

SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

MARY DEWOLF,
Grievant,

HF No. 12 G, 2007/08

v.

DECISION

**TODD COUNTY BOARD
OF EDUCATION,**
Respondents.

This matter comes before the Department of Labor based on Grievant's Petition for Hearing on Grievance filed pursuant to SDCL 3-18-15.2. Al Arendt appeared on behalf of Grievant Mary DeWolf. Paul E. Jensen represented Respondent, Todd County Board of Education. The Department of Labor conducted a hearing in Pierre, South Dakota. Upon consideration of the live testimony given at hearing and the evidence presented at hearing, Grievant's Petition for Hearing and request for relief is hereby denied.

Issue(s):

1. Does the Department has proper jurisdiction over this matter?
2. Did Respondent violated, misinterpreted, or inequitably applied the Agreement when Grievant's contract was not renewed due to a reduction in staff?

Facts:

Based upon the record and the live testimony at hearing, the following facts are found by a preponderance of the evidence:

Mary DeWolf (Grievant) worked as a high school Spanish teacher at the Todd County High School from 1998 until 2008. Prior to teaching at Todd County, Ms. DeWolf was employed by various school districts in South Dakota since 1983. Ms. DeWolf was certified in elementary education grade k-8, English grade k-8, and Spanish grade k-12.

As a teacher at Todd County High School, Ms. DeWolf was subject to the TCEA Agreement (Agreement). The Agreement was effective June 11, 2007. Ms. DeWolf was not a member of the Todd County Education Association (TCEA).

Superintendent Dr. Margo Heinert testified that before the 2008-2009 school year, a review of staffing was done on a District wide basis. Todd County High School was the only high school in the district. The Board of Education found that there was a large staff at the high school, however there has not been an increase in students. The result was a 10:1 student to faculty ration. The decision was made to implement a reduction in staff. A review of the staff showed that Ms. DeWolf was certified only in Spanish at the

high school level. Another teacher was certified to teach both Spanish and Chemistry at the high school level. It was decided to retain the teacher with dual certifications and not to renew Ms. DeWolf's contract pursuant to the staff reduction policy.

Dr. Heinert met with the co-presidents of the TCEA and informed them that there would be reduction in force. Dr. Heinert also communicated to the certified staff at a high school staff meeting prior to making her recommendation to the Board. Dr. Heinert announced that there would likely be a reduction in force and that some of their positions may be affected. Staff was informed that they could contact Dr. Heinert if they wished to find out if their position was one that may be included in the reduction in staff. Two staff members did make inquiries. Ms. DeWolf did not. Ms. DeWolf does not recall being present at that meeting.

Schedule D of the Agreement contained the policy for staff reduction/recall. The staff reduction policy states,

If in the judgment of the District it is necessary or may be necessary to reduce the number of instructional staff employees within the District, the following procedure will be used:

- A. The District will use reasonable efforts to communicate the situation to the certified staff so as to allow the staff up to ten days from the date of communication to present possible alternative suggestions and recommendations to a reduction in force.
- B. No teacher will be laid off as a result of a reduction in force if the teacher is certified for a position held by another teacher employee who does not have full certification (i.e. when employed under an Authority to Act)
- C. If paragraph B does not apply or if two or more certified teachers would be able to fill the position held by an employee who does not have full certification, the following criteria may be considered by the District when determining which teacher will be laid off due to staff reduction. These criteria are not in order of priority but rather a list of factors all of which may be considered by the District: students needs, priority of programs, program elimination, evaluations, administrative recommendations, certifications and endorsements, employees educational development (classes, workshops, etc. after initial certification), professional employment history, length of employment within the District, federal and state requirements, and other factors being equal then seniority shall determine the order.
- D. In any District action involving reduction in force, the District will adhere to the provisions on SDCL 13-43.

On April 3, 2008, the Board of Education approved Dr. Heinert's recommendation for a reduction in force at a special meeting. On April 4, 2008, Ms. DeWolf was called into the

office of Principal Gerald Ray, where she was given written notice that her contract would not be renewed for the 2008-2009 school year due to staff reduction. Attached to that notice was a list of job openings that were available with the District. No further discussion was had on the matter at that time. Ms. DeWolf testified that after she received the written notice, she reviewed the grievance procedure in the Agreement.

