

February 14, 2013

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Letter Decision and Order

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Re: HF No. 2 G, 2012/13 – Deborah L. Martin v. Rapid City Area School District 51-4

Dear Mr. Martin and Mr. Hickey:

Submissions:

This letter addresses the following submissions by the parties:

December 27, 2013	[District's] Motion for Summary Judgment; Memorandum of Law in Support of Motion for Summary Judgment; Affidavit of Valerie Nefzger in Support of Motion for Summary Judgment;
January 11, 2013	Petitioner's Rebuttal to Respondent Rapid City Area School District's Motion for Summary Judgment;
January 28, 2013	Respondent's Reply Brief in Support of Motion for Summary Judgment; and Affidavit of Valerie Nefzger in Support of Motion for Summary Judgment.

Facts:

The facts of this case are as follows:

1. Deborah Martin (Martin) was employed as a special education teacher by the Rapid City School District (District). As such, Martin was covered by the terms of a negotiated collective bargaining agreement (Agreement) negotiated between the Rapid City Education Association (Association) and the District.
2. The Agreement establishes the terms and conditions of employment for classroom and special education teachers employed by the District.
3. Article XXIX of the Agreement stated the grievance procedures to be followed by teachers in the District. Article XXIX of the Agreement in effect during all time relevant in this case states:

ARTICLE XXIX
GRIEVANCE PROCEDURE,

A. Definitions

1. A "grievance" shall mean a complaint by a teacher, or teachers, employed by the District, that there has been a violation, misinterpretation or inequitable application of any of the terms of this agreement, except that the term "grievance" shall not apply to any matter as to which (a) the method of review is prescribed by law, or (b) the Board of Education is without authority to act.
2. An "aggrieved person" is a teacher or teachers asserting a grievance.

B. Purpose,

1. The purpose of this procedure is to secure, at the lowest possible administrative level, equitable solutions to the problems that may arise from time to time. The proceedings under the procedure will be kept as informal and confidential as appropriate at any level of the procedure.

D. Miscellaneous Provisions,

2. The District and Association shall provide and utilize the grievance procedure form, located in individual buildings and Office of Human Resources.
4. The District shall make available to the aggrieved person and the aggrieved person's representative all pertinent information, not privileged under law, in its possession or control that is relevant to the issues raised in the grievance.

6. No grievance shall be recognized unless it is presented within twenty-five (25) calendar days after the aggrieved person knew, or should have known of the act or condition on which the grievance is based. If not so presented, the alleged grievance will be null and void. A grievance filed under the first paragraph of Miscellaneous Provisions shall not be recognized at Level 3 unless it shall have been filed with the Superintendent's office within twenty-five (25) calendar days after the act or condition upon which it is based occurred.

E. Procedure.

Since it is important that grievances be processed as rapidly as possible, the number of days indicated at each level should be considered the maximum, and every effort should be made to expedite the process. The time limit specified may, however, be extended by mutual agreement. The original grievance form will be submitted to the Assistant Superintendent of Human Resources with a copy filed with the appropriate personnel as outlined below. If a grievance is filed, which cannot be resolved under the time limits set forth prior to the end of the school year, and which if left unresolved until the beginning of the following school year could result in irreparable harm to an aggrieved person or a party in interest, the time limits set forth will be reduced so that the grievance procedure may be concluded prior to the end of the school year, or as soon thereafter as is practicable.

Informal Level: Prior to the expiration of twenty-five (25) calendar days, the potential grievance must first be discussed with the teacher's principal or immediate supervisor with the objective of resolving the matter informally. At this time the teacher may discuss the potential grievance personally or may request that a representative of the Association accompany him/her and/or act on his/her behalf.

Level 1: If the potential grievance is not resolved informally, it will be submitted to the principal/supervisor in writing on the proper grievance form. In the absence of the principal/supervisor, the grievance may be filed in the Human Resource Office. If the grievance is resolved, the document will be returned to the teacher. The principal/supervisor shall hold the Level 1 meeting with the teacher within ten (10) calendar days of the request, (emphasis by counsel) and a decision will be rendered within ten (10) calendar days of the Level 1 meeting. If the principal/supervisor fails to provide a written decision within ten (10) calendar days, then the aggrieved person may proceed to file at Level 2.

