

**SOUTH DAKOTA DEPARTMENT OF LABOR and REGULATION
DIVISION OF LABOR AND MANAGEMENT
Pierre, South Dakota**

**BERESFORD EDUCATION
ASSOCIATION,**

HF No. 18G-7U, 2010/11

Petitioner,

v.

DECISION

**BERESFORD SCHOOL DISTRICT #61-2
and BOARD OF EDUCATION,**

Respondents.

The Petitioner, the Beresford Education Association (BEA), filed with the Department of Labor and Regulation, pursuant to SDCL §§3-18-1.1, 3-18-3.1, 3-18-3.4 and 3-18-15.2, a Grievance Petition and Petition of Unfair Labor Practice against Respondent, the Beresford School District #61-2 and the Board of Education (District). A hearing on the above matter was conducted by the Department on February 1, 2012. Attorney Anne Plooster represents BEA. Attorney Thomas H. Frieberg represents District. Both parties have submitted post hearing briefs and the Department being advised fully, hereby makes this Decision.

ISSUES

- I. Whether the Beresford School District #61-2, Board of Education and/or its agents committed an unfair labor practice when it used a non-negotiated reduction-in-force policy to reduce-in-force a member of Petitioner's bargaining unit?
- II. Whether the Beresford School District #61-2, Board of Education and/or its agents violated, misinterpreted and/or inequitably applied the policies, rules or regulations, or negotiated agreement of the school district in using the 2010 version of the reduction-in-force policy to non-renew a member of Petitioner's bargaining unit?

FACTS

In October 2010, a Negotiated Agreement was entered into by and between the BEA and the District. This was the first master contract that had been entered into between the two parties that contained policies and procedures expected of the District and its staff. Historically, the District and the BEA had negotiated and agreed upon terms of compensation and benefits and

had entered a one-page document. The parties had never entered into negotiations regarding school or administrative policies, including the reduction-in-force policy.

BEA and the District negotiators combed through the District's policy manuals for all policies that the District and BEA wanted incorporated into the master contract. Most policies were kept electronically by the Superintendent's administrative assistant and some were contained in a binder entitled "Educational Staff Handbook." The SDEA and BEA reviewed the policies and brought forward some policies to discuss in the negotiations process. The District prepared and sent out the first draft of the master contract on May 21, 2010. The parties met together and went through most of the policies contained in that master contract. The parties signed the completed Negotiated Agreement on October 18, 2010. Included in the master contract was a staff reduction policy or reduction-in-force policy. The staff reduction policy was never specifically discussed by BEA and the District during the negotiations process, but was always included in the drafts. The language did not change from the time it was included by the District in the master contract to when the Negotiated Agreement was signed.

The staff reduction policy was used by the current District Superintendent on two prior occasions to reduce staff, in 2009 and 2010. BEA did not grieve these reductions in staff. Superintendent Field was not aware of any other version of the staff reduction policy than what was given to BEA to include in the master contract. He was given this policy when he became superintendent for the District in 2007. It is the same language that was used by the District when he was Beresford High School Principal from 2002 to 2005.

In April 2011, Superintendent Field used the staff reduction policy contained within the 2010-11 Negotiated Agreement (District language) to non-renew Ms. Sheila Huth for the 2011-12 school year. Paragraph 3 of the staff reduction policy in the Negotiated Agreement states:

No professional staff member protected by statutory continuing contract provisions will be non-reemployed while qualified and certified for a position held by a person temporarily or not fully certificated by the State Board of Education.

The above language is different than the wording that BEA now argues was the policy prior to the 2010-11 Negotiated Agreement (BEA language). The BEA language states:

No professional staff member protected by statutory continuing contract provisions will be non-reemployed while qualified and certificated for a position held by a person temporarily or not fully certificated by the State Board of Education or a person who has not attained continuing contract status.

There is evidence that the BEA language was used by the District in 2006 during the attempted reduction of a staff member's salary, Mr. Tom Rice. This attempted reduction of salary using the staff reduction policy resulted in a grievance. The BEA language was presented as evidence in a Department of Labor Hearing regarding Mr. Rice. The Rice Hearing was not about the language currently at issue in this case. There were never any negotiations between the parties over the change in language, after 2006. Testimony from both parties indicated that school

policies such as staff reduction were thought to have been the prerogative of the District and past negotiations only dealt with wages and benefits.

