

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

**ANDREW SHIERS,**

**HF No. 4G, 20010/11**

**Petitioner,**

**v.**

**DECISION ON MOTION FOR  
SUMMARY DISPOSITION**

**SOUTH DAKOTA BOARD OF  
REGENTS AND DAKOTA STATE  
UNIVERSITY,**

**Respondents.**

This matter comes before the Department of Labor (Department) based on a Petition for Hearing on Grievance filed pursuant to SDCL 3-18-15.2. Grievant (Grievant) Andrew Shiers represents himself, pro se. Attorney James F. Shekleton represents Respondents, South Dakota Board of Regents and Dakota State University (Respondents). The Petition for Hearing was filed with the Department on September 13, 2010. An Answer to the Petition was filed by Respondents on October 15, 2010. Respondent made a Motion for Summary Disposition of Petition for Hearing on November 2, 2010. Petitioner Responded to the Motion and Respondent filed a Final Reply to the Response. Based upon the evidence submitted with the Pleadings and Briefs and the compiled record, Respondent's Motion for Summary Disposition is granted. Grievant's request for relief is denied.

Grievant initially filed a Grievance with Respondents under the Negotiated Contract between the South Dakota Board of Regents (BOR) and the faculty bargaining unit representative, the Council of Higher Education (COHE), Section VII. A grievance under BOR-COHE is defined as: "an alleged misinterpretation, misapplication or violation of a specific term or provision of this agreement; provided that allegations supporting the claimed grievance assert a specific factual basis for the complaint, that, if proven would establish that an action attributable to the administration deprived the individual employee of a right arising under such term or provision."

The Grievance procedure for Public Employee Unions is found in SDCL Chapters 3-18 and 1-26, and ARSD Article 47:02. SDCL §3-18-1.1 defines “grievance” as follows:

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 §3-18-1.1.

Grievant’s Petition for Hearing alleges that the policies of Respondents violate State and Federal law and that by that violation, Grievant is denied constitutionally protected rights in violation of the BOR-COHE Agreement §§ 3.2(4), 8.5(7), and Appendix E, Section 5. The aggrieved policies are BOR policy 1.25 (3) and DSU policy 01-81-00.

The facts indicate that Grievant properly brought this grievance under the rules set out in the BOR-COHE agreement and in a timely manner. The Department has subject-matter jurisdiction over this grievance, as the Policies in question meet the definition defined by the BOR-COHE agreement and SDCL §3-18-1.1.

### **ISSUE**

Whether the South Dakota Board of Regents, Dakota State University or its agents violated, misinterpreted, or inequitably applied the BOR-COHE agreement by implementing BOR Policy 1.25(3) and DSU Policy 01-81-00 in violation of BOR-COHE agreement §§ 3.2(4), 8.5(7), Appendix E, Section 5, and various state and federal laws?

### **FACTS**

Grievant is an Assistant Professor of Mathematics at Dakota State University (DSU). Grievant holds a concealed weapons permit issued under SDCL §23-7 by the State of South Dakota. Grievant challenges the enforceability against the faculty unit members of BOR Policy

1:25 (3) and DSU Policy No. 01-81-00. The BOR Policy reads, “Possession of firearms or other dangerous weapons on the physical premises of the Regental institutions is prohibited unless authorized by the institutional chief executive officer or designee.” The DSU Policy provides that, subject to certain exceptions, “employees are prohibited from possessing firearms and other items defined as dangerous weapons on institutional premises, including both facilities and grounds.” There is no indication that Grievant has violated either Policy and the Policies have not been enforced against him.

Grievant’s employment with Respondents is subject to the work rules and policies established by Respondents. The BOR-COHE Agreement Article III, Section 3.2(4) includes the management right “to establish reasonable work rules.”

Further facts will be developed in the analysis below.

### **ANALYSIS**

It is not a contested fact that Respondents have the right to make reasonable work rules for the workplace; that provision is found in the BOR-COHE Agreement §3.2.4. What Grievant has contested is the reasonableness of Respondents’ work rules regarding safety in the workplace and the possession of weapons (particularly firearms) on campus. Grievant argues that these policies are unreasonable and deprive him of the due process right to bear arms guaranteed by the United States and South Dakota Constitutions as adopted by the BOR-COHE Agreement §8.5(7). He also argues that South Dakota law SDCL §1-26-6.10 prohibits Respondents from making such rules prohibiting firearms from campus. Both questions raised by Grievant are strictly questions of law. As the South Dakota Supreme Court has written, “the rights and obligations of parties to a contract are determined solely by the contract language, which must be construed according to the plain meaning of its terms. Contract interpretation is a question of law.” *Yarcheski v. Reiner*, 2003 SD 108, ¶24, 669 NW2d 487 (internal citations omitted).

