

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

**LAUREN BOER,**

**HF No. 16G, 2008/09**

**Petitioner,**

**v.**

**DECISION**

**SIOUX FALLS SCHOOL DISTRICT  
# 49-5 and BOARD OF EDUCATION,**

**Respondent.**

This matter came before the Department of Labor when Petitioner, Lauren Boer, filed a Petition for Hearing on Grievance pursuant to SDCL 3-18-15.2. The Department conducted a hearing on February 18<sup>th</sup> and 19<sup>th</sup>, 2010, in Sioux Falls, South Dakota. Anne Plooster appeared on behalf of Petitioner, Lauren Boer. Susan Simons represented Respondent, Sioux Falls School District #49-5 and Board of Education.

After Petitioner had concluded his case, Respondent moved for a directed verdict pursuant to SDCL 3-18-15.2, because Petitioner failed to present evidence legally sufficient to sustain his grievance. The Department denied Respondent's motion at that time. After Respondent concluded its case, it renewed its motion. Respondent subsequently filed its motion in writing.

***Issue:***

This case presents the following legal issue:

Whether the Sioux Falls School District and Board of Education violated, misinterpreted or inequitably applied any provisions of the negotiated agreement when it terminated Lauren Boer's employment?

***Facts:***

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

1. Lauren Boer (Boer) was employed by Sioux Falls School District # 49-5 and Board of Education (District) as an educational assistant (EA).
2. During the 2008-09 school year, Boer was assigned to Lowell Math Science Technology Elementary School (Lowell) to be a personal EA for a first grade

student (T.). Boer had been assigned to this same student for a portion of 2007-08 school year.

3. During the 2008-09 school year, T. had an Individualized Education Plan (IEP) that also contained a Behavior Intervention Plan (BIP) due to concerns over the student's behavior.
4. During the 2007-08 school year, T. pushed a child off a piece of playground apparatus and pushed another student in the coat closet resulting in an injury that required the student to get stitches. Consequently, the District had concerns about T. acting out aggressively toward other students during the 2008-09 school year.
5. Patricia Vincent (Vincent) was hired by the District as the new Principal of Lowell for 2008-09 school year. Vincent was new to both Lowell, and the District.
6. Maureen Bland (Bland) was the veteran first grade teacher during the 2008-09 school year. As a result, several of the more challenging students were placed in her class. T. was among those challenging students placed in Bland's class.
7. At the beginning of the 2008-09 school year, Bland met with Vincent and made Vincent aware of T. and the events from the 2007-08 school year.
8. After meeting with Bland, Vincent reviewed T.'s IEP and BIP and talked to the kindergarten teachers about the previous 2007-08 school year.
9. Vincent learned that T. was big for his age and that he was academically delayed. T. had been identified as qualified for special education services. In addition, the BIP specifically required a personal EA be assigned to the student for the purpose of safety of other students.
10. T.'s BIP for the 2008-09 school year required the EA to be with T. at all times in the classroom and on the playground.
11. Vincent was Boer's direct supervisor during the 2008-09 school year.
12. On August 14, 2008, Vincent met with Boer before the start of the 2008-09 school year. Vincent told Boer of her expectations: Safety of students was a primary concern. Therefore, Boer was to remain close to T. on the playground and in the classroom. She emphasized this point by using the phrase "I want you to stick to him like fleas on a dog." Vincent documented this conversation.
13. Soon after the 2008-09 school year began, Bland noticed that Boer was not following Vincent's directives. Bland maintained a "journal" as a method of stress relief and had noted Boer's interactions with T. over the first few day of the school year. Bland noted the Boer was frequently separated from T. to the

extent that he could not immediately control T.'s actions. She also noted that Boer was often distracted from his duties due to his interactions with a group of first grade female students.

