SOUTH DAKOTA DEPARTMENT OF LABOR AND REGULATION

DIVISION OF LABOR AND MANAGEMENT

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES (AFSCME), COUNCIL 59 AND AFSCME LOCAL 169

Petitioner,

v.

HF No. 2 U, 2011/12

DECISION ON MOTION FOR SUMMARY JUDGMENT

CITY OF HURON COMMISSION,

Respondent.

The Petitioner, the American Federation of State County, and Municipal Employees (AFSME) Council 59 and AFSME Local 69 (AFSCME), filed with the Department of Labor and Regulation, pursuant to SDCL §§ 3-18-3.1 and 3-18-3.4, a Petition of Unfair Labor Practice against Respondent, the City of Huron Commission (City). AFSCME is represented by Mr. Matthew Miller, Executive Director for AFSCME Council 59. The law firm of Boyce, Greenfield, Pashby & Welk, L.L.P, attorneys Lisa Hansen Marso, and Meghann Joyce, represent City.

City filed a Motion for Summary Judgment pursuant to SDCL 1-26-18(1). AFSCME filed their Response in Opposition to the Motion. City filed a Final Reply to that Response. All briefs, affidavits, pleadings, and documents on file in regards to this Petition have been taken into consideration and the Department now makes this Decision granting Summary Judgment.

ISSUE

The Petition for Unfair Labor Practice alleges that the City's imposition of an at-will employment provision at Article XI in the Collective Bargaining Agreement, is a clear attempt to usurp the grievance procedure. Furthermore, AFSCME alleges that City violated SDCL §3-18-3.1(3) by discriminating in regards to a term or condition of employment to discourage membership in an employee organization; that City's actions have a chilling effect on the efforts of AFSCME to effectively represent their members and constitute a violation of SDCL §3-18-3.1; and the conduct of the City violates SDCL §3-18-3.1(6) in that it constitutes a failure or refusal to comply with the provisions of the chapter as stated above.

The City argues that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. Because the City's proposed amendment to Article XI of the collective bargaining

agreement was a proper subject of negotiation and the City negotiated the amendment in good faith, the City did not commit an unfair labor practice by negotiating the amendment to impasse.

FACTS

1. AFSCME is the duly recognized bargaining representative for the City's bargaining unit employees.

2. AFSCME and the City have operated through collective bargaining agreements since 1980.

3. Article XI of the collective bargaining agreement, a provision regarding discipline and discharge, remained unchanged from 1980 through 2004.

4. This provision was extensively changed in the 2005-06 collective bargaining agreement.

5. The provision remained the same in the 2007-2009 collective bargaining agreement.

6. Article XI contains a definition of "just cause." The definition, in all the collective bargaining agreements from 1980 through the most recent, starts with the sentence, "Just causes for dismissal or suspension, without pay, include, but are not limited to those areas listed below." The list is not exclusive to the causes listed.

7. The most recent collective bargaining agreement, the 2007-2009 agreement, was scheduled to expire on December 31, 2009. The parties commenced negotiations in September 2009.

8. The City proposed a change to the agreement regarding the at-will issue. This change was discussed during at least seven, of the over twenty-seven, negotiating meetings held between the parties.

9. The City proposed amendments added a number of provisions including a new subsection 11.09. It reads, "Nothing in Article XI or Article XII abrogates the employment at-will employment relationship which exists between the employer and employee."

10. AFSCME resisted the amendments to Article XI.

11. City articulated a specific rationale to the proposed amendment to Article XI throughout the negotiating process. This rationale was given to AFSCME orally during the meetings and in writing.

12. The City's rationale for the amendment was that the change was making less ambiguous the meaning of the current Article XI. The City contended that the amendment did not alter the nature of the existing contract but was just a clarification of what was already in place. City rationalized that the amendment did not replace the existing "just cause" provision, but was an explanation of what the current provision means, under current South Dakota case law.

13. On December 27, 2010, the City voted to declare impasse regarding the collective bargaining agreement negotiations.

14. A Department of Labor conciliation was requested and was held on May 5, 2011. The parties did not conciliate their differences.

15. A fact-finding was held before the Department of Labor on June 28, 2011. On July 8, 2011, the Department issued its fact-finding report and recommendations. Included in the recommendations was that the City's proposals be adopted, including the at-will provision.

16. City implemented the last best offer including the amendment to Article XI.

17. On August 25, 2011, AFSCME filed this petition for hearing alleging an unfair labor practice.

18. The unfair labor practice complaint was premised on the City's amendment to Article XI.

ANALYSIS

The City has brought this Motion for Summary Judgment pursuant to SDCL §1-26-18 (1). The statute is as follows:

> Opportunity shall be afforded all parties to respond and present evidence on issues of fact and argument on issues of law or policy. However, each agency, upon the motion of any party, may dispose of any defense or claim: (1) 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 a party is entitled to a judgment as a matter of law[.]

SDCL §1-26-18(1). The moving party has the burden of proving that no material issues of fact exist and that they are entitled to judgment as a matter of law. However, on the onus of opposing a motion for summary judgment, the South Dakota Supreme Court has written:

> It should be unmistakable to lawyers and laypersons alike that when facing a motion for summary judgment, the opposing party must "be diligent in resisting [the motion], and mere general allegations and denials which do not set forth specific facts will not prevent the issuance of a judgment." *Bordeaux v. Shannon County Schools*, 2005 S.D. 117, ¶14, 707 N.W.2d 123, 127 (quoting *Hughes-Johnson Co. v. Dakota Midland Hosp.*, 86 S.D. 361, 364, 195 N.W.2d 519, 521 (1972)); see also SDCL 15-6-56(e); *Chem-Age Industries, Inc. v. Glover*, 2002 S.D. 122, ¶18, 652 N.W.2d 756, 765.

