

October 15, 2008

VIA FACSIMILE TRANSMISSION
AND FIRST CLASS MAIL

Linda Lea Viken
Viken Law Firm
Attorney for Grievant, AFSCME
4200 Beach Drive, Ste.4
Rapid City, SD 57702

Amended
Letter Decision and Order

Anne Plooster
SDEA/NES
Attorney for Grievant and Petitioner, SFEAA
411 East Capitol Avenue
Pierre, SD 57501

Susan Brunick Simons
Davenport, Evans, Hurwitz & Smith LLC
Attorney for Respondent, Sioux Falls School District
PO Box 1030
Sioux Falls, SD 57101-1030

Re: AFSCME Local 1025 vs. Sioux Falls School District, 14G, 2007/08; Sioux Falls Education Assistants Association vs. Sioux Falls School District, 1G, 2008/09; Sioux Falls Education Assistants Association vs. Sioux Falls School District, 1G, 2008/09

Dear Counsel:

This letter addresses the following submissions by the parties:

July 28, 2008	[Respondent's] Answer and Motion to Dismiss, 14G, 2007/08
	[Respondent's] Brief in Support of Motion to Dismiss Grievance as Untimely, 14G, 2007/08
August 21, 2008	[Respondent's] Answer and Motion to Dismiss Petition for Hearing on Grievance, 1G, 2008/09
	[Respondent's] Brief in Support of Motion to Dismiss Petition for Hearing on Grievance as Untimely, 1G, 2008/09

[Respondent's] Answer and Motion to Dismiss Petition for Hearing on Unfair Labor Practice, 1U, 2008/09

[Respondent's] Brief in Support of Motion to Dismiss Petition for Hearing on Unfair Labor Practice, 1U, 2008/09

August 25, 2008 Grievant's Response to Answer and Motion to Dismiss Grievance as Untimely, 14, 2007/08

Grievant's Brief in Opposition to Motion to Dismiss As Untimely, 14G, 2007/08

September 5, 2008 [Respondent's] Reply Brief in Support of Motion to Dismiss Petition for Hearing on Grievance, 14G, 2007/08

September 15, 2008 Petitioner's Response to Respondent's Answer and Motion to Dismiss Petition for Hearing on Grievance, 1G, 2008/09

Petitioner's Brief in Support of Petitioner's Response to Respondent's Answer and Motion to Dismiss Petition for Hearing on Grievance, 1G, 2008/09

Petitioner's Response to Respondent's Answer and Motion to Dismiss Petition for Hearing on Unfair Labor Practice, 1U, 2008/09

Petitioner's Brief in Support of Petitioner's Response to Respondent's Answer and Motion to Dismiss Petition for Hearing on Unfair labor practice, 1U, 2008/09

September 26, 2008 [Respondent's] Reply Brief in Support of Motion to Dismiss Petition for Hearing on Grievance as Untimely (HF No, 1G, 2009/09)

[Respondent's] Reply Brief in Support of Motion to Dismiss Petition for Hearing on Unfair Labor Practice as Untimely (HF No, 1U, 2009/09)

FACTS

The facts of these cases as reflected by the above submissions and supporting documentation are as follows:

1. AFSCME Local 1025 (Local 1025) and Sioux Falls Education Assistants Association (SFEAA) are organized bargaining units (Bargaining Units) whose member are non-instructional employees of the Sioux Falls School District (School District).
2. Local 1025 and SFEAA have negotiated and signed agreements with the School District related to the wages and hours of their members. These agreements extended through June 30, 2013.
3. The negotiated agreements tie the wages and yearly wage increases of Local 1025 and SFEAA's members to the state's "per student allocation".
4. During the 2008 legislative session, Senate Bill 187 (SB 187) was introduced and passed. A section of SB 187 related to the per student allocation was codified at SDCL 13-13-10.6. That section contains a contingency whereby a school district may receive either a 2.5 % or 3 % increase in its fiscal year (FY) 2009, per student allocation depending on whether it certifies to the secretary of education that its average teacher salary and benefits will increase by at least three percent and that it will spend at least \$22.64 per fall enrollment on teacher salaries and benefits in excess of the school district's FY 2008 expenditures on teacher salaries and benefits.
5. On April 8, 2008, a meeting was held with the Bargaining Units and administration of the School District, including Superintendent Homan and Business Manager Todd Vik. At that meeting both Bargaining Units were provided with a copy of a Memorandum of Understanding (MOU) that had been prepared by the School District.
6. The MOU set forth the School District's interpretation of the new legislation, including SDCL 13-13-10.6 and its impact on the salary increases for non-instructional employees. The MOU set forth the School District's intended wage increase for FY 2009 of 2.5%, unless the MOU was accepted by the bargaining units.
7. Local 1025 and SFEAA were advised to discuss the MOU with their membership.
8. At the conclusion of the meeting on April 8, 2008, Jan Dalseide signed the MOU on behalf of SFEAA and Ruth Anderson signed on behalf of Local 1025. Both added the initials "T.A." indicating that it was a "tentative agreement."
9. At the conclusion of the meeting, the several bargaining units, including SFEAA and Local 1025, asked for a breakdown on the difference between a 2.5% and 3% wage increase. That information was provided to SFEAA on April 10, 2008.
10. Between April 8 and April 18, Dr. Homan communicated with the Bargaining Units, outlining the School District's position.
11. On April 16, 2008, following a meeting that included two Local 1025 representatives, Dr. Homan sent an explanatory email attempting to explain the School District's position on the effect of SDCL 13-13-10.6.

12. Ms. Dalseide set an e-mail on April 17, 2008, in which she advised the School District that the SFEAA had sought and obtained legal opinions from three (3) union lawyers that SFEAA was entitled to a 3% raise without the MOU.
13. On April 18, 2008, Ruth Anderson sent Dr. Homan an email indicating that Local 1025 had voted unanimously to reject the MOU after "much discussion".
14. After April 18, 2008, there was no further communication between the School District and Local 1025 regarding the salary increase for FY 2009.
15. On April 22, 2008, SFEAA's members voted no to signing the MOU.
16. After April 22, 2008, there was no further communication between the School District and SFEAA regarding the salary increase for FY 2009.
17. On June 11, 2008, Superintendent Homan and School Board President Daby sent a letter to all employees affected by SFEAA's April 18, 2008, vote including those employees who were not union members. That letter was factual in nature and included a review of the Legislature's change in the per student allocation, the meeting to discuss the MOU and the rejection of the MOU by vote of the members of the bargaining units.
18. The letter of June 11, 2008, did not change or alter the position of the District from that which had been presented to the bargaining units on April 8, 2008 and rejected by Local 1025 and SFEAA.
19. On June 18, 2008, Local 1025 sent the School District a document (dated the same day) entitled "Official Grievance Form" signed by James R. Jones, Chief Steward, Local 1025. The form stated that it was filed on behalf of all custodians. The form indicated the item to be grieved was the School District's intention to provide a 2.5% rather than a 3% wage increase.
20. On June 23, 2008, the Sioux Falls School Board voted to offer its non-instructional employees a 2.5% rise for FY 2009.
21. On July 10, 2008, SFEAA served the School District with a document (dated the same day) entitled "Sioux Falls School District Grievance Form" signed by Jan Dalseide SFEAA President. The form stated it was filed on behalf of SFEAA. The item to be grieved, according to the form, was the 2.5% rather than a 3% wage increase.
22. On August 1, 2008, SFEAA filed a Petition for Hearing on Unfair Labor Practice with the Department alleging that the same facts and actions taken by the School District set forth in its Petition for Hearing on Grievance constituted an unfair labor practice.
23. The School District has enacted grievance procedures, by agreement with the Bargaining Units. The relevant provisions of those grievance procedures contain very similar language. Those procedures both state:
24. That "grievance" is defined as "a complaint by an employee concerning the interpretation of or application of the existing provisions of this agreement."

25. That a grievance is to be filed “within thirty (30) days of the violation, or within thirty (30) days of when through reasonable diligence should have been discovered.”

GRIEVANCES

SDCL 3-18-15.1 requires school districts to enact, “by agreement” a procedure which its employees may follow for prompt informal dispositions of grievances.” A grievance is defined by statute as “a complaint by a public employee or group of public employees based upon an alleged violation, misinterpretation, or inequitable application of any existing agreement” SDCL 3-18-1.1.

