January 9, 2018

Jessica Rogers
Assistant City Attorney
City of Rapid City
300 Sixth Street
Rapid City, South Dakota 57701

LETTER DECISION AND ORDER

Aaron Eiesland
Johnson Eiesland Law Offices, P.C.
4020 Jackson Blvd., Ste 1
Rapid City, SD 57709

RE: HF No. 2U, 2018/19 – International Association of Firefighters Local 1040 vs. City of Rapid City

Dear Ms. Rogers and Mr. Eiesland:

This letter addresses the following submissions by the parties:

October 24, 2018	Respondent's Motion to Dismiss
	Affidavit of Nick Stroot
	Affidavit of Rod Seals
	Affidavit of Steve Allender
November 15, 2018	Petitioner's Response to Motion
November 26, 2018	Respondent's Reply Brief in Support of Motion

QUESTION PRESENTED: IS RESPONDENT ENTITLED TO DISMISSAL AS A MATTER OF LAW?

FACTS

Petitioner, IAFF Local 1040, is a union representing firefighters in the Rapid City Fire Department. IAFF filed this unfair labor practice on behalf of Sean Fischer, a former Rapid City firefighter. Fischer was hired by Respondent, City of Rapid City, in

2009 as a firefighter medic. This position required Fischer to obtain EMT certification from the State of South Dakota. Fischer underwent EMT training while employed as a firefighter and, upon completion of the training in November 2013, Fischer was promoted to the position of journeyman firefighter paramedic. He remained in this position until he was terminated on July 16, 2018.

On June 5, 2018, Fischer sent a letter to his superior advising that he intended to drop his South Dakota paramedic certification and wished to resume working as a firefighter medic. Seals informed Fischer that letting his license lapse would result in his termination. Fischer did allow his license to lapse and Respondent terminated him on July 16, 2018. In a letter to Fischer, the Department explained that Fischer was no longer qualified to hold the position of journeyman firefighter paramedic.

IS RESPONDENT ENTITLED TO DISMISSAL AS A MATTER OF LAW?

ANALYSIS

A. UNFAIR LABOR PRACTICE

Respondent argues that Petitioner has failed to state facts which would sustain an unfair labor practice. SDCL 3-18-3.1 establishes that an unfair labor practice exists when employers:

> (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.

The South Dakota Supreme Court has examined the termination of a public union member in the context of an unfair labor practice in two cases. The first, *Gen. Drivers & Helpers Union v. Brown Cty.,* 269 N.W.2d 795, (S.D. 1978), involved two sheriff's deputies who filed unfair labor practices alleging their respective employers had terminated them for their activity in a union. The court examined a list of ten criteria to determine whether an employee's termination constituted an unfair labor practice. They include:

1. Whether the employee had been criticized or specifically warned of his shortcomings;

2. Whether the employee was given any advance notice of his discharge;

3. Whether the employer offered economic benefits if the employee would refrain from union activity;

4. Whether the employer was opposed to unionization;

5. Whether the employee was competent;

6. Whether the employee was a known leader of the unionization drive and the employer knew of the employee's activity in the union at the time of the discharge;

7. Whether the discharge plan was promulgated with speed;

8. Whether the employer gave an implausible explanation for its action;

9. Whether the discharged employee was singled out for special treatment;

> 10. Whether the reasons for discharge given at the hearing were the same as those given to the employee at the time of the discharge.

Id. at 799. In analyzing these factors, the court determined that both deputies were terminated as retaliation for union activity and remanded the case with instructions for the Department to order reinstatement of the deputies.

The court again examined the termination of a public union member in *McCauley v. S. Dakota Sch. of Mines & Tech.*, 488 N.W.2d 53 (S.D. 1992). In *McCauley*, the court relied on the same ten factors and opined "[the] Department was to determine if there was substantial evidence indicating McCauley's 'union activity' weighed more heavily in the decision to fire him than did Tech's dissatisfaction with his performance." Id. at 57. The court upheld the Department's original determination that the evidence did not indicate the petitioner's termination was related to his union activities.

