SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

Sioux Falls Education Assistants Association,	**HF 3 U, 2005/06**
Petitioner,	**HF 1 E, 2005/06**
v.	
	DECISION
Sioux Falls School District,	
Respondent.	

These petitions are before the Department pursuant to Petitioner's allegation of unfair labor practice and request for unit determination under SDCL 3-18-3.1, ARSD 47:02:03:01 and SDCL 3-18-4. Anne Plooster represents Petitioner. Sandra Hoglund Hanson, of Davenport, Evans, Hurwitz & Smith L.L.P., represents Respondent.

These two petitions concern Respondent's May 2005 decision to eliminate the Community Trainer positions at Respondent's Community Campus, effective the end of the 2004/05 school year, and replace these education assistant positions with Community Facilitators in the specialist bargaining unit. These two petitions were consolidated for hearing by agreement of the parties.

Issues

1. **HF 3 U, 2005/06.** Whether Respondent's action in unilaterally eliminating the Community Trainer positions in Petitioner's bargaining unit and creating the Community Facilitator positions in the specialists bargaining unit constitutes an unfair labor practice in violation of SDCL 3-18-3.1(5) or (6).

   It is the Department's determination that Respondent's action constitutes an unfair labor practice under SDCL 3-18-3.1(5).

2. **HF 1 E, 2005/06.** Whether the Community Facilitator positions should remain with, be contained in and defined as being within the existing Sioux Falls Education Assistants Association bargaining unit.

   It is the Department's determination that the Community Facilitator positions belong in the specialist bargaining unit.

Facts

Prior to the end of the 2004/05 school year, the Community Trainers worked generally with developmentally disabled young adults, assisting them with various matters, including job placement, behavior management, physical assistance, and education.

On May 13, 2005, Respondent sent a "Reduction Notice" to its four Community Trainers at the Community Campus: Kay Childrey, Lisa Tiensvold, Terry White and Shelley Williams; and to Petitioner's co-presidents, Jan Dalseide and Donna Underberg.

This "Reduction Notice" eliminated these Community Trainer positions, stating, in part:

> This communication is to inform you that the position of Community Trainer at Community Campus will be eliminated at the end of the 2004-5 school year.

As part of a reorganization process, Respondent intended to create a new position to replace the Community Trainers. Originally, Respondent intended to post this new position on May 23, 2005. However, the new job description was not finalized until after that date. On July 1, 2005, Respondent notified Petitioner, by email to Dalseide, that the new position would be referred to as a Community Facilitator, and this new position would be a specialist position.

Because of Petitioner's resistance to this change, Respondent also indicated in the July 1 email that the four existing Community Trainers would be allowed to remain in the educational assistants bargaining unit. However, any successors or new hires would be placed in the specialist bargaining unit.

Other facts will be developed as necessary to the discussion.

HF 3 U, 2005/06.

Whether Respondent's action in unilaterally eliminating the Community Trainer positions in Petitioner's bargaining unit and creating the Community Facilitator positions in the specialists bargaining unit constitutes an unfair labor practice in violation of SDCL 3-18-3.1(5) or (6).

Respondent argues that Petitioner's allegation of unfair labor practice is untimely.

SDCL 3-18-3.4 provides

> Any complaint brought under the provisions of Sections 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.

Petitioner, and the affected employees, were officially notified of Respondent's intention to eliminate the Community Trainer positions on May 13, 2005, the date of the Reduction Notice. Petitioner filed no petition alleging an unfair labor practice until August 3, 2005. Looking solely at Respondent's May 13, 2005, action to eliminate the

Community Trainer position, Petitioner's August 3 filing would be outside the 60 days allowed by SDCL 3-18-3.4. However, Petitioner's allegation of unfair labor practice is not limited to Respondent's action to unilaterally remove the Community Trainer positions from Petitioner's bargaining unit, but includes the allegation that Respondent could not unilaterally replace these positions with identical or similar positions in another bargaining unit.

The May 13, 2005, Reduction Notice should not be viewed alone, but should be viewed together with Respondent's action to replace the Community Trainers with a new position, the Community Facilitators, in the specialists bargaining unit.

Although Respondent argues that elimination of the Community Trainer positions and its concurrent creation of the Community Facilitator positions should be treated as two separate actions that could each be made unilaterally under Respondent's management authority, Respondent admits that these actions were taken together because the Community Facilitator position had changed from its "previous incarnation" as Community Trainer to require its removal from Petitioner's bargaining unit to the specialist bargaining unit.

Respondent's two employment actions must be viewed together as one, and these actions were not complete until July 1, 2005, when Respondent completed the new Community Facilitator job description and announced its intention to Petitioner to place this new position in the specialists bargaining unit. Petitioner then filed its petition with the Department on August 3, 2005, within 60 days of July 1, 2005.

Petitioner's allegation of unfair labor practice was timely.

Petitioner argues that Respondent's actions were in violation of SDCL 3-18-3.1(5) and (6), which make it an unfair practice for a public employer to:

(5) Refuse to negotiate collectively in good faith with a formal representative; [or]
(6) Fail or refuse to comply with any provision of this chapter.

Petitioner has the burden of proof to show that Respondent committed an unfair labor practice. Rininger v. Bennett County School District, 468 N.W.2d 423 (SD 1991).

