

July 7, 2010

Jane Wipf-Pfeifle  
Lynn, Jackson, Shultz & Lebrun  
PO Box 8250  
Rapid City, SD 57709

**Letter Decision and Order**

Jerry D. Johnson  
Banks, Johnson, Kappelman & Becker  
PO Box 9007  
Rapid City, SD 57709-9007

Re: HF No. 6G, 2009/10 – Nicole C. Shiffrar v. City of Belle Fourche

Dear Counsel:

***Submissions:***

This letter addresses the following submissions by the parties:

February 25, 2010 Respondent's Motion for Summary Judgment Under SDCL 15-6-56/SDCL 13-18-15.2;

Brief in Support of Respondent's Motion for Summary Judgment Under SDCL 15-6-56/SDCL 3-18-15.2;

Respondent's Statement of Undisputed Facts;

Affidavit of Dwight Gubbrud;

Affidavit of Elnora Erhart;

Affidavit of Thomas Maunders;

March 25, 2010 Petitioner's Response to Respondent's Motion for Summary Judgment;

Petitioner's Response to Respondent's Statement of Undisputed Facts;

Affidavit of Nicole Shiffrar;

April 9, 2010

City of Belle Fourche's Reply Brief in Support of Its Motion for Summary Judgment.

**Facts:**

The facts of this case as reflected by the above submissions and supporting documentation are as follows:

1. On February 14, 2007, Nicole Shiffrar (Shiffrar or Petitioner) signed an application for employment with the city of Belle Fourche (City or Respondent). The position was for secretary with the City Police Department.
2. Page 1 of the application contained the following language:

I understand that nothing in this application is intended to imply or create an employment relationship or contract for employment. I further understand that, if hired, my employment is at-will and can be terminated at any time, with or without notice, for any reason. I also understand that, while personnel policies, programs, and procedures may change from time to time, such at-will status is not subject to change without a written agreement signed by an authorized representative of the City of Belle Fourche.

3. Shiffrar was hired as a secretary for the City Police Department on March 12, 2007.
4. In September of 2000, the City adopted a Policy and Procedures Manual. At the time that Shiffrar was hired on March 12, 2007, and when she was terminated on August 3, 2009, the manual contained, and the manual presently contains, the following language:

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This handbook is not a contract of employment. Nothing contained in this handbook or in any other statement of company philosophy, including statements made in the course of performance evaluations and wage reviews, should be taken as constituting an express or implied promise of continuing employment. The employee and the city are both free to terminate the employment relationship at any time for any lawful reason or no reason at all.

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1.2 Department Practices and Procedures

This Manual shall not limit the authority of any municipal department, after obtaining Council approval, from making department rules and regulations, and establishing Standard Operating Procedures (SOP) to more specifically govern employees. These rules and regulations and standard operating

procedures may be more restrictive but not less restrictive than the Manual. In addition, the standard operating procedures shall not conflict with the Manual nor with the Nondiscrimination and Sexual Harassment Policies. In the event of any conflict, this manual shall supersede all Departmental rules, regulations and Standard Operating Procedures.

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### Disclaimer

The City recognizes that South Dakota is an employment at-will state and the City hereby declares that all employees of the City are at-will employees for employment. This means that either party is free to terminate the relationship at any time, with or without reason, and with or without notice.

In most cases, it shall be the practice of the City Council to conduct termination of employment activity in accordance with approved policies. However, the City, in no way, abandons its right of employment-at-will.

This manual does not confer a contract of employment nor does it create a property interest in the employee. These policies are provided as a reference of present policies and not a guarantee of employment or specific employment benefits.

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### 10.4 Employment-at-Will

All City employees are at-will employees. The City or the employee may terminate the employment relationship at any time for any or no reason. The City Council has the authority to terminate any employment relationship for any or no reason.

The City recognizes that South Dakota is an employment at-will state and the City intends to maintain the employment at-will status for all employees.