Respondents have properly brought a Motion for Summary Judgment under SDCL § 3-18-15.2(1) based upon argument that the material facts of this case are not in dispute. The law regarding summary judgment in the matter of public employee grievances reads:

If, after following the grievance procedure enacted by the governing body, the grievance remains unresolved, except in cases provided for in § 3-6A-38, it may be appealed to the Department of Labor, if notice of appeal is filed with the department within thirty days after the final decision by the governing body is mailed or delivered to the employee. 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. However, the department, upon the motion of any party, may dispose of any grievance, 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; or
- (2) At the close of the evidence offered by the proponent of the grievance, defense, or claim if it determines that the evidence offered by the proponent of the grievance, defense, or claim is legally insufficient to sustain the grievance, defense, or claim.

Nothing in this section may be interpreted as giving the department power to grant tenure or promotion to a faculty member employed by the Board of Regents.

SDCL §3-18-15.2. Despite Grievant's argument against this motion, he has not specified any facts which are in dispute. The parties have brought forth disputed questions of law, which will be answered herein. Summary Judgment is an entirely appropriate method of coming to a conclusion on the issues in this grievance.

The BOR-COHE Agreement requires that all personnel contracts or appointments shall contain "a statement that the contract is subject to the constitution and laws of the state of South Dakota, policies and regulations of the Board, and the provision of this agreement." Agreement §8.5.7. This section of the Agreement requires that all provisions follow the U.S. and State Constitutions.

The state laws which Grievant allege the policies violate are SDCL §§ 23-7-8.1 and 1-26-6.10. The first of which states "the holder of a permit may carry a concealed pistol anywhere in South Dakota, [except in alcohol establishments]", and the latter states, "No state agency may adopt or promulgate any rule that restricts any right or privilege to carry or possess a pistol in contravention to authority being exercised in accordance with being licensed to carry a concealed pistol pursuant to chapter 23-7." Grievant makes the argument that because he holds a valid

concealed weapons permit, he is allowed to bring a gun “anywhere in South Dakota” unless specifically prohibited by law.

The language expressed in SDCL § 23-7-8.1 only excludes a gun from being brought into an alcohol establishment. The law does not limit, for example, the power of a property owner from prohibiting concealed weapons to be brought onto a property or limit a business owner from prohibiting employees from carrying weapons while at work. This specific exclusion or alcoholic establishments does not, in and of itself, create an automatic right of entrance to all other locations. When interpreting a statute, the Supreme Court has recently written,

The general rule that the express mention of one thing in a statute implies the exclusion of another ‘is merely an auxiliary rule of statutory construction, to be applied with great caution; it is not a rule of substantive law, or a constitutional command. The maxim is not of universal application, or conclusive as to the meaning of a statute; and it does not constitute a formula for construction to be arbitrarily applied.’

*Argo Oil Corp. v. Lathrop*, 76 S.D. 70, 74, 72 N.W.2d 431, 434 (1955) (quoting 82 CJS, Statutes, § 333 b; *Rehurek v. Rapid City*, 65 S.D. 542, 275 N.W. 859 (1937)).

*Tracfone Wireless, Inc. v. S.D. Dept. of Revenue and Regulation*, 2010 S.D. 6, ¶14, 778 N.W.2d 130, 135. Furthermore, “Since statutes must be construed according to their intent, the intent must be determined from the statute as a whole, as well as enactments relating to the same subject. But, in construing statutes together it is presumed that the legislature did not intend an absurd or unreasonable result.” *Dakota Plains Ag Center, LLC v. Smithey*, 2009 S.D. 78, §47, 772 N.W.2d 170, 186. In other words, the statute does not require all South Dakota landowners or business owners to allow gun permit holders entrance with weapons onto their property, just because the location is not excluded in SDCL §23-7-8.1. Such a result would be absurd and unreasonable. Therefore, SDCL §23-7-8.1 does not give a blanket allowance for gun permit holders to bring a gun wherever they so choose in South Dakota, absent a specific prohibiting statute. The policies in question limit valid gun owners from bringing a gun onto campus of DSU and prohibit employees of DSU from carrying weapons on campus. Although not a private institution, DSU and BOR are responsible for the safety of the residents and visitors to the campus and have the duty to implement reasonable work rules and rules for the campus in general. Respondents’ policies do not violate SDCL §23-7-8.1.

