

SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

GAYLE KRIZ,

HF No. 9 G, 2001/02

Grievant,

DECISION

vs.

CITY OF SISSETON,

Respondent.

This matter comes before the Department of Labor based on a grievance complaint filed by Gayle Kriz pursuant to SDCL 3-18-15.2. A hearing was held before the Division of Labor and Management on August 26 & 27, 2003, in Sisseton, South Dakota. Ronald A. Parsons, Jr. represented Gayle Kriz (Kriz). Roy A. Wise represented the City of Sisseton (City).

ISSUES

1. Did the City violate, misinterpret or inequitably apply the City's personnel policies when it terminated Kriz on January 14, 2002?
2. If so, what relief is Kriz entitled to receive?

FACTS

The Department finds the following facts, as established by a preponderance of the evidence.

1. At the time of the hearing, Kriz was fifty-five years old. Kriz is unmarried and lives in Claire City, South Dakota.
2. Kriz grew up as one of seven children on a farm near Siche Hollow, South Dakota. In 1963, Kriz's family moved to Claire City and she enrolled in high school at New Effington. Kriz had to withdraw due to health reasons and she never graduated from high school. Kriz eventually earned her GED in 1971.
3. Kriz has worked all of her life. She has had essentially only two jobs, working at the store in Claire City for twelve years and for the City for over twenty-two years.
4. On October 8, 1979, Kriz began working as the Deputy Finance Officer for the City. Kriz worked in that position until she was terminated on January 14, 2002.
5. Section 1-4 of the City's Personnel Policies provides that after an employee completes an initial six-month probationary period, "the employee shall automatically receive status as a permanent employee unless notified in writing that [her] services are terminated or unless [she] was hired on a temporary basis."
6. Kriz successfully completed her probationary period and attained status as a "permanent employee" under the City's Personnel Policies.

7. Shortly after Kriz started in her position as Deputy Finance Officer, she signed an “Oath of Office.” Kriz swore that she would “faithfully and impartially discharge all the duties” as the Deputy Finance Officer.
8. Kriz took this Oath of Office seriously. She explained this meant she “had to work for the city and the citizens. You’d have to protect their funds. You had to treat people fairly.”
9. Section 5 of the City’s Personnel Policies addresses “Disciplinary Action.” Throughout her tenure as Deputy Finance Officer, Kriz was never reprimanded or disciplined in any fashion pursuant to the policy. Kriz’s personnel file, assembled during her lengthy career with the City, did not contain a single critical or negative reference.
10. Former Mayor Dennis Jensen confirmed that Kriz was a good employee for the City. Jensen was Mayor for the City from 2001 to 2003. Although Jensen is no longer Mayor for the City, he will be referred to as Mayor Jensen in this Decision.
11. The City Finance Office consists of only two employees, the Deputy Finance Officer and the City Finance Officer.
12. Nearly all of the City’s administrative personnel, including the Mayor’s office and the Police Department, are located in Sisseton City Hall. The City Finance Office is the first office one encounters upon entering the building.
13. Although Kriz’s title was that of Deputy Finance Officer, her duties were primarily secretarial in nature. Kriz was the receptionist and waited on customers, answered the phone, sorted through mail, prepared correspondence and issued water bills.
14. In 1986, when the previous Finance Officer left the position, the City offered the promotion to Kriz. However, Kriz turned the offer down as she did not believe she had the education to perform the duties of City Finance Officer. In addition, Kriz was happy in her position “doing what [she] did.”
15. After Kriz declined the position, the City hired Joan Rice (Rice) as the City Finance Officer. Rice was Kriz’s supervisor.
16. Kriz and Rice did not have a good working relationship due to certain incidents in the past. Kriz thought Rice did a good job and respected Rice’s abilities, but Kriz did not trust Rice. Kriz stated, “whenever I questioned her about something, she’d yell about it and say she was the boss and not to question her. She would - - I’d do up reports and stuff and whenever she got mad at me, they’d disappear, they’d just walk right off my desk. I’d have to keep doing things over and over and over.” Kriz testified that Rice “was just mean sometimes.”
17. Despite the fact that Kriz and Rice did not have a good working relationship, Kriz was able to work with Rice in the City Finance Office for over fifteen years, until Kriz’s termination in January 2002. Again, Kriz’s personnel file did not contain any performance evaluations, negative or otherwise.
18. As the Deputy Finance Officer, Kriz periodically attended continuing education programs sponsored by the South Dakota Municipal League. This was referred to as Finance Officers’ School. During these training sessions, Kriz learned that is it illegal for the City to invest money out of state.¹