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### 11.3 Defining Disciplinary Action

D. Termination of Employment-A Department Head or Council Committee may recommend termination of an employee to the council for disciplinary purposes. This does not mean that employment can only be terminated for disciplinary reasons. All City employees may be terminated with or without cause.

### 11.4 Disciplinary Procedure

When an employee is suspended or termination is recommended, the following procedures shall be used:

- A. Notify the employee in writing of the recommended disciplinary action. The notice shall state the reasons(s) for the action, including any prior disciplinary actions and the facts of any other incidents upon which the present disciplinary action is based. The notice shall also advise the employee of the right to grieve the disciplinary action.
- B. The Common Councilor Department Head shall meet with the employee to give the employee an opportunity to present reasons, verbally or in writing, why the action should not be taken.

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#### 11.5.7 Referral to Department

Any grievance not resolved as a result of the hearing described in Section 11.5.5 may be referred by either party to the Department of Labor & Management [sic] pursuant to SDCL 3-18-5 [sic]. The appeal must be initiated within thirty (30) calendar days following notification of the decision by the City Counsel.

5. The City Police Department adopted a Standard Operating Procedures Manual (SOP). That SOP manual at Policy 515 contained the following language:

Discharge: The common council may discharge any member of the police department for cause. The Causes include, but [sic] limited to the following:

- a. Misconduct.
- b. Incompetence.

6. On March 12, 2007, June 19, 2007, and again on April 1, 2008, Shiffar acknowledged receipt of the City's Personnel Policy Manual by signing documents entitled, "Manual Receipt and Acknowledgement." Each of these documents contained the following provisions:

I understand that the manual and all other written and verbal material is intended for informational purposes only. Neither the manual, City policies and practices, or any other communications between the City and myself create an employment contract or specified term of employment. I understand that the policies set forth in the manual or policies communicated to me in any fashion are subject to interpretation, review and change by the City at any time without prior notice.

I further agree and understand that I am an employee-at-will and that my employment may be terminated by myself or by the City at any

time, for any or no reason with or without cause and without prior notice.

I acknowledge that as an employee-at-will, any manual provisions which list causes for which my employment may be terminated do not constitute an exclusive list, and the City in no way surrenders its statutory power to terminate my employment at any time, for any reason and without prior notice. Furthermore, I acknowledge that any procedures contained in the manual pertaining to disciplinary actions are merely guidelines and that the City has the discretion to take whatever disciplinary action, using whatever disciplinary procedures which it deems appropriate under the circumstances.

7. On July 28, 2009, Chief of Police, Tom Maunders, hand delivered to Shiffrar a Notice of Suspension and Recommended Termination. In addition to the suspension that document advised her that Chief Maunders was going to recommend that she be terminated for the following reasons:

Insubordination, breach of confidentiality, violation of City policy (3:22, 13.2), poor performance, neglect of duty, and inappropriate behavior.

This document further advised Shiffrar that "at the time of receiving this letter, you have an opportunity to present reasons, verbally or in writing, why this suspension and the recommended termination should not occur." Shiffrar was also told that she had the right to file a written grievance regarding her suspension and the recommended termination. Attached to that Notice was a one-page document wherein Chief Maunders outlined the specific conduct and incidents supporting the reasons cited in the Notice for the suspension and recommendation for termination.

8. After providing the July 28, 2009 letter to Shiffrar, Chief Maunders met with her and gave her an opportunity to ask questions and dispute the grounds for the Notice. That meeting was recorded.
9. On August 3, 2009, Shiffrar filed with the City a request for a grievance hearing before the entire Police Committee and filed a document in rebuttal to her suspension and recommended termination.
10. On August 3, 2009, the Common Council terminated the employment of Shiffrar.
11. On August 11, 2009, Shiffrar presented her grievance to the Police Committee. On August 17, 2009, the Police Committee prepared a two-page written response to Shiffrar's grievance.
12. Shiffrar delivered a document dated August 26, 2009, to the City requesting a grievance hearing before the Common Council "per policy 11.5.5 in the Belle Fourche Policy and Procedures Manual." The grievance hearing was requested "in response to my termination by the City of Belle Fourche, and the grievances raised against Chief Thomas Maunders and Officer Justin Shellhammer."

