May 20, 2015

Ms. Anne Plooster
South Dakota Education Association
411 East Capitol Avenue
Pierre, SD 57501

LETTER ORDER

Mr. Michael M. Hickey
Bangs, McCullen, Butler, Foye & Simmons, LLP
PO Box 2670
Rapid City, SD 57709-2670

RE: HF No. 2G, 2014/15 – Rapid City Education Association v. Rapid City Area School District #51-4 and Board of Education

Dear Ms. Plooster and Mr. Hickey:

Petitioner, Rapid City Education Association (RCEA) filed with the South Dakota Department of Labor (Department) a Petition for Hearing on Grievance on September 16, 2014. An Answer to the Petition was filed by Respondents, Rapid City Area School District #51-4 and Board of Education (Board), on October 3, 2014.

Respondents, by and through their attorney, Michael M. Hickey, filed a Motion for Summary Judgment on March 16, 2015. A Response was received from Petitioner on April 8, 2015. The Department has reviewed the Motion, the Response, the accompanying Briefs and Affidavits, and the entirety of the current record in this case.

The parties have negotiated a grievance procedure to be used by members of the bargaining unit represented by RCEA. On July 29, 2014, the Board voted to implement/impose its last best offer pursuant to SDCL 3-18-8.2. On August 20, 2014, RCEA filed a grievance with the Board regarding the Salary and Teacher Classification Schedule, Article XXIV, contained within the imposed contract.

The Grievance moved through the 3 grievance steps at the local level concluding on or about September 12, 2014 when the Board denied the grievance. RCEA filed this Petition for Hearing on Grievance with the Department on September 18, 2014.

The basis of the grievance is that Appendix A of the contract (the compensation schedule) is not in agreement or is consistent with the written explanation in Article XXIV. The history of why it does not match is given by the Respondents in their Motion for Summary Judgment. This history is not disputed by Petitioner.

The Department has jurisdiction to hear the grievance appeals of public employees, under the authority granted by SDCL 3-18-15.2. The Motion for Summary Judgment is brought under SDCL §1-26-18. "Opportunity shall be afforded all parties to respond and present evidence on issues of fact and argument on issues of law or policy. However, each agency, upon the motion of any party, may dispose of any defense or claim: (1) 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 a party is entitled to a judgment as a matter of law."

Respondents have made a Motion for Summary Judgment in that 1) the grievance was not timely filed with the Respondents which deprive the Department of jurisdiction; and 2) that there are no disputed issues of material fact and that Respondents are entitled to judgment as a matter of law. Petitioner answers this Motion arguing that a dispute of fact surrounds whether Respondents properly implemented/imposed the section of the contract at issue. Petitioner, in the alternative, makes a Cross-Motion for Summary Judgment and argues that Petitioner is entitled to judgment as a matter of law.

Petitioner has also made a motion to Strike the Affidavit of Valerie Brablec in Support of Motion for Summary Judgment. Ms. Brablec's Affidavit was offered by Respondents in support of their motion for summary judgment. The argument presented is that the affidavit contains conclusory statements. The statements made by Ms. Brablec do not give legal conclusions, but set out facts as would be admissible in evidence. As every case, I will ultimately determine the facts in this Decision based upon the file and evidence presented. **The Motion to Strike the Affidavit of Valerie Brablec is Denied.**

Timely Filing of the Grievance

"The Department's jurisdiction is lost if the grievance is not timely filed in accordance with grievance procedures." *Cox v. Sioux Falls School Dist*., 94 SDO 279, 514 NW2d 868 (SD 1994)

(quoting *Rininger v. Bennett Co. Sch. Dist.,* 468 NW2d 423, 428 (SD 1991) (citing *Schloe v. Lead-Deadwood Indep. Sch. Dist. No. 106*, 282 NW2d 610, 614 (SD 1979))).

