March 13, 2013

Ms. Vicki L. DeVille
19444 459th Ave.
Estelline, SD 57234

LETTER ORDER

Rodney Freeman, Jr.
Churchill, Manolis, Freeman, Kludt, Shelton, & Burns LLP
PO Box 176
Huron, SD 57350-0176

RE: HF No. 1U, 2012/13 – Vickie L. DeVille v. Estelline School District 28-2

Dear Ms. DeVille and Mr. Freeman:

Petitioner, Vickie L. DeVille (Petitioner), filed with the South Dakota Department of Labor (Department) a Petition on Unfair Labor Practice on December 12, 2012. An Answer to the Petition was filed by Respondent, Estelline School District #28-2 (Respondent), on December 19, 2012.

Respondent, by and through their attorney, Rodney Freeman, Jr., filed a Motion to Dismiss Petition with their Answer to Petition. Because the Answer and the Motion to Dismiss alleged jurisdictional defects as well as a failure to state a claim upon which relief may be granted, the Department requested briefs on the Motion. Respondent filed a Brief and Affidavit which included information outside the parameters of the jurisdictional question. Petitioner filed a Response to Respondent's initial brief on February 6, 2013 as well as a time-table and evidence regarding her underlying claim. The Department has reviewed the Motion, the Response, and the accompanying Briefs and Affidavits from both parties.

The accompanying materials sent by both parties are outside the scope of the Motion to Dismiss and go to the heart of the underlying question in this case. Therefore, I am converting the Motion to Dismiss to a Motion for Summary Judgment. This has been done without notice to the parties, however, both sides had adequate opportunity to present additional information in regards to the question at issue.

In regards to this conversion to a Summary Judgment, the South Dakota Supreme Court has written:

> A motion to dismiss for failure to state a claim upon which relief can be granted should be converted into a motion for summary judgment if matters extraneous to the pleadings are "presented to, and not excluded by, the trial court." SDCL 15-6-12(b); See also, Cooper v. Merkel, 470 N.W.2d 253, 255 (S.D. 1991).

Storm v. Durr, 2003 S.D. 6, ¶11, 657 N.W.2d 34, 37.

> We have held that consideration of matters beyond the pleadings under Rule 12 triggers the notice provision of Rule 56(c). Failure to convert and provide litigants with reasonable notice to permit addition to the record can constitute reversible error. Nonetheless, despite consideration of matters outside the pleadings, a court's error in failing to convert the motion and to comply with Rule 56 is harmless if the dismissal can be justified under §12(b)(5) standards without reference to matters outside of the pleadings. Moreover, the failure to give notice that the matter is being converted to a summary judgment proceeding "does not necessarily mandate reversal where nothing else could have been raised to alter the entry of summary judgment."

Jenner v. Dooley, 1999 S.D. 20, ¶14, 590 N.W.2d 463, 469-470 (citations omitted).

In this case, the facts presented by both sides are not at issue and all that is left is a determination of the law of the case.

FACTS

Petitioner is employed by Respondent, a public agency, as classified staff. For the 2010-11 school year, Respondent published a policy handbook which is entitled Board Policies including Teacher Policies, Administrative Policies, and Classified Policies. The Policy Handbook has specific sections for Teacher policies, Administrative policies, and Classified Staff policies. Prior to the separate sections for each of the three classes, there are general policies which are not designated for any employee class, but for the general school district and its patrons and taxpayers. The Classified staff policies are separated into sections of: classified salaries, classified substitutes, classified hospitalization/dental/life insurance annuities, classified vacation time, classified sick and personal leave policy, classified sick leave bank, substitutes, driver education instructor pay, and referees.

There is no "complaint" or "grievance" section specifically set out under the classified policies. The Complaint Policy in the general policy section reads in pertinent part:

> The term “complaint” in this policy is restricted in meaning to that criticism of a particular school employee, by a patron of Estelline School District, which includes and /or implies a demand for action by school authorities.

The Complaint Policy is not a grievance policy for classified staff. It is a Complaint Policy for patrons or taxpayers of the Estelline School District.

Petitioner has presented the timeline of when the events occurred. On August 1, 2012, the salaries were printed in the local paper; August 7, Petitioner sent a letter to the School Board with her concerns; August 12, Petitioner was asked to attend the School Board meeting that day; August 13, Respondent told Petitioner that the Board would be looking into the issues; September 10, the local paper printed that the School Board tabled discussion on the issues brought by Petitioner; October 2, Petitioner filed a formal grievance with Respondent; November 27, Petitioner e-mailed Respondent in regards to the grievance and was told that the grievance procedure was not applicable to Classified staff; December 3, Petitioner filed a Petition of Unfair Labor Practice with the Department.

The District Manual is clearly delineated into section for each of the three types of employees for the district. The only employees of the District that are allowed to make complaints against the District are the Administrators. Neither the Teachers nor the Classified Staff have Grievance procedures available to them based upon the Policy Handbook.

ANALYSIS & DECISION

After Petitioner filed a grievance with Respondent, Respondent sent an e-mail to Petitioner telling her that she had no right to grieve. That e-mail was sent on November 27, 2012. She was told that the right to grieve was only given to teachers and administrators. Petitioner filed an unfair labor practice under SDCL 3-18-3.1. The statute 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.

Respondent's Motion to Dismiss is based upon the Petitioner's failure to file the Unfair Labor Practice within 60 days after the alleged commission of an unfair labor practice or within 60 days after the complainant should have known of the offense. SDCL 3-18-3.4. The ULP was filed within 60 days of when Respondent refused to hear Petitioner's grievance regarding her contract for pay. However, Petitioner filed the ULP 135 days after being informed that Respondent had not followed the policies regarding salary schedule for classified staff.

Summary Judgment is granted to Respondent in regards to the claimed ULP for not allowing Petitioner to present a grievance. There is no right in state law for employees that are not part of a union to present grievances. Petitioner is not part of a union or negotiating unit. If she had been, then a grievance may have been allowed under SDCL 3-18-3. Failing to give classified staff not members of a public employees union the ability to grieve is not an unfair labor practice.

The other possible ULP, the salary conflict between Petitioner and Respondent, is not discussed or decided here because the ULP was brought beyond the 60-day time period allowed by law. Petitioner did not meet the Statute of Limitations to have that issue heard by the Department.

This letter shall serve as the Department's Order. As this is a Summary Judgment, no Findings of Fact or Conclusions of Law are required to be filed. Parties retain the right to appeal this Order to the Circuit Court.

Sincerely,

_____

Catherine Duenwald
Administrative Law Judge
Division of Labor and Management
Department of Labor and Regulation