Similarly, SDCL §1-26-6.10 deals with the promulgation of “rules” by state agencies. The statutory meaning of “rules” in this case is the Administrative Rules of South Dakota (ARSD) as defined by SDCL §1-26-1(8):

"Rule," each agency statement of general applicability that implements, interprets, or prescribes law, policy, procedure, or practice requirements of any agency. The term includes the amendment or repeal of a prior rule, but does not include:

- (a) Statements concerning only the internal management of an agency and not affecting private rights or procedure available to the public;
- (b) Declaratory rules issued pursuant to § 1-26-15;
- (c) Official opinions issued by the attorney general pursuant to § 1-11-1;
- (d) Executive orders issued by the Governor;
- (e) Student matters under the jurisdiction of the board of regents;
- (f) Actions of the railroad board pursuant to § 1-44-28;
- (g) Inmate disciplinary matters as defined in § 1-15-20;
- (h) Internal control procedures adopted by the gaming commission pursuant to § 42-7B-25.1; and
- (i) Policies governing specific state fair premiums, awards, entry and exhibit requirements adopted by the state fair commission pursuant to § 1-21-10.

SDCL §1-26-1(8). The Respondents policies specifically deal with “student matters under the jurisdiction of the board of regents” (subsection e) and are “statements concerning only the internal management of an agency and not affecting private rights or procedure available to the public” (subsection a). BOR Policy 1:25(3) deals with student matters under the jurisdiction of the board of regents (security of the campus and students) and DSU Policy 01-81-00 only affects employees of DSU and not the general public.

The work policies implemented by the Board of Regents are not “rules” as defined by statute and therefore Respondents did not violate SDCL §1-26-6.10 by the adoption of the policies. The statutory definition of a “rule” is clearly set out in §1-26-1(8). As the Supreme Court ruled in *Rotenberger v. Burghduff*:

Statutes are to be construed to give effect to each statute and so as to have them exist in harmony. It is a fundamental rule of statutory construction that the intention of the law is to be primarily ascertained from the language expressed in the statute... . “We give words their plain meaning and effect, and read statutes as a whole, as well as enactments relating to the same subject.

*Rotenberger v. Burghduff*, 2007 S.D 7, ¶8, 727 N.W.2d 291, 294 (additional and internal citations omitted).

Another argument advanced by Grievant is that Respondents policies violate the U.S. and South Dakota Constitutions' Right to Bear Arms. This is found in the U.S. Constitution at Article II of the Bill of Rights, as well as in Article VI, Section 24 of the South Dakota Constitution. For guidance, the Department turns to the most recent cases involving the Right to Bear Arms, issued by the U.S. Supreme Court. In the case of *District of Columbia v. Heller*, 554 U.S. 290, 128 S. Ct. 2783, 171 L.Ed. 2d 637 (2008), Justice Scalia opining for the majority, wrote:

Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. ...For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues. ... nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

*Heller*, 128 S. Ct. 2783 at 2816-2817 (internal citations omitted) (emphasis added). This opinion was reiterated and upheld by the Supreme Court in *McDonald v. City of Chicago*, 130 S. Ct. 48, 561 US 3025, 174 L. Ed. 2d 632 (2010), at p. 3047 (plurality opinion by J. Alito).

The policies adopted by Respondents do not restrict any right of Grievant to carry legal firearms, pursuant to his concealed weapons permit. The policies only restrict the locations which Grievant may carry his concealed weapons or firearms. These locations are under the jurisdiction of Respondents.

The BOR-DSU policies meet the test of constitutionality under the U.S. and S.D. constitutions. The Policies are not unconstitutional and do not violate state law.

The final question brought forward by Grievant is whether the policies are “reasonable” as required by BOR-COHE Agreement §3.2(4). Respondents have given valid reasons for the

implementation of the policies, both in the hearings below and in the submissions to the Department. Grievant has also articulated reasons for his position. However, as the Policies do not violate protected constitutional rights of Grievant nor do they violate state statute, and there is a legitimate, articulated purpose by Respondents for the policies, the policies are reasonable.

Therefore, the policies do not violate BOR-COHE Agreement §§3.2(4) and 8.5(7). There are no material facts at issue and the questions of law are found in favor of Respondents.

Respondents 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 (10) days from the date of receipt of Respondents' proposed Findings of Fact and Conclusions of Law to submit objections thereto or to submit 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, Respondents shall submit such stipulation along with an Order in accordance with this Decision.

Dated this 15<sup>th</sup> day of December, 2010.

SOUTH DAKOTA DEPARTMENT OF LABOR

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s/Catherine Duenwald/  
Catherine Duenwald  
Administrative Law Judge