The Grievance procedure set out in the negotiated agreement (as imposed by the Respondents for the 2014/15 school year) requires that initial action must be made within 25 days of the grievable occurrence. There is the Informal level within 25 days, then a Level 1 grievance if the matter is not resolved informally; a level 2 grievance is in front of the Superintendent or designee; the level 3 grievance goes in front of the Board of Education; and a level 4 grievance is this Petition for Hearing to the Department under SDCL 3-18-5.2.

Respondents make the argument that Petitioner's Grievance was brought after 25-day time limit contained within the contract. They argue that if the 7 years of past practice are ignored, that Petitioners knew about the contract language and discrepancy when the last, best offer was presented by Respondents to Petitioner on May 16, 2014; 96 days prior to the filing of the Grievance.

Petitioner makes the argument that the 25-day limit did not start running until Respondents imposed the agreement. The question becomes whether the statute of limitations is based upon the occurrence or upon the date of damage. If the 7 years is ignored, the occurrence for a grievable action occurred 96 days prior to the filing. The alleged damage occurred less than 25 days prior to the filing.

This grievance was brought under the procedures set out in the contract between the parties and in the local policies and procedures. Article XXIX (D)(6), the Grievance Procedure, specifies that "No grievance shall be recognized unless it is presented within twenty-five (25) calendar days after the aggrieved person knew, or should have known, of the act or condition on which the grievance is based." This is an "occurrence" rule and not a "damages" rule. This rule is similar to the general grievance rule set by the Department at ARSD 47:03:04:02. The Administrative Rule is also an "occurrence" rule that limits when a grievance may be brought.

The statute of limitations for a grievance is based upon the occurrence of the alleged grievable action, not when the damages occurred. **Therefore, the Respondents' Motion to Dismiss is granted. Petitioner filed the Petition for Grievance beyond the 25-day deadline required by the contract. The Department is without jurisdiction to hear this case.**

Cross Motions for Summary Judgment

In the alternative, the parties have made cross motions for Summary Judgment. The material facts are not in dispute in this case, and one side is entitled to judgment as a matter of law. Although the Motion to Dismiss is granted, I am also deciding the Alternative Motion for Summary Judgment.

The grievance is based upon Article XXIV Salary and Teacher Classification of the Negotiated Agreement (imposed) and the associated Appendix A Salary Schedule. The language of the Agreement states in pertinent part:

> Article XXIV Salary and Teacher Classification
>
> A. Salary Schedule
>
> 1. The salary schedule shall be in accordance with the attached Appendix "A". All employees covered by this agreement shall be paid in accordance with the provisions of this Appendix.
>
> 2. The lanes of the salary schedule are based upon the specified levels of education. The incremental increases (i.e. steps of the schedule) specified for each lane are equal to five (5.0%) every other year; lanes are four (4.0%).

This language has been present in the annual Negotiated Agreement since the 2005/06 School Year. This language is not in agreement with Appendix A, in that one lane does not increase 4%; the BA to BA +12 lane does not increase 4% but increases only 2.4%. All the other steps increase 5% and the other lanes increase 4%.

The decrease from 4% to 2.4% in the BA to BA+12 lane occurred during salary negotiations for the 2007/08 School Year. The Negotiated Agreement in 2007/08 was agreed upon by the parties and was not imposed. Since that time, the Respondents have paid salaries in accordance with Appendix A and no grievances have been made to Respondents in regards to this language discrepancy. Respondents imposed the contract upon Petitioner in a few of the school years following 07/08, and in some years it did not. For the 2010/11 and 2012/13 School Years, the parties agreed upon the contract including the language contained within Article XXIV (A)(2) and the corresponding discrepancy in Appendix A.

Each year, the salary portion of the agreement is up for negotiations. The discrepancy between Article XXIV (A)(2) and Appendix A was not raised until the spring of 2013, when the Negotiations process began. During the negotiations process, Respondents made the offer to delete or discard Article XXIV (A)(2), however Petitioner indicated they wanted the language kept so Respondents withdrew their proposal. Petitioner wanted to see the changes made to Appendix A instead of changing the language of XXIV(A)(2). So in 2013, both parties indicated that they wanted to keep the language of XXIV (A)(2).

