effect to the language of the entire

contract and particular words and phrases are not interpreted in isolation.” Lillibridge v. Meade Sch. Dist. #46-1, 746 N.W.2d 428, 432 (S.D. 2008) (quoting In re Dissolution of Midnight Star, 724 N.W.2d 334, 337 (S.D. 2006)). The language contained within the Negotiated Agreement in this case is not ambiguous.

Here, the Department must next determine whether the City had the authority to alter the normal work schedule on the evening of December 6, 2009. Article 32 of the Negotiated Agreement reflects the general principal that control that question. That article provides in pertinent part:

**Section 1.** Except to the extent expressly modified by a specific provision of this agreement, the City of Sioux Falls reserves and retains solely and exclusively all of its statutory and common law rights to manage the operation of the City of Sioux Falls, South Dakota, as such rights existed prior to the execution of this agreement with the MEA/AFSCME including, but not limited to:

- A. The right to operate and manage all manpower, facilities and equipment;
- C. To determine work assignments and work schedules, locations, or functions in accordance with municipal and departmental needs;
- H. To determine the utilization of technology and manpower and to modify organizational structures; to select, direct, and determine the number of personnel engaged in total functions or any particular part thereof;

(emphasis added). This section reflects the premise that the City has the authority to manage its manpower resources, which include creating and changing work schedules. Article 8, of the Negotiated Agreement deals more specifically with the City’s scheduling powers. That article provides in part:

**Section 1. Department Schedules**

- B. Work schedules shall be established by the City. Daily and weekly work schedules, having regular starting and quitting times, may be permanently or temporarily changed by the City to suit varying business conditions and will be posted at least five working days in advance, unless doing so is not feasible due to exigent circumstances. “Exigent circumstances” is defined as situations that demand unusual or immediate action.

**Section 2. Workweek**

- B. A regular work week shall consist of either four (4) consecutive ten (10) hour days or five (5) consecutive eight (8) hour days totaling forty (40) hours, except upon mutual consent of the employee and employer. This does not restrict management from implementing temporary modifications to the regular work week to meet emergency or urgent business needs

except that an “emergency call-in” as defined in Article 11, Section 2 of this agreement, shall be governed by that Article and Section. Except for weather-related needs, a shift change pursuant to this section may only be accomplished upon 24 hours’ notice.

### **Section 3. Workday**

- A. The regular workday shall consist of eight (8) hours of work within nine (9) consecutive hours or ten (10) hours of work within eleven (11) consecutive hours in a calendar day. This does not restrict management from implementing temporary modifications to the regular workday to meet emergency or urgent business needs.

(emphasis added).

The emphasized portions of these provisions make clear that the City has the authority to alter work schedules on very short notice when weather conditions dictate. Grievant argues on one hand that the Employees are entitled to emergency call in pay for those hours worked on December 7. On the other, it argues that the conditions were not urgent enough for the City to alter the work schedule. It cannot have it both ways. Anyone who has lived in South Dakota for any length of time understands that the threat of heavy accumulations of snow and ice on the roads and streets constitutes an urgent or exigent situation. Therefore, the City had the authority to implement the snow event schedule after talking with the NWS at 10:13 p.m. on December 6, 2009.

Snowfall in South Dakota is a common occurrence. It only seems prudent for the City to prepare work schedules which allow it to deal with that snow in the most efficient manner possible. Article 8 of the Negotiated Agreement clearly intended to accommodate schedule changes during these types of events.

The next question to be answered is whether the Negotiated Agreement required emergency call in pay for those hours worked by the Employees beginning at midnight on December 7, 2009. Article 11, Section 2 of the Negotiated Agreement defines an “emergency call in”. That section states in part:

An “emergency call-in” is a requirement to report to work on a nonscheduled day or during nonscheduled hours to work an unspecified period of time provided the employee is requested to report to work as soon as possible after receiving the request.

(emphasis added).

The calls made on December 6, 2009 did not constitute an emergency call in. First, the City did not require the Employees to report to work at midnight on December 7. They originally volunteered to be on the midnight to noon shift of the snow event schedule

and they again had the opportunity to turn down the City's request when they were called on December 6. Second, they were not asked to work unscheduled hours. The snow event schedule was known and understood by everyone, and was properly implemented. Third, the Employees were not required to work an unspecified period of time. The snow event schedule was specified as midnight to noon. Finally, the employees were not required to report "as soon as possible." They were told to report at midnight which was the regular start time on the snow event schedule. Under these circumstances, the Employees were not entitled to emergency call in pay. The Department would be required to ignore much of the language contained in Article 11, Section 2 of the Negotiated Agreement in order to find this situation an emergency call in.

Grievant argues that adoption of the City's position would allow the City to manipulate every situation into one where emergency call in pay need not be paid. The Department disagrees. The example given by the City is appropriate. In the event of a water main break, the need for repair is immediate and the length of time needed to repair it does not conform to any implemented work schedule. In this situation, emergency call in pay would be required.

**Conclusion:**

In accordance with the discussion above, the City did not violate, misinterpret or inequitably apply the terms of the Negotiated Agreement when it did not provide emergency call in pay to Employees for snow removal work done on December 7, 2009. Grievant's petition is denied and the matter dismissed. The City shall submit proposed Findings of Fact and Conclusions of Law, and an Order consistent with this Decision within twenty (20) days from the date of receipt of this Decision. Grievant shall have twenty (20) days from the date of receipt of City's Proposed Findings of Fact and Conclusions to submit objections thereto or to submit Proposed Findings and Conclusions. The parties may stipulate to a waiver of Findings of Fact and Conclusions of Law and if they do so, City shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 5th day of November, 2010.

SOUTH DAKOTA DEPARTMENT OF LABOR

          /s/ Donald W. Hageman            
Donald W. Hageman  
Administrative Law Judge