Citibank v. Schmidt, 2008 S.D. 1, ¶8, 744 N.W.2d 829, 832.

Petitioner files this unfair labor practice complaint pursuant to SDCL 3-18-3.1 (3), (5), and (6). This statute reads in pertinent part:

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

(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;
(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 (3), (5), and (6).

The material facts of this case, seen in a light more favorable to the nonmoving party, are not at issue. AFSCME has not shown any material facts to be at issue. The material facts are those facts regarding the negotiations over the 2009 collective bargaining agreement and the implementation of the amendment to the particular Section XI.

In South Dakota, it is well established that:

> A public employer "while under a duty to negotiate in good faith, [is] not required to agree to a contract or any specific rates of pay, wages, hours of employment or other conditions of employment."

South Dakota Bd. of Regents v. Heege, 428 N.W.2d 535, 541 (SD 1988). City was under no obligation to agree to AFSCME's proposed contract. City was under a legal requirement to conduct negotiations in good faith, but was not required to change any of their proposals. In regards to what constitutes "good faith," the Court recently wrote:

> In South Dakota, public employees are permitted to "negotiate matters of pay, wages, hours of employment, or other conditions of employment" through collective bargaining. See *Bon Homme Cnty. Comm'n v. Am. Fed'n of State, Cnty, and Mun. Emps. (AFSCME), Local 1743A*, 2005 S.D. 76, ¶13, 699 N.W.2d 441, 448 (citing SDCL ch 3-18 et seq.). "Employers and employees are required to 'negotiate collectively in good faith[.]'" Id. (quoting SDCL 3-18-3.2(4); SDCL 3-18-2). And "[a]lthough we have no explicit definition of the term 'negotiate collectively in good faith,' we interpret this requirement to mean that the parties must seriously work to resolve differences and reach a common understanding." Id.

International Union of Operating Engineers v. City of Pierre, 2011 S.D. 37, ¶3. The South Dakota Supreme Court wrote, in *Bon Homme Co. Com. v. AFSCME*,

> Where a public employer fails "to negotiate collectively in good faith," that employer commits an unfair labor practice. SDCL 3-18-3.1(5) (1973) (emphasis added). SDCL 3-18-2 provides in part:
>
> > The negotiations by the governmental agency or its designated representatives and the employee organization or its designated representative shall be conducted in good faith. Such obligation does not compel either party to agree

> to a proposal or require the making of a concession but *shall require a statement of rationale for any position taken* by either party in negotiations.
>
> *Id*. (emphasis added). Good faith negotiation requires that where a party refuses to agree to a proposal or make a concession, that party is required to provide a "statement of rationale." We do not interpret this requirement as permitting any reason to suffice. To do so would render the language meaningless, and our method of statutory interpretation requires that we find a meaningful understanding of a statute where possible. See *Rapid City Educ. Ass'n,* 522 N.W.2d at 498. Here, the statute sets forth a requirement that parties to negotiations who neither agree nor concede to a proposal must present a *legitimate and specific rationale* for their positions.

Bon Homme Co. Com. v. AFSCME, 2005 SD 76, ¶22, 699 NW2d 441, 451-452 (emphasis added). City and AFSCME met numerous times in a period of over one year. Written and oral rationale was given by City to AFSCME in regards to all changes to the collective bargaining agreement.

City presented rationale to AFSCME regarding the amendments presented for Article XI. Whether the City's rationale is "legitimate or specific" is not a material issue of fact in this case, but is a question of law. Two of the written rationales are as follows:

> 11.01 and 11.04 "Rationale – the current "just cause" language can be interpreted that the City has relinquished its statutory right to have an at-will employment relationship with employees and that is something the City does not wish to do."
>
> 11.09 "The City desires to have it clearly stated in the contract that the employment relationship between the City and employees is employment-at-will in order to avoid any confusion, dispute or debate as to the nature of the employment relationship which exists."

City then orally explained their rationale during the negotiation sessions. During the process of negotiations, City also wrote a letter to AFSCME with the attempt to explain why City is legally correct to argue that "at-will" and "just cause" language can coexist within the same agreement. The oral rationale presented by City, according to the City's attorney during negotiations and witness in this case, was that the City's proposed amendment clarified the meaning of Article XI, under the current case law in South Dakota, and may prevent future lawsuits. City cited to case law regarding "just cause" and "at-will employment," specifically, *Aberle v. City of Aberdeen,* 2006 S.D. 60, 718 N.W.2d 615.

It is immaterial whether City's rationale or explanation is legally correct. Having a legally correct rationale is not a requirement of state law for a good faith negotiation. The legal requirement is that the rationale be made in good faith and be "legitimate and specific." It is legitimate in that both sides believe Article XI to mean the opposite of each other and was in need of clarification. That point has been made clear by this petition. It is also specific, in that the City presented a full and complete rationale for the amendment. The negotiations were also conducted in good faith, in that

the City made a serious effort "to resolve differences and reach a common understanding." *Bon Homme Co. Com.* at ¶13.

For those reasons, the moving party is entitled to judgment as a matter of law. City did not violate any provision of SDCL 3-18-3.1 during the negotiations. There are no material issues of fact as seen in a light more favorable to the non-moving party. Summary Judgment is granted to City.

Dated this ____6th_____ day of November, 2012.

SOUTH DAKOTA DEPARTMENT OF LABOR

_____/s/_____
Catherine Duenwald
Administrative Law Judge