¹ SDCL 9-22-6 provides, “The governing body shall designate the depository or depositories in which the funds belonging to the municipality shall be deposited. Such depository or depositories shall be a bank or banks within the State of South Dakota, unless otherwise specifically provided by law.”

19. In mid to late 2001, Kriz noticed that Rice was receiving many letters, as well as faxes and telephone calls, from out-of-state financial institutions and investment companies. Kriz had noticed similar activity in the past.
20. Kriz thought these letters looked like account statements or billings.
21. Kriz did not open any of the correspondence because, as a practice, Kriz did not open any mail addressed to Rice.
22. For example, Kriz noticed that Rice was receiving letters and telephone calls from financial institutions in Kansas City, Missouri, St. Paul and Edina, Minnesota, River Falls, Wisconsin, Lubbock, Texas and New York.
23. Kriz remembered seeing a fax from Norwest Trust that referenced an account containing over \$600,000.00.
24. Kriz also noticed an increase of telephone calls from out-of-state financial companies. Kriz thought it "just seemed really strange."
25. Kriz testified:

Well, I was getting letters in, not me myself, there [were] letters coming into city hall addressed sometimes to Joan Rice, City of Sisseton; sometimes City of Sisseton, Joan Rice. And I was getting calls along with those letters for her and I was getting faxes regarding - - and these were from financial institutions and investment firms out of state and it was just very uncomfortable.

26. Rice confirmed that during this time period she was receiving letters and telephone calls from banks, financial institutions and investment firms located outside the state.
27. Kriz knew it was illegal for the City to invest funds outside of South Dakota and the correspondence and telephone calls raised serious concerns in her mind. Kriz thought there was a possibility that city funds might be being invested out of state.
28. Kriz stated, "[i]t just made me uncomfortable because that big of an amount and from out of state and stuff where - - and I didn't know for sure that this one was out of state, but other, you know, other ones that had come through were and I just figured I had to tell somebody, that somebody needed to know besides me."
29. Kriz took her oath as a public servant charged with protecting city funds very seriously. As a result, Kriz felt she had a duty to report her suspicions that Rice might be engaging in illegal activity by investing the City's funds out of state.
30. Based on her relationship with Rice, Kriz did not feel comfortable asking Rice about the letters, faxes and telephone calls. Furthermore, it was not Kriz's duty to investigate her suspicions.
31. The City's Personnel Policies do not contain a policy instructing an employee as to the proper procedure to follow if one suspected a supervisor of engaging in illegal activity. Kriz testified:

Q: Did anyone ever tell you what you're supposed to do in those circumstances?

A: No, they didn't.

Q: Did you feel that it was your role to start initiating and conducting an investigation of your suspicions?

A: I figured somebody had to know about it so I tried talking to Paul . . . Stapleton, councilman, on the 3rd. I tried talking to [Mayor Jensen], but I couldn't catch him where he didn't have somebody in there.

32. In early January 2002, Kriz notified Doug Flannery, the City's Chief of Police, of her concerns regarding possible illegal activity by her supervisor. Kriz testified, "I told him that there [were] suspicious letters coming in from out of state, that they were from financial and investment firms and the city cannot invest out of state, it's against the law."

33. Chief Flannery's initial reaction was that Kriz would lose her job for making the report.

34. Chief Flannery described the meeting with Kriz:

Q: Do you remember meeting in your office in January with Gayle where Gayle came to you?

