

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

**INTERNATIONAL UNION OF
OPERATING ENGINEERS, LOCAL 49,
ON BEHALF OF TOBY HANES,**

HF No. 2 U, 2013/14

Petitioner,

v.

DECISION

CITY OF EDGEMONT,

Respondent.

Petitioner, International Union of Operating Engineers, Local 49, on behalf of Union Member Toby Hanes, filed a Petition for Hearing on Unfair Labor Practice with the Department of Labor against the City of Edgemont. A Hearing was held on August 19, 2014 at the U.S. Federal Building in Rapid City, South Dakota pursuant to SDCL 3-18-3.3 and ARSD 47:02:03:04. Attorney Mr. Todd A. Love appeared as counsel for the Union. Attorney Mr. Donald P. Knudsen appeared as counsel for the City of Edgemont. Testifying at hearing were witnesses: Mr. Tobias Hanes, Mr. Scott Niles, Ms. Rheta Reagan, Mr. Mike Koopman, and Mr. Carl Shaw.

ISSUE

Whether the City violated SDCL §3-18-3.1 when not affording a grievance procedure to Mr. Toby Hanes when he separated from employment with the City?

STATUTORY REFERENCES

Local files their complaint pursuant to SDCL 3-18-3.1. This statute reads:

It shall be an unfair practice for a public employer to:

- (1) Interfere with, restrain or coerce employees in the exercise of rights guaranteed by law;
- (2) Dominate, interfere or assist in the formation or administration of any employee organization, or contribute financial or other support to it; provided, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

- (3) Discriminate in regard to hire or tenure or employment or any term or condition of employment to encourage or discourage membership in any employee organization;
- (4) Discharge or otherwise discriminate against an employee because he has filed a complaint, affidavit, petition, or given any information or testimony under this chapter;
- (5) Refuse to negotiate collectively in good faith with a formal representative; and
- (6) Fail or refuse to comply with any provision of this chapter.

SDCL §3-18-3.1.

FACTS

1. The Union and City are parties to a collective bargaining agreement (CBA) effective January 1, 2011 through December 31, 2013. Contained within the CBA is a grievance procedure. This procedure is not available to employees who resign their employment voluntarily.
2. The parties also utilize a City of Edgemont Personnel Manual, dated 2010.
3. The Personnel Manual Section 9.1.6 reads: "Except as where protected activity, employees who voluntarily terminate their employment will have any outstanding or unresolved grievances immediately dismissed."
4. The Personnel Manual Section 8.2.1 reads: "A municipal employee may resign from municipal service by giving his/her supervisor written notice of his/her resignation. Said resignation is requested at least two weeks in advance of their leaving municipal service. In extenuating circumstances, the mayor may accept the employee's resignation as taking affect [sic] immediately."
5. Toby Hanes, was employed by the City, and worked in the City's shop. His supervisor was his father, Les Hanes.
6. On the morning of November 18, 2013, while at work, Les Hanes and another employee had an argument. Toby overheard the argument and interjected himself into the argument.
7. The argument escalated and the other employee threatened Toby. To prevent the verbal argument from turning into a physical altercation, Les told Toby to leave the shop and go home.
8. Instead of going home, Toby drove to the City Hall to confront the mayor, Karl Shaw. Mayor Shaw was not in the office, so Toby spoke with the Billing Clerk whose desk is outside the Mayor's office. The City Engineer was also in the room.

