

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

RAPID CITY SCHOOL DISTRICT
PRINCIPALS AND ASSISTANT
PRINCIPALS,

HF No. 3E, 2008/09

Petitioner,

v.

DECISION

RAPID CITY AREA SCHOOL DISTRICT 51-4
BOARD OF EDUCATION,

Respondent,

and

MARIE OLSON and RONALD MINCKS,

Respondents,

and

CORA L. ALLEY, THOMAS E. BREY,
GEORGE E. LEE, BEVERLY J. MCLEOD,
CURTIS A. MIDDLETON, STEPHANIE D.
NESSELHUF, SONJA SHANNON, DUANE
E. TUMAS, ANITA WINTER, DENNIS BERG,
JOHN BEEMAN, BRADLEY C. BLAUVELT,
WAYNE L. GRAVES, DAVID HERRERA,
DAVID J. KAISER, KELLY D. KRUEGER,
CAROLYN J. LAURENCE, CHARLENE M.
LAURENTI, JASON LIND, THOMAS J.
LEONARD, MERRILL L. MABBS, DANIEL
N. MAXFIELD, BRENDA PITSOR, TODD D.
SCHMITT, CYNTHIA M. STARR, TRAVIS G.
THOMPSON, VALERIE L. THOMPSON,
DAVID L. TURNER, JULIE K. WARD, AND
NANCY WILLIAMS,

Respondents.

Petitioner having filed a Petition for Unit Determination on January 27, 2009, pursuant to SDCL 3-18-4 and that Respondents having objections to the Petition, and Responses

having been filed thereafter, the Department provided a Hearing under SDCL 3-18-4 that was held on April 20, 2009. Petitioner was represented by Mr. Craig Pfeifle of the law firm, Lynn, Jackson, Shultz & Lebrun, P.C. The Rapid City Area School District Board of Education (District) responded and was represented by Mr. Michael M. Hickey of Bangs McCullen Law Firm. Attorney Mr. Dennis W. Finch, of Finch Maks, Prof. LLC, represented respondents Ms. Marie Olson (Olson) and Mr. Ronald Mincks (Mincks). A group of 30 individual respondents (Unit Respondents) each hired Mr. John Stanton Dorsey of Whiting, Hagg & Hagg LLP to represent his or her interests. Each of the parties had an opportunity to present their case to the Department through evidence and witnesses. Witnesses testifying at hearing were: Larry Stevens, Steven Henjen, Marie Olson, Mike Kenton, Ronald Mincks, Tom Brey, and Merrill Mabbs. The parties filed post-hearing briefs with the Department. The Department having fully advised in the premises makes this Decision and Order.

ISSUE

Whether the Principals and Assistant Principals, currently part of the Rapid City School Administrators and Technicians Association, should be allowed to form a separate bargaining unit?

LEGAL AUTHORITY

The authority of the Department to hear this Petition for Unit Redetermination is found under SDCL § 3-18-4, which states:

When a governmental agency declines to grant formal recognition or when a question concerning the designation of a representation unit is raised by the governmental agency, labor or employee organization, or employees, the department of labor or any person designated by it shall, at the request of any of the parties, investigate such question and, after a hearing if requested by any party, rule on the definition of the appropriate representation unit. The department shall certify to the parties in writing the proper definition of the unit. In defining the unit, the department shall take into consideration, along with other relevant factors, the principles of efficient administration of government, the principles and the coverage of uniform comprehensive position classification and compensation plans in the governmental agency, the history and extent of organization, occupational classification, administrative and supervisory levels of authority, geographical location, and the recommendations of the parties.

SDCL § 3-18-4. The South Dakota Supreme Court in the case *Appeal of the City of Aberdeen*, 270 NW2d 139, 141 (SD 1978) said, “[w]e do not construe the statute to require that there necessarily be evidence in the record before the [Department] as to each factor nor that a separate finding must invariably be made by the [Department] as to each factor.” *Id.*

FACTS

The South Dakota Department of Labor issued a Certificate of Recognition to the Rapid City School Administrators and Technicians Association in 1989. Membership of the recognized unit included the school district's technicians, psychologists, principals, assistant principals, grounds administrators, cafeteria supervisor, special education director, buildings and grounds supervisor, and payroll manager.

