

October 24, 2011

Dr. Mathias E. Stricherz
213 Forest Avenue
Vermillion, SD 57069

Letter Decision and Order

Terry N. Prendergast
Murphy, Goldammer & Prendergast, LLP
PO Box 1535
Sioux Falls, SD 57101-1535

Re: HF No. 19 G, 2010/11 – Mathias E. Stricherz v. University of South Dakota, Board of Regents

Dear Mr. Stricherz and Mr. Prendergast:

Submissions:

This decision addresses the following submissions by the parties:

July 22, 2011	[Respondent's] Motion to Dismiss Grievance for Lack of Jurisdiction and Supporting Authority;
August 26, 2011	Grievant's Response to Board of Regents / University of South Dakota's Motion to Dismiss Grievance for Lack of Jurisdiction and Supporting Authority; and
September 9, 2011	Reply Brief of University of South Dakota and SD Board of Regents on Motion to Dismiss for Lack of Jurisdiction.

Background:

The facts of this case as reflected by the submissions are as follows:

1. Mathias E. Stricherz (Stricherz) was hired as the Director of the Student Counseling Center at the University of South Dakota (USD) on June 1, 1989.
2. USD is a public institution of higher learning governed by the South Dakota Board of Regents (BOR).

3. Stricherz was initially appointed as the Director of Student Counseling at USD for a term from July 1, 1989 to June 30, 1989.
4. From June of 1989 until May of 2010, Stricherz never formally reapplied for his position, but was reappointed each year for a one year fixed term by written contract.
5. Stricherz' position was categorized as "Administrative Non-Faculty Exempt." He had no tenure rights or right to continuing employment beyond the one year contract.
6. The last written employment contract appointing Stricherz as Director of Student Counseling was signed by President James Abbott and was dated May 25, 2009. This contract appointed Stricherz for a one year term from June 22, 2009, through June 21, 2010.
7. As Director of Student Counseling, Stricherz was the senior administrator of a major university unit, and as a supervisor, was responsible for the supervision and direction of the counseling center staff.
8. On May 6, 2010, Stricherz was informed that his annual contract of employment, set to expire on June 21, 2010, would not be renewed. The letter stated that the reason the employment contract was not being renewed was due to "strategic reorganization."
9. Stricherz filed two grievances with the BOR.
10. Stricherz filed a Petition for Hearing on Grievance with the Department of Labor and Regulation pursuant to SDCL 3-18-15.2, appealing BOR's actions with regards to Stricherz grievances.

Motion to Dismiss:

In its motion to dismiss, USD/BOR contends that the Department of Labor and Regulation lacks jurisdiction in this case because Stricherz does not fall within the group of individuals who may seek review of their grievances by the Department pursuant to SDCL Ch. 3-18.

The Department's authority to review grievances is granted by SDCL 3-18-15.2. That provision 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 and Regulation...

SDCL 3-18-15.1. 1 (emphasis added). SDCL defines the term, "grievance" as used in SDCL Ch. 3-18. That statute states:

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.

3-18-1. (emphasis added). SDCL 3-18-1 states:

The words "public employees" as used in this chapter shall mean any person holding a position by appointment or employment in the government of the State of South Dakota or in the government of any one or more of the political subdivisions thereof, or in the service of the public schools, or in the service of any authority, commission, or board, or any other branch of the public service. The term does not include:

(2) Administrators except elementary and secondary school administrators, administrative officers, directors, or chief executive officers of a public employer or major divisions thereof as well as chief deputies, first assistants, and any other public employees having authority in the interest of the public employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other public employees, or the responsibility to direct them, or to adjust their grievances, or to effectively recommend such action, if in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment;

SDCL 3-18-1 (emphasis added).

In this case, Stricherz was hired as a "director" and "administrator". He was hired to supervise and direct the staff of the student counseling center at USD. Stricherz job duties required him to "use independent judgment." Consequently, Stricherz' position is excluded from the definition of "public employee" and is not a member of the group who may seek review by the Department.

The adjudicatory jurisdiction of an agency is discussed by the South Dakota supreme court in O'Toole v. SD Retirement System, 2002 S.D. 77, 648 N.W.2d 342 (2002) where it stated:

The general rule is that administrative agencies have only such adjudicatory jurisdiction as is conferred upon them by statute. Johnson v. Kolman, 412 N.W.2d 109, 112 (SD 1987) (citing Springville Com. Sch. Dist. v. Iowa Dept. of Pub. Inst., 252 Iowa 907, 109 N.W.2d 213 (1961); Montana Bd. of Nat. Res. & Con. v. Montana Power Co., 166 Mont. 522, 536 P.2d 758 (1975); 2 Am.Jur.2d Administrative Law § 328). Furthermore, "[an administrative agency] may not acquire jurisdiction by estoppel or consent, and, where it acts without jurisdiction, its orders are void." Montana Bd. of Nat. Res. & Con., 536 P.2d at 762 (quoting 73 CJS Public Administrative Bodies and Procedures § 116). See also Pickering v. Illinois

Human Rights Com'n, 496 N.E.2d 746 (111App2Dist 1986); and Powell v. Khodari-Intergreen Co., 303 N.W.2d 171 (Ia 1981).

An agency has only such power as expressly or by necessary implication is granted by legislative enactment; agency may not increase its own jurisdiction and, as a creature of statute, has no common-law jurisdiction nor inherent power such as might reside in a court of general jurisdiction. Lee v. Div. of Fla. Land Sales & Condominiums, 474 So.2d 282, 284 (Fla App5Dist 1985)."

Id. The South Dakota legislature has not bestowed jurisdiction upon the Department to review this matter. Consequently, the matter must be dismissed.

Order:

For the reasons discussed above, USD/BOR's Motion to Dismiss for Lack of Jurisdiction is granted. This case is dismissed with prejudice. This letter shall constitute the order in this case.

Sincerely,

Donald W. Hageman
Administrative Law Judge