9. Toby threw his work keys onto the Billing Clerk's desk and told anyone within hearing that the City employees should tell that "piece of shit Mayor" that he was not coming back to work at the City and that he was "done with the City."
10. The Billing Clerk, City Engineer, and the Mayor believed Toby's intention was to voluntarily quit his employment with the City. Toby was visibly upset during this interaction at City Hall.
11. The Mayor consulted with the city's legal counsel and decided that extenuating circumstances existed. He prepared a letter accepting Toby's resignation and had it delivered to Toby at his home address later that afternoon.
12. Later that same morning, Les Hanes, Toby's supervisor, went to City Hall and retrieved Toby's keys. Les informed the Billing Clerk that Toby was taking a sick day, that day.
13. Les informed the Mayor that it was not Toby's intention to quit that day; that he was just upset about a situation.
14. At the next meeting of the City Commission, the Mayor made the motion to accept the resignation of Toby Hanes. The City Commission voted in favor of the motion.
15. Toby Hanes spoke in open session to the City Commission. He apologized for his behavior and let them know it was not his intention of resigning his job.
16. The Union prepared a letter to the Mayor stating Toby's resignation was a misunderstanding and that there was no intent to resign.
17. The City Attorney informed the Union that because Toby had voluntarily resigned, there was no grievance procedure available to him.
18. In response, the Union filed this Petition for Unfair Labor Practice.

Other facts will be developed as necessary.

ANALYSIS

Whether the City violated SDCL §3-18-3.1 when not affording a grievance procedure to Mr. Toby Hanes when he separated from employment with the City?

The City Personnel Manual specifically has a provision that allows an employee to resign by contacting the mayor. The mayor may accept that resignation in "extenuating circumstances." That is exactly what Claimant did in this situation. Mr. Toby Hanes was upset and moments later rethought his actions, and obviously regretted what he had done. However, by the time Mr. Hanes apologized to the Mayor for his actions and informed the Mayor he was not intending to quit, the Mayor had already accepted his resignation by

letter and had it delivered to him. The Mayor was within his rights, according to the Personnel Manual, to accept Mr. Hanes verbal resignation without a written resignation and without the rights associated with a formal discharge.

Both the Mayor and the City Attorney believed there to be extenuating circumstances where an immediate acceptance of the resignation was appropriate. Mr. Hanes was visibly upset with the mayor to the point of throwing keys and flinging curses in the front office of City Hall. Although the mayor could have ignored Mr. Hanes outburst, he chose to accept Mr. Hanes' words on their face.

When a person resigns from the City, he no longer has the right to present a grievance. The CBA, the Personnel Manual, and state law only allow grievances to current employees of a public agency. Once an employee has resigned, he no longer has the right to grieve under SDCL Chapter 3-18.

A Union may file an unfair labor practice against a former employer under 3-18-3.1 on behalf of an employee, which is how this case is before the Department. However, the Union has not shown how the City has violated any of the practices contained within the statutory "laundry list" of 3-18-3.1. The Union makes the argument that the City's refusal to allow Mr. Hanes the right to grieve under the CBA is a violation of the ULP statute.

The City did not commit an Unfair Labor Practice by accepting Mr. Hanes resignation. Mr. Hanes resigned on November 18, 2013. He "took it back" after cooling off, but he did resign. Both the Mayor and the City Council met with Mr. Hanes and heard his reasoning and his wish to remain with the City. The City Council decided to accept his resignation and not reinstate him to his position. There was no disparate action by the City due to Mr. Hanes actions with the Union and all procedures were followed by the City. Accepting a resignation without a grievance procedure is not a ULP.

The Union's Petition for Hearing on Unfair Labor Practice is Denied.

Counsel for City shall submit proposed Findings of Fact and Conclusions of Law, and an Order, consistent with this Decision, within 10 days of the receipt of this Decision. The Union shall have 10 days from the date of receipt of City's proposed Findings of Fact and Conclusions of Law to submit objections or submit proposed Findings of Fact and Conclusions of Law. The parties may stipulate to a waiver of formal Findings of Fact and Conclusions of Law. If they do so, counsel for City shall submit such stipulation together with an Order consistent with this Decision.

DONE at Pierre, Hughes County, South Dakota, this ____ day of March, 2015.

SOUTH DAKOTA DEPARTMENT OF LABOR
AND REGULATION

Catherine Duenwald
Administrative Law Judge