

**SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION
DIVISION OF LABOR AND MANAGEMENT**

KATHY HARVEY,

HF No. 6G, 2020/21

Petitioner,

v.

DECISION

**MILLER SCHOOL DISTRICT 29-4 and
BOARD OF EDUCATION,**

Respondent.

This matter came before the Department of Labor & Regulation pursuant to SDCL 3-18-15. The Department conducted a hearing on June 23, 2021, in Miller, South Dakota. The matter was heard by Michelle M. Faw, Administrative Law Judge. Petitioner, Kathy Harvey was represented by Anne Plooster. Rodney Freeman, Jr. represented Respondent, Miller School District 29-4 and Board of Education.

This case presents the following legal issue:

Whether the Miller School District 29-4 and Board of Education and/or its agents violated, misinterpreted and/or inequitably applied policies, rules or regulations, or negotiated agreements of the school district when it issued Kathy Harvey a written reprimand and suspended her without pay for one day.

Background

On August 21, 2020, Kathy Harvey (Harvey) sent an email to the Principal, Steve Schumacher, and the Superintendent, Dr. Charlene Crosswait, suggesting that they ask the Board of Education, regarding the pandemic, "How many grandparents do we want to kill?" After she received the email, Dr. Crosswait spoke with Harvey. Harvey was concerned about COVID, but she felt she could perform her duties as a teacher because the students and employees would wear mask and the District provided other

accommodations. On or about November 9, 2020, the Board held a special meeting to address a reduction in quarantine time for exposed students. The next day, Dr. Crosswait received a parental complaint against Harvey from a fellow school employee.

On November 12, 2020, Harvey received an email from Dr. Crosswait informing Harvey that she wished to meet with Harvey that day regarding some information provided by a parent. At the meeting, Dr. Crosswait and the Principal informed Harvey that there was a complaint alleging that she had been swearing in the school hallway on November 9, 2020, and that Dr. Crosswait, having viewed the school's surveillance camera, had observed Harvey in the hallway at the alleged time shaking her finger while talking to two students. The camera did not provide audio recording. Harvey informed the Superintendent and Principal that she would be grieving the issue and left the meeting.

The Superintendent and Principal followed Harvey to her classroom where the Superintendent attempted to continue the conversation from the meeting. Harvey refused to engage in a discussion. The Superintendent informed Harvey that she was suspended without pay for the day and to go home. The Superintendent told Harvey that if she attempted to remain on school grounds the police would be called. Harvey left the building. Dr. Crosswait sent Harvey a written reprimand on November 14, 2020. Harvey submitted this Petition for Hearing on Grievance to the Department of Labor & Regulation (Department) on February 5, 2021. Harvey seeks the following remedy:

1. The November 14, 2020, reprimand be removed from Harvey's personnel file and be given, along with all other Board copies, to her for destruction.

2. The pay docked from Harvey's salary for November 12, 2020, be restored along with appropriate interest thereon.
3. The Board be instructed to properly follow Board Policy KL, Public Complaints, and the Complaint Procedure Policy provision of the Parties' negotiated agreement.
4. The Board be instructed to properly honor and provide Petitioner with her First Amendment rights.
5. Any other relief deemed just and proper.

Additional facts may be developed in the issue analysis below.

Argument

The Department's authority to review grievances is provided, in pertinent part, by SDCL 3-18-15.2 which states, in part, "[i]f, 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..." Harvey, as the grievant, has the burden to prove that the Miller School District 29-4 and Board of Education (Board) failed to comply with its policies, rules or regulations or negotiated agreement and/or arbitrarily and discriminatorily applied those items. *Rininger v. Bennett County School District*, 468 N.W.2d 423 (SD 1991)

Harvey asserts that the Board failed to follow School Board Policy KL and the negotiated agreement Complaint Procedure Policy prior to the meeting between Harvey and the administration. She argues that both Board Policy KL and the Negotiated Complaint Procedure Policy dictate that parental complaints are to be referred to the

teacher in question first for potential resolution at the lowest level. School Board Policy

KL states:

Constructive criticism of the schools will be welcomed by the Board when it is motivated by a sincere desire to improve the quality of the educational program or to equip the schools to their tasks more effectively.