A: Yes.

Q: And she told you she suspected that city funds might be being invested outside of the state?

A: Yes.

Q: And that's illegal, isn't it?

A: Yes.

Q: Gayle told you that her suspicion was based on letters, calls and faxes that the city was receiving from out of state investment firms, is that true?

A: Yes.

Q: And then at that meeting you asked her if she thought that her supervisor was embezzling city funds?

A: Yes.

Q: And Gayle's response to that was that she had no proof of that, true?

A: Yes.

Q: Then at that point you issued some sort of warning to her about her job, is that true?

A: Yes.

Q: You said that she better watch out or she might get herself fired?

A: I said she was putting her job on the line by making these allegations.

35. Kriz explained why she reported her concerns to Chief Flannery, "[b]ecause it shouldn't have been - - you know, there [were] just too many [letters and telephone calls] coming in and it just made me very uneasy. I felt it was my duty as in my job to do this, to help protect city funds."

36. The focus of Kriz's report to Chief Flannery was on her suspicions regarding the possible investment of money out of state, even though several other past incidents were discussed during their conversation.
37. Kriz reported her suspicions to Chief Flannery in good faith. Kriz sincerely believed that something illegal might be happening with the City's funds.
38. Following the meeting with Kriz, Chief Flannery conducted an investigation. Chief Flannery asked Kriz to assist in the investigation by checking the City Council Minutes to try to determine what authority the City Finance Officer had to transfer municipal funds.
39. Chief Flannery informed Mayor Jensen that Kriz had reported to him there were suspicious letters and telephone calls coming in from out-of-state investment firms and that Kriz suspected city funds might be being invested out of state. Chief Flannery also mentioned that the letters and telephone calls coincided with large personal purchases.
40. Sometime in the afternoon of January 14, 2002, Kriz met again with Chief Flannery and also Mayor Jensen.
41. Kriz confirmed during this meeting that she did not have any proof that Rice was embezzling money from the City.
42. Kriz testified:

Q: Did they ask you any follow-up questions?

A: Doug did. He kept saying - - well, he said, why would you think that she would do this and I said because of things in the past.

...

Q: In addition to your suspicions about things being investigated out of state, there are notes [on the police report] about other things that have happened in the past. Were some of the things listed here, I think most of them are on page two of the report, things that you gave in response to Chief Flannery's questioning?

A: Yes, they wanted to know why I - - they kept asking why I thought she would have done this, what suspicions, you know - -

Q: Did you tell - - let me ask it this way. Did Chief Flannery or Mayor Jensen ask if you had any proof regarding embezzlement of funds?

A: Yes, I told - - like I told him, like I told Doug down in the office, I had no proof of anything. I knew the audits were coming clear. I had never seen - - you know, I've never seen nothing other than these letters coming in and I've know - - and the stuff that happened in the past I said. I had no proof. I'm not a CPA. You know, I don't - - and I don't do her book work, you know, so I don't - - it's not my, I guess it's not my job.

43. Mayor Jensen confirmed that the focus of Kriz's report was about her suspicions regarding the possible investment of money out of state.
44. Also on January 14th, Chief Flannery and Mayor Jensen met with Rice to discuss Kriz's suspicions. Rice showed them a few letters from out-of-state financial institutions and investment firms. These were similar letters that initially triggered

- Kriz's suspicions. Chief Flannery and Mayor Jensen also reviewed past audit reports.
45. Based on their conversation with Rice, Chief Flannery and Mayor Jensen determined that no city funds were being invested out of state and that no wrongdoing had occurred.
 46. Thereafter, Chief Flannery wrote up an incident report, which was dated January 14, 2002.
 47. Mayor Jensen stated that, even after the meeting with Rice confirming there was no illegal activity with the City's funds, Kriz's job was not in jeopardy for making the report to Chief Flannery.
 48. However, during the City Council meeting on the evening of January 14, 2002, the City Council voted to terminate Kriz for reporting her suspicions to Chief Flannery that her supervisor might be engaged in illegal activity.
 49. Mayor Jensen testified:

Q: Then the matter was brought before the city council?

