March 16, 2011

Paul Aylward
Executive Director
AFSCME Council 59
311 Illinois Ave. SW
Huron, SD 57350

Amended
Letter Decision and Order

Gerald L. Kaufman
City Attorney
Kaufman Law Office
PO Box 173
Huron, SD 57350

Re: HF No. 24 G, 2009/10 - AFSCME Local 169 Group Grievance v. City of Huron

Dear Mr. Aylward and Mr. Kaufman:

Submissions:

This decision addresses the following submissions by the parties:

December 28, 2010	[City of Huron's] Motion to Dismiss;
January 28, 2011	AFSCME Local 169's Resistance to City of Huron's Motion to Dismiss Petition for Hearing;
February 11, 2011	[City of Huron's] Response to AFSCME Local 169's Resistance to Motion to Dismiss.

Issue:

Whether the Department of Labor has jurisdiction to hear AFSCME Local 169's grievance of general concern against the City of Huron?

Background:

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

1. AFSCME Local 169 (Union) and the City of Huron (City) have negotiated and executed a collective bargaining agreement (Negotiated Agreement) which was in effect during the pertinent events of this case.

2. In mid-December, 2009, the Union received copies of new job descriptions/classifications from the City during the 2010 wage negotiations. Copies of the job descriptions/classifications were received by the Union in electronic and paper forms.

3. The Union and City discussed the new job descriptions during negotiations sessions on December 17, 2009, and December 23, 2009.

4. On December 23, 2009, the Union and City tentatively agreed to the 2010 wage proposal which reflected the new job descriptions/classifications.

5. The tentative agreement was drafted into a Memorandum of Understanding. The City and Union approved the Memorandum of Understanding on December 31, 2009, and January 5, 2010, respectively.

6. A document identifying each employee by name, position, 2009 wage, and 2010 wage, placement on a 10 step scale, and the raise which the employee would receive in 2010 was attached to the Memorandum of Understanding.

7. On December 31, 2009, the City approved changes in the job descriptions/classifications. The job description of Equipment Operator positions were changed to Maintenance I, II and III. These changes impacted five employees.

8. On January 4, 2010, the City approved Resolution 2010-1 based upon a wage study and consultant's recommendations. Resolution 2010-1 adopted guidelines for establishing pay within a classification when operating specific types of equipment and the qualification for "out of class" pay.

9. The City emailed Resolution 2010-1 to the Union on January 5, 2010, prior to the Union's vote to approve the Memorandum of Understanding,

10. On January 8 and 11, 2010, the City's Human Resources Coordinator met with the five employees, gave each a copy of their job descriptions and a copy of Resolution 2010-1, and discussed with each employee how the changes would impact them.

11. On January 14, 2010, the Union notified the City that it had learned that employees were being informed that they would not be getting out of class pay. The Union also indicated that it believed that the City's actions constituted a violation of the contract and good faith negotiations.

12. On February 5, 2010, the five employees impacted by the change of classification received the first payroll checks which included no "out of class" pay.

13. The Union filed the grievance of general concern on February 12, 2010. The grievance alleges that employees of the Solid Waste and Street Departments

of the City were not paid “out of class” pay in violation of the Negotiated Agreement. The Union seeks back pay for the hours worked by the employees for which they were improperly paid.

14. Article XII of the Negotiated Agreement contain the grievance procedures. The relevant sections of those procedures state as follows:

> 12.03 Both parties agree to encourage an employee to discuss his complaint with his immediate supervisor. The employee may request that the formal representative be present.
>
> 12.05 Failure by an employee to comply with any time limitation shall constitute a withdrawal of the grievance.
>
> 12.07 STEP 1: If discussion with his immediate supervisor has failed to resolve the problem, the employee and/or his representative have ten (10) calendar days to submit to the head of his department a written notice outlining the grievance. This notice shall include the time (date) that the grievance occurred, relief sought, and the specific areas of this agreement which has been misapplied, violated or inequitably applied.
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> 12.08 Within seven (7) calendar days of the date of the receipt of the written notice of the grievance, the department head shall meet with the employee, who may be accompanied by his representative, for discussion of the grievance. The city's Human Resource Officer shall be at any meeting held pursuant to this section. Within seven (7) calendar days of the meeting, the head of the department shall submit his decision in writing to the employee. If the department head fails to render his decision in writing within seven (7) calendar days, the grievance shall be deemed denied and there shall be an automatic appeal of the grievance to the next level.
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> 12.09 STEP 2: If the employee disagrees with this decision, the employee and/or his representative may, within ten (10) calendar days after receipt of the decision or the date the decision is due, initiate the next step in the grievance procedure by written notice to the Mayor, or his designee. Such written notice will outline those factors of the grievance which he feels have not been equitably resolved.
>
> 12.10 Within fifteen (15) calendar days of the receipt of the notice initiating the second step of the grievance procedure, the Mayor or his designee will meet with the employee who may be accompanied by his representative to discuss the grievance. Within fifteen (15) calendar days of this meeting, a written decision will be submitted to the employee by the Mayor, or his designee. Failure to meet this time limit shall constitute the resolution of the grievance in favor of the grievant.

12.11 If the employee disagrees with the decision at Step 2, the employee personally or with the assistance of his representative may appeal that decision to the Department of Labor pursuant to SDCL 3-18.

12.12 GRIEVANCES OF GENERAL CONCERN. Grievances filed by a group of employees or by the formal representative on behalf of a group of employees which are of General Concern shall be initiated at Step 2 of the grievance procedure.

Motion to Dismiss:

In its Motion to Dismiss, the City contends that the Department of Labor lacks jurisdiction in this case because the Union failed to timely file it's grievance with the City. The City argues that the terms of the grievance procedures required the Union to file its grievance within 10 days of the employees or the Union becoming aware "of the events giving rise to the grievance". The department's role here is to determine whether the Union complied with the time limitations imposed by the grievance procedures of the Negotiated Agreement when it filed its grievance.

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. State law required the City to enact, "by agreement" procedures which it's employees may follow for prompt informal disposition of grievances. SDCL 3-18-15.1.1. The City complied with this requirement when it enacted Section XII of the Negotiated Agreement.

"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).

"When the terms of a negotiated agreement are clear and unambiguous, and the agreement actually addresses the subjects that it is expected to cover, "there is no need to go beyond the four corners of the contract." Wessington Springs Education Association v. Wessington Springs School District Dist. No. 36-2, 467 NW2d2d 101, 104 (SD 1991).

"A contract is not rendered ambiguous simply because the parties do not agree on it proper construction or intent upon executing the contract." Ducheneaux v. Miller, 488 NW2d 902, 909 (SD 1992) (internal citations omitted). "In cases such as this one where the parties to a contract cannot agree on the interpretation of a word in the contract, this Court will apply the "plain and ordinary" meaning of the disputed term." Prudential Kahler Realtors v. Schmitendorf, 2003 SD 148, ¶10, 673 NW2d 663, 665 citing, Opperman v. Heritage Mutual Insurance Co., 1997 SD 85, ¶4, 566

NW2d 487, 490; Economic Aero Club, Inc. v. Avemco Ins. Co., 540 NW2d 644, 645 (SD 1995) (additional citations omitted)).

In this case, the grievance procedures are not ambiguous. The Union filed a grievance of general concern. Section 12.12 of the grievance procedures dictate that grievances of general concern "shall be initiated at Step 2 of the grievance procedure." Step 2 requires an employee to file a grievance at the mayoral level within 10 days of a department level decision, if the employee disagrees with the departmental decision. Step 2 places no time restrictions between the date that an employee becomes aware of "the events giving rise to the grievance" and the date the employee files the grievance.

Here, there was no department level decision. Consequently, there is no time limitation within which for the Union to file its grievance.

It should be noted, that there is also no requirement at Step 1 for an employee to file a grievance within a specified time period after becoming aware of "the events giving rise to the grievance." The only requirement is that the grievance be filed at the departmental level within 10 days of discussing the employee's complaint with the employee's supervisor.

Regardless, Step 1 does not apply in this case, and there is no time bar to the Union's grievance. Consequently, the department has jurisdiction to hear this case.

Order:

For the reasons discussed above, the City's Motion to Dismiss is denied.

Sincerely,

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Donald W. Hageman
Administrative Law Judge