Though these two opinions came to opposite conclusions, both were premised on the argument that an employee's termination was related to his union activity. Here, there is no suggestion that Petitioner's termination was in any way related to union activity. Petitioner argues by terminating Mr. Fischer, the city unilaterally modified the collective bargaining agreement (CBA) without negotiation. However, Petitioner's argument more closely fits the definition of a grievance.

> The term "grievance" as used in this chapter means 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 government 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.

(SDCL 3-18-1.1)(emphasis added).

Petitioner alternatively claimed that his petition also stated a claim for a grievance. The question then becomes whether Respondent had sufficient notice that Petitioner's pleading was also to be treated as a grievance. In *Int'l Union of Operating Engineers Local No. 49 on Behalf of Maack v. Aberdeen Sch. Dist. No. 6-1*, 463 N.W.2d 843 (S.D. 1990), the Supreme Court examined a similar question. *Maack* involved a custodian in the Aberdeen School District who grieved his termination. Maack argued that he believed he was terminated after being presented by his supervisor with two reprimands. Maack attempted to regain his job after he learned that he was not in fact fired. After the local grievance procedure failed to gain Maack his job back, Petitioner filed a "request for conciliation" with the Department on Maack's behalf. The Department treated the request as a notice of appeal and proceeded as if it was a grievance. After the Department ruled in Petitioner's favor, the District appealed the decision to circuit court. The District argued that since Petitioner had not filed a notice of appeal, the matter was not properly a grievance. The circuit court agreed and reversed the Department's decision. Petitioner then appealed to the South Dakota Supreme Court. The court agreed with the Department's original decision, explaining:

> In considering the sufficiency of the content of the notice [of appeal,] ... if the intent of the appellant to appeal from a judgment may be inferred from the text of the notice and if the appellee has not been misled by the defect the appeal will be entertained. This more liberal rule of construction is consistent with our oft repeated preference for disposition of cases on the merits and not on mere technicalities.

Id. at 844 (quoting *Blink v. McNabb,* 287 N.W.2d 596, 598–99 (Iowa 1980).

In this case, Petitioner lays out sufficient allegations in his petition to constitute a notice of appeal under SDCL 3-18-15.2. After Fischer was terminated, he initiated a grievance under the CBA. After this failed to resolve his dispute, he filed notice to the Department, albeit as an unfair labor practice. The petition alleges Fischer's termination was in contravention of the current CBA. In addition to arguing that Claimant failed to state a claim, Respondent also raises several arguments relevant to a summary judgment. Having presented arguments for summary judgment, Respondent can be said to have contemplated that the petition would also state a claim for a grievance.

SDCL 15-6-12(b) provides in relevant part "If, on a motion asserting the defense numbered (5) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in § 15-6-56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by § 15-6-56." The department is not bound by the rules of civil procedure for circuit court but nonetheless finds that conversion to a motion for summary judgment is proper in this instance.

B. SUMMARY JUDGMENT

The Department is authorized to grant summary judgment pursuant to ARSD 47:03:01:08:

> A claimant or an employer or its insurer may, anytime after expiration of 30 days from the filing of a petition, move with supporting affidavits for a summary judgment. The division shall grant the summary judgment immediately 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 that the moving party is entitled to a judgment as a matter of law.

The Supreme Court has noted the proper standard for consideration of summary judgment:

> In reviewing a grant or a denial of summary judgment…, we must determine whether the moving party demonstrated the absence of any genuine issue of material fact and showed entitlement to judgment on the merits as a matter of law. The evidence must be viewed most favorably to the nonmoving party and reasonable doubts should be resolved against the moving party. The nonmoving party, however, must present specific facts showing that a genuine, material issue for trial exists.

Saathoff v. Kuhlman, 2009 S.D. 17, ¶ 11, 763 N.W.2d 800, 804 (citing *Pellegrino v. Loen,* 2007 SD 129, ¶ 13, 743 N.W.2d 140, 143).