ANALYSIS

I. Whether the Beresford School District #61-2, Board of Education and/or its agents committed an unfair labor practice when it used a non-negotiated reduction-in-force policy to reduce-in-force a member of Petitioner’s bargaining unit?

As Petitioner, the burden of proof falls on BEA to show that District committed an unfair labor practice. *Rininger v. Bennett County School District*, 468 NW2d 423 (SD 1991).

The statute regarding unfair labor practice for public employers is found at SDCL §3-18-3.1. It reads:

It shall be an unfair practice for a public employer to:

- (1) Interfere with, restrain or coerce employees in the exercise of rights guaranteed by law;
- (2) Dominate, interfere or assist in the formation or administration of any employee organization, or contribute financial or other support to it; provided, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;
- (3) Discriminate in regard to hire or tenure or employment or any term or condition of employment to encourage or discourage membership in any employee organization;
- (4) Discharge or otherwise discriminate against an employee because he has filed a complaint, affidavit, petition or given any information or testimony under this chapter;
- (5) Refuse to negotiate collectively in good faith with a formal representative; and
- (6) Fail or refuse to comply with any provision of this chapter.

SDCL §3-18-3.1. BEA is the exclusive bargaining representative in respect to wages, hours of employment, rate of pay, or other conditions of employment. SDCL §3-18-3 states in pertinent part:

Representatives designated or selected for the purpose of formal representation by the majority of the employees in a unit appropriate for such purposes shall be the exclusive representatives of all employees in such unit for the purpose of representation in respect to rates of pay, wages, hours of employment, or other conditions of employment;

SDCL §3-18-3. “The law requires public employers to negotiate matters of pay, wages, hours of employment, or other conditions of employment.” *Sisseton Educ. Ass’n v. Sisseton Sch. Dist. No. 54-8*, 516 N.W.2d 301, 303 (S.D. 1994) (citing SDCL 3-18-3).

The Reduction-in-Force or Staff Reduction policy is not a managerial right and is typically the topic of negotiations. The South Dakota Supreme Court has stated that it is

mandatorily negotiable. *Webster Education Association v. Webster School District*, 2001 SD 94, ¶11, 631 NW2d 202. However, it was not presented by either party as an item to be negotiated. During the negotiations for the 2010-11 Negotiated Agreement, neither party disagreed about the District language regarding the staff reduction policy; that it was not correct or that changes should be negotiated.

There is no evidence as to when the language changed or how it changed. There is some evidence that the BEA language used in 2006 for the Rice salary reduction was not the correct language, but that the District language was also used on at least two occasions prior to May 2010. The parties know the language changed, but there is no evidence as to when it changed or how it changed.

“Ultimately, “[w]hether a contract is formed is judged objectively by the conduct of the parties, not by their subjective intent.” *Behrens v. Wedmore*, 2005 S.D. 79, ¶28, 698 N.W.2d 555 (quoting *Geraets v. Halter*, 1999 S.D. 11, ¶17, 588 N.W.2d 231, 234). BEA did not object to the language of the staff reduction policy, as written in the 2010-11 Negotiated Agreement, prior to the nonrenewal of Ms. Huth. BEA’s action (or inaction) leads to the conclusion that the District language was not objectionable by BEA in October 2010.

BEA argues that the doctrine of judicial estoppel should apply to the District’s action in using the District language instead of the BEA language. The South Dakota Supreme Court has stated:

Judicial estoppel cannot be reduced to an equation, but courts will generally consider the following elements in deciding whether to apply the doctrine: the later position must be clearly inconsistent with the earlier one; the earlier position was judicially accepted, creating the risk of inconsistent legal determinations; and the party taking the inconsistent position would derive an unfair advantage or impose an unfair detriment to the opponent if not estopped.

Watertown Concrete Products, Inc. v. Foster, 2001 S.D. 79, ¶12, 630 N.W.2d 108, 112-13 citing *New Hampshire v. Maine*, 532 U.S. 742, 750, 121 S.Ct. 1808, 1814-15, 149 LE2d 968, 977). See also *Gesinger v. Gesinger*, 531 N.W.2d 17, 21 (S.D. 1995); *State v. St. Cloud*, 465 N.W.2d 177, 180 (S.D. 1991). “Unlike collateral estoppel or equitable estoppel, judicial estoppel requires neither privity between parties in the two proceedings nor detrimental reliance by the other party.” *Id.* at 180 (quoting Comment, Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel, 80 NwU. L.Rev. 1244, 1249 (1986) (“The gravamen of judicial estoppel is not privity, reliance, or prejudice. Rather it is the intentional assertion of an inconsistent position that perverts the judicial machinery.”)).

