

April 21, 2011

Anne Plooster  
General Counsel  
SDEA/NEA  
411 E. Capitol Ave.  
Pierre, SD 57501

LETTER DECISION & ORDER

Sue Simons  
Asst. Superintendent HR/Legal  
201 East 38<sup>th</sup> Street  
Sioux Falls, SD 57101

RE: HF No. 21 G, 2009/10 – Sioux Falls Education Association v. Sioux Falls School District #49-5 and Board of Education

Dear Ms. Plooster and Ms. Simons:

By Order of the Sixth Judicial Circuit, this matter was remanded to the Department of Labor for further proceedings to determine whether Petitioner's conduct at the May 18, 2010, school board proceeding constituted a failure to follow grievance procedures.

The Sioux Falls Education Association (SFEA or Petitioner) initiated a grievance by filing a Level II grievance with the District Superintendent. Petitioner met with the Superintendent on March 26, 2010, and the Superintendent issued her written decision in a letter dated April 8, 2010. Petitioner received the letter on April 9, 2010. Petitioner filed a Level III grievance with the School Board on April 23, 2010. On April 29, 2010, Petitioner was notified that the Level III grievance would not be heard by the School Board because it was not filed within the time limits set forth in the Collective Bargaining Agreement (CBA).

The School Board did not believe that Petitioner had timely appealed the Superintendent's decision, however in the interest of resolving the grievance in a timely manner and of resolving grievances at the local level, the Board agreed to hear SFEA's grievance, so long as SFEA was willing to agree that such a hearing would not constitute a waiver of the timeliness issue. The grievance was scheduled to be heard by the School Board on May 18, 2010.

The Circuit Court has determined that the grievance was timely filed. The matter was remanded to the Department for a determination on Respondent's Motion to Dismiss.

Prior to the May 18, 2010 hearing, Deb Merxbauer, president of the SFEA spoke with Kent Alberty, the School Board President, about the presence of legal counsel and school administrators at the Level III grievance proceeding. Merxbauer expressed that many grievance committee members would be hesitant to talk for fear of retaliation. No agreement was reached, however Alberty indicated that he thought it would be possible to not have either legal counsel or the administrators present at the hearing. He agreed to discuss it with Superintendent Homan and get back to her. Merxbauer never heard back from Alberty prior to the hearing.

When the parties arrived at the grievance proceeding on May 18, 2010, SFEA discovered that the School Board's attorney was present. Merxbauer spoke with Alberty again requesting that the Board's attorney not be allowed to attend the proceedings. Merxbauer was informed that the attorney would be allowed to attend the proceedings but not allowed to speak. Merxbauer also requested that the School Administrators would not be allowed in the room during the SFEA's presentation.

Merxbauer returned to the SFEA grievance committee and informed them that the Board's attorney and the School Administrators would be present at the proceeding. The committee decided that it was not comfortable going through with the proceedings due to the Board's attorney's presence because their representative, Sue Nipe was not present and not available. The committee voted not to go on with the proceeding and Merxbauer informed Alberty that the committee was not comfortable moving forward without representation. Merxbauer requested that that hearing be rescheduled and Alberty agreed to do so. Alberty did not indicate that he would need any further authorization to make that agreement.

Merxbauer returned to the committee and informed them that the hearing would be rescheduled. All but two members of the committee then left. After the committee members left, Merxbauer was informed that the School Board had gone into executive session and the committee needed to stay. Merxbauer was unable to reach the other committee members before they left. When the Board came out of executive session, Alberty informed Merxbauer that he did not have the authority to agree to reschedule the hearing and had overstepped his authority as Board President by agreeing to do so. Alberty further stated that the Board was ready to hear the grievance at that time. Merxbauer was asked if she was ready to present the grievance and Merxbauer indicated that she was not able to present the grievance without the committee. The Board then upheld the Level II grievance decision because SFEA did not participate in the hearing.

Article III, Section F, outlines the formal grievance procedures at the Board Level and any subsequent appeal to the Department of Labor as follows,

#### Level Three: The Board

If the aggrieved person is not satisfied with the disposition of his/her grievance at Level Two or if no decision has been rendered within fourteen(14) days after he/she first met with the Superintendent, he/she may within fourteen days of the written response or fourteen (14) days after the meeting with the Superintendent, refer the grievance to the Board.

The Board shall consider the grievance within fourteen (14) days. The grievant shall receive at least three (3) days' prior notice of such hearing, unless such notice is waived by mutual agreement in writing.

After receiving the written appeal, the Board may appoint a factfinder to review the grievance and its processing to this point and to report to the Board prior to its meeting with the aggrieved person and with representatives of the committee for the purpose of resolving the grievances. The decision of the Board shall be rendered in writing within fourteen (14) days.

Level Four: Department of Labor

If after following the grievance procedure through the first three (3) levels the grievance remains unresolved, it may be appealed the Department of Labor. The appeal to the Department of Labor of the state must be filed within 35 days of the date written Board decision at Level Three.

Respondent argues that despite giving appropriate notice of a hearing before the Board, SFEA chose not to participate in the Board's grievance hearing. Respondent argues that SFEA failed to follow the grievance procedure set forth in the CBA by not participating in good faith at Level III of the grievance proceedings before the District's Board. Respondent argues that rather than presenting its grievance to the Board as both the CBA and SDCL §3-18-15.2 required, SFEA opted to ignore the avenue for substantive resolution at the Board level. Instead of giving the Board the opportunity to resolve its grievance, SFEA refused to present its case, effectively giving the Board no choice by to affirm the Level II decision. Respondent argues that by not following the procedure, the SFEA failed to exhaust administrative remedies and therefore the Department is deprived of jurisdiction.

Petitioner argues that SFEA was present at the scheduled grievance proceedings on May 18, 2010 and prepared to participate under the terms that had been previously agreed upon. Petitioner argues that the Board's actions prevented SFEA from presenting, not SFEA failing to appear before the board.

Respondent's arguments must fail. Petitioner did not choose not to participate, quite the opposite, the grievance committee was prepared and in attendance at the grievance proceeding. When a dispute arose over having counsel present at the hearing, Petitioner wanted to be represented by their union representative, as was their right to

do so under Article III, section G(2)<sup>1</sup> of the CBA. Due to misrepresentations on the part of Board president, telling the committee members that the proceedings would be rescheduled to allow for their representative to be present, the committee members left. The committee members still intended to present their grievance at another time. When the Board determined that they would go on, despite knowing that Alberty had told the members that the hearing would be rescheduled, it effectively deprived the Petitioner from being heard. If Petitioner had been informed that rescheduling was not possible, they may have elected to move forward with presenting their grievance without representation. Petitioner was not given the opportunity to make that decision. SFEA's conduct was not a failure to follow grievance procedures. Respondent's Motion to Dismiss is denied. The parties are to contact the department when ready to proceed with a hearing on the merits of petitioner's grievance.

This letter shall serve as the Department's Order

Sincerely,

*/s/ Taya M Runyan*

Taya M. Runyan  
Administrative Law Judge

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<sup>1</sup> The CBA provides that "all parties in interest may be represented at all levels of the formal grievance procedure by Association representatives, legal counsel, or other persons of their choosing."