On November 30, 1989, the association formally adopted its bylaws. The Association was known as Administrative Staff Bargaining Unit (ASBU). The purpose of ASBU, as set forth in its bylaws, was to gather ideas and present opinion of district administrators and technicians to the Board of Education concerning conditions of employment. ASBU represented the administrators and technicians for the purposes of contract negotiations. There is no historical indication of why, in 1989, the technicians (including psychologists) were joined together with the administrators in the bargaining unit. For about 10 years or so, the principals and assistant principals have talked informally about forming their own bargaining unit.

Petitioners are the District's principals and assistant principals. The chairperson of the ASBU (a principal) testified that 19 of the 39 principals and assistant principals (about 48%) had voted in favor of forming a separate bargaining unit apart from ASBU. The ASBU general membership received this notification on January 27, 2009. The petition for unit redetermination was filed with the Department on January 28, 2009.

On January 30, 2009, Ms. Olson and Mr. Mincks specifically asked Petitioners if they could be part of any new bargaining unit that was formed. Petitioners rejected that request and reiterated that the group desired to consist of only principals and assistant principals. Petitioners did indicate they considered Mr. Lorenzo "Junior" Bettelyoun (Delinquent/Prevention Drop Out Facilitator) and Mr. Todd Christensen (Special Education Program Director) to be part of the proposed bargaining unit, as they hold the same administrative authority as principals.

Respondents, Tom Brey (Psychologist) and Merrill Mabbs (Computer IT Support Specialist), filed an objection to the Petition with the Department of Labor. Thereafter, Respondents, Marie Olson (Cafeteria Supervisor) and Ronald Mincks (Coordinator of Energy Conservation – Building and Grounds), filed objections to the Petition as well. District filed an answer and objection to the petition. Later, the remaining twenty-eight (28) technicians of the ASBU filed an answer and objection to the petition. All Respondents objected to the principals' and assistant principals' request for a new bargaining unit to be formed.

Further facts will be developed as necessary.

ANALYSIS AND DECISION

Unit Respondents make the argument that Petitioners are required to have a majority of the employees in the present ASBU unit to agree to unit redetermination. Unit Respondents cite to SDCL 3-18-3 as legal authority. The statute provides:

Representatives designated or selected for the purpose of formal representation by the majority of the employees in a unit appropriate for such purposes shall be the exclusive representatives of all employees in such unit for the purpose of representation in respect to rates of pay, wages, hours of employment, or other conditions of employment; provided that salary increases for Board of Regents' faculty and exempt staff may only be distributed to address institutional priorities, program needs, performance meeting or exceeding expectations, or internal or external market considerations. Notwithstanding any other provision of this section, any individual employee, or a group of employees, shall have the right at any time to present grievances to their employer and to have such grievances adjusted without the intervention of the formal representative as long as the adjustment is not inconsistent with the terms of any settlement with the formal representative then in effect; provided that the formal representative has been given opportunity to be present at such adjustment.

SDCL 3-18-3 (emphasis added). After an appropriate unit is defined, a majority of the members, as provided for by this statute, must select their representatives. This case is to determine whether the current unit of ASBU is appropriate.

As the SD Supreme Court has said, "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. ... When the question is which of two enactments the legislature intended to apply to a particular situation, terms of a statute relating to a particular subject will prevail over the general terms of another statute." *Martinmaas v. Engelman*, 2000 SD 85, ¶149, 612 NW2d 600, 611 (citations omitted).

The more specific statute for defining an appropriate unit is SDCL 3-18-4. Administrative rules have been promulgated by the secretary of labor, pursuant to SDCL 3-18-6, that give requirements for filing a petition for bargaining unit determination or redetermination. The particular rule regarding petitions for certification of a bargaining unit is found at ARSD 47:02:02:04. The rule reads:

When a petition is filed by an employee organization, it must state that the organization:

- (1) Represents at least 30 percent of the members of the proposed unit;
- (2) Does not assert the right to strike against the state of South Dakota or any subdivision of the state or to assist or participate in a strike and does not impose a duty or obligation to conduct, assist, or participate in a strike in violation of South Dakota law;

- (3) Does not advocate the overthrow of the constitutional form of government in the United States;
- (4) Does not discriminate with regard to the terms or conditions of membership because of race, color, creed, or national origin. This section shall not be construed as limiting the right to advocate peaceful and legal changes in existing law.