Level 2: If the aggrieved person is not satisfied with the disposition of the grievance at Level 1, the aggrieved person may file the grievance in writing with the Superintendent or the Superintendent's designee within ten (10) calendar days after the

grievance decision has been rendered at Level 1. If requested by the aggrieved person, the Association may file the grievance on behalf of the aggrieved person within the ten (10) day time limit set forth above. The Superintendent or designee, will represent the Administration at Level 2 of the grievance, and shall meet with the aggrieved person and parties in interest in an effort to resolve the grievance. Such meeting shall take place within ten (10) calendar days after the receipt of the written grievance at Level 2. Within ten (10) calendar days after said meeting, a decision in writing shall be rendered to the aggrieved person. If the Superintendent or designee fails to provide a written decision within ten (10) calendar days, then the aggrieved person may proceed to file at Level 3.

Level 3: If the aggrieved person is not satisfied with the disposition of the grievance at Level 2, the aggrieved person may file the grievance in writing with the Board of Education within ten (10) calendar days after the grievance decision has been rendered at Level 2. The Board of Education will hold a hearing on the grievance within thirty (30) calendar days. Within ten (10) calendar days after the hearing, the Board of Education shall render its decision in writing to the aggrieved party and the Association.

Level 4: If the aggrieved person is not satisfied with the disposition of the grievance at Level 3, the aggrieved party may within thirty (30) calendar days initiate an appeal to the Department of Labor, which shall conduct an investigation and hearing and shall issue an order covering the points raised. The order shall be binding on the aggrieved person and the District in accordance with the provisions of SDCL 3-18-15.2. The investigation and hearing held by the Department shall be conducted in accordance with the rules and regulations of the Department.

It is specifically and expressly understood and agreed that an appeal to the Department of Labor constitutes an election of remedies and a waiver of any and all rights by the appealing party or parties and his or her representative(s) to litigate or otherwise contest the appealed subject matter in any court under SDCL 13-46, except in the form of an appeal from the decision of the Department of Labor as provided in SDCL 1-26.

Article XXIX.

4. In anticipation of Martin's early retirement, Teresa Namanny (Namanny) the District's Payroll Manager, provided Martin, on June 12, 2012 by email, the calculations she used to determine the amount of Martin's severance pay and the methodology she used to determine the amount. The email indicated her severance pay in the amount of \$18,184.32

5. The District calculates the severance pay of its teachers by using a formula set out in the Agreement which varies depending on the teacher's daily rate of pay, length of service and age at the time of retirement.
6. On June 18, 2012, Namanny emailed to Martin a Retirement Worksheet which confirmed the amount of severance pay indicated in the June 12th email.
7. The Board of Education approved Martin's early retirement on June 20, 2012, and the District thereafter mailed payment to the South Dakota Retirement System in the amount of \$18,184.32 on or about June 25, 2012.
8. On June 27, 2012, Martin emailed Namanny stating that she disagreed with the amount of the severance pay Namanny had calculated.
9. On June 29, 2012, Namanny emailed Martin explaining in more detail how her daily rate was calculated. It further stated that Martin could contact the Human Resources Director if she disagreed with the calculation.
10. On July 3, 2012, Valerie Nefzger (Nefzger), the District's Human Resources Director emailed Martin, inviting her to meet with Nefzger on July 6, 2012. The parties met on July 6th.
11. On July 23, 2012, Nefzger emailed Martin as a follow-up to their meeting. She indicated that she had discussed the matter with the Superintendent and the District's legal counsel. She stated that the District's legal counsel would be contacting Martin.
12. The District's legal counsel sent a letter to Martin dated July 25, 2012. The District's attorney reaffirmed the accuracy of the District's computation of Martin's severance pay. The letter ended by stating, "if you have any questions or comments, please advise."
13. Following the District's legal counsel's July 25, 2012 letter, there was several letters exchanged between the District's counsel and Martin's attorney. The District's counsel ended all of his letters with the same phrase he used to end the July 25, 2012 letter.
14. On September 14, 2012, Martin filed a grievance in writing at level 1. The District denied the grievance because Martin failed to comply with the grievance procedures.
15. Following the denial of Martin's level 3 grievance, she filed an appeal with the Department of Labor & Regulation.
16. Additional facts may be discussed in the analysis below.

