

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

**THE MINNEHAHA COUNTY DEPUTIES'
ASSOCIATION, STEVE KIRTON, DOREEN
JANSSEN, JULIE TIGHE, PATRICIA
ALBRECHT, ROBERT FRITZ, ISRAEL
SUAREZ, SCOTT HACKING, SCOT
PULSE, SCOTT DRIES, LORI JOHNSON,
AND RYAN TIEDEMAN,
Grievants,**

HF No. 13 G, 2003/04

v.

DECISION

**MINNEHAHA COUNTY, SOUTH DAKOTA
COMMISSION AND THE MINNEHAHA
COUNTY SHERIFF'S DEPARTMENT,
Respondents.**

This matter comes before the Department of Labor based on Grievants' Petition for Hearing on Grievance filed pursuant to SDCL 3-18-15.2. Thomas K. Wilka appeared on behalf of Grievants. Gordon D. Swanson represented Respondents. The Department of Labor conducted a hearing on November 4, 2004, in Sioux Falls, South Dakota. Upon consideration of the live testimony given at hearing and the evidence presented at hearing, Grievants' Petition for Hearing and request for relief is hereby denied.

FINDINGS OF FACT

1. Minnehaha County is a political subdivision of the State of South Dakota.
2. The Minnehaha County Deputies Association is a collective bargaining unit that represents employees of the Minnehaha County Sheriff's Office.
3. The individual named Grievants above are all correctional officers, working for Minnehaha County as part of the Sheriff's Office.
4. The County implemented a new pay plan starting in the year 2000.
5. On September 26, 2000, County passed Resolution MC 00-71, Resolution of Acceptance and Implementation of DMG Classification and Compensation Study (Resolution).
6. The Resolution accepted the Final Report Compensation and Classification Study as presented to County on September 12, 2000.
7. The Resolution recommended that "the procedures for the implementation of the Compensation & Classification Study" include two documents, Appendix A: Implementation Procedure for New Pay Plan (Appendix A) and Appendix B: Grade Change Summary (Appendix B).
8. The procedures outlined in Appendix A called for a three-year implementation of the new pay plan.

9. Appendix A provided, "The current grade and step pay plan will be used in the first two years of implementation (2001 and 2002). The new grade and step plan will be fully implemented in the third year (2003)."
10. Appendix A also provided, "Employees in positions being moved to higher grades will be placed in the step at the new grade that is equal to or immediately above their current rate."
11. Each Grievant is classified as either a Correctional Officer I (CO I) or Correctional Officer II (CO II).
12. The Collective Bargaining Agreement (CBA) effective from January 1, 2003 to March 9, 2004¹, provided that CO I's would be paid at grade 9 and CO II's would be paid at Grade 10 on the new pay plan².
13. The CBA was signed by County and the Association on October 1, 2002.
14. The CBA provided, "For purposes of payroll only, all grade assignments for 2003, are effective December 21, 2002. All subsequent classifications and grade increases will be made at the first full payroll at the beginning of the year."
15. The new pay plan increased the starting pay for new CO I's by \$1.78 per hour.
16. The County adopted the goal of the DMG study "to develop a pay system that would enable the county to ensure a fair and equitable pay system for county employees."
17. The pay plan was implemented for Grievants on December 21, 2002.
18. On January 21, 2003, County published the first set of Grievants' salaries that were affected by the new pay scale.
19. County publishes all salary increases that occur via step increases within a couple weeks of its occurrence.
20. County publishes new hire salaries in the commissioners' weekly minutes of meetings as they occur.
21. County's implementation of its pay plan did not differ from its explanation to Grievants and the Deputies Association.
22. Grievants are advancing through the pay scale just as the DMG study recommended.
23. Article XIII GRIEVANCE PROCEDURE:

Section 1. Grievances are herein defined to be disputes involving the interpretation of this Agreement.