Respondent argues that it reserved the right to approve self-demotion under the article entitled "City Rights." Section H of this article specifies "[a]uthority to appoint, promote, transfer, demote, suspend rate personnel shall be vested in the First Chief or his designee." "When a contract is clear and unambiguous and speaks to a subject it is expected to, there is no need to go beyond the four corners of the contract. Thus, we will look to the language of the contract." *Am. Fed'n of State, Cty. & Mun. Employees (AFSCME) Local 1922 v. State*, 444 N.W.2d 10, 12 (S.D. 1989). The CBA unambiguously reserves the right to demote to the City. By letting his certification lapse, effectively self-demoted by making himself ineligible for the firefighter medic position. The question then remains whether termination was an appropriate action in this instance. Grievant argues that, according to the CBA, a member cannot be terminated without following a progressive disciplinary procedure. Respondent contends that by letting his paramedic's certification lapse, Fischer committed insubordination.

The procedure for discipline is found in Article 3 of the CBA. Section 3.01 states "[t]he City has the right to impose discipline upon employees for violations of the City's work rules, or for conduct that is detrimental to the Department or the City. The City shall only impose discipline for cause. Discipline may include discharge of an employee." Section 3.02 provides the actions available for discipline.

> Whenever the work habits, attitude, production, or personal conduct of an employee falls below an acceptable standard, or infractions of regulations, standard operating procedures or work rules are observed, supervisors should point out the deficiencies at such time. The First Chief or his designee may take any one or a combination of the following disciplinary measures, as appropriate, for just and reasonable cause:
>
> 1. Oral reprimand;
> 2. Written reprimand;
> 3. Suspension without pay;
> 4. Demotion;
> 5. Dismissal.

In addition to this section, the CBA contains an appendix B entitled "Standard Schedule of Disciplinary Offenses/Penalties for City of Rapid City Employees." The schedule is not an exhaustive list of infractions but provides many bases for discipline. Number 3 of the appendix states "Depending on the gravity of the offenses, dismissal proceedings may be instituted against an employee for four infractions committed in any 24-monthy period." The Appendix provides that insubordination is "disobedience to competent authorities; or deliberate refusal to carry out a proper order from any supervisor having responsibility for the work of the employee[.]" There is insufficient evidence in the record at this time to determine whether Fischer's actions constituted

insubordination under the CBA. However, neither is it necessary to make that determination. By the terms of the CBA this alone, one act of insubordination would not constitute sufficient grounds to terminate Fischer. The Appendix provides that termination is premised on four infractions within 24 months. Even if the lapse of Fischer's EMT certification would be considered insubordination, by itself this would be insufficient for termination as a disciplinary measure.

This is not to say that the City was not justified in termination Fischer. Regardless of whether he committed a disciplinary infraction, Fischer made himself unavailable for the firefighter/medic position by letting his EMT certification lapse. Though Fischer expressed his intent to return to the firefighter/paramedic position, the CBA reserves for the City the right to make staffing determinations. To allow employees to self-demote without consent would make it all but impossible for Respondent to maintain adequate staffing levels to serve the city.

Finally, Petitioner argues that the City has allowed other employees in the past to self-demote. "If a past practice which does not derive from the express terms of a bargaining agreement becomes a part of the employer's structure and conditions of employment, it takes on the same significance as the other terms of employment and is protected from unilateral change. *Oberle v. City of Aberdeen*, 470 N.W.2d 238, 246 (S.D. 1991). Petitioner has claimed that it must be allowed to conduct discovery to obtain evidence from employee personnel files to support its claim. The Department requested that Respondent provide any documentation of such self-demotion to the Department for in camera review. Respondent provided several personnel files of individuals in question, none of which contained any evidence to support Petitioner's

assertion that other employees have self-demoted without the approval of the City. Respondent maintains that no such evidence exists because no employees have been allowed to self-demote without the approval of their superiors. As none of the evidence provided by Respondent supports Petitioner's contention, no further discovery is necessary. Even when considered in the light most favorable to Petitioner, there is no dispute that employees have not been allowed to self-demote except with the approval of the City.

CONCLUSION

Though the petition fails as an unfair labor practice, the Department finds that it may be treated as a grievance. As such, the motion for dismissal is improper. However, the Department shall treat the motion as a motion for summary judgment. The evidence presented does not support Petitioner's contention that Respondent established a past practice of allowing employees to self-demote without prior approval. Respondent's motion for summary judgment is GRANTED. This letter shall constitute the Department's decision on this matter.

Sincerely,

/s/ Joe Thronson
Joe Thronson
Administrative Law Judge