14. After learning of Bland's observations, Vincent asked Bland to continue to document Boer's performance of his duties in a more formal manner.
15. After learning that Boer was not following her directives, Vincent met with Boer again. This time she gave Boer a written reprimand dated August 25, 2008, in which she outlined her concerns.
16. The August 25, 2008 reprimand stated that Boer had been observed not following through with the expectations previously given to him and provided examples.
17. During the meeting on August 25, 2008, Vincent told Boer the consequences of not providing the proper supervision to T. She told Boer that the safety of T. and the other students were being compromised by his lack of attention. She stated, "Your attention to other students, most often females, is inappropriate and does not follow through with IEP behavior goals as well as the expectations you and I established together." Boer was advised that his failure to provide the proper supervision would result in further discipline which could affect his employment status. He was told that on the playground he needed to be within a physical distance of T. so that Boer could support T. in case he attempted to act out towards another student or to prevent him from hurting himself.
18. Boer did not fully agree with the instructions given to him by Vincent. He believed that he could control T. actions with some distance separating them. He also found it strange that the children's safety was Vincent's "No. 1 goal."
19. After Vincent and Boer's August 25, 2008 meeting, Vincent dropped into the classroom and observed the playground when walking through the building. Vincent did not personally observe anything that caused her to question whether Boer either understood or was following the expectations that had been outlined.
20. In November, Vincent received a call from Lisa Heidelberger (Heidelberger), an Integration Specialist with the District seeking Vincent's permission for Boer to be a couple of chairs away from his student during a particular group activity. Boer had told Heidelberger that she needed to obtain Vincent's approval as it was not consistent with her prior directives.
21. Heather Stegemann (Stegemann), a first year teacher, testified that she made inquiry of Vincent in September or October as to the role of a personal EA. Vincent described the general duties of a personal EA. Stegemann stated that she had made the inquiry after seeing Boer walking with two girls to line up after recess while Boer's assigned student was near the basketball court.

22. On January 8, 2009, two separate events were reported involving Boer's assigned student. T. had been involved in altercations with two students. One of the students was struck twice in the face resulting in a bloody lip. T. admitted to the Behavior Facilitator that he had struck the student twice in the face. A parent also reported that her son had claimed that T. had pushed him down, ripping his snow pants. Boer was unaware of either of these events at the time of their occurrences.
23. Vincent was out of the office on January 8, 2009, but was informed of the two events through an email from Bland. Vincent advised the school secretary to have Boer phone her the following morning when he arrived at school. Vincent wanted to discuss with Boer why these events occurred, where he was at the time and what he knew about these reported events.
24. On the morning of January 9, 2009, Boer phoned Vincent. When asked by Vincent about the events, Boer said he did not know what had happened. Vincent asked why he did not know and where he was. Boer's response was that he was not prepared to talk about the events. Boer could not tell Vincent where he was in proximity to his student when these events had occurred. Vincent told Boer they would meet on Monday to further discuss the situation.
25. After his phone conversation with Vincent on January 9, 2009, Boer left the school office. After taking a few steps, he returned and told the school secretary that he was leaving. He did not tell the secretary he was sick. He stated that there was no emergency. He stated that he was leaving as he was not going to have a good day. He then went to the classroom, picked up his coat, and gave the same message to Bland. Boer then left before a substitute arrived. Boer took sick leave for the remainder of the day.
26. On January 15, 2009, Vincent advised Boer in a phone conversation that there was going to be a meeting at the end of the school day on January 20, 2009, to discuss the events on January 8<sup>th</sup> and 9<sup>th</sup>. When Boer returned to the classroom after receiving this notice, Bland observed that Boer was upset. She was concerned about his demeanor and actions. She observed that Boer had placed T. in the "take-a-break" chair. This chair is used for minor behavioral issues. However, Boer had been instructed that T. should not be kept in the chair for more than a couple of minutes. Bland observed Boer shaking his finger at T. and speaking to him in a harsh voice. Bland released the student from the chair after noting that T. had been in the chair longer than T.'s usual time. Bland then told T. to gather his belongings and get ready to go home for the day. Bland observed Boer angrily kick an item when walking to the back of the room with T. Bland reported these concerns to Vincent.
27. The morning of January 16, 2009, Boer was asked to report to Vincent's office upon arriving at school. Two kindergarten teachers reported to Vincent that Boer

was seen walking through the hallway, that he appeared angry and one reported having to pull two of her students out of Boer's way as she felt Boer was going to run into them.