13. By way of a letter dated September 9, 2009, the City gave notice to Shiffrar that a hearing on her grievance had been scheduled before the Common Council for September 14, 2009.
14. On September 14, 2009, a grievance hearing was held before the Common Council. The hearing followed the procedures set forth in Policy 11.5.5 of the Policy and Procedures Manual. During that hearing, Shiffrar was allowed to make an opening statement; she presented evidence through her own testimony, her own witnesses, and her own documents; she was allowed to call Tom Maunders and examine him in her case-in-chief; she was allowed to cross examine the testimony of witnesses called Tom Maunders; and she was allowed to present closing remarks.
15. By way of a letter dated September 17, 2009, Shiffrar was given notice that on September 21, the Common Council "may request information from witnesses that were not present at the initial grievance hearing on Monday, September 14."
16. On September 21, 2009, a continued hearing was held before the Common Council to obtain testimony from witnesses not present at the first hearing. These witnesses included a number of police officers from the Belle Fourche Police Department. Shiffrar was allowed to examine those witnesses after they were examined by members of the Common Council.
17. At the conclusion of the hearing, and after considering the matter in executive session, the Common Council did not rescind the termination of Shiffrar.
18. City sent a letter to Shiffrar dated September 23, giving her written notice of the Council's final determination.

***Summary Judgment:***

Respondent has filed a motion for summary judgment. Summary judgments in workers' compensation cases are governed by ARSD 47:03:01:08: That regulation states:

ARSD 47:03:01:08. A claimant or an employer or its insurer may, anytime after expiration of 30 days from the filing of a petition, move with supporting affidavits for a summary judgment. The division shall grant the summary judgment immediately 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 that the moving party is entitled to a judgment as a matter of law.

The party seeking summary judgment bears the burden of demonstrating the lack of any genuine issue of material fact, and all reasonable inferences from the facts are viewed in the light most favorable to the non-moving party. *Railsback v. Mid-Century Ins. Co.*, 2005 SD 64, ¶ 6, 680 N.W.2d 652, 654.

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. *Estate of Elliott*, 1999 SD 57, ¶15, 594 NW2d 707, 710 (citing *Wilson*, 83 SD at 212, 157 NW2d at 21). 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. *Breen v. Dakota Gear & Joint Co., Inc.*, 433 NW2d 221, 223 (SD 1988) (citing *Hughes-Johnson Co., Inc. v. Dakota Midland Hosp.*, 86 SD 361, 364, 195 NW2d 519, 521 (1972)). See also *State Auto Ins. Companies v. B.N.C.*, 2005 SD 89, 6, 702 NW2d 379, 382. [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. *Elliott*, 1999 SD 57, ¶16, 594 NW2d at 710 (quoting *Himrich v. Carpenter*, 1997 SD 116, 18, 569 NW2d 568, 573 (quoting *Moody v. St. Charles County*, 23 F3d 1410, 1412 (8thCir 1994))).

*McDowell v. Citicorp USA*, 2007 SD 53, ¶ 22, 734 N.W.2d 14, 21.

### ***Employment-at-Will:***

South Dakota has codified the employment-at-will doctrine at SDCL 60-4-4. That provision states “[a]n employment having no specified term may be terminated at the will of either party on notice to the other, unless otherwise provided by statute. “Employment-at-will “can be terminated by the employee or employer at any time for any reason.” (emphasis added) *Peterson v. Sioux Valley Hospital, Assoc.*, 486 NW2d 516, 520 (SD 1992).

