SOUTH DAKOTA DEPARTMENT OF LABOR

DIVISION OF LABOR & MANAGEMENT

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS LOCAL 1040,
Petitioner,

vs.

CITY OF RAPID CITY,
Respondent.

HF Nos. 4U, 2009/10
22G, 2009/10

DECISION and ORDER ON MOTIONS FOR SUMMARY JUDGMENT

The Petitioner, International Association of Firefighters Local 1040, filed a Petition of Unfair Labor Practice, pursuant to SDCL §§ 3-18-2 and 3-18-3.1 and a Grievance, pursuant to SDCL §§ 3-18-1.1, and 3-18-15.2. The Parties have filed cross motions for Summary Judgment pursuant to SDCL 1-26-18(1).

At issue is whether Respondent failed to follow a Memorandum of Understanding (MOU) attached to the collective bargaining agreement (CBA) in effect from 2006 through 2009. Petitioner argues that the rationale of Respondent to Petitioner's salary proposal is not valid or controlling under the law and that Respondent did not bargain in good-faith. Furthermore, under the Grievance, Petitioner argues that Respondent violated a contract between the parties as it applies to a condition of employment. Respondent makes the argument that the rationale presented was legitimate and that they bargained in good-faith. Furthermore, Respondent argues that they were under no obligation to implement the Study contemplated in the MOU or make the Study part of the 2010 CBA.

The Parties have agreed there are no facts at issue in this combined matter and that a party is entitled to judgment as a matter of law. SDCL §1-26-18(1). The Petitioner and Respondent have filed Statements of Undisputed Material Facts. The Stipulated Facts are set out in full below.

1. The City of Rapid City and the IAFF Local 1040 engaged in collective bargaining beginning on July 6, 2009. These negotiations were a successor to the CBA in effect dated for the period 2006 through 2009.

2. The April 3, 2006, Memorandum of Understanding is an essential part of the 2006 CBA.

3. The City terminated the 2006 CBA by serving notice of termination on the Union on October 28, 2009. The 2006 CBA was terminated as of December 31, 2009.

4. The parties had extensive discussions regarding the salary issue at the collective bargaining sessions on July 27, 2009, August 13, 2009, September 10, 2009, and October 28, 2009.

5. At each of these sessions where the issues of salary were discussed in earnest, the City clearly stated its rationale for the positions it took regarding salary. These statements of rationale are reflected in the minutes of the collective bargaining sessions.

6. In a letter dated January 15, 2010, the City's positions regarding the salary issue was reiterated to the Union's attorney.

7. In a letter dated April 6, 2010, the City Attorney again reiterated the City's rationale for rejecting the Union's latest proposal on the salary issue.

Further Findings of Fact not stipulated to by the parties, but as found by the Department as material and undisputed, are as follows:

8. The MOU found in the 2006 agreement is as follows:

> In 2009, a new contract will be negotiated. Prior to the beginning of the negotiation process, a compensation study shall be conducted, provided that the Common Council appropriates funds for that purpose. The result of the wage and benefit survey would be used as a basis for negotiations for the contract year beginning in 2010.

9. Respondent, through the Common Council, paid for a compensation to be performed, as referred to in the MOU. The Study is commonly known as the "Condrey Study" as the study was performed by Condrey & Associates. The Condrey Study was completed in January 2009. No competing or alternative wage studies were performed.

10. Petitioner brought a copy of the Condrey Study to the first negotiating session for the 2010 negotiated agreement.

11. Respondent informed Petitioner, at the beginning of negotiations, that the Condrey Study would not be used as a basis for setting wages in the agreement to be negotiated.

12. On August 13, 2009, Petitioner and Respondent had a lengthy negotiation session regarding salary at which Petitioner presented the Condrey Study. Respondent rejected the Study due to the cost of implementation.

13. On January 15, 2010, Respondent wrote to Petitioner that Petitioner's request for full implementation of the Condrey Study over a course of four years is rejected by Respondent. Respondent wrote, "Nothing in the former contract requires the City to make any particular offer to the Union. Rather, the City was required to have the Study done and to make use of it during the collective bargaining process. This is exactly what happened. The City is of the opinion that it is financially unable to implement the Condrey recommendations at this time and for the foreseeable future."

14. Respondent's initial and final salary proposals did not refer to the Condrey Study. Respondent's initial and imposed salary proposal based Petitioner salaries upon Respondent's sales tax receipts.

ANALYSIS

Petitioner files their unfair labor practice 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.

As well, Petitioner has filed a grievance under SDCL §3-18-1.1, which reads:

> 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.

In an earlier action in these files, the Respondent filed a Motion to Dismiss both actions, based upon the timeliness of the underlying grievance and unfair labor practice. The Motions to Dismiss were denied on August 3, 2010, by Letter Order of the Department. The Letter Orders and the reasons contained therein are incorporated fully in this Decision. To reiterate the Letter Orders, the basis of the denial is that the MOU survives the contract until the end of negotiations, as the MOU specifically referred to the negotiations process and the resulting negotiated agreement. Both parties signed off on the MOU. The MOU is a contract attached by reference and convenience but separate to the 2006-2009 Negotiated Agreement.

The MOU, as a contract between the parties, did not cease or die at the end of the Negotiated Agreement term, as the MOU specifically sets out the “basis for negotiations” for the 2010 Agreement. The Parties were contractually bound to follow the existing MOU.

