SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

CITY OF RAPID CITY
PUBLIC LIBRARY BOARD and **HF No. 1U, 2010/11**
CITY OF RAPID CITY, **2 U, 2010/11**

Petitioners,

V. **DECISION**

LOCAL 1031, COUNCIL 59,
AMERICAN FEDERATION OF STATE,
COUNTY & MUNICIPAL EMPLOYEE
(AFSCME) AFL-CIO.

Respondent.

Petitioners, City of Rapid city Public Library Board and City of Rapid City (collectively "City") each filed a petition for hearing on unfair labor practice alleging that Respondent, Local 1031, Council 59, American Federation of State, County & Municipal Employees AFL-CIO ("Union") had not negotiated in good faith. The Union filed an Answer and Motion to Dismiss in each case. These cases were consolidated and come before the Department of Labor pursuant to SDCL 3-18-3.1, 3-18-4 and ARSD 47:02:03:01. There appearing to be no dispute of facts and concluding that the matter might be resolved without hearing, the Department directed that the Petitioner's Motions to Dismiss be considered as cross-motions for Summary Judgment. Aaron Eisland represents the Union. Jason Green represents the City.

Issue:

Whether the Union committed an unfair labor practice by failing to implement the agreement that was reached during the Department of Labor's conciliation?

Facts:

Based upon the record, the following facts are found by a preponderance of the evidence:

The Union is the authorized collective bargaining representative for the employees of the City. The Union and the City reached impasse while negotiating a collective bargaining agreement. The Union asked the Department of Labor to intervene and conciliate the parties to the controversy pursuant to SDCL 3-18-8.1. The Department conducted a conciliation on July 15, 2010.

During that conciliation, the negotiating teams of the Union and the City reached a tentative agreement. The Union then took the agreement to the Union membership for a vote pursuant to the Local Union's and the AFSCME International's Constitutions. Both bargaining units of the Union, library and general city workers rejected the tentative agreement. The City now alleges that the Union did not negotiate in good faith after failing to implement the tentative agreement. Additional facts may be discussed in the analysis below.

Analysis:

When public entities and public employees enter into collective bargaining, both parties have an obligation to negotiate in good faith. Bon Homme County Comm'n v. AFSCME, Local 1743A, 699 N.W.2d 441, 452 (S.D. 2005). "[H]owever, such obligation does not compel either party to agree to a proposal or make a concession." Rapid City Educ. Assn. v. Rapid City Sch. Dist. No. 51 4, 522 N.W.2d 494, 497 (S.D. 1994) citing SDCL 3 18 2, 3.1, & 3.2. As Petitioner, the City has burden of proof in this case. Rininger v. Bennett County School District, 468 NW2d 423 (SD 1991).

SDCL 3-18-3.2 describes what constitutes an unfair labor practice by a union. That statute states:

> It is an unfair practice for an employee organization or its agents:
>
> (1) Restrain or coerce an employee in the exercise of the rights guaranteed by this chapter. However, this subdivision does not impair the right of an employee organization to prescribe its own requirements with respect to the acquisition or retention of membership therein;
>
> (2) Restrain or coerce an employer in the selection of his representative for the purpose of collective bargaining or the adjustment of grievances;
>
> (3) Cause or attempt to cause an employer to discriminate against an employee in violation of subdivision 3-18-3.1(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground; and
>
> (4) Refuse to negotiate collectively in good faith with an employer, provided it is the formal representative.

SDCL 3-18-3.2

The City argues that the failure of the Union to adopt the agreement negotiated by its collective bargaining team either demonstrates that the Union negotiators exceeded their negotiating authority during the negotiations or that the Union withdrew or altered its negotiator's authority after the agreement was reached. In either case, the City asserts that the Union did not negotiate in good faith. The Department disagrees.

State law dictates the actions of the City and the City negotiators after a tentative agreement is reached. It does not do so with regard to the actions of the Union or the Union's negotiators. SDCL 3-18-7 provides:

> If a tentative settlement is reached between a labor or employee organization or organizations and the designated representatives of the governmental agency, such representatives shall recommend such settlement to the governing body or officer having authority to take action. The governing body or officer shall as soon as practicable consider the recommendations and take such action, if any, upon them as it or he deems appropriate.

SDCL 3-18-7. This statute requires the City negotiators to take any agreement negotiated with the Union to the City Council for final approval. It seems unlikely that the legislature reserved the final approval of a tentative agreement for the City's governing body while depriving the Union membership the same authority. Likewise, this statute makes clear that the City negotiator's lack the authority to bind the City. Consequently, it seems unlikely that the legislature intended for Union negotiators to wheel that authority. More importantly, the legislature has not passed a corollary to SDCL 3-18-7 for unions. State law neither requires final action by the Union member nor prohibits it. In essence, the legislature has left the Union to set its negotiators authority.

The City also argues that the agreement reached between the City and the Union is binding and not a tentative agreement because it was reached during conciliation rather than a typical collective bargaining session. While this argument may have some appeal, there is not statutory or common law authority for this proposition. There is nothing in the language of the statutes which suggests that the conciliation is anything more than an extension of the negotiating process.

Finally, the City argues that there had been five Union negotiators. Yet, the Union's final vote was 17-3, not to approve the agreement. Consequently, not all of the Union negotiators supported the agreement when it went before the Union membership which evidences a lack of good faith during the negotiations. First, unlike the requirement imposed on the City's negotiators by SDCL 3-18-7, there is no statutory requirement that the Union negotiators recommend final approval of the agreement to the Union members. In addition, the fact that some of the negotiators may have changed their minds at a later date does not, without

additional facts, demonstrate a lack of good faith during the conciliation. Ultimately, it is impossible to demonstrate a lack of good faith in this case without exploring the rationale given by the Union for its position and the City has failed to do so here.

Conclusion:

The City has failed to meet its burden of proof in this matter. Therefore, this case will be dismissed with prejudice. The Union shall submit proposed Findings of Fact and Conclusions of Law, and an Order consistent with this Decision within twenty (20) days from the date this Decision is received. The City shall have twenty (20) days from the date of receipt of the Union's proposed Findings of Fact and Conclusions of Law to submit objections thereto or to submit proposed Findings of Fact and Conclusions of Law. The parties may stipulate to a waiver of Findings of Fact and Conclusions of Law and if they do so, the Union shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this _10th_____ day of December, 2010.

SOUTH DAKOTA DEPARTMENT OF LABOR

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