A: True.

Q: Who was present at that meeting, do you remember?

A: The full council which would be six members and myself and Joan Rice and the city attorney.

Q: Okay. And it was decided at that meeting that Gayle would be terminated for making this report?

A: The decision - - there was discussion in executive session naturally. Any time we discuss personnel, it's in executive session, and we came out of session and there was a motion and a second to terminate the employment and it was a unanimous vote.

Q: And the reason she was terminated was for making this report?

A: I would say yes to that.

Q: And it's true that there was not anything else that Gayle did that entered into the decision to terminate her other than making this report to Chief Flannery?

A: Not to my knowledge, no.

Q: That's a true statement, there was nothing else that went into making the decision other than her report?

A: I would have to agree.

(emphasis added).

50. Mayor Jensen confirmed that Kriz was fired "solely for this particular incident and not because of any past conduct."
51. The minutes from the City Council meeting on January 14, 2002, reflect that the City Council voted to terminate Kriz's employment. No specific reason was given in the minutes.
52. Again, Mayor Jensen testified that Kriz was terminated "for the specific reason that she made a report of suspected illegal activity by her supervisor."
53. Mayor Jensen conceded the City Council believed that Kriz's report was sincere and made in good faith. Mayor Jensen testified:

Q: [W]hen Gayle was making this report and when she was talking about it in her meeting with you and Officer Flannery January 14th, you believed at that time that Gayle believed what she was telling you, isn't that true?

A: She was believable what she told, yes.

Q: But you didn't think she was lying to you about it, you believed she believed what she was saying about these investments out of state?

A: I didn't know if it was truthful or not.

Q: Okay. Page 41 of your deposition, line four, question, "You've known Gayle a long time, fair?" Your answer, "Yes." Question, "Do you think when she made these reports that she believed what she was saying?" Your answer, "Yes."

A: Yes.

Q: And those are still your answers today?

A: Yes.

Q: When the city council was making its decision and you were there, did the city council believe she was lying about what she was saying?

A: I doubt that. I don't think so, but I - -

Q: They just thought she was mistaken about her suspicions?

A: You could use that word, yes.

Q: In other words, they don't think she was creating false allegations?

A: No.

Q: That's true that they didn't believe that?

A: No, what was presented to them they felt to be accurate, to be her honest accusations.

Q: It's just that the accusations turned out not to be true in the city council's mind?

A: Correct, correct.

(emphasis added).

54. As a result of making the report to Chief Flannery, Kriz was immediately fired by the City.
55. On January 15, 2002, Kriz was called into a meeting with Mayor Jensen, City Attorney Kerry Cameron, and two City Council members. Kriz was informed that she had been terminated for making a report of her suspicions.
56. Kriz testified about the meeting:

Q: Was it your understanding that you were being fired [for] making your report of your suspicions?

A: Yes.

Q: Is there any other reason given for being fired?

A: No.

Q: What did they tell you at that time?

A: They told me that Joan could no longer work with me. Katie said that there was no position there anymore for me, that I could pack up my stuff and leave. Terry Jaspers said that she'd go down with me and clean out my desk and I could give my keys to her.

57. On January 16, 2002, the City Council conducted a special session and voted to give Kriz the choice to resign in lieu of termination. Kriz stated, "they said if I wanted to resign, they'd give me a piece of paper and pencil, and if I resigned right away, I could have like all my benefits plus two weeks severance. I said no, I said, I didn't do nothing wrong, I am not going to resign."
58. On January 24, 2002, ten days after her termination, the City sent Kriz an after-the-fact letter regarding her "[d]ismissal from employment." This was the first time the City specifically set forth in writing the reasons for Kriz's termination.
59. The letter was signed by Mayor Jensen and City Attorney Cameron. The letter contradicts Mayor Jensen's credible testimony that Kriz was fired "for the specific reason that she made a report of suspected illegal activity by her supervisor."
60. The letter stated:

This is your notice as required by Article 5-2 of the Personnel Policy of the City of Sisseton as to your dismissal as an employee of the City of Sisseton.

