

November 21, 2019

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P.O. Box 759
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RE: HF No. 1G 2019/20 Rebecca Peterson v. Meade County School District 46-1

Dear Mr. Clayborne and Mr. Nies:

This letter addresses the following submissions by the parties:

August 20, 2019	Respondent's Motion to Dismiss
September 10, 2019	Petitioner's Response to Motion
September 17, 2019	Respondent's Reply Brief in Support of Motion

In addition, a telephonic hearing was held Friday, October 18, 2019 to take further arguments on the motion. Grievant was represented by her attorney of record, Courtney Clayborne. Respondent was represented by its attorney of record Eric Nies.

ISSUES PRESENTED:

DOES THE DEPARTMENT HAVE JURISDICTION TO HEAR GRIEVANT'S APPEAL?

FACTS

The Meade County School District (District) and the Meade County Education Association (MEA) entered into a negotiated agreement (Agreement) for the 2018/19

school year. Included in this Agreement was a provision setting aside up to \$300,000 annually through the 2021/22 school year to pay an early retirement incentive for staff. Teachers who qualify for the incentive may opt to retire early and receive a payment of 70 percent of the average of that teacher's highest salary years up to a maximum of \$35,000. Section 5.12 of the Agreement sets the criteria for any staff member wishing to take advantage of the incentive. The Agreement also specifies that early retirement will be granted on a first-come, first-serve basis. Once the \$300,000 threshold has been met for the year, no other teachers will be eligible to take advantage of the benefit.

Grievant, Rebecca Peterson, was a teacher with thirty-two years' experience in the Meade County School District. In April 2019, Grievant learned that she required a number of surgeries on both of her feet over the next year. Given that she would have three different classes for the upcoming school year, Grievant did not feel that she could be an effective teacher with the amount of school she would miss for the surgeries. On April 24, 2019, Grievant sent an e-mail to the District's superintendent, Jeff Simmons requesting that an exception be made to the policy which would allow her to retire early even though the allotted monies had been allocated for that year. Grievant pointed out that the previous year the District had granted a wavier to a different staff member who wished to retire early due to medical reasons. This waiver was granted even though the allocated \$300,000 had already been earmarked for early retirements. Grievant also wrote an e-mail to the school board on April 27, 2019, stating the same things.

On April 30, 2019, Grievant sent an e-mail to Anna Tescher, the president of the MEA and requested a wavier so she could also retire early and receive the incentive.

Grievant indicated that Superintendent Simmons had advised her to reach out to MEA since in his opinion, the District could not grant a waiver without MEA's approval.

Grievant did not receive a response from Tescher or any other MEA member about whether it would agree to a waiver. However, Grievant did send a follow-up e-mail to Simmons on May 9, 2019. In the e-mail, Grievant asked if there was anything else she could do to receive the early retirement incentive. Grievant specifically requested that some action be taken before the next scheduled school board meeting. Simmons replied to Grievant that same day and indicated that he would not grant Grievant a waiver of the early retirement policy:

As I reflect on the conversation we had in my office last week I can see how different perceptions could be interpreted. I perceived the message from the meeting that you were going to retire. I do understand clearly your frustration in regard to how this retirement situation has developed. It pains me to tell you that as your new superintendent I will not grant a similar exception. (original).

Simmons went on to explain:

Our attorney recently informed me that the agreement, as it is written, does not grant the Superintendent, MEA or the School Board discretion or authority to make exceptions to 5.12 of the MEA negotiated agreement. Additionally, our attorneys have conferred and informed me that in part because I am the new superintendent and this situation with you is not identical to the previous, a precedent has not been set. Furthermore, making a similar exception again would put the school board, the school district and me as the superintendent in a precarious situation next year. I was strongly advised that an exception not be made again.

ANALYSIS

The Department's jurisdiction to hear grievances is found at SDCL 3-18-5.2. It reads in part:

If, after following the grievance procedure enacted by the governing body, the grievance remains unresolved, except in cases provided in § 3-6D-15, the grievance may be appealed to the Department of Labor and Regulation by filing

an appeal with the department within thirty days after the final decision by the governing body is mailed or delivered to the employee. The department shall conduct an investigation and hearing and shall issue an order covering the points raised, which order is binding on the employee and the governmental agency.

On May 11, 2019, Grievant wrote an e-mail to Charlie Wheeler, the president of the Meade County School Board. Grievant again stated her desire to be considered for an early retirement given her medical diagnosis. She explained that she felt since the District had previously granted an exception the previous year, it should also grant her an exception. Grievant requested to discuss the issue at the next school board meeting. However, the board took no action and Grievant was not allowed to appear.

ANALYSIS

Jurisdiction to hear grievances is conferred pursuant to SDCL 3-18-15.2. “If, after following the grievance procedure enacted by the governing body, the grievance remains unresolved, except in cases provided in § 3-6D-15, the grievance may be appealed to the Department of Labor and Regulation by filing an appeal with the department within thirty days after the final decision by the governing body is mailed or delivered to the employee.”

Before the Department can assert jurisdiction over this appeal, Grievant must first exhaust the procedures provided by the District. Article Seven of the Agreement lays out the procedure for a grievance. First, Section 7.2 of the Agreement requires a grievant “meet informally with the immediate supervisor within thirty-five (35) days of the occurrence in an attempt to resolve the issue.” In the event that the grievance is not resolved informally, a grievant must then “submit a formal written statement of the

grievance to the immediate supervisor of the grievant within ten (10) days after the informal meeting.”