ARSD 47:02:02:04. Petitioners' Amended Petition, filed post-hearing and pre-certification pursuant to ARSD 47:02:02:11, meets the requirements of ARSD 47:02:02:04. The Amended Petition is legally sufficient for the Department to determine an appropriate bargaining unit.

One of Respondents' main objections to the reorganization is that the technicians, psychologists, and other administrators as well as the principals and assistant principals share a community interest and common goals and therefore already belong to an appropriate bargaining unit. They all work together with the same students, in the same buildings. They all share the same work day. They have the same conditions of employment in terms of leave, retirement, reduction in force, and grievance procedures.

The history of the ASBU shows that the group, amongst itself, separated into 5 groups or subsets for purposes of contract negotiations and bargaining; the high school principals, the middle school principals, the elementary principals, the assistant principals and psychologists, and the technicians. Each subset takes a turn at contract negotiations and has successfully bargained for the whole ASBU each year.

ASBU has requested market adjustments to salaries for the preceding three years; this is in addition to any increase received by the rest of the District teachers and staff. ASBU determined that it was more effective to negotiate the market adjustment increase with one of the groups each year. In the contract year 2006-07, the senior high school principals negotiated for and received a market adjustment increase to their salary. In 2007-08, the middle school principals negotiated for and received a market adjustment increase as well. This past contract year, 2008-09, the elementary school principals received a market adjustment increase to their salaries. The assistant principals, psychologists, and technicians were waiting their turn to negotiate the market adjustment to their salaries. Respondents make the argument that past practice indicates contract negotiations are more effective when fewer positions are asking for increases. Respondents are of the belief that having more members of a bargaining unit puts them a stronger position when it comes to bargaining a negotiated agreement.

Petitioners argue that they should be in a separate bargaining unit as their responsibilities are quite different from the psychologists and technicians. Petitioners have supervisory authority over certified teachers, staff, and the entire school building. Petitioners also evaluate certified staff for purposes of retention the following year. Petitioners now concede that Olson and Mincks have similar responsibilities to them and Petitioners would not be opposed to having all employees with supervisory authority be included in a newly formed bargaining unit.

There are a number of similarities between the Petitioners and Respondents. There are no differences between the educational requirements of the Petitioners and Unit Respondents. Members from each side are required to hold a college degree; some must hold a master's degree depending upon their job classification and some must be certified. The Petitioners supervise and evaluate certified teachers who hold college degrees. A few of the Respondents also supervise and evaluate individuals (some with certifications) although there is no requirement that cooks or buildings and grounds workers have college educations. The supervisor of the technicians does supervise and evaluate employees with college educations, although there is no certification required of computer technicians. All members of ASBU are paid monthly and are salaried employees. The parties work together in similar and nearby geographical locations; the various schools in and around Rapid City.

The ASBU Negotiated Agreement sets out 19 separate job classifications within the Agreement. The Agreement also places these jobs in either an "administration" or "technician" category. Each of these job classifications has a different salary level as well as different length of contract. The Agreement has two different salary schedules, one for administrators and one for technicians. The Agreement has two separate contracts, one for certified personnel and the other for non-certified personnel.

The following chart lists the job classifications within the Negotiated Agreement, marked as a Petitioner (P) or Respondent (R), along with their contract term and whether the Negotiated Agreement lists them as an Administrator (A) or a Technician (T).