Section 2. Employees who feel they have been unjustly discharged, suspended, reduced in rank, or disciplined may employ the grievance procedure and shall have the right of appeal provided by SDCL Chapter 3-18. The grievance procedure is as follows:

- A. An Employee shall reduce to writing and submit to their immediate supervisor the grievance within 10 calendar days from when they

¹ The written term of the CBA was January 1, 2003, to December 31, 2003, but the effective dates were extended because of the parties' failure to adopt a CBA until March 9, 2004.

² The previous pay plan placed CO I's at Grade 21 and CO II's at Grade 25.

grievance occurred. An Employee may have an Association representative present at the time of submission of the grievance.

- B. Failing to settle the grievance with the Employee's immediate supervisor, the Association representative and/or the Employee may present the grievance to the Sheriff.
 - C. Failing to settle the grievance with the Sheriff, the Association's steward or representative and/or Employee shall present the grievance to the Minnehaha County Commission.
 - D. Failing to settle at this level the grievance with the Minnehaha County Commission, the aggrieved Employee may pursue any remedy permitted to them by SDCL 3-18.
24. Grievances were filed with Warden Michelle Boyd and Associate Warden Tim Devlin, as the immediate supervisors, on the following days:
- A. January 25, 2004 by Steve Kirton.
 - B. February 4, 2004 by Doreen Janssen.
 - C. February 9, 2004 by Julie Tighe.
 - D. February 9, 2004 by Patricia Albrecht.
 - E. February 10, 2004 by Robert Fritz.
 - F. February 11, 2004 by Israel Suarez.
 - G. February 12, 2004 by Scott Hacking.
 - H. February 12, 2004 by Scot Pulse.
 - I. February 22, 2004 by Scott Dries.
25. Warden Boyd and Associate Warden Devlin, on February 10, 2004, responded to the grievances, stating that the grievances could not be handled at their level and needed to "be forwarded up the chain of command."
26. On February 19, 2004, Sheriff Mike Milstead responded to the grievances in a letter addressed to the Association, stating:
- You have brought a group of grievances to me about the effects of the implementation of the pay matrix that resulted from the DMG study. You have issues where employees are making less money than others who have more time on the job. You also indicate that you have concern[s] about employees who have minimal time on the job, yet are making the same as officers with the same qualifications and 4 years on the job.
- I am unable to resolve your grievance at this level, and ask that this issue be forwarded to the next step in the grievance process which will be the County Commission.
27. On April 29, 2004, the Minnehaha County Office of the State's Attorney Chief Civil Deputy Gordon D. Swanson responded to the Association's grievance in a letter to its attorney, Thomas K. Wilka. That letter reads in relevant part:

The commissioners considered the wage question submitted by various correctional officers at their April 27th meeting, and decided not to consider the question as a grievance based on the then-existing contractual language defining “grievance” for our purposes.

28. Grievants filed their Petition for Hearing on Grievance on May 27, 2004.
29. Other facts will be developed as necessary.

Issue One

Whether Grievants timely filed their Petition for Hearing on Grievance.

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 Grievants. Rininger v. Bennett County Sch. Dist., 468 N.W.2d 423 (S.D. 1991).

The County moved for dismissal based on Grievants’ failure to submit their grievances within the deadlines set by the CBA. The Department reserved ruling on the Motion to Dismiss until the evidence was presented. The CBA requires that grievances be submitted to management “within 10 calendar days from when the grievance occurred.” The new pay scale was implemented on Grievants on December 21, 2002. The step placement Grievants complain of took place during this implementation. Grievants failed to recognize the impact of this step placement and failed to submit their grievances until January and February of 2004, well beyond the 10-day time limit.

County presented ample evidence to prove that the Association had plenty of opportunity to discover the impact of the new pay plan and step placement. During the negotiations for the 2002 contract, step placement was widely discussed and debated. The Association tried to get the step placement method changed, but instead accepted other concessions. Any alleged failure of the Association to explain or the deputies to understand the new pay plan is not the fault of County. Grievants did not demonstrate any sort of purposeful obfuscation of the implementation methods on the part of the County.