The South Dakota Supreme Court wrote, in *Bon Homme Co. Com. v. AFSCME*,

> Where a public employer fails "to negotiate collectively in good faith," that employer commits an unfair labor practice. SDCL 3-18-3.1(5) (1973) (emphasis added). SDCL 3-18-2 provides in part:
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> > The negotiations by the governmental agency or its designated representatives and the employee organization or its designated representative shall be conducted in good faith. Such obligation does not compel either party to agree to a proposal or require the making of a concession but *shall require a statement of rationale for any position taken* by either party in negotiations.
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> Id. (emphasis added). Good faith negotiation requires that where a party refuses to agree to a proposal or make a concession, that party is required to provide a "statement of rationale." We do not interpret this requirement as permitting any reason to suffice. To do so would render the language meaningless, and our method of statutory interpretation requires that we find a meaningful understanding of a statute where possible. See *Rapid City Educ. Ass'n, 522 N.W.2d at 498.* Here, the statute sets forth a requirement that parties to negotiations who neither agree nor concede to a proposal must present a *legitimate and specific rationale* for their positions.

Bon Homme Co. Com. v. AFSCME, 2005 SD 76, ¶22, 699 NW2d 441, 451-452 (emphasis added). The *Bon Homme County* case specifically rejected the rationale given by both Bon Homme and Kingsbury Counties in contract negotiations with their employees. The rationale for a contract provision was found to be "not specific," "nebulous," and "lack[ing] any legitimate or precise rationale for the provisions desired." Id. at ¶24, 452. (Bon Homme County gave the Union and the Department six different reasons; Kingsbury County listed four.)

In the present case, the reason given by Respondent for not referring to the Study or using it as a basis for salary terms is that Respondent simply could not afford to implement the Study due to economic conditions at the time of negotiations. Respondent did not provide any specific or legitimate reasons why Respondent could not afford implementing the Study or why implementation could not take place over a period of years or other variations of implementing the Study. Petitioner did not propose an immediate full implementation of the Study, but proposed incremental increases in salary for a period of years until the Study numbers might be reached.

Respondent's rationale for refusal was not specific as to the reason for refusal, except the full implementation would cost more than Respondent could afford that year or for the "foreseeable future". The Contracted MOU was unilaterally set aside because Respondent did not want to base the negotiated salaries on the Study. Basing negotiations on a Study does not necessarily mean that the proposed salary structure

must reflect the outcome of the Study. The negotiations can be based upon the Study, but fail to meet the Study outcomes in whatever way is eventually negotiated between the parties.

In South Dakota, it is well established that:

> A public employer "while under a duty to negotiate in good faith, [is] not required to agree to a contract or any specific rates of pay, wages, hours of employment or other conditions of employment." *South Dakota Bd. of Regents v. Heege*, 428 N.W.2d 535, 541 (SD 1988).
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> > In the context of wage negotiations, therefore, while an employer cannot use its economic power to remove a subject completely from the bargaining table, it is not compelled to agree to the union's wage terms. That being the case, the union does not enjoy a unilateral veto over wage terms, and the employer may try to achieve the wage terms it desires by using its economic weapon of implementing at impasse. See *Katz*, 369 U.S. at 745 & n. 12, 82 S.Ct. at 1113 & n. 12; *Newspaper Printing Corp. v. NLRB*, 625 F.2d 956, 966 (10th Cir. 1980), cert. denied, 450 U.S. 911, 101 S.Ct. 1349, 67 L.Ed.2d 335 (1981). Consistent with the Act, this right exists irrespective of the parties' bargaining positions. See *American Nat'l Ins. Co.*, 343 U.S. at 401-02, 72 S.Ct. at 828.
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> *Colorado-Ute Elec. Ass'n Inc.*, 939 F.2d at 1404.

Sisseton Ed. Assc. v. Sisseton Sch. Dist., 516 N.W.2d 301, 303 (SD 1994).

Respondent used their "economic power" to unilaterally remove the MOU and the resultant Study from the bargaining table. There was no requirement in the MOU that the outcome of the Study be used in full, only that the Study be the "basis of negotiations." The crux of this matter is that the parties made an agreement in 2006 and Respondent failed to follow the agreement.

Summary Judgment on the Grievance Petition is granted in favor of Petitioner. Respondent violated an existing agreement regarding a condition of employment between themselves and Petitioner.

Summary Judgment on the Unfair Labor Practice Petition is granted in favor of Petitioner. Respondent failed to negotiate in good faith by failing to sufficiently provide a legitimate statement of rationale why the Condrey Study could not form a basis of negotiations as contracted for between the parties.

REMEDY

The Department is given quasi-judicial functions by statute. SDCL 1-32-1(10) defines the functions as that of "adjudicatory function exercised by an agency, involving the exercise of judgment and discretion in making determinations in controversies. The term includes the functions of … granting or denying privileges, rights, or benefits; …determining rights and interests of adverse parties; evaluating and passing on facts; awarding compensation; … or performing any other act necessary to effect the performance of a quasi-judicial function." The SD Supreme Court wrote, "the department may perform 'any' act 'necessary' to perform its quasi-judicial functions … with every 'implied power' necessary to effectuate all of its 'express powers.' *Bon Homme Co. Com.,* at ¶39, 458-459 (internal citations omitted).

Petitioner did not specify a prayer of relief. The MOU had no requirement that the Condrey Study be implemented in full. The only requirement is that the Study be used as a "basis for negotiations for the contract year beginning in 2010."

To effectuate the intent of the MOU, IT IS HEREBY ORDERED that Respondent and Petitioner meet in good-faith to renegotiate the 2010 Contract Agreement and base the negotiations on the Condrey Study, in that the results of the Condrey Study will be used in the Contract unless legitimate and specific rationale is given for setting aside the Study results.

Dated this ____11th_____ day of April, 2011.

_____/s/Catherine Duenwald_____
Catherine Duenwald
Administrative Law Judge
Department of Labor
Division of Labor & Management