28. At the meeting on January 16, 2009, Boer was advised by Vincent that he was being suspended with pay and that there would be an investigation into his conduct when he returned to the classroom on January 15. He was told not to return to the building until the meeting set for 3:00 p.m. on January 20, 2009.
29. Vincent met with T. and Bland and asked the student about Boer's conduct upon his return to the classroom on January 15. The student told Vincent that Boer used an angry voice, a bully voice and made him feel sad and mad.
30. Based upon the events of January 15 and 16, 2009, Vincent recommended to the Board of Education that Boer's employment be terminated. However, before this recommendation was accepted, Vincent was told by the Board of Education to conduct further investigation into Boer's lack of attention to his student.
31. At the meeting on January 20, 2009, Boer was told that he was being placed on a 10-day unpaid suspension. Boer was also told that the events of January 8<sup>th</sup> had raised concerns as to whether he was fulfilling his assigned duties and that the District would be investigating these concerns during the suspension.
32. Boer was informed on January 20, 2009, that as part of the ongoing investigation, a meeting would be held with him on January 30, 2009, at 3:30 and that a final meeting would then occur at the conclusion of the 10-day suspension. After the meeting, Boer was specifically asked to leave the building "as he was on suspension." The document provided to Boer specifically told him that he was not to contact Lowell staff during his suspension.
33. On the evening of January 20, 2009, Boer contacted two Lowell staff, Jill Powell and Shannon Hohweiler. Ms. Hohweiler testified that when Boer spoke to her he told her that he was on suspension.
34. During her investigation, Vincent spoke with staff that would have had the opportunity to observe Boer on the playground and in the classroom. Those staff members testified at the hearing. All testified that Vincent asked them about their observations of Boer on the playground. All testified that Vincent's questions were open-ended and did not reveal any specific concerns. The testimony of these staff members was compelling. They all observed that Boer was frequently not in the proximity of T. and that he spent a lot of time involved with a group of female first grade students. Each of them voiced their own concern about these observations.

35. Boer was also questioned as part of the investigation. After only two questions Boer asked if the meeting had to continue. After conferring with his union representatives, Boer ended the interview.
36. Based upon the results of Vincent's investigation, the Board of Education accepted Vincent's recommendation and Boer was advised of his termination on February 3, 2009.
37. The reasons stated by the District for Boer's termination were: dereliction of duty, poor performance, student safety issues and insubordination. This decision was based upon Boer's failure to provide the directed academic support of T. in the classroom, his failure to supervise T. in all areas of the building and playground. Giving his attention to other students, most often female students. In addition, the District stated that Boer contacted Lowell staff after being instructed not to do so during his suspension.
38. The Sioux Falls Education Assistant's Association (SFEAA) is a collective bargaining unit. During the 2008-09 school year, Boer was a member of the SFEAA. The District and the SFEAA had a negotiated agreement in effect during the 2008-09 school year.
39. Article 12, of the negotiated agreement states:

Discipline.

12.01. No employee shall be disciplined without just cause. In no case shall this be done publicly except as required in state law.

12.02 Except in the case of an oral reprimand under 12.03.01, on any occasion in which an employee receives disciplinary action which may affect his/her employment status, the employee shall be provided reasonable notice of such meeting in advance and notified of his/her right to have an employee union/organization representative present.

12.03 The administration and the Board shall have the authority to discipline employees consistent with this section. Such discipline shall be progressive through the following steps beginning with 12.03.01, or with whatever step may be appropriate to the situation.

12.03.01 Oral reprimand by the immediate supervisor.

12.03.02 Written reprimand by the immediate supervisor.

12.03.03 Suspension without pay for up to three (3) days by the Superintendent, Assistant Superintendent or designee.

12.03.04 Suspension without pay for no more than ten (10) days by the Superintendent, Assistant Superintendent or designee.

12.03.05 Suspension with or without pay by the Superintendent not to exceed ninety (90) working days.

12.03.06 Termination of employment

At any discipline step except 12.03.01 and 12.03.06, a written communication shall state what conduct is expected, what conduct is not to occur, and the consequences of further misconduct.

