

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

**AFSCME LOCAL 1031,  
Grievant,**

**HF No. 4 G, 2002/03**

**v.**

**DECISION**

**CITY OF RAPID CITY,  
Respondent.**

This matter comes before the Department of Labor based on AFSCME Local 1031's Petition for Hearing on Grievance filed pursuant to SDCL 3-18-15.2. Grievant is represented by Paul Aylward. The City of Rapid City is represented by Michael Booher. The Department of Labor conducted a hearing on January 14, 2003, in Rapid City, South Dakota. Upon consideration of the live testimony given at hearing, the evidence presented at hearing, and the parties' written submissions, Grievant's Petition for Hearing is hereby denied.

**Issues:**

1. Did the City of Rapid City violate Section 22.08 of the Union Contract by not promoting employees to the same step level as their previous position?
2. Did the City of Rapid City violate Section 22.08 of the Union Contract in its placement of employees on the pay schedule?

**Facts:**

1. AFSCME Local 1031 (AFSCME) is a recognized collective bargaining unit and has a contract with the City of Rapid City (the City).
2. In 2001, AFSCME and the City entered into negotiations for a successor agreement (the contract).
3. The resulting contract became effective January 1, 2002, and is effective through December 31, 2005.
4. As part of the contract, a revised pay scale was adopted and mutually agreed to by AFSCME and the City.
5. Previous contracts between AFSCME and the City provided for six (6) step levels and Grades 1 and Grade 7 through 20, while the new contract via the revised pay schedule provides for placement of employees on Grades 9 through 20, with each Grade having eighteen (18) step levels.
6. The language in the contract governing Step placement when employees are promoted, reclassified, or transferred to a different Grade is Section 22.08.<sup>1</sup>
7. No change in the language of Section 22.08 was negotiated by either party.
8. The language at issue reads in relevant part:

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<sup>1</sup> Section 22.09 in the prior contract.

Upon promotion, transfer, or reclassification, an employee will be advanced to the same step level as the existing position, unless prior to awarding of the job bid the City determines and notifies that the employee will be awarded the job at a different step level. Step level determination by the City shall be commensurate with the employee's skill level and prior experience. Such determination shall be subject to grievance.

9. The City provides sufficient notice upon a determination that the employee will be awarded the job at a different step level. The notice is provided to the employee prior to awarding of the job bid.
10. Before the new pay schedule was adopted, the City had followed the practice of maintaining an employee's step level despite a change in Grade.
11. The new pay schedule set forth in the contract changes the structure of the step levels and Grades and makes the past practice impractical.
12. To apply the new pay schedule along with the past practice could result in subordinates being placed above supervisors on the pay schedule.
13. The City presented AFSCME with a Memorandum of Understanding (MOU) on January 28, 2002, along with its Guidelines for Placing Employees within the Compensation System for Promotion, Transfer, Reclassifications, or Out-of-Class Pay (the Guidelines).
14. AFSCME filed a grievance when the City implemented this MOU and the Guidelines.
15. There is no dispute that AFSCME and the City properly followed all grievance procedures set forth in the contract.
16. As a result of AFSCME's grievance, the City withdrew the MOU and the Guidelines and adopted a form entitled "Statement in Connection with Promotion Prior to Final Bid Award" (Promotion Form).
17. The Promotion Form provides for notice in the event that a promotion will not be to the employee's same step in his/her new grade.
18. AFSCME felt that this form did not resolve the grievance and filed this appeal with the Department of Labor.
19. Since the adoption of the new pay schedule, the City's step level determinations have been commensurate with the employee's skill level and experience.

## **ANALYSIS**

### Grievance defined:

SDCL 3-18-1.1 defines a grievance:

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 resolving a grievance is defined by SDCL 3-18-15.2. SDCL 3-18-15.2 reads, 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.

The burden of proof is on the grievant. Rininger v. Bennett County Sch. Dist., 468 N.W.2d 423 (SD 1991).

AFSCME urges the Department to find that the City's past practice trumps the language of Section 22.08. AFSCME alleges that the City has always promoted to the same step and that that past practice prevents the City from promoting to a different step all the time. This argument must fail. Past practice is only to be considered when contract language is ambiguous. MEA/AFSCME Local 519 v. Sioux Falls, 423 N.W.2d 164, 168 (S.D. 1988). No ambiguity exists in the contract as it relates to step placement.

Even if past practice were to be considered, the application of the past practice to the new pay schedule creates unintended and illogical results. For example, to apply the new pay schedule along with the past practice could result in subordinates being placed above supervisors on the pay schedule. The clear language of Section 22.08 gives the City authority to change an employee's step level, with the proper notice. The City's Promotion Form follows the notice requirements of Section 22.08.

AFSCME has failed to demonstrate that any of the promotions, transfers, and reclassifications since the adoption of the contract have been in violation of Section 22.08. Section 22.08 explicitly allows the City to place an employee at a different step level, provided notice is given. The City's past practice does not create an ambiguity in this language.

Regarding Issue Two, the evidence at hearing presented by AFSCME fails to demonstrate that the City has violated Section 22.08 in step placements by not adequately considering skill level and prior experience in the determination of step level placement. AFSCME specifically argued that the City was limiting all step level determinations to that step level that would allow for the closest to a five- percent increase in pay, yet could not present evidence of this. The evidence presented by the City demonstrates that the City has considered skill level and prior experience in the determination of step level placement. AFSCME has failed to demonstrate that the City has violated Section 22.08 in its placement of employees on the pay schedule in the contract.

The City shall submit proposed Findings of Fact and Conclusions of Law, and an Order consistent with this Decision within ten (10) days from the date of receipt of this Decision. AFSCME shall have ten (10) days from the date of receipt of the City's proposed Findings of Fact and Conclusions to submit objections thereto or to submit its own proposed Findings and Conclusions. The parties may stipulate to a waiver of Findings of Fact and Conclusions of Law and if they do so, the City shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this \_\_\_\_\_ day of July, 2003

SOUTH DAKOTA DEPARTMENT OF LABOR  
DIVISION OF LABOR AND MANAGEMENT

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Heather E. Covey  
Administrative Law Judge