During the negotiations for the 2014/15 School Year, neither side proposed changing the language or the percentages between the steps in the Appendix – particularly BA to BA+12. The language of XXIV (A)(2) remained part of the best and final offer given to Petitioner on May 16, 2014. Petitioner eventually rejected the last offer and the final offer of contract was imposed by Respondents by Board action on July 29, 2014.

Petitioners filed this Grievance Petition in response to comments made at a salary study session led by a committee created by Respondents. Petitioner, after hearing comments from Respondents, presumed that the salary schedule as a whole may be removed the following school year, 2015/16. Due to the uncertainty of the salary schedule as a whole, Petitioner brought this grievance.

In a case like this, seven (7) years of past practice cannot be ignored. Petitioner and Respondents agreed to the short step at BA to BA+12 initially and in a number of contracts that followed. As this deals with contract and contract law, I find persuasive the argument made by Respondents in regards to past practice in contract law. In South Dakota, a teaching contract is treated like other contracts and is governed by general principles of contract law. The South Dakota Supreme Court has written:

> Trade agreements or collective bargaining agreements are contracts under South Dakota law. Contracts negotiated between teachers and public school districts are like any other collective bargaining agreement. Disputes over collective bargaining agreements negotiated between school districts and teachers are settled by application of general contract principles. Disputes over the meaning of terms in teacher contracts are settled by applying general principles of contract law.
>
> When the terms of a negotiated agreement are clear and unambiguous, and the agreement actually addresses the subjects that it is expected to cover,

> there is no need to go beyond the four corners of the contract. When the language of the collective bargaining agreement is ambiguous, we may go outside the four corners of the contract to interpret its meaning.

Hanson v. Vermillion Sch. Dist., 2007 S.D. 9, ¶27-28, 727 N.W.2d 459, 468 (internal cites and quotes omitted).

As the language written in Article XXIV(A)(2) is not followed in Appendix A, the contract language is ambiguous. At least two different meanings may be given to the contract language. "[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 agreement." *Hill City Education Assn. v. Hill City School District 51-2*, 2004 S.D. 47, ¶6, 678 N.W.2d 817, 820 (quoting *Estate of Fisher v. Fisher*, 2002 S.D. 62, ¶12, 645 N.W.2d 841, 845 (citation omitted)." Therefore, past practice is looked at when interpreting the meaning of the contract.

The past practice is that Appendix A, as negotiated by the parties and as specified, was followed by the parties. Teachers and staff were paid the salaries set out in Appendix A. Appendix A followed Article XXIV (A)(2) except for the lane between BA and BA+12. The past practice for 7 years is that this lane was set at approximately 2.4%, not 4%.

Allowing and causing this discrepancy to exist is equivalent to waiver by both sides. The language set forth by Respondents is cited from other jurisdictions, but it would fit in this circumstance. A past practice if "widely acknowledged and mutual accepted[,] can create an amendment to the contract." *Macom County v. AFSCME Council,* 494 Mich. 65, 89 833, N.W.2d 225, 239 (2013); *Port Huron Ed. Assoc. v. Port Huron Sch. Dist*., 452 Mich. 309, 550 N.W.2d 228 (1996).

The Respondents are entitled to Judgment as a Matter of Law, material facts are not in dispute. In this case, looking outside the four corners of the document to seven years of past practice, the ambiguity created by the language in XXIV (A)(2) versus the Appendix A is resolved by upholding the past practice. The language in XXIV(A)(1) pays the teachers according to Appendix A despite the short percentage between the lanes BA to BA+12; XXIV (A)(2) is not followed as concerns the step between the lanes BA to BA+12. The past practice is considered to be part of the contract as the contract is ambiguous.

The Department hereby does Dismiss Petitioner's Petition for Grievance for Lack of Jurisdiction. In the Alternative, the Motion for Summary Judgment is Granted in favor of Respondents.

This letter shall serve as the Department's Order.

Sincerely,

/s/ Catherine Duenwald
Catherine Duenwald
Administrative Law Judge
Division of Labor and Management
Department of Labor and Regulation