“The Department’s jurisdiction is lost if the grievance is not timely filed in accordance with grievance procedures.” Cox v. Sioux Falls Sch. Dist. 49-5, 514 N.W.2d 868, 871 (S.D. 1994) quoting Reninger v. Bennett County Sch. Dist., 468 N.W.2d 423, 428 (S.D. 1991). See also Bon Homme County Commission v. American Federation of State, County, and Municipal Employees, Local 1743A, 2005 SD 76, 699 N.W.2d 441; Larson v. Mitchell School Dist., 2000 WL 1920462 (SD Dept. Labor HF No. 3G, 1999/00 October 5, 2000).

The grievances filed by both Bargaining Units challenge the School District’s interpretation of SDCL 13-13-10.6, and its impact on the FY2009 salary increases of their members. The School District made clear its interpretation of SDCL 13-13-10.6 in the MOU that was distributed and discussed at the April 8, 2008 meeting. After that meeting, both Bargaining Units continued to communicate with the School District about the impact of that interpretation, until their members voted to reject the MOU. Local 1025 voted to reject the MOU on April 18, 2008. SFEAA announced that it rejected the MOU on April 22, 2008.

The Grievant, SFEAA argues that it “could reasonably assume that the School District intended to honor its original agreement which included a 3% raise for 2008-9” after its member rejected the MOU and the Bargaining Units communication with the School District ended. The Grievant come to this conclusion without any supporting facts or history.

There is no indication that the School District’s interpretation of SDCL 13-13-10.6 had ever changed from its original position. The School District’s position was consistent throughout the discussions. There was no reason to believe that the School district’s position would change after the discussions ended. To the contrary, once the Bargaining Units rejected the MOU and communication ended. The Bargaining Units should have understood that the School District’s interpretation of SDCL 13-13-10.6 was not apt to change in the near future. At that point in time, April 18 and 22, 2008 respectively, the Bargaining Units should have understood the School District’s position had they exercised “reasonable diligence.”

Local 1025 served its grievance on June 18, 2009 and SFEAA on July 10, 2008. Both dates were well beyond “thirty (30) days of when through reasonable diligence” the School District’s interpretation of SDCL 13-13-10.6, “should have been

discovered". Consequently, the Department of Labor does not have jurisdiction to consider these grievances and both cases must be dismissed.

UNFAIR LABOR PRACTICE

The Department of Labor's jurisdiction in unfair labor practice complaints is limited by SDCL 3-18-3.4. That statute states: "Any complaint brought under the provisions of §§ 3-18-3.1 and 3-18-3.2 shall be filed with the Department of Labor within sixty days after the alleged commission of an unfair labor practice occurs or within sixty days after the complainant should have known of the offense."

The "offence" in SFEAA's unfair labor practice complaint is essentially the same as stated in its grievance. SFEAA complains that the School District's interpretation SDCL 13-13-10.6 constitutes an unfair labor practice.

SFEAA argues that the time limit imposed by SDCL 3-18-3.4 is not triggered until the School District performs an "official act" and that act did not occur until June 11, 2008. Its argument fails. The statute states in part, "or within sixty days after the complainant should have known of the offense." This language indicates that something less than an "official act" is required. This language is rendered meaningless if an official act is required.

SFEAA "should have known" of the School District's interpretation of SDCL 13-13-10.6 on April 22, 2008 when the Bargaining Unit voted to reject the MOU. SFEAA failed to file its complaint until August 1, 2008, well beyond the 60 days limit allowed by SDCL 18-3-3.4. Therefore, the Department of Labor lacks jurisdiction to consider the unfair labor practice and the case must be dismissed.

ORDER

For the reasons stated above, Respondent's Motion to Dismiss, 14G, 2007/08 is granted. Respondent's Motion to Dismiss Petition for Hearing on Grievance, 1G, 2008/09 is granted and Respondent's Motion to Dismiss Petition for Hearing on Unfair Labor Practice, 1U, 2008/09 is granted.

Sincerely,

Donald W. Hageman
Administrative Law Judge