Respondent argues in its Motion to Dismiss that Grievant did not follow the procedure set forth by the Agreement and therefore cannot appeal her grievance to the Department. First, Respondent contends that Grievant skipped the first step of the District’s grievance policy because she did not first discuss the issue of early retirement with her building principal. Grievant argues that since her immediate supervisor had no authority to act on the issue of her early retirement, it would have been futile for her to go there first. The Department agrees with Grievant that beginning her grievance with her building principal would have served no purpose since early retirement is a district-wide policy. Bringing the matter to her building principal would have only slowed down resolution of Grievant’ s grievance by adding a superfluous step to the process.

This conclusion is also supported by the Agreement itself. Section 7.7 of the Agreement, entitled “Special Grievances”, provides: “[a] grievance involving the actions of an administrator with District-wide responsibilities... is to be filed as provided by Section 7.2 and the administrator involved will be considered to be the immediate supervisor for the purpose of processing the grievance.” Since early retirement was a district-wide issue, it was logical that Simmons would be considered the immediate supervisor for this issue.

Respondent next argues that none of Grievant’ s contacts with Simmons could be considered a grievance. Section 7.1 of the Agreement defines a grievance as “a complaint by an employee, group of employees or the grievant based upon an alleged

violation, misinterpretation or inequitable application of any existing agreements, contract, policies, rules or regulations of Meade School District 46-1 as they apply to conditions of employment.” Respondent’s position is that Grievant merely reached out to Simmons to request advice on how to proceed. However, the context of Simmons’ May 9, 2019 e-mail demonstrates that he was aware Grievant wished to contest the decision not to allow her to receive the early retirement bonus for the 2018-19 school year.

Grievant contends that this situation is similar to that in *Schloe v. Lead-Deadwood Indep. Sch. Dist. No. 106*, 282 N.W.2d 610, (S.D. 1979). In *Schloe*, a teacher with the Lead-Deadwood School District received a letter indicating the board would not renew her contract for the next school year. The District had a recall policy at the time which required it to place all teachers subject to a reduction in force on a call back list. The grievant learned that her name was not on the list and immediately contacted the school board and indicated that she wished to have her name placed on the list pursuant to District policy. After the district took no action on her letter, grievant filed an appeal of her grievance with the Department. The district moved for dismissal arguing that grievant had not followed the its grievance procedure, thus depriving the Department of jurisdiction. The Department denied the motion but upon appeal, the circuit court granted the dismissal. The Supreme Court upheld the original Department decision denying dismissal. It reasoned:

The court holds that the April 15, 1976, letter sent by appellant to the Board constituted a grievance in that her immediate supervisor and the Board were put on notice that she felt her name should have been placed on the recall list in accordance with the Policy. The magic word “grievance” need not be used in following the procedure outlined by the Board. The mere fact that appellant's future employment with the District was in jeopardy would compel the conclusion

that she felt aggrieved when she sent a letter on April 15, 1976, requesting specific relief.

Id, at 614.

The key facts in *Schloe* are nearly identical in all key respects and the Department finds that it is controlling. As in *Schloe*, Simmons and the District were put on notice that Grievant meant to address a perceived inequitable application of the early retirement policy within the District. In her April 24, 2019 e-mail to Simmons, Grievant specifically referenced the policy and a previous exception that had been granted by the District: “Is there any chance that if I have medical documentation from my surgeons that I may retire this year and still receive the buy-out, just as [another staff member] did when he had to retire early for medical reasons?” That Grievant’s April 24 e-mail was considered a grievance is supported by Simmons’s reply in which he specifically stated that he would not grant Grievant a waiver to the early retirement policy.

Simmons explanation demonstrates that he understood Grievant’s e-mail to be a request to treat her the same as the employee who was granted a waiver of the District’s early retirement rule.

Respondent argues that *Schloe* does not apply to this case because the Court premised its decision on the fact that the Lead-Deadwood School District had failed to follow its own procedure. However, the Court’s proclamation in *Schloe* is right on point for this case. Here, Grievant went to Simmons to discuss obtaining a waiver to the early retirement policy. On May 9, 2019, Simmons denied her request for an exception. Under section 7.4 of the Agreement, Grievant’s next step was to appeal the decision to the school board within five days of the decision. Two days later, on May 11, Grievant wrote an e-mail to Charlie Wheeler, the president of the Meade County School Board,

and requested that they reconsider the decision. Grievant offered to appear at the next scheduled school board meeting and discuss the matter with the board in person. The board failed to act upon Grievant's letter as outlined in Section 7.4 of the Agreement which states: "[t]he board shall hold a formal hearing no later than its next regularly scheduled meeting and serve a written position of the matter on the party or parties within (5) five days after the hearing."

Respondent finally argues that it could not grant an exception to its policy without the consent of MEA. Grievant reached out to MEA but was given no response. However, the issue presented to the Department is one of jurisdiction. A refusal by MEA to grant its approval to another exception does not remove the Department's jurisdiction over that appeal.

CONCLUSION

The Department finds that Grievant followed the grievance procedure of the Agreement and the Department therefore has jurisdiction to hear Grievant's appeal. Respondent's motion to dismiss is DENIED. This letter shall constitute the Department's decision on this matter.

**SOUTH DAKOTA DEPARTMENT OF LABOR
& REGULATION**

/s/ Joe Thronson
Joe Thronson
Administrative Law Judge