Your employment was terminated by unanimous vote of the City Council on January 14, 2002. The reason for your termination was your report to the Chief of Police, your family and others that Joan Rice, the City Finance Officer and your immediate supervisor was embezzling money from the City of Sisseton and that she had money invested outside the State of South Dakota contrary to state law.

You stated that your accusations were based on the fact that Mrs. Rice got mail from investment companies out of state at times when was spending money on large personal purchases.

Your statements were a reflection on not only the Finance Officer, but the Mayor and the City Council. These statements made it impossible for you and the Finance Officer to work together in the future. These allegations had no basis in fact.

61. It is true that Kriz reported her suspicions to Chief Flannery. However, Kriz did not tell family members about her suspicions that Rice was investing funds outside the state. Kriz only discussed her concerns with law enforcement personnel.
62. In addition, Kriz did not specifically accuse Rice of embezzling funds. Chief Flannery raised this issue with Kriz. Again, Kriz insisted that she did not have any proof that Rice was embezzling money from the City.
63. As of the date Kriz was terminated, her salary was \$9.88 per hour, plus overtime, health insurance and retirement benefits. Kriz's bi-monthly gross paycheck

totaled approximately \$790.40. Pursuant to the City's Personnel Policies, Kriz received full insurance benefits according to a plan implemented with Blue Cross and Blue Shield of South Dakota. Kriz was entitled to pension benefits under the South Dakota Retirement System.

- 64. Had Kriz continued working for the City, she planned to retire when she reached the age of 65.
- 65. Despite the fact that she did not have any "proof," Kriz believed she had a duty to report her suspicions to Chief Flannery. When she made the report, Kriz thought she had an affirmative duty as a city employee to report any suspected wrongdoing. Kriz testified she "got dumped for trying to do something that was right."
- 66. Kriz confirmed that she was scared of losing her job, especially after her conversation with Chief Flannery. However, Kriz reported her suspicions because she "had to . . . [s]omebody had to know."
- 67. Mayor Jensen agreed that it was not Kriz's duty to investigate her concerns.
- 68. Mayor Jensen, and even Chief Flannery, confirmed Kriz had an affirmative duty as a city employee to report suspected wrongdoing. Mayor Jensen testified:

Q: But the city does specifically want to encourage city employees to report suspected wrongdoing?

A: That's true.

Q: Would you agree that employees have an affirmative duty to come forward when they suspect wrongdoing?

A: Yes.

. . . .

Q: Should a city employee have to choose between reporting what they believe - - what they suspect might be illegal activity and their job?

A: No, they shouldn't have to choose that.

- 69. Mayor Jensen recognized that the decision to fire Kriz was not consistent with acceptable public policy. He testified:

Q: But it's the job of law enforcement to investigate suspicious activity, you would agree with that?

A: Sure, that's part of their job, sure.

Q: It's not the job of the city deputy finance officer to investigate possible crimes?

A: No.

Q: And since you were at these meetings where the decision was made to terminate Gayle, it's true Gayle was not fired for failing to conduct her own investigation of this matter, that's true, isn't it?

A: That's true.

Q: It's true also that law enforcement cannot do its job unless someone has the courage to come forward and make a report?

A: True.

- Q: Someone suspects wrongdoing and they inform the authorities and the authorities conduct an investigation, that's the way it is supposed to work, right?
- A: Sure.
- Q: And that's how it worked in this situation?
- A: You might say so, yes.
- Q: Except Gayle got fired, right?
- A: That's an exception?
- Q: That's my question, except Gayle got fired, true?
- A: That was the end result, yes.