Canyon Lake Park, LLC v. Loftus Dental, PC, 2005 S.D. 82, ¶34, 700 N.W.2d 729.

There was no previous legal determination regarding the language in question. There was a previous Department determination regarding the attempt to reduce a staff member’s salary. The Rice hearing did not interpret the language contained in paragraph 3 of the staff

reduction policy. The decision in that 2006 case has no impact on this case and the use of the District language does not create a risk of inconsistent legal determination. Whether or not the District language was used in 2006 does not create any unfair detriment or advantage to either party. Judicial estoppel does not apply to this case.

The District did not refuse to negotiate collectively in good faith or fail or refuse to comply with any provision in SDCL Chapter 3-18. BEA has not shown District engaged in an unfair labor practice in regards to the 2010-11 Negotiated Agreement.

II. Whether the Beresford School District #61-2, Board of Education and/or its agents violated, misinterpreted and/or inequitably applied the policies, rules or regulations, or negotiated agreement of the school district in using the 2010 version of the reduction-in-force policy to non-renew a member of Petitioner’s bargaining unit?

As the grievant, the burden of proof falls upon BEA to show that the District violated, misinterpreted, and/or inequitably applied its existing policies, rules or regulations or failed to follow the contracts or agreements. *Rininger*, 468 NW2d 423.

The law regarding contract construction and interpretation is also well-settled. The South Dakota Supreme Court recently wrote:

Trade agreements or collective bargaining agreements are contracts under South Dakota law. Contracts negotiated between teachers and public school districts are like any other collective bargaining agreement. Disputes over collective bargaining agreements negotiated between school districts and teachers are settled by application of general contract principles. Disputes over the meaning of terms in teacher contracts are settled by applying general principles of contract law.

When the terms of a negotiated agreement are clear and unambiguous, and the agreement actually addresses the subjects that it is expected to cover, there is no need to go beyond the four corners of the contract. When the language of the collective bargaining agreement is ambiguous, we may go outside the four corners of the contract to interpret its meaning.

Hanson v. Vermillion Sch. Dist., 2007 S.D. 9, ¶ 27-28, 727 N.W.2d 459, 468 (internal citations and quotes omitted). The language contained within the staff reduction policy is not ambiguous. “Contracting parties are held to the terms of their agreement, and disputes cannot be resolved by adding words the parties left out.” *Gettysburg Sch. Dist. 53-1 v. Larson*, 2001 S.D. 91, ¶ 11, 631 N.W.2d 196. See *Wessington Springs Educ. Ass’n v. Wessington Springs School Dist.*, 467 N.W.2d 101, 104.

As shown by the parties’ signatures to the Agreement, the District staff reduction policy language is the language agreed upon by both parties in the 2010-11 Negotiated Agreement.

Ms. Huth, the person non-renewed by the District, held continuing contract while the District retained another teacher who did not hold continuing contract. This is allowed under the

2010-11 Negotiated Agreement. If the BEA language had been agreed upon by the parties, this would not be allowed. It has been determined that the District did not commit an unfair labor practice and that the BEA language, obtained from the Rice hearing, was not made part of the 2010-11 Negotiated Agreement. District followed the language contained within the 2010-11 Negotiated Agreement when it did not renew the contract of Ms. Huth.

BEA has not proven that the District violated, misinterpreted, or inequitably applied the 2010-11 Negotiated Agreement or other rules, policies, and procedures of the District when the District used the staff reduction or reduction-in-force policy contained within the 2010-11 Negotiated Agreement.

District shall submit Findings of Fact and Conclusions of Law, and an Order consistent with this Decision within twenty (20) days from the receipt of this Decision as well as any Proposed Findings and Conclusions. BEA shall have twenty (20) days from the date of receipt of the District's proposed Findings and Conclusions to submit objections thereto or to submit its own proposed Findings and Conclusions. The parties may stipulate to a waiver of Findings of Fact and Conclusions of Law and if they do so, District shall submit such stipulation along with an Order in accordance with this Decision.

DONE at Pierre, Hughes County, South Dakota, this 25th day of May, 2012.

SOUTH DAKOTA DEPARTMENT OF LABOR

_____/s/
Catherine Duenwald
Administrative Law Judge