The general rule is that “when there is no contract or specified term of employment...the employment is terminable at the will of the employer under SDCL 60-4-4.” *Johnson v. Kreiser’s, Inc.*, 433 NW2d 225, 227 (SD 1988). However, South Dakota recognizes an exception to the employment-at-will doctrine. That exception is discussed by the Supreme Court in *Aberle v. City of Aberdeen*, 2006 SD 60, 718 NW2d 615. In that case, the Court stated:

In the context of employment relationships, South Dakota is an employment- at-will state per the provisions of SDCL 60-4-4. Should a contract exist between the employer and the employee, the terms of the contract control over the provision of the statute. Obviously the two parties may, as part of an employment contract, agree that the employee is employed under an at-will term of employment.

*Id.* at ¶ 20, 718 NW2d at 621.

However, an employer may surrender its statutory at-will power via either an express or implied contract. *Holland v. FEM Elec. Ass’n, Inc.*, 2001 SD 143, ¶12, 637 NW2d 717, 720 (citing *Butterfield v. Citibank of South Dakota, N.A.*, 437 NW2d 857, 859 (SD 1989); *Osterkamp v. Alkota Mfg.*, 332 NW2d 275 (SD 1983)). An express surrender occurs when the employer affirmatively indicates such intent by adopting written personnel policies or manuals that explicitly state that a for-cause termination procedure must be followed. *Id.* (citing *Hollander v. Douglas County, South Dakota*, 2000 SD 159, ¶14, 620 NW2d 181, 185; *Richardson v. East River Elec. Power Co-*

op, Inc., 531 NW2d 23 (SD 1995)). In such instances, an express contract of employment is created that contains specific terms surrendering the statutory at-will power. *Id.* The second manner in which an employer may surrender its statutory at-will power occurs when an employer impliedly creates such a contract. *Id.* When no explicit surrender of the statutory at-will power is made by the employer, but policies or handbooks “[contain] a detailed list of exclusive grounds for employee discipline or discharge and a mandatory or specific procedure which the employer agrees to follow prior to any employee’s termination[,]” an implied contract is created that binds the employer to the for-cause termination procedure. *Id.* (quoting *Hollander*, 2000 SD 159, ¶14, 620 NW2d at 185).

*Id.* at ¶ 21, 718 NW2d at 621-622,

The hallmark of both an implied and an express surrender of the statutory power to terminate employees at will is a clear intention on the part of the employer. *Butterfield*, 437 NW2d at 859. An employer creates a protected property right in continued employment for its employees when it surrenders its statutory at-will power and adopts a discharge policy that provides termination will occur only for cause. *Hollander*, 2000 SD 159, ¶15, 620 NW2d at 185 (citing *Hopkins v. Saunders*, 199 F3d 968, 975 (8thCir 1999) (citing *Spitzmiller v. Hawkins*, 183 F3d 912, 916 (8thCir 1999))). Whether the surrender is made by an express or implied contract, if the employer does not follow proper termination procedures an employee who has been terminated may have a wrongful discharge claim. *Holland*, 2001 SD 143, ¶12, 637 NW2d at 721.

*Id.* at 22. NW2d at 622.

However, the fact that an employment contract is memorialized in writing does not in and of itself constitute a surrender of an employer’s statutory at-will power. *Butterfield*, 437 NW2d at 860 (quoting *Toussaint v. Blue Cross and Blue Shield of Mich.*, 292 NW2d 880, 890 (Mich 1980)). A written employment contract may include both guidelines for employee conduct and behavior and an explicit reservation of the at-will power. *Id.* Such an explicit reservation does not require the use of any specific language, but it must clearly indicate that the employer reserves the right to fire an employee at any time when it deems discharge to be appropriate. *Id.* at 859.

*Id.* at 23, 718 NW2d at 622.

Further, the Court has stated that any exception to the employment-at-will doctrine must be narrowly construed. *Peterson v. Sioux Valley Hospital Assoc.*, 486 NW2d 516, (SD 1992).