Article XI of the Agreement sets forth the grievance policy as follows:

Section 1- Definitions:

- (1) A "grievance" is a complaint by a teacher or a group of teachers covered under the negotiated agreement upon an alleged violations, misinterpretation, or inequitable application of any existing agreements, contracts, ordinances, policies, rules, or regulations of the school district of the State of South Dakota. The absence of policy, or disagreement with, existing agreements, contracts, ordinances, policies, rules or regulations is not a "grievance" but may be subject to negotiations.
- (2) An "aggrieved teacher" is the teacher (or teachers) who is differently affected and, therefore, will make the claim. The Association is the aggrieved when Association rights have been allegedly violated. Also, the Association may submit a grievance on behalf of the teacher, provided all teachers are equally affected. Association grievances will commence in writing at Level Two.
- (3) The term "teacher" except where otherwise indicated, is considered to apply to any certified professional employee. The term "teacher" may include a group of teachers who are similarly affected by a grievance.
- (4) A "party in interest" is the person or persons making the claim and any person or persons who might be required to take action or against whom action might be taken in order to resolve the problem.
- (5) The term "days" when used in these Articles shall, except where otherwise indicated, mean working school days.
- (6) Association shall mean the group recognized by the Board as the exclusive representative of the particular employee unit.
- (7) Board shall mean Board of Education of the Todd County School District.

Section 2- Purposes:

- (1) The purpose of this procedure is to secure, as soon as possible, at the lowest possible administrative level, equitable solutions to the problems which may from time to time arise affecting the welfare or conditions of professional services of teachers.
- (2) These proceedings shall be kept as informal and confidential as may be appropriate at any level of the procedure.
- (3) Nothing herein contained shall be construed as limiting the right of any teacher having a grievance problem to discuss the matter informally with any appropriate member of the administration or with any appropriate representative of the Association at any time.

- (4) Any certificated professional employees or group of employees shall have the right at any time to present any grievance to such persons and through such channels as are as are designated for that purpose.

Section 3- Time Limits:

- (1) Since it is important that grievances be processed as rapidly as possible, the number of days indicated at each level should be considered as maximum, and every effort should be made to expedite the process. The time limits specified may, however be extended by mutual agreement in writing.
- (2) In the event a grievance is filed at such time that is cannot be processed through all the steps in this grievance procedure by the end of the school year and, if left unresolved until the beginning of the following year, could result in irreparable harm to a party in interest, the time limits set forth herein will be reduced so that the grievance procedure may be exhausted prior to the end of the school year or as soon as thereafter is practical.
- (3) It is required that a teacher file a written grievance pursuant to Section 5 within 15 days after the date the teacher knew or should have known of the alleged violation. Failure by the teacher to file the written grievance within said time frame shall constitute a waiver by the teacher to file the written grievance related to the alleged violation. The day following the event giving rise to a grievance, and the day following any notice as required is received shall be day 1 for time line purposes.

Section 4- Informal Grievance Procedures: If a teacher feels that he/she has a grievance, he/she shall prior to filling a written grievance pursuant to Section 5 discuss the matter with his/her principal, or administrator, or supervisor to whom he/she is directly responsible in an effort to resolve the problem informally. Neither the teacher or principal/administrator/supervisor shall have a representative present during the meeting. Upon agreement between the teacher and principal/administrator/supervisor a mutually agreed upon third person may be present during this meeting; however, the informal meeting shall be required even should the teacher and administrator not agree as to the presence of a third person or who that third person may be.

If the grievance is resolved at the informal level, the resolution shall be in accordance with the negotiated agreement. TCEA shall be notified in writing of the resolution within 5 days of the resolution being reached. The teacher shall write the notice to be received by TCEA, and the teacher's signature and the signature of the principal/administrator/teacher shall signify mutual resolution has been reached. The teacher shall be responsible for providing a copy of the signed resolution to TCEA.

Section 5- Formal Grievance Procedures:

- (1) Level One- Director/School Principal:

- (a) If an aggrieved person is not satisfied with the disposition of his/her problem through informal procedures, he/she may submit his/her claim as a formal written grievance to his/her principal, identifying the alleged violation, misinterpretation, or inequitable application of any existing agreements, contracts, ordinances, policies rules, or regulations of the school district or of the State of South Dakota, the facts related to the grievance and stating the reason(s) why he/she does not agree with the disposition at the informal level.
 - (b) The principal shall meet again with the aggrieved person, and within ten (10) days of receipt of the written grievance render his/her decision and the reasons thereafter in writing to the aggrieved person, with a copy for his/her file and a copy for the Association Building Representative.
 - (c) A teacher who is not directly responsible to a building principal may submit his formal written grievance claim to the administrator to whom he/she is directly responsible. Said administrator shall carry out the aforementioned responsibilities of the principal.
- (2) Level Two- Superintendent of Schools: If the aggrieved person is not satisfied with the disposition of his/her grievance at Level One, and/or if no decision has been rendered within ten (10) days after presentation of the grievance in writing, he/she may appeal the formal written grievance to the superintendent of Schools. The appeal shall state with specificity what portion(s) of the principal's disposition that the employee is appealing and shall state and explain why the employee disagrees with the principal's disposition. Within ten (10) days after receipt of the written appeal, the Superintendent or Superintendent's designee shall meet with the aggrieved person and the principal. Within ten (10) days of the meeting(s), and the Superintendent shall render his decision in writing to the employee, the principal and the Association.
- (3) Level Three- Board of Education: If the aggrieved person is not satisfied with the disposition of his/her grievance at Level Two, within ten (10) days of receipt of the Level Two decision, or within ten (10) days after the time period for the Level Two decision to be issued has expired (and no extensions being granted) and no decision has been rendered, the aggrieved person may appeal to the Board of Education. The appeal shall state with specificity what portion(s) of the Superintendent's disposition that the employee is appealing and shall state and explain why the employee disagrees with the Superintendent's disposition or related to the circumstances resulting in a Level Two decision not having been rendered within the specified time frame. The Board shall conduct a hearing on the grievance within thirty (30) days of

- (4) Level Four- Arbitration by the Commissioner of Labor: If the aggrieved person is not satisfied with the deposition of his/her grievance at Level Three or if no decision has been rendered within thirty (30) days of the Board receipt of the grievance, the aggrieved person may appeal the decision to the South Dakota Department of Labor, Division of Labor and Management, pursuant to SDCL 3-18.

Later in the day on April 4, 2008, Ms. DeWolf approached Principal Ray in the hall and asked him to step into her classroom to discuss the non-renewal of her contract. Ms. DeWolf testified that she told Principal Ray that she had a solution to the problem and that she could take a different position as an English teacher or elementary teacher. Principal Ray informed her that he could not help her.

Ms. DeWolf testified that she intended this conversation to be the informal grievance procedure set forth in Section 4 of the Agreement. Ms. DeWolf did not receive anything in writing from Principal Ray following this conversation. Principal Ray testified at hearing that he did not recall this conversation with Ms. DeWolf.

Ms. DeWolf retained counsel, and on April 14, 2008 filled a written notice grievance pursuant to Article XI, Section 5 (3) of the Agreement requesting a hearing before the Board of Education.

On April 29, 2008, the Board of Education met in executive session to conduct a hearing. Ms. DeWolf asserted that the grievance was initially brought at this level because she felt it was illogical to go to the principal or the superintendent to overrule a decision of the School Board. The Board of Education determined that "the informal conference between the employee and the principal is not discretionary under the collective bargaining agreement, it is mandatory." The Board of Education further held that it lacked jurisdiction to proceed with a hearing on the merits because Grievant had failed to have an informal meeting with the principal in accordance with the grievance procedure set forth in the Agreement.

Following the April 29, 2008 Board of Education meeting, Ms. DeWolf, through her legal counsel, sent a letter to Principal Ray which stated,

Since the School Board made the initial decision, we do not feel that you have the authority to overrule the School Board and therefore this matter cannot be resolved under Section 4 of the informal grievance procedure nor can it be resolved under Level one or two of the formal grievance procedure.

Despite Ms. DeWolf's position, she gave written notice to Principal Ray in that same letter requesting an informal meeting pursuant to Article XI, Section 4 of the Agreement.

The letter also requests a Level One formal grievance under Article XI, Section 5 of the Agreement.

An informal grievance meeting was held with Principal Ray on May 8, 2008, at which time Ms. DeWolf declined to discuss the matter further with Principal Ray because he did not have the authority to resolve the matter.

On May 13, 2008, Ms. DeWolf gave written notice to Principal Ray of a formal grievance under Article XI, Section 5(1) of the Agreement. On May 20, 2008, Principal Ray responded as follows:

The formal written grievance is untimely pursuant to Section 3 Article XI. In addition, I do not have the authority to provide relief for your grievance.

On June 9, 2008, Ms. DeWolf gave written notice to Dr. Heinert of a Level Three grievance under Section 5(3) of the formal grievance procedures. A meeting was held on July 16, 2008. Dr. Heinert issued a decision pursuant to Article XI, Section 5 (2), stating that Dr. Heinert had the authority to make a further recommendation to the Board of Education in this matter, that Dr. Heinert did not intend to ask the Board of Education to change its previous action in this matter, and that Ms. DeWolf had failed to follow the requirements of the grievance procedure set forth in the Agreement, and failure to comply with those procedures deprived her of authority to act.