Grievants' argument that the Department should apply a "discovery" clause to the CBA's time limit for filing grievances fails to persuade. Grievants rely on Cox/Adler v. Sioux Falls Sch. Dist. 49-5, 514 N.W.2d 868 (S.D. 1994) for application of a discovery rule. In Cox/Adler, the Court was dealing with a District handbook provision that explicitly gave 35 days to file grievances not only from the alleged violation, but "*within thirty-five (35) days of when the alleged violation was discovered, or through reasonable diligence should have been discovered.*" Id.

The parties negotiated all the language in the CBA and it can be assumed that the lack of a discovery clause is consistent with the intentions of the parties. The Department declines to create a discovery clause or read a discovery clause into the CBA. The Grievants failed to submit their grievances within ten days of the occurrence of the alleged violation, the step placement. This failure deprives the Department of Labor of jurisdiction.

Even if a discovery clause as proposed by Claimant is inferred, Grievants failed to demonstrate that they exercised "reasonable diligence" in examining County's implementation of the new pay plan. County and the Association negotiated the new pay plan, including step placement. The Association held meetings where the changes were discussed. Grievants knew at what step they would be placed and should have known that new hires would be placed at the first step and would be given all the opportunities for advancement the CBA allowed.

With reasonable diligence, Grievants could have discovered the alleged violation when the first salaries under the new pay plan were published on January 21, 2003. With reasonable diligence, the Grievants could have discovered the alleged violation at the time the salaries for new hires were published. Grievants presented some testimony that the publications were misleading because the names and salaries were separated by line breaks.³ Any one of the Grievants could have verified that the names were separated from the salaries by checking their own name and salary. Grievants failed to

³ For example:

Keeton, K M, \$10.8900; Kinder,
S K, \$11.3220; Kirton, S A,
\$14.0880; Klaassen, T E

use reasonable diligence in examining the new pay plan implementation; therefore, a discovery clause does not save them from the untimely submission of their grievances.

Finally, Grievants argue that the wording of the issue on the Prehearing Order precludes a dismissal for Grievants failure to file their grievance within ten days of its occurrence, instead only allows a dismissal if their Petition for Hearing on Grievance was filed late. Grievants were well aware that Respondents were asserting that Grievants had failed to file their grievances within the time allowed by the CBA and presented evidence on that very issue. The Department accepted testimony at the hearing addressing the timeliness issue. The Department also reserved its ruling on County's Motion to Dismiss based on the issue.

Grievants failed to submit their grievances within ten days as required by the CBA. Grievants also failed to exercise reasonable diligence in examining the implementation of the new pay plan. County's Motion to Dismiss is granted.

Issue Two

Whether Respondents violated the negotiated agreement when it implemented the salary schedule by placing Grievants where it did on the salary schedule.

Each Grievant alleges that he/she was incorrectly placed on the pay plan on December 21, 2002. Each Grievant alleges that this allegedly incorrect placement led to a one year "loss in service" as he/she believe years of service are recognized by the new pay plan. Grievants allege that his/her placement on the pay scale was not "fair and equitable" because it did not, as a matter of opinion, adequately reflect years of service and caused a decrease in the pay gap between new hires and experienced employees.

Grievants allege that step placement should be implemented in such a way as to keep a certain gap in pay between new hires and employees with several years of experience. Grievants' argument is without merit. No reading of the DMG study requires anything other than what County did in implementing the new pay plan. No agreement, rule, or law requires that employees are the same number of pay scale steps apart as their years of service. County placed current employees on the step that reflected their current pay rather than in a step that equaled their years of service, as the pay plan provided. County did not violate the negotiated agreement, ordinances, policies, or rules when it implemented the new pay plan.

Grievants have failed to meet their burden of proof and their requests for relief are denied.

Respondents shall submit proposed Findings of Fact and Conclusions of Law, and an Order consistent with this Decision within ten (10) days from the date of receipt of this Decision. Grievants shall have ten (10) days from the date of receipt of Grievants' 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, Respondents shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 22nd day of June, 2005.

SOUTH DAKOTA DEPARTMENT OF LABOR

Heather E. Covey
Administrative Law Judge