70. Kriz exhausted the appropriate grievance procedures, as set forth in the City's Personnel Policies.
71. Kriz has been unable to find other employment since she was fired. Kriz has conducted an extensive job search throughout the Sisseton and the surrounding area. Kriz applied and has been rejected for positions with virtually every municipality within her area. Kriz has continued with her job search because she cannot afford not to work.
72. Kriz kept a diary during the time she was employed with the City. The diary contains Kriz's innermost thoughts, both good and bad, and sometimes contradictory. Kriz used her diary as a way to vent frustration or blow off steam. Kriz explained, "I just started writing in my diary just what happened during the day [to] get rid of [my] frustrations so [I] could face the next day."
73. The City did not know of the existence of Kriz's diary until several months after she was terminated. The City did not fire Kriz because she kept a diary or even because of any information contained within her diary. The uncontroverted testimony established that Kriz was fired solely for reporting her suspicions that Rice might be engaged in unlawful activity by investing city funds outside the state. Therefore, Kriz's diary is unpersuasive in this matter and is not relevant to the ultimate legal issue in this case.
74. Despite the City's persistent portrayal of Kriz as a "petty, vindictive and disgruntled employee," Kriz was a credible witness and her testimony is credible. This is based on her consistent testimony throughout the hearing and the opportunity to observe her demeanor at the hearing.
75. Kriz, Mayor Jensen, Chief Flannery, City Attorney Cameron and Rice were the only fact witnesses to testify at the hearing. Dr. Ralph Brown and Dr. Hillar Neumann, Jr., provided expert testimony on the issue of damages.
76. Other facts will be developed as necessary.

ISSUE I

DID THE CITY VIOLATE, MISINTERPRET OR INEQUITABLY APPLY THE CITY'S PERSONNEL POLICIES WHEN IT TERMINATED KRIZ ON JANUARY 14, 2002?

SDCL 3-18-15.2 provides for an appeal to the Department of Labor when a public employee's grievance remains unresolved. Under this statute, the Department is

instructed to “conduct an investigation and hearing” and “issue an order covering the points raised” in the public employee’s appeal. Kriz properly exhausted the City’s grievance procedures. Kriz, as a public employee, brought this matter before the Department pursuant to SDCL 3-18-15.2. Therefore, the Department has jurisdiction over this matter to determine whether the City committed a grievance when it terminated Kriz on January 14, 2002.

SDCL 3-18-1.1 defines a grievance as:

[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 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.

Kriz has the burden of proof as she is the party alleging the violation. Rininger v. Bennett County Sch. Dist., 468 N.W.2d 423, 425 (S.D. 1991).

The City’s Termination Policy, contained in Section 1-9 of the City’s Personnel Policies, provides:

An employee may be discharged by majority action of the City Council if the work of the employee is unsatisfactory. A two (2) week notice shall be given in such an instance. Discharge without notice may be given for gross misconduct or insubordination.

State Statute (SDCL 61-6-14.1) defines “misconduct:”

1. Failure to obey orders, rules, or instructions, or failure to discharge the duties for which an individual was employed; or
2. Substantial disregard of the employer’s interests or of the employee’s duties and obligations to his employer; or
3. Conduct evincing such willful or wanton disregard of an employer’s interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee; or
4. Carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent, or evil design.

Kriz could be terminated only in accordance with the City’s Termination Policy. See generally Wessington Springs Educ. Ass’n v. Wessington Sch. Dist. No. 36-2, 467 N.W.2d 101, 104 (S.D. 1991) (the City must abide by the terms of the agreement or policy). There is no dispute that the Termination Policy is clear and unambiguous. Therefore, the terms in this policy are to be given ““their plain and ordinary meaning.”” Harms v. Northland Ford Dealers, 1999 SD 143, ¶ 12 (citation omitted).