12.04 If the behavior recurs, any discipline shall begin with the step which is appropriate for the frequency and the lapse of time since the last disciplinary action for the same or similar offense.

12.05 Paragraph 12.03.05 of this article may be used during a period of investigation, as an interim step, or as a form of discipline. If used as an interim step, the suspension shall be with full pay and benefits.

12.06 The imposition of discipline at any step below 12.03.05 shall not prohibit the district in an appropriate case from imposing discipline at a higher step in the same manner.

40. Additional facts may be discussed in the Analysis below.

***Analysis:***

***Grievance***

In this case, the analysis begins with the statutory definition of "grievance". SDCL 3-18-1.1 states:

SDCL 3-18-1. 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 grievance cases is set forth in SDCL 3-18-15.2. That statute states 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.

SDCL 3-18-15.2. In this case, the Department must determine whether the District violated the terms of Article 12. of the negotiated agreement when it terminated Boer's employment.

As the grievant, the burden of proof falls on Boer. *Rininger v. Bennett County School District*, 468 NW2d 423 (SD 1991). "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." *Wessington Springs Education Association v. Wessington Springs School District #36-2*, 467 NW2d 101, 104 (SD 1991) citing *Schnabel v. Alcester School District*, 295 NW2d 340 (SD 1980). "The contracts negotiated between public school districts and teachers are like any other collective bargaining agreement, and disputes over the agreement are resolved with reference to general contract law." *Id.* (citations omitted).

### ***Just Cause***

The parties' negotiated agreement provides that no employee may be terminated without just cause. Petitioner argues that there was not "just cause" to terminate his employment.

"Just cause" is not defined by the negotiated agreement. However, the South Dakota Supreme Court has stated in public employee cases that misconduct justifying termination "for cause" "is lower than that which determines whether an employee's misconduct will deprive him of unemployment compensation." *City of Sioux Falls v. Miller*, 1996 SD 132, ¶ 12, 555 N.W.2d 368, 371; *Kleinsasser v. City of Rapid City*, 440 N.W.2d 734, 736-37 (S.D. 1989).

Misconduct for purposes of unemployment compensation includes the following:

- (1) Failure to obey orders, rules or instructions, or failure to discharge the duties for which an individual was employed; or
- (2) Substantial disregard of the employer's interests or of the employee's duties and obligations to his employer; or
- (3) Conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee; or



- (4) Carelessness or negligence of such degree or recurrence as to manifest equal culpability or wrongful intent.

However, mere inefficiency, unsatisfactory conduct, failure to perform as the result of inability or incapacity, a good faith error in judgment or discretion ... is not misconduct.

SDCL 61-6-14.1.

The District's decision to terminate Boer's employment was based upon multiple incidents. One of the less serious incidents occurred when Boer left the school on January 9, 2009 claiming to be sick. Another occurred when he became upset after his phone conversation with Vincent on January 15, 2009, and then projected his anger on T. While these incidents demonstrate a lack of professionalism, they would not, on their own, justify Boer's termination. However, Boer's continuing failure to stay close enough to T. to prevent him from injuring other students and the repeated distractions by the first grade female students is more serious.

Boer was instructed at the beginning of the 2008-09 school year to stay close enough to T. at all times to prevent him from hurting himself or other students; he was to stay "as close as fleas on a dog." When Boer failed to do so, he was given a written reprimand. Despite this warning, Boer continued to disregard his instructions. This was evidenced by the playground teacher's testimony and the fact that Boer was unaware of the two incidents on January 8, 2009.

The testimony of the playground teachers was compelling. While none of these teachers had reason to take special notice of Boer, they all noticed that Boer was often not in close proximity of T. And each of them found it unusual that Boer's attention to T. was frequently distracted by a group of female students.