In this case, it is clear that the City intended to retain its statutory employment-at-will power when it employed Shiffar. The City has neither expressly nor impliedly surrendered its statutory at-will rights. The City’s employment documents are replete with instances where the at-will doctrine is explicitly retained. In *Aberle*, the Court found that an employment-at-will relationship existed when *Aberle* signed an employment application and an acknowledgement of receipt of the city’s personnel manual when those documents contained employment-at-will language. *Id.* 2006 SD 60 at ¶ 25. Here, Shiffar signed and

employment application and three acknowledgements of receipt of City's manual which contained similar language.

Shiffar argues that Policy 515 of the City Police Department SOP manual constitutes a surrender of the City's employment-at-will status because it only permits termination-for-cause. It is note-worthy, that the list of grounds for termination contained in Policy 515 is neither detailed, exclusive nor mandatory as required by the Aberle case. *Id.* 2006 SD 60 at ¶ 21. In Aberle, the list of grounds for termination was far more detailed than the list in this case; yet, the Court found the list to be mere guidelines. The grounds for termination listed in Policy 515 are likewise, only guidelines.

Shiffar was an at-will-employee of the City. Consequently, it was proper for the City to terminate her employment at any time, for any reason.

### ***Due Process Rights:***

Shiffar claims that the City violated her due process rights. At-will-employees do not have a constitutionally protected property right in continued employment. Hollander v. Douglas County, 2000 SD 159, 620 NW2d 181, 185. An employee who does not have a property right interest in continued employment has no due process rights of continued employment. Aberle v. City of Aberdeen, 2006 SD 60. 718 NW2d 615.

In this case, Shiffar was an at-will-employee. Therefore, she had no constitutionally protected due process rights to violate.

### ***Disciplinary and Grievance Procedures:***

As indicated above, Shiffar has no constitutionally protected termination due process rights. However, South Dakota statutorily requires cities to adopt grievance procedures to help resolve employee disputes. SDCL 3-18-15.1 states:

The governing officer or board of each governmental agency shall enact, by agreement, ordinance, rule, or resolution, and make known to its employees a procedure which its employees may follow for prompt informal dispositions of their grievances.

SDCL 3-18-15.1. State law defines grievance as follows:

The term "grievance" as used in this chapter means a complaint by a public employee or group of public employees based upon an alleged violation, misinterpretation, or inequitable application of any existing agreements, contracts, ordinances, policies, or rules of the government of the State of South Dakota or the government of any one or more of the political subdivisions thereof, or of the public schools, or any authority, commission, or board, or any other branch of the public service, as they apply to the conditions of employment. Negotiations for, or a disagreement over, a nonexisting agreement, contract, ordinance, policy, or rule is not a "grievance" and is not subject to this section.

SDCL 3-18-1.1.

In accordance with SDCL 3-18-15.1, the City adopted grievance and disciplinary policies. These policies authorized the Chief of Police to suspend Shiffrar and recommend termination.

The Chief met with Shiffrar presented her with written reasons for his suspension and termination. During that meeting Shiffrar had the opportunity to ask questions and dispute the grounds stated for her suspension and possible dismissal. Shiffrar requested and received hearings before the Police Committee and the City Counsel. At those hearings, she was given the opportunity to testify, present evidence and witnesses and cross-examine opposing witnesses. The disciplinary and grievance policies demand no more.

The City Council had the right to terminate Shiffrar at any time, for any reason. The City's policies provided Shiffrar with the opportunity to persuade the City not to terminate her. However, the City's policies did not require the City to change its original determination and continue her employment. The City complied with its disciplinary and grievance policies in this case.

***Order:***

There is no genuine issue of any material fact and the City is entitled to judgment as a matter of law. Therefore, the City's Motion for Summary Judgment is granted. Shiffrar was an at-will-employee and the City had the right to terminate her employment. Shiffrar did not have a property right to continued employment with the City and had no constitutionally protected due process rights related to her employment. In addition, Shiffrar's suspension and termination were in compliance with the City's disciplinary and grievance policies. Shiffrar's Petition is dismissed with prejudice. This letter shall constitute the order in this matter.

Sincerely,

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Donald W. Hageman  
Administrative Law Judge