

August 9, 2012

Ms. Brenda Johnson
1334 First Street
Brookings SD 57006

**LETTER DECISION and
FINAL ORDER**

Mr. Richard J. Helsper
Glover & Helsper, P.C.
415 Eighth Street South
Brookings SD 57006

RE: HF No. 3U, 2011/12 – Brenda Johnson v. Brookings Health System

Dear Ms. Johnson and Mr. Helsper:

Petitioner, Brenda Johnson (Petitioner), filed her Petition for Hearing on Unfair Labor Practice on October 14, 2011. The Respondent, Brookings Health System (Respondent), filed its Answer with the Department of Labor (Department) on November 2, 2011. A Hearing was held on this matter on April 12, 2012, before Catherine Duenwald, Administrative Law Judge with the Department of Labor and Regulation. Post-hearing briefs were filed by the parties. The Department, having reviewed all evidence and arguments and being fully advised, makes this Decision.

FACTS:

Petitioner was employed by a public agency, the Brookings Health System, which is owned and operated by the City of Brookings, South Dakota. The City of Brookings and its employees operate under an Employee Handbook. This Handbook sets out the grievance procedures an employee must follow, in order to file a grievance.

Petitioner began her most recent employment with Respondent in November 2004. She was hired as the Director of Nursing for the nursing home Brookview Manor, which is owned and operated by Brookings Health Systems. Petitioner's job consisted of many administrative and supervisory duties. Petitioner was in charge of the nurses and certified nursing assistants employed by Brookview Manor.

Petitioner was also attending school while employed by Respondent. She made it known to Respondent that she intended to leave her job after attaining her degree. After

she graduated, Respondent made plans for Petitioner's resignation and hired an assistant director of nursing that would eventually be Petitioner's replacement. Petitioner did not resign or inform Respondent when she was going to resign.

Respondent urged her to give a date of resignation and Petitioner did not have one. On July 25, 2011, Petitioner finally told Kevin Coffey that she was not going to resign, and if Respondent wanted her to leave, they would have to fire her. Respondent started to document Petitioner's missteps and problems on July 25, 2011. Respondent gave Petitioner a written corrective counseling on August 10, 2011 regarding employee requisitions and employee evaluations. Petitioner was behind on her employee evaluations and had failed to hire enough staff although the staff positions were approved. Because of the constant questions regarding her resignation and the corrective counseling, Petitioner felt harassed by Respondent and was upset with the actions of Interim CEO Kevin Coffey.

On August 12, 2011, Petitioner made known to Respondent that she intended to file a grievance with Respondent against its Interim CEO, Kevin Coffey. On August 15, 2011, Petitioner met with her direct supervisor, the first step of the grievance procedure. Petitioner's supervisor and the human resource manager informed Kevin Coffey about Petitioner's allegations and that she was going to formally file a grievance against him that day. Kevin Coffey discharged Petitioner two hours after Petitioner met with her supervisor regarding the grievance against Kevin Coffey.

Petitioner was unable to follow the grievance procedure outlined in Respondent's Employee Handbook because she was no longer employed by Respondent. Petitioner filed her Petition for Hearing on Unfair Labor Practice as she believed she was discharged and retaliated against for filing a grievance or attempting to file a grievance.

ANALYSIS

South Dakota law sets out the criteria for filing a complaint on an unfair labor practice. SDCL 3-18-3.4 states:

Any complaint brought under the provisions of §§ 3-18-3.1 and 3-18-3.2 shall be filed with the department of labor within sixty days after the alleged commission of an unfair labor practice occurs or within sixty days after the complainant should have known of the offense.

SDCL 3-18-3.4. Petitioner filed this Petition for Unfair Labor Practice less than 60 days following the actions that are alleged in the Petition. Petitioner's allegations are found under Sections (1) and (4) of SDCL 3-18-3.1. It states:

- 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;

- (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.

SDCL 3-18-3.1(1),(4). The Department has also been given the authority to promulgate rules regarding the filing of an unfair labor practice. SDCL 3-18-3.3. The pertinent administrative rule states:

A public employee or group of employees or a public employer may bring a charge of any of the unfair labor practices enumerated in SDCL 3-18-3.1 and 3-18-3.2 by filing a charge in writing with the division on forms prescribed by the division.

ARSD 47:02:03:01.

In the post-hearing brief, Respondent moves the Department to Dismiss the ULP for lack of jurisdiction. The argument posed by Respondent is that Petitioner is not a "public employee" under state law, and therefore is not eligible to file a Petition for ULP with the Department.

This argument is a jurisdictional argument. "The issue of jurisdiction may be raised at any time." *Deno v. Oveson*, 307 N.W.2d 862, 863 (S.D. 1981).

The definition of a "public employee" is found at SDCL 3-18-1. It reads:

The words "public employees" as used in this chapter shall mean any person holding a position by appointment or employment in the government of the state of South Dakota or in the government of any one or more of the political subdivisions thereof, or in the service of the public schools, or in the service of any authority, commission, or board, or any other branch of the public service. The term does not include:

- (1) Elected officials and persons appointed to fill vacancies in elective offices and members of any board or commission;
- (2) Administrators except elementary and secondary school administrators, **administrative officers, directors**, or chief executive officers of a public employer or major divisions thereof as well as chief deputies, first assistants, and any other public employees **having authority in the interest of the public employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other public employees, or the responsibility to direct them, or to adjust their grievances, or to effectively recommend such action, if in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment;**

- (3) Students working as part-time employees twenty hours per week or less;
- (4) Temporary public employees employed for a period of four months or less;
- (5) Commissioned and enlisted personnel of the South Dakota national guard; and
- (6) Judges and employees of the unified court system;
- (7) Legislators and the full-time and part-time employees of the legislature or any state agency that statutorily is directed by the legislative branch.

This section does not preclude employees described in subdivisions (1) to (7), inclusive, from joining professional, noncollective bargaining organizations.

SDCL 3-18-1 (emphasis added). Petitioner's job as Director of Nursing was administrative in nature. She had the authority and responsibility to hire, assign, and discharge public employees or recommend that such action be taken. The Director of Nursing has responsibilities that are not merely routine or clerical but that require the use of independent judgment.

Petitioner is not a "public employee" as defined by South Dakota law, but is an administrator or director employed by a "public employer." The administrative rule does not give authority for exempt, administrative employees to file unfair labor practices against the public employer.

The Department grants Respondent's Motion to Dismiss. As there is no jurisdiction for the Department to make a determination on the underlying matter, I will not make an analysis on whether Respondent retaliated against Petitioner in violation of state law. The Department lacks jurisdiction in this matter and the Petition for Hearing on Unfair Labor Practice is dismissed.

This letter shall serve as the Department's Order.

Sincerely,

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