Analysis:

Summary Judgment:

The District filed a Motion for Summary Judgment alleging that the Department lacks jurisdiction in this matter. The authority for summary judgment motions in grievance claims is set forth in SDCL 1-26-18. That provision states in part:

Opportunity shall be afforded all parties to respond and present evidence on issues of fact and argument on issues of law or policy. However, each agency, upon the motion of any party, may dispose of any defense or claim:

- (1) If the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and a party is entitled to a judgment as a matter of law;

SDCL 1-26-18. The South Dakota Supreme Court has discussed summary judgment on numerous occasions. The Court stated in McDowell v. Citicorp USA, 2007 SD 53, ¶ 22, 734 N.W.2d 14, 21, the following:

The burden is on the moving party to clearly show an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law. (Internal citations omitted). On the other hand, [t]he party opposing a motion for summary judgment must be diligent in resisting the motion, and mere general allegations and denials which do not set forth specific facts will not prevent issuance of a judgment. (Internal citations omitted). [T]he nonmoving party must substantiate his allegations with sufficient probative evidence that would permit a finding in his favor on more than mere speculation, conjecture, or fantasy. (Citations omitted).

Martin argues that an issue of material fact exists regarding what the word “presented” means, as used in Article XXIX, D. Miscellaneous Provisions, 6. The Department disagrees. Contract interpretation is a question of law. Detmers v. Costner, 2012 SD 35, ¶ 20, 814 NW2d 146; Clarkson & Co. v. Cont’l Res., Inc., 2011 SD 72, ¶ 10, 806 NW2d 615, 618. Therefore, the Department concludes that there are no issues of material fact and judgment can be rendered on the issue of jurisdiction as a matter of law.

Grievance:

SDCL 3-18-15.1 requires school districts to enact, “by agreement” a procedure which its employees may follow for prompt disposition of grievances.” 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. Here, the District complied with these provisions when Article XXIX was negotiated and signed.

Jurisdiction:

The Supreme Court has discussed the jurisdictional limitation of the Department of Labor & Regulation in grievance cases. It stated “[t]he 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 NW2d 444.

Here, the Agreement states at Article XXIX, D. Miscellaneous Provisions, 6, the following in part:

6. No grievance shall be recognized unless it is presented within twenty-five (25) calendar days after the aggrieved person knew, or should have known of the act or condition on which the grievance is based. If not so presented, the alleged grievance will be null and void.

Article XXIX, B. When XXIX, B, is read in isolation the word “presented” does appear to be ambiguous. However, when paragraph 6 is read in conjunction with the procedures listed in Section E., it becomes apparent that the grievance must be “presented” in the manner prescribed within Section E.¹

Martin became aware of the District’s calculation of her severance pay on June 12, 2012. She then had 25 days within which to meet informally with her immediate supervisor or principal and, if unresolved, submit a grievance in writing on a “proper grievance form” to her supervisor or principal. Martin failed to both meet informally with her supervisor or principal and submit the grievance in writing to them within 25 days after learning about the severance pay calculation.²

Martin argues that Namanny’s email stating that Martin could contact Nefzger if she disagreed with the calculation, Metzger’s willingness to meet with Martin and the District’s legal counsel’s willingness to accept questions and comments constituted a waiver of the grievance deadlines. This argument falls short. There was no discussion or agreement between the parties about extending the deadlines. The District’s willingness to listen and discuss the matter was nothing more than that, a willingness to listen and discuss. A courtesy any good employer might be expected to make to an employee.

These comments cannot be construed to be an offer to negotiate or settle the disagreement. The District never altered or changed its position throughout these discussions. Nor was the District obligated to inform her that her time for filing a grievance was passing. As an employee covered by the Agreement, Martin was charged with

¹ “[E]xtrinsic evidence is not considered because the intent of the parties can be derived from within the four corners of the contract.” Ziegler Furniture and Funeral Home, Inc. v. Cicmanec, 2006 S.D. 6, ¶14, 709 N.W.2d 350, 354).

² Nefzger was not Martin’s supervisor or principal.

knowledge of the contents of the Agreement and is bound by them. Spearfish Education Association v. Spearfish School District, 2010 SD 26, 780 NW2d 482.

The District's actions also do not warrant estoppel. There was no inducement offered to Martin to prevent her from filing her grievance. Discussion of the dispute could have and should have continued during the grievance process. As such, the Department lacks jurisdiction to hear or consider this matter.

Appeal:

The District's Motion for Summary Judgment also alleges that Martin did not timely file her appeal with the Department. In light of the determination above, there is no need to consider this issue.

Order:

For the reasons stated above, the Department lacks jurisdiction in this matter and must grant the District's Motion for Summary Judgment. This case is dismissed with prejudice. This letter shall constitute the Order in this matter.

Sincerely,

 /s/ Donald W. Hageman
Donald W. Hageman
Administrative Law Judge