Mayor Jensen confirmed that Kriz was not discharged because her work was unsatisfactory. Mayor Jensen testified:

- Q: Now in this case Gayle was not discharged because her work was unsatisfactory, that's true?
- A: Yes, in this case we're referring to the last sentence of that same paragraph.
- Q: Okay. And that sentence says, "Discharge without notice may be given for gross misconduct or insubordination," correct?
- A: That's correct.
- Q: And then it lists four instances it says that the state statute defines misconduct and I think you've indicated you don't know whether Gayle's report of her suspicions fits under any of these instances, is that true?
- A: Yeah, right, right. The letter was authored by our city attorney.
- Q: Was there any discussion at all at the city council meeting where the decision to terminate Gayle was made to her conduct fitting under one of these statutory categories?
- A: That's possible, but I don't recall.
- Q: Do you remember any?
- A: I don't recall.

According to the clear language of the Termination Policy, Kriz could be terminated without notice only for "gross misconduct or insubordination." The Termination Policy then sets forth definitions of "misconduct."

The undisputed and credible testimony established that Kriz was fired solely for reporting her sincere suspicions that Rice might be engaged in unlawful activity by investing city funds outside the state. This reason for her termination does not fall under any of the criteria set forth in the Termination Policy. Kriz credibly testified that she had a genuine and honest belief that something illegal might be happening with city funds. Kriz was not directed as to how she should act in such a situation. Kriz decided to report her suspicions to Chief Flannery. Kriz reported her suspicions in good faith and she freely admitted that she did not have any proof of illegal activity. The undisputed testimony from Mayor Jensen established that the City Council believed that Kriz's report was made sincerely and in good faith. Even though no wrongdoing had in fact occurred, Kriz had a duty to report her suspicions that her supervisor might be engaged in illegal activity. Both Mayor Jensen and Chief Flannery confirmed that Kriz, as a City employee, had an affirmative duty to come forward and report her suspicions.

Despite the fact that the City Council believed Kriz's suspicions were sincere and made in good faith, the City voted to terminate Kriz on January 14, 2002, for making a good faith report of her suspicions. The City Council did not consider the Termination Policy when it voted to terminate Kriz. Kriz's conduct cannot be construed as either "gross misconduct or insubordination." Kriz's conduct does not meet the definition of "misconduct" as contained within the Termination Policy. The City Council voted to terminate Kriz in plain violation of the Termination Policy.

The City violated its Termination Policy when it fired Kriz for reporting her suspicions that Rice might be engaged in illegal activity. The City did not properly follow its Termination Policy and wrongfully terminated Kriz on January 14, 2002. Kriz established by a preponderance of the evidence that the City committed a grievance when it terminated Kriz on January 14, 2002.

ISSUE II

WHAT RELIEF IS KRIZ ENTITLED TO RECEIVE?

Kriz has suffered an economic loss as a result of the City's violation of its Termination Policy. Kriz requested the Department order the City to pay back pay and front pay, as well as prejudgment and postjudgment interest, based on her wrongful discharge. The City argued the Department does not have the authority to award these monetary damages to Kriz.

The South Dakota Supreme Court has stated, "[w]e believe that under SDCL 3-18-15.2 the Director has authority to act only on grievances that do not involve the exercise of an executive or legislative power of the governmental agency or the performance of a governmental function." Kierstead v. City of Rapid City, 248 N.W.2d 363, 366 (S.D. 1976). However, this case is clearly distinguishable from Kierstead. This matter does not involve setting salaries or compensation. Rather, this matter involves awarding compensation to Kriz that she was denied as the result of her wrongful termination. This is permissible under SDCL 3-18-15.2. See Cox v. Sioux Falls Sch. Dist., 514 N.W.2d 868, 874 (S.D. 1994).

As of the date of the hearing, Kriz had conducted a reasonable and exhaustive job search, but was unsuccessful. The City failed to present evidence that her job search was deficient. Kriz has been living off her savings and credit cards. She cannot afford not to work and has been diligent in her attempts to find a job. Based on her efforts to find employment, it is highly unlikely that Kriz will find employment in her area. In addition, reinstatement is not an option in this matter.

Kriz presented testimony from Dr. Ralph Brown, a professor of economics at the University of South Dakota. Dr. Brown is also a partner with an economic consulting group and a forensic economist. Dr. Brown was asked to opine on Kriz's economic loss due to her wrongful discharge. Dr. Brown prepared an "Economic Loss Appraisal."

