August 1, 2018

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LETTER DECISION AND ORDER

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HF No. 11G, 2016/17 – B. Lynn Gordon v. South Dakota State University and the South Dakota Board of Regents

Dear Counsel:

Pursuant to the Department's previous order dated June 8, 2018, the Grievant submitted evidence of a calculation of damages from Respondent's violation of the negotiated agreement (Agreement). Respondent then submitted objections to Grievant's calculation. The Department held a telephonic hearing on the matter Tuesday, July 24, 2018.

QUESTIONS PRESENTED

IS GRIEVANT ENTITLED TO THE COST OF HEALTH INSURANCE AND MATCHING RETIREMENT CONTRIBUTION AS PART OF AN AWARD OF DAMAGES?

DID GRIEVANT PROPERLY MITIGATE HER DAMAGES?

ANALYSIS

ISSUE I: IS GRIEVANT ENTITLED TO THE COST OF HEALTH INSURANCE AND MATCHING RETIREMENT CONTRIBUTION AS PART OF AN AWARD OF DAMAGES?

For violation of the Agreement, Grievant asserts the value of her damages to be $81,020.40 based on the following:

Salary from 2017/18 contract-	$67,925.64
Six percent matching retirement-	$4,075.54
2.1 percent cost of living adjustment (COLA)-	$1,512.02
Cost to maintain COBRA health insurance-	$7,507.20

Respondent counters that Grievant is entitled only to salary under the 2017/18 contract. Respondent puts forth two arguments to support this contention. First, Respondent points to section 9.6(5) of the agreement, which provides:

> If the administration is late in providing the final written notice stipulated in ¶ 3 above, the faculty unit member will be entitled to receive, at the election of the administration, either (1) an additional term contract for the following academic year, or (2) a payment equal to the base salary for the current academic year.

The Department finds that this section is inapplicable to this case. Respondent did not provide late notice to Grievant but rather violated the Agreement by not renewing Grievant's contract without a proper corrective plan. Had Grievant been given another contract for the 2017/18 academic year, on top of her salary, she would have been entitled to matching retirement and health benefits.

Second, Respondent cites *Bad Wound v. Lakota Cmty Homes*, 1999 SD 165, to support its argument that Grievant is only entitled to salary. *Bad Wound* involved a

plaintiff that sued his former employer for breach of an employment contract. Among the remedies sought by the plaintiff was an amount based on his entire work life expectancy and not simply the amount due to him in his employment contract. The Court rejected plaintiff's argument and instead limited his recovery to his salary under the employment contract stating, "it is 'well settled that the only damages which may be recovered by an employee who has been wrongfully discharged is the balance of the salary due under the employment contract less any sums the employee was able to earn during the remainder of the contract period.'" *Id*, at ¶ 12.

However, *Bad Wound* is distinguishable from this case. The issue of whether other benefits were also payable was not raised. Therefore, the Court's proclamation does not stand for the proposition that only salary is awardable for a breach of an employment contract. To the contrary, the Court's decision suggests that such benefits are indeed recoverable for a breach of contract:

> This Court has often stated that "[i]n an action for breach of contract, the plaintiff is entitled to recover all his detriment proximately caused by the breach, not exceeding the amount he would have gained by full performance… The ultimate goal in awarding damages for breach of contract is to "place the injured party in the position he or she would have occupied if the contract had been performed." *Id., at* ¶ 9 (internal quotations omitted).

Grievant is entitled to recover the value of matching retirement and health insurance costs. However, since faculty were not given a COLA for 2017/18, Grievant's 2.1 percent adjustment will not be calculated in her award.

ISSUE II: DID GRIEVANT PROPERLY MITIGATE HER DAMAGES?

Under South Dakota law, "the duty to mitigate damage caused by a breach of contract is an 'active duty of making reasonable exertion to render the injury as light as possible.'" *Arrowhead Ridge I, LLC v. Cold Stone Creamery, Inc.,* 2011 S.D. 38, ¶ 16, 800 N.W.2d. Additionally, "[t]he breaching party has the burden of proving damages would have been lessened by the exercise of reasonable diligence on the part of the non-breaching party. *Ducheneaux v. Miller*, 488 N.W.2d 902, 918 (S.D. 1992)(citing *Hepper v. Triple U Enterprises, Inc.,* 388 N.W.2d 525, 530 (S.D.1986); *Renner Elevator Co. v. Schuer,* 267 N.W.2d 204, 207 (S.D.1978)).

Grievant earned a total of $5,115.55 during the timeframe covered by the contract. $3,065.55 came from a part-time retail sales position at Scheel's Sports store in Sioux Falls. Claimant also earned $2,050.00 from a company known as SweetPro Feeds. Respondent argues that Grievant could have earned more by working more hours and thus failed to fully mitigate her damages. Grievant counters that during the time in question, she was also searching for other employment. To support this, Grievant submitted a list of twenty positions for which she applied, all of which were in her field of expertise. Because of the highly specialized nature of her field, Grievant's search included positions outside of South Dakota. Grievant also argues that there is no requirement that she work forty hours to prove due diligence in mitigating her damages and that applying for these positions was very time-consuming.

The Department agrees that there is no requirement that Grievant work any set number of hours in order to prove she made a good faith effort to mitigate her damages to the maximum extent possible. Certainly, an extensive job search could justify

Grievant working less than forty hours per week. However, Grievant has not presented sufficient evidence that her job search prevented her from working forty hours per week. Grievant did not specify what was necessary to apply for each job or whether she in fact interviewed for any of them.

Respondent argues that at a minimum, it should be assumed that Grievant could have earned minimum wage at a full-time job during this time period. In the absence of evidence to the contrary, Respondent's argument is not unreasonable. While Grievent's level of education and experience would make her overqualified for a minimum wage position, Respondent is not here arguing Grievant should be charged with earning an amount more fitting her skill set. Respondent has met its burden of proving Grievant did not sufficiently mitigate damages cause by Respondents breach. Under South Dakota law, minimum wage is $8.85 per hour. Assuming Grievant worked forty hours per week, she would have earned $18,408.00 before taxes. That amount shall be credited against the amount of damages due to Grievant for Respondent's breach.

CONCLUSION AND ORDER

The Department finds that Grievant is entitled to the full value of one-year's contract including the cost of matching retirement and the cost expended on health insurance for a total of $79,508.38. Against this amount the Department will credit $18,408.00. Grievant is entitled an award of $61,100.38. Grievant's attorney shall submit Proposed Findings of Fact and Conclusions of Law, and an Order consistent with this Decision within 20 days from the date of receipt of this Decision. Respondent's attorneys shall have 20 days from the date of receipt of Respondent's Proposed

Findings of Fact and Conclusions of Law to submit objections and/or Proposed Findings of Fact and Conclusions of Law. The parties may stipulate to a waiver of Findings of Fact and Conclusions of Law and if they do so, Grievant's attorney shall submit such Stipulation along with an Order in accordance with this Decision.

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION

/s/ Joe Thronson
Joe Thronson
Administrative Law Judge