Whenever a complaint is made directly to the Board as a whole or to an individual Board member, the individual or group involved will be advised to take their concern to the appropriate staff member.

The Board believes that complaints and grievances are best handled and resolved as close to their origin as possible, and that the staff should be given every opportunity to consider the issues and attempt to resolve the problem prior to involvement by the Board. Therefore, the proper channeling of complaints involving instructions, discipline, or learning materials will be as follows:

1. Teacher
2. Principal
3. Superintendent
4. Board

If a complaint, which was presented to the Board and referred back through the proper channels, is adjusted before it comes back to the Board, a report of the disposition of the matter will be made to the Board and then placed in the official files.

The Board expects the professional staff to receive complaints courteously and to make a proper reply to the complainant. Matters referred to the superintendent and/or Board must be in writing and should be specific in terms of action desired.

As Harvey was not informed about any complaints until the meeting, she further argues, any consequences arising out of the improper meeting are null and void. The written reprimand she received after the meeting stated, "According to the negotiated agreement, a complaint that involves a particular employee shall be referred to the employee immediately by the principal or superintendent." Additionally, Harvey asserts that the written reprimand she received from Dr. Crosswait also reprimanded Harvey for

a letter she had written to the administration two and a half months prior regarding the Board's COVID policy. Harvey argues that such discipline is a violation of her First Amendment Rights. The letter of reprimand states,

Dear Mrs. Kathy Harvey,

Mr. Schumacher and I asked to meet you due to a concerned parent. According to the negotiated agreement, a complaint that involves a particular employee shall be referred to the employee immediately by the principal or superintendent.

The concern was you did not care for the School Board's decision. You were out in the hallway on November 9, 2020 swearing and sharing that your family would be suing the school if you die from COVID. This is not the first time that you have shared your thoughts with the students. Prior to this situation a School Board member was contacted by a family, that you said, that the School Board and administration will have blood on their hands with the decisions that have been made. The Board member was also told that you have shared your beliefs about God to the class. Mr. Schumacher discussed this information with you at that time. You also wrote a letter to administration about opening up, with the argument with "How many grandparents do we want to kill?" This letter was due to your disagreement with how the school was handling COVID.

On November 12, 2020, when I shared what was said, you threw a document on my desk and stormed out of my office. You did not take the time to discuss. With these inappropriate actions, I felt it important that the situation be discussed due to the severity. When Mr. Schumacher and I entered your room, you began screaming. At that time, I sent you home, without pay, to collect yourself. You were not going to go home, but after I shared that law enforcement would help you, you took your coat and purse and left the building.

The Miller School District has policies that coincide with the behaviors that are deemed to be professional and ethical for all employees. The above behaviors are not appropriate for our school and school culture.

This letter of reprimand and with your insubordinate and unprofessional behavior, you have been asked to go home for the day without pay. You will be allowed to return on Monday, November 16, 2020 with a professional and ethical behavior that is conducive to educating students. If this unethical, and unprofessional behavior happens again, I will recommend that you are suspended, without pay, or depending on the severity of the insubordination and misconduct, recommend for dismissal.

Sincerely,

Dr. Charlene Crosswait

The Board asserts that the negotiated agreement required that the superintendent or the person receiving the complaint, recommend that the complainant meet with the teacher concerned. Dr. Crosswait recommended to the complainant that she meet with Harvey, but as she is a fellow employee of the school, she refused.

Section Q(1)(b) of the negotiated agreement provides, in pertinent part,

A complaint which comes first to the principal or superintendent shall be listened to courteously...A complaint which involves a particular employee shall be referred to the employee immediately by the principal or superintendent. A conference shall be recommended between the complainant(s) and the employee criticized. If the complainant has already conferred with the employee criticized and remains unsatisfied, the principal or superintendent will immediately invite the complainant to file his/her complaint in writing and provide the complainant with the appropriate form.