R	Administrator of Buildings and Grounds	*230	A
R	Application Support Analyst	*230	T
R	Computer Programmer	*230	T
R	Computer Support Specialist	*230	T
R	Coordinator of Student Transportation, et al.	*230	A
R	Help Desk Specialist	*230	T
R	Network Administrator	*230	T
R	Operations Coordinator	*230	T
R	Program Manager	*230	T
R	Software Application Trainer	*230	T
R	Coordinator of Conservation & Custodial Support Services	225	A
P	High School Principal	225	A
R	Supervisor of Cafeteria	225	A
P	Assistant High School Principal - Student Activities	215	A
P	Middle School Principal	215	A
P	Elementary School Principal	210	A
P	Special Education Program Director	210	A
P	Assistant Elementary/Middle/High School Principal	205	A
R	Psychologist	195	T

* After 10 years with the District, this is reduced to 225 days.

The District, although a Respondent, testified that they have not taken an official position on the issue of the make-up of the bargaining unit. The most significant

difference to the District, as far as administration is concerned, is that there would be one more bargaining unit to negotiate with each year. There are currently 10 bargaining units in the Rapid City School District. Historically, ASBU has not gone to impasse regarding the contents of the negotiated agreement or contract, but the parties have successfully negotiated an agreement each year. There would be no increase in government efficiency if Petitioners are granted their request. That being said, having 11 instead of 10 bargaining units is not significantly more work for the District.

Recognizing whether or not a “community of interest” exists in this situation is a relevant factor in determining whether the redetermination should be granted. “An identifiable community of interest does not require perfect uniformity in conditions of employment and can exist despite differences in wages, hours, working conditions, or other facts.” *51 C.J.S. Labor Relations § 246*. “A community of interest may exist between groups of employees with different skills who work together, under similar conditions, at similar pay rates.” *Id.* See also, *Black Hawk College Professional Technical Unit v. State Educational Labor Relations Board*, 275 Ill.App.3d 189, 655 N.E.2d 1054, 211 Ill.Dec. 671, 150 L.R.R.M. (BNA) 2681, 103 Ed. Law Rep. 1135. In this cited case from Illinois, the Professional and Technical Unit and the Teachers Unit wished to merge into a single unit. The State of Illinois Labor Relations Board denied the request and focused their determination on governance/collegiality and tenure instead of on community interest and desire of the parties. The Appellate Court reversed the initial determination and found that there was a community interest. The state statute only required that a unit be “appropriate,” based upon listed factors and that although the unit may not be the *most* appropriate unit, that is was still *an* appropriate unit.

Similarly, South Dakota law only requires that a bargaining unit be appropriate, based upon a laundry list of specific factors, but also “other relevant factors” not listed in statute. In this case, the majority of ASBU is on the side of Respondents, furthermore, less than a majority of the principals and assistant principals side with Petitioners. Petitioners and Respondent have a shared community interest. The ASBU history includes past agreements regarding negotiations and each subset taking a year to negotiate and receive the market adjustment to their salaries. The geographic location, method of salary, and contract terms are all the same or similar. All parties possess higher educational degrees

There are two factors that fall on the side of Petitioners’ request. The first is that the professional occupations of the parties fall into about three occupational classifications; school principals and administrators, computer technicians, and psychologists; however, neither side is arguing that there be three bargaining units created. The second is the level of supervisory authority of Petitioners is higher than some of the Respondents.

The majority of the factors the Department is required to consider, under law, give credence to the current level of appropriateness of the ASBU. The Department gives great weight to the fact that the majority of the members of the ASBU do not want change. Based upon the factors listed above, the Department finds in favor of Respondents. ASBU, as currently defined, is an appropriate unit under SDCL § 3-18-4.

Counsel for Unit Respondents shall submit proposed Findings of Fact and Conclusions of Law and an Order consistent with this Decision, within 20 days of the receipt of this Decision. Counsel for District and Mincks & Olson may submit additional proposed Findings of Fact and Conclusions of Law within 10 days after receipt of Unit Respondents' submission. Petitioner shall have 30 days, from the date of receipt of Unit Respondents' proposed Findings of Fact and Conclusions of Law, to submit objections. The parties may stipulate to a waiver of formal Findings of Fact and Conclusions of Law. If they do so, counsel for Unit Respondents shall submit such stipulation together with an Order consistent with this Decision.

Dated this 8th day of June, 2009.

SOUTH DAKOTA DEPARTMENT OF LABOR

Catherine Duenwald
Administrative Law Judge