Boer was aware of his responsibilities toward T. Boer disagreed with his instructions to stay close to T. and questioned the policy that safety was his "No. 1 goal." He believed that he could control T. from a longer distance than his instructions permitted. Consequently, he intentionally ignored his instructions while on the playground and at other times. Boer's actions demonstrated a failure to "obey orders, rules or instructions" as provided in SDCL 61-6-14.1. His actions constituted "insubordination" regardless of the definition used to describe that term.<sup>1</sup>

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<sup>1</sup> The Supreme Court in *Barnes v. Spearfish School District No. 40-2*, 2006 SD 108, ¶ 10, 725 N.W.2d 226, 229-30 states:

Black's Law Dictionary now defines insubordination as: "(1) A willful disregard of an employer's instructions, esp. behavior that gives the employer cause to terminate a worker's employment. (2) An act of disobedience to proper authority; esp., a refusal to obey an order that a superior officer is authorized to give." (8th ed 2004). The definition of insubordination used by the Board and accepted by the circuit court was adopted by this Court in *Schroeder v. Department of Social Services*, 1996 SD 34, ¶10, 545 NW2d 223, 228, and restated in *Bad Wound v. Lakota Cmnty Homes, Inc.*, 1998 SD 25, ¶18, 576 NW2d 229,

In similar fashion, Boer met with Lowell staff members after being instructed not to do so during his suspension. While Boer tries to find a technical “loophole” to justify his actions. It was apparent that the District did not want him to communicate with the staff prior to their investigation because of the danger of compromising the investigation results.

In *Hollander v. Douglas County*, 2000 SD 159, ¶ 22, 620 NW2d 181, 185, the Supreme Court stated that it was not proper to look at each separate action of the employee; rather all actions should be taken together. In this case, when all of Boer’s actions are taken together, it is clear that “just cause” existed to terminate Boer’s employment.

### ***Progressive Discipline***

Petitioner also argues that the District failed to comply with the progressive disciplinary scheme imposed by the negotiated agreement.<sup>2</sup> His argument is without merit. The negotiated agreement contains the following provisions:

12.03 The administration and the Board shall have the authority to discipline employees consistent with this section. Such discipline shall be progressive through the following steps beginning with 12.03.01, or with whatever step may be appropriate to the situation.

12.04 If the behavior recurs, any discipline shall begin with the step which is appropriate for the frequency and the lapse of time since the last disciplinary action for the same or similar offense.

12.05 Paragraph 12.03.05 of this article may be used during a period of investigation, as an interim step, or as a form of discipline. If used as an interim step, the suspension shall be with full pay and benefits.

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232. This definition is sufficient. Moreover, it is in accord with the second definition of insubordination as stated in Black’s Law Dictionary (8th ed 2004).

The Court ultimately accepted the definition of insubordination as “[N]ot submitting to authority; disobedient.” *Id.* at ¶ 9.

<sup>2</sup> Article 12.

12.03.01 Oral reprimand by the immediate supervisor.

12.03.02 Written reprimand by the immediate supervisor.

12.03.03 Suspension without pay for up to three (3) days by the Superintendent, Assistant Superintendent or designee.

12.03.04 Suspension without pay for no more than ten (10) days by the Superintendent, Assistant Superintendent or designee.

12.03.05 Suspension with or without pay by the Superintendent not to exceed ninety (90) working days.

12.03.06 Termination of employment.

12.06 The imposition of discipline at any step below 12.03.05 shall not prohibit the district in an appropriate case from imposing discipline at a higher step in the same manner.

None of these provisions require the district to utilize each and every step of the progressive scheme. All that is required is that the next step taken is appropriate under the circumstances. There is nothing in this case to suggest that termination after receiving a written reprimand, a suspension with pay and a suspension without pay during which an investigation was conducted, was an inappropriate step.

**Conclusion:**

In accordance with the discussion above, the evidence offered by Boer is legally insufficient to sustain his grievance. Consequently, the District's Motion Pursuant to SDCL3-18-15.2, is granted. Boer's grievance is dismissed.

The District shall submit proposed Findings of Fact and Conclusions of Law, and an Order consistent with this Decision within twenty (20) days from the date of receipt of this Decision. Association shall have twenty (20) days from the date of receipt of District'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, District shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 5<sup>th</sup> day of October, 2010.

SOUTH DAKOTA DEPARTMENT OF LABOR

Donald W. Hageman  
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Administrative Law Judge