The Board argues that Dr. Crosswait complied with the policy when she received the complaint. Dr. Crosswait recommended that the complainant confer with Harvey, but she refused. The complainant was then invited to file a written complaint but declined to do so. The policy, subsection D, states that “no further action shall be taken unless the complainant submits a written record.” The Board asserts there was no further action taken for the alleged hallway incident.

At hearing, Dr. Crosswait testified that the meeting she held with the Principal and Harvey, was more about the future of Harvey’s employment than with the hallway incident. Dr. Crosswait had been concerned about Harvey’s ability to perform her duties even before the start of the 2020-21 school year. Harvey had expressed concerns regarding COVID and possible exposure. Dr. Crosswait knew that finding a replacement teacher like Harvey who would teach art, biology, and anatomy would be difficult. Dr. Crosswait testified that she met with Harvey to address if Harvey was going to quit and not be able to do her job. She further testified that at the meeting, Harvey refused to

discuss the matter, raised her voice, and loudly told the Principal and Dr. Crosswait that they were “spying on” her. Dr. Crosswait testified that Harvey threw a letter on her desk and left. Dr. Crosswait said she and the Principal followed Harvey to her classroom to continue the conversation. Dr. Crosswait further testified that Harvey could not simply walk away from her supervisor and needed to have a conversation about her COVID concerns.

Harvey allegedly became louder and louder and continued to refuse to discuss the situation. Dr. Crosswait concluded that Harvey was too upset to perform her duties. She placed Harvey on administrative leave, without pay, and sent her home for the rest of the day. Dr. Crosswait then sent the letter of reprimand to Harvey on November 14, 2020. The Board insists that the discipline, including the forced administrative leave without pay and letter of reprimand, were not related to the hall incident, but were instead the result of Harvey’s behavior and insubordination during and following the meeting on November 12, 2020.

Analysis

Harvey argues that the meeting was improper and any consequences arising out of the meeting should be null and void. The Board asserts that once the complainant refused to submit a written complaint as required by subsection D of the complaint policy no further action was taken for the hallway incident. The Department concludes that the record does not support the Board’s assertion regarding the purpose for the meeting. The Board has stated that no further action was taken for the hallway incident, however, the letter of reprimand states,

Mr. Schumacher and I asked to meet you due to a concerned parent. According to the negotiated agreement, a complaint that involves a

particular employee shall be referred to the employee immediately by the principal or superintendent.

The language of the letter indicates that the purpose of the meeting was to address the concerns of a parent and follow procedure established by the negotiated agreement. Therefore, the Board's assertion that no action was taken regarding the complaint is incorrect. The purpose of the meeting was stated in the reprimand. Once the complainant decided not to submit a written complaint or be referred to Harvey directly, no further action should have been taken according to subsection D. The procedure outline in the negotiated agreement was not followed.

Harvey has argued that since the meeting was a violation of the complaint procedure outlined in the negotiated agreement it should be null and void, and therefore, all consequences arising out of the meeting should also be null and void. However, she has not offered any support for this assertion. Regardless of the misbehavior of the school by having the meeting, Harvey is still responsible for her own behavior. The letter of reprimand indicates that Dr. Crosswait sent Harvey home "to collect [herself]" after Harvey "began screaming" at Dr. Crosswait and Mr. Schumacher in her classroom. Harvey was insubordinate to her supervisors and was disciplined for that reason.

As Harvey's First Amendment violation claim is beyond the scope of the Department's jurisdiction in grievance procedures, it will not be addressed in this decision.

Order:

The Miller School District 29-4 and Board of Education and/or its agents did not violate, misinterpret and/or inequitably apply policies, rules or regulations, or negotiated agreements of the school district when it issued Kathy Harvey a written reprimand and suspended her without pay for one day. Therefore, Harveys' requests that the reprimand be removed from her personnel file and her request to restore her docked pay are denied.

The Board is instructed to properly follow Board Policy KL, Public Complaints, and the Complaint Procedure Policy provision of the Parties' negotiated agreement.

Harvey's grievance is DISMISSED with prejudice. This letter shall constitute the order in this matter.

Dated this day 28 of September, 2021

SOUTH DAKOTA DEPARTMENT OF LABOR
& REGULATION



Michelle M. Faw
Administrative Law Judge