

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

**JASON KIRSCH**

**HF No. 3G, 2016/17**

**Petitioners,**

**v.**

**DECISION**

**CAMPBELL COUNTY BOARD  
OF COMMISSIONERS,**

**Respondent.**

This matter came before the Department of Labor and Regulation when Petitioner, Jason Kirsch filed a Petition for Hearing on Grievance on August 9, 2016, pursuant to SDCL 3-18-15.2. The Department conducted a hearing on October 26, 2016, in Selby, South Dakota. Laurie M. Bauer appeared on behalf of Petitioners. Mark K. Kroontje represented the Respondent.

***Issues:***

This case raises the following legal issue:

Whether the Campbell County Board of Commissioners improperly terminated Jason Kirsch's employment.

***Facts:***

The facts of this case are as follows:

1. On July 5, 2016, Jason Kirsch (Kirsch or Petitioner) was served a notice of Termination by the Campbell County Board of Commissioners (Board or Respondent.) The basis for his termination was "the knowing or willful violation of laws pursuant to paragraph 5-1 of the Campbell County Personnel Policy."
2. On July 11, 2016, Kirsch sent a letter to the Board claiming his termination was improper and requesting to discuss the issue further.
3. On July 26, 2016, Kirsch received a letter from Respondent's counsel on behalf of the Board informing him that his grievance had been considered, and the Board had chosen not to reverse his termination. The Board based its decision on the fact that in addition to the charges Kirsch faced for DUI and Assault, he had previously been insubordinate or tardy on multiple occasions.
4. On August 9, 2016, Kirsch filed a petition for grievance with the Department of Labor (Department.)

5. Other facts may be discussed in analysis below.

***Jurisdiction:***

The Department's authority to review grievances is granted by SDCL 3-18-15.2. That provision 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 and Regulation...

SDCL 3-18-15.1.1 (emphasis added).

SDCL 3-18-1.1 defines "grievance" as:

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.

SDCL 3-18-1 defines public employee. That statute states in pertinent part:

The words "public employees" as used in this chapter shall mean any person holding a position by appointment or employment in the government of the State of South Dakota or in the government of any one or more of the political subdivisions thereof, or in the service of the public schools, or in the service of any authority, commission, or board, or any other branch of the public service.

Kirsch's employment by Campbell County places him in the group defined as "public employees." The Campbell County grievance procedure was properly followed, the grievance remained unresolved, and the petition was properly brought before the Department. The Department has jurisdiction over this matter per SDCL 3-18-15.

***Argument:***

Kirsch argues that according to the Campbell County Personnel Policy (Policy), only causes of action that affect on the job performance can be considered for disciplinary action. This argument is supported by the policy handbook which states in pertinent part of section 5-1: Causes for disciplinary action include but are not limited to the following *insofar as they affect on-the-job performance* (emphasis added.) The language of the policy indicates that Campbell County has chosen to limit its

disciplinary procedures to actions that affect on the job performance. Therefore, Kirsch argues that he was improperly terminated, because the cause given for his termination, “the knowing and willful violations of laws,” did not affect his on the job performance. He also argues that the Board did not properly follow procedure by not giving the reasons of tardiness and insubordination until after the Board decided not to reverse his termination.

The Board argues that as Kirsch is an at-will employee not a contractual employee, the Board has the right to terminate his employment at any time for any reason. The Board further argues that by specifically stating that the causes for disciplinary action are “not limited to the following” the list is not exclusive. The Board further argues that section 5-2 of the Policy provided the authority to terminate Kirsch. Section 5-2: *The County Commission may remove or suspend any employee with status at any time* and furnish the employee with a written statement within fifteen days of reasons for dismissal or suspension (emphasis added.)

**Analysis:**

South Dakota has codified the employment-at-will doctrine at SDCL 60-4-4. That provision states “[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. “Employment-at-will “can be terminated by the employee or employer at any time for any reason.” (emphasis added) Peterson v. Sioux Valley Hospital, Assoc., 486 NW2d 516, 520 (SD 1992).

The general rule is that “when there is no contract or specified term of employment...the employment is terminable at the will of the employer under SDCL 60-4-4.” Johnson v. Kreiser’s, Inc., 433 NW2d 225, 227 (SD 1988). However, South Dakota recognizes an exception to the employment-at-will doctrine. That exception is discussed by the Supreme Court in Aberle v. City of Aberdeen, 2006 SD 60, 718 NW2d 615. In that case, the Court stated:

In the context of employment relationships, South Dakota is an employment- at-will state per the provisions of SDCL 60-4-4. Should a contract exist between the employer and the employee, the terms of the contract control over the provision of the statute. Obviously the two parties may, as part of an employment contract, agree that the employee is employed under an at-will term of employment.