On September 4, 2008, the Board of Education met again at the request of Ms. DeWolf for a hearing. On September 17, 2008, the Board of Education issued a formal decision and again dismissed the grievance for lack of jurisdiction; however the Board addressed the underlying grievance and found that she was not entitled to relief. Subsequently, Ms. DeWolf filed this petition for hearing on Grievance with the Department.

Analysis

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 (S.D. 1991).

Whether Petitioner timely filed the Petition for Hearing on Grievance.

The Grievance procedure set forth in the Agreement clearly sets forth the required steps that an aggrieved teacher must take if he or she feels they have a grievance. Article XI, Section 4 of the Agreement requires a teacher to discuss the matter with his/her principal, or administrator, or supervisor to whom he/she is directly responsible in an effort to resolve the problem informally. In this case, Ms. DeWolf was required to meet with her Principal, Gerald Ray as a first step in the grievance process. Section 4 does not specify that this meeting be requested in writing or that any documentation be made unless there is a resolution of the matter at this level. Ms. DeWolf satisfied the requirements of Section 4 when she asked to speak to Principal Ray after receiving the notice that her contract would not be renewed. Because Principal Ray was unable to resolve her problem, the Agreement required that Ms. DeWolf then follow the formal grievance procedures set forth in Section 5 of the Agreement.

Rather than file a written grievance with the Principal as required by Article XI, Section 5(1) of the Agreement, Ms. DeWolf appealed directly to the Board of Education. "Policies of a school district, especially those negotiated with bargaining representatives for the protection of teachers, have the full force and effect of law, and legally bind the school district." *Wess. Spgs. Ed. Assc. v. Wess. Spgs. Sch. Dst.* 467 NW2d 10, 104 (citing *Schnabel v. Alcester School District #61-1*, 295 NW2d 340 (SD 1980)). Because Ms. DeWolf did not follow the grievance procedure enacted by the governing body, the Department of Labor is deprived of jurisdiction over this matter.

Did Respondent violate, misinterpret, or inequitably apply the Agreement when Grievant's contract was not renewed due to a reduction in staff?

Although jurisdiction is a threshold issue and must be met before benefits relief can be granted, the Department gives the analysis and ruling on the remaining issue brought forward.

Ms. DeWolf argues that there was a violation of Schedule D because reasonable efforts were not made to communicate the reduction in staff prior to her receiving notice on April 4, 2008. Schedule D of the Agreement provides that "the District will use reasonable efforts to communicate the situation to the certified staff so as to allow the

staff up to ten days from the date of communication to present possible alternatives suggestions and recommendations to a reduction in force”.

In this case, Dr. Heinert made a reasonable effort to notify the staff by giving notice to the TCEA co-presidents and the staff at the high school staff meeting. Sufficient communication was given. Claimant has failed to show that there was a violation, misinterpretation or inequitable application of the Agreement in the way Dr. Heinert communicated the reduction in force to the certified staff.

Ms. DeWolf further argues that there was a violation because there were at least four positions held in elementary school held by non-certified teachers that Ms. DeWolf could have qualified for under Schedule D. Schedule D of the Agreement provides that, “[n]o teacher will be laid off as a result of a reduction in force if the teacher is certified for a position held by another teacher employee who does not have full certification.”

Ms. DeWolf testified that she believed there were non-certified teachers holding several positions in the elementary school. Dr. Heinert testified that all teachers were certified and in compliance with the Department of Education. The Department accepts the testimony of Dr. Heinert as to the certifications of the District’s staff as more credible than that of the Grievant.

Grievant has failed to show that there a violation, misinterpretation, or inequitable application of the Agreement when her contract was not renewed due to a reduction in staff. Respondent shall submit proposed Findings of Fact, Conclusions of Law, and an Order consistent with this Decision within ten (10) days from the date of receipt of this Decision. Grievant shall have ten (10) days from the date of receipt of Respondent’s proposed Findings of Fact and Conclusions to submit objections thereto or to submit proposed Findings and Conclusions. The parties may stipulate to a waiver of Findings of Fact and Conclusions of Law and if they do so, Respondent shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 9th day of August, 2010.

SOUTH DAKOTA DEPARTMENT OF LABOR

/s/ TAYA M DOCKTER

Taya M Dockter
Administrative Law Judge