Dr. Brown, after reviewing Kriz's relevant financial information and work history, presented two alternatives for Kriz's economic loss. Dr. Brown's first opinion assumed that Kriz would have worked until June 2006, when she would have reached the Rule of 85. Using this information, Dr. Brown opined Kriz's economic loss is \$263,729.00. Dr. Brown's second opinion assumed Kriz would have worked until age 65. Based on this information, Dr. Brown opined Kriz's economic loss is \$417,648.00.

The City presented testimony from Dr. Hillar Neumann, Jr., a professor of economics at Northern State University. Dr. Neumann reviewed Dr. Brown's report prior to testifying at the hearing. One of Dr. Neumann's main criticisms was that Dr. Brown used a net discount rate of 1.5 percent per year. Dr. Neumann thought a 2 percent net discount rate was more appropriate because "interest rates are extremely low at this point in time." However, Dr. Neumann agreed that Dr. Brown's use of the 1.5 percent net discount rate was fair and reasonable. Dr. Neumann, using a 2 percent net discount rate, opined that Kriz's economic loss would be \$135,030.00 if she retired in June 2006. Using the same net discount rate, Dr. Neumann opined Kriz's economic loss would be \$240,090.00 if she retired at age 65.

Kriz testified, "I had planned, if I could get all my retirement, if I could continue on with the health insurance, I had planned on retiring at Rule 85, but if I couldn't get those things, there was no way I could afford to quit." Kriz was under the misunderstanding

that retiring at the Rule of 85 meant that she would retire early at the maximum possible monthly benefit she would receive if she had retired at age 65. Kriz testified:

- A: Well, I had planned on leaving early if I could, if I could get all - - like, okay, like I was led to understand, there was a lady that came up and talked to the city employees in mass and we all gleaned from it, I wasn't the only one, that at Rule 85 you got one thousand - - that one figure, that \$1,162 at Rule 85 and so that's what I set my plans on you know.
- Q: Let's look at Exhibit 10 and this is your personal benefits statement from June 30th of 2001 and under the age 65, it talks about a benefit of \$1,162 per month. Is that the benefit that you thought you would receive if you retired at the Rule of 85?
- A: That's what I was led to believe.
- Q: And it turns out that is not the case, do you understand that now?
- A: Yeah, I understand that when Dr. Brown explained it.
- Q: Would you have retired at the Rule of 85 if your benefit was less than that?
- A: No, 'cause [I] wouldn't be able to.

Dr. Brown explained to Kriz that her understanding was not accurate and that if she would have retired early, her monthly benefit would be much lower than if she worked until age 65. Once she received the correct information, Kriz stated she would have had no choice but to work until age 65. Kriz's credible testimony established that she would not have retired until age 65 because it would have been financially infeasible.

Dr. Brown's calculations of Kriz's economic loss are well-founded, reasonable and reliable. Dr. Brown's opinions are more persuasive than Dr. Neumann's opinions. Dr. Brown's opinion, assuming Kriz would have worked until age 65, that Kriz's economic loss is \$417,648.00 is accepted. Kriz has established by a preponderance of the evidence that she is entitled to \$417,648.00 for her economic loss due to her wrongful termination by the City. Kriz is also entitled to prejudgment interest.

Kriz shall submit Findings of Fact, Conclusions of Law, and an Order consistent with this Decision, and if necessary, proposed Findings and Conclusions within ten days from the date of receipt of this Decision. The City shall have ten days from the date of receipt of Kriz's Findings and Conclusions to submit objections thereto or to submit proposed Findings and Conclusions. The parties may stipulate to a waiver of Findings of Fact and Conclusions of Law and if they do so, Kriz shall submit such Stipulation, along with an Order in accordance with this Decision.

Dated this 17th day of May, 2004.

SOUTH DAKOTA DEPARTMENT OF LABOR

Elizabeth J. Fullenkamp
Administrative Law Judge