*Id.* at ¶ 20, 718 NW2d at 621.

However, an employer may surrender its statutory at-will power via either an express or implied contract. Holland v. FEM Elec. Ass’n, Inc., 2001 SD 143, ¶12, 637 NW2d 717, 720 (citing Butterfield v. Citibank of South Dakota, N.A., 437 NW2d 857, 859 (SD 1989); Osterkamp v. Alkota Mfg., 332 NW2d 275 (SD 1983)). An express surrender occurs when the employer affirmatively indicates such intent by adopting written personnel policies or manuals that explicitly state

that a for-cause termination procedure must be followed. *Id.* (citing *Hollander v. Douglas County, South Dakota*, 2000 SD 159, ¶14, 620 NW2d 181, 185; *Richardson v. East River Elec. Power Co-op, Inc.*, 531 NW2d 23 (SD 1995)). In such instances, an express contract of employment is created that contains specific terms surrendering the statutory at-will power. *Id.* The second manner in which an employer may surrender its statutory at-will power occurs when an employer impliedly creates such a contract. *Id.* When no explicit surrender of the statutory at-will power is made by the employer, but policies or handbooks “[contain] a detailed list of exclusive grounds for employee discipline or discharge and a mandatory or specific procedure which the employer agrees to follow prior to any employee’s termination[,]” an implied contract is created that binds the employer to the for-cause termination procedure. *Id.* (quoting *Hollander*, 2000 SD 159, ¶14, 620 NW2d at 185).

*Id.* at ¶ 21, 718 NW2d at 621-622,

The hallmark of both an implied and an express surrender of the statutory power to terminate employees at will is a clear intention on the part of the employer. *Butterfield*, 437 NW2d at 859. An employer creates a protected property right in continued employment for its employees when it surrenders its statutory at-will power and adopts a discharge policy that provides termination will occur only for cause. *Hollander*, 2000 SD 159, ¶15, 620 NW2d at 185 (citing *Hopkins v. Saunders*, 199 F3d 968, 975 (8thCir 1999) (citing *Spitzmiller v. Hawkins*, 183 F3d 912, 916 (8thCir 1999))). Whether the surrender is made by an express or implied contract, if the employer does not follow proper termination procedures an employee who has been terminated may have a wrongful discharge claim. *Holland*, 2001 SD 143, ¶12, 637 NW2d at 721.

*Id.* at 22. NW2d at 622.

However, the fact that an employment contract is memorialized in writing does not in and of itself constitute a surrender of an employer’s statutory at-will power. *Butterfield*, 437 NW2d at 860 (quoting *Toussaint v. Blue Cross and Blue Shield of Mich.*, 292 NW2d 880, 890 (Mich 1980)). A written employment contract may include both guidelines for employee conduct and behavior and an explicit reservation of the at-will power. *Id.* Such an explicit reservation does not require the use of any specific language, but it must clearly indicate that the employer reserves the right to fire an employee at any time when it deems discharge to be appropriate. *Id.* at 859.

*Id.* at 23, 718 NW2d at 622.

Further, the Court has stated that any exception to the employment-at-will doctrine must be narrowly construed. *Peterson v. Sioux Valley Hospital Assoc.*, 486 NW2d 516, (SD 1992).

In this case, the Department must decide whether the Board intended to surrender its right to terminate at will. To decide this issue, the Department must look to the Policy document itself for guidance as to the intent. Section 5-1 is clear in that the causes for disciplinary action are limited to actions insofar as they affect on the job performance. However, in section 5-2 the Board reserved its right to terminate at will with the clear language, "The County Commission may remove or suspend any employee with status at any time." The inclusion of this language persuades the Department that the Board did not intend to surrender its right to at-will terminations.

***Conclusion***

Considering the above analysis, Kirsch remained an at-will employee and was subject to termination at the discretion of the Board as long as he was provided with the reason for his dismissal within (15) days per section 5-2 of the Policy. Kirsch was informed of the reason and the termination in the same letter dated July 5, 2016. Therefore, Kirsch was properly terminated as an at-will employee by the Campbell County Board of Commissioners.

***Order:***

Kirsch's termination was in compliance with the Campbell County Personnel Policy. Kirsch's petition is dismissed with prejudice. This letter shall constitute the order in this matter.

Sincerely,

*/Michelle Faw/*

Michelle M. Faw

Administrative Law Judge