"Unilateral changes cannot be made by a public employer regarding topics which are mandatory subjects of bargaining unless the employer and employees have reached a bona fide impasse and the employer has bargained in good faith." Oberle v. City of Aberdeen, 470 NW2d 238 (SD 1991) (citations omitted).

It is undisputed that the parties did not negotiate concerning this change.

In determining whether Respondent's unilateral action was an unfair labor practice, it must be determined whether elimination of the Community Trainer position in favor of the new Community Facilitator position was a mandatory subject of negotiation.

The three-part test to determine whether a particular issue must be negotiated in the context of public sector employment contracts is as follows:

1. A subject is negotiable only if it intimately and directly affects the work and welfare of public employees.
2. An issue is not negotiable if it has been preempted by statute or regulation.
3. A subject that affects the work and welfare of public employees is negotiable only if it is a matter on which negotiated agreement would not significantly interfere with the exercise of inherent management prerogatives pertaining to the determination of governmental policy.

Rapid City Education Association v. Rapid City Area School District #51-4, 376 NW2d 562, 564 (SD 1985).

The first element of the Rapid City test is satisfied. Respondent's actions, replacing the Community Trainer position with a new Community Facilitator position intimately affected the work and welfare of those who were employed as Community Trainers and who were subsequently re-employed as Community Facilitators.

The second element of the Rapid City test has also been met. This subject has not been preempted by statute or regulation.

Respondent incorrectly argues that this subject has been preempted by SDCL 13-10-2. SDCL 13-10-2 gives Respondent general authority as a school board to employ necessary personnel: "The school board shall have the power to employ personnel deemed necessary by the board and to define the duties and fix the compensation of each." This general statute confers only general authority, but does not preempt the school board's obligation to negotiate in good faith on certain specifics of that employment.

Having satisfied the first two elements of the Rapid City test, the discussion must focus on the third element of the test: Whether elimination of the Community Trainer positions and the concurrent creation of the new Community Facilitator positions "is a matter on which negotiated agreement would not significantly interfere with the exercise of inherent management prerogatives pertaining to the determination of governmental policy."

The elimination of the Community Trainer position and the creation of the Community Facilitator position was a reorganization within the scope of Respondent's management prerogative. Under the negotiated agreement, Respondent has the authority to eliminate an unnecessary position, and authority to create a necessary position.

Petitioner admits that the management rights clause gives Respondent authority to add or delete positions within a bargaining unit.

However, although Respondent was within the broad scope of its management prerogative in taking this action, there is no evidence in the record that bargaining on this issue would have significantly interfered with Respondent's inherent management prerogatives. Respondent's position fails in this respect.

Petitioner met the three-part Rapid City test. Respondent should not have taken this unilateral action; but should have engaged in good faith negotiation. Respondent's actions intimately and directly affected the work and welfare of these employees; negotiation on the subject is not preempted by statute or regulation; and bargaining on this issue would not have significantly interfered with Respondent's exercise of its inherent management prerogatives.

Petitioner met its burden to establish that Respondent's action in unilaterally eliminating the Community Trainer positions in Petitioner's bargaining unit and creating the Community Facilitator positions in the specialists bargaining unit constitutes an unfair labor practice in violation of SDCL 3-18-3.1(5).

Respondent is hereby ordered to bargain in good faith on subjects of mandatory negotiation in the future.

HF 1 E, 2005/06.

Whether the Community Facilitator positions should remain with, be contained in and defined as being within the existing Sioux Falls Education Assistants Association bargaining unit.

Petitioner argues that the Community Facilitator position is unchanged from the Community Trainer position and should remain in Petitioner's bargaining unit. Respondent argues that the Community Facilitator position should be placed in the specialist bargaining unit.

SDCL 3-18-4 may be used to determine where the new Community Facilitator position should be located for the purposes of collective bargaining.

SDCL 3-18-4 provides, in relevant part:

> [W]hen a question concerning the designation of a representation unit is raised by the governmental agency, labor or employee organization, or employees, the department of labor or any person designated by it shall, at the request of any of the parties, investigate such question and, after a hearing if requested by any party, rule on the definition of the appropriate representation unit. The department shall certify to the parties in writing the proper definition of the unit. In defining the

> unit, the department shall take into consideration, along with other relevant factors, the principles of efficient administration of government, the principles and the coverage of uniform comprehensive position classification and compensation plans in the governmental agency, the history and extent of organization, occupational classification, administrative and supervisory levels of authority, geographical location, and the recommendations of the parties.

Petitioner incorrectly argues that the new Community Facilitator position is identical to the Community Trainer position it replaced. Respondent developed the job description for the new Community Facilitator position based on how the Community Trainer position had evolved. Petitioner is correct that the duties being performed now by the Community Facilitators are not different than what was being performed by the Community Trainers during the 2004/05 school year. Rather than Petitioner's incorrect allegation that the two jobs are identical, a more correct statement would be that what the Community Trainer's were being asked and required to do in 2005 was outside the 1998 Community Trainer job description and those duties and responsibilities became the new job description for the Community Facilitators.

Both written job descriptions are in the record. There are several significant differences between the old job description for Community Trainer and the new job description for Community Facilitator.

The 1998 job description for the Community Trainer position did not adequately describe the duties or responsibilities of the Community Trainers in 2005. Over the years, new and increased duties and responsibilities had fallen on the Community Trainers.

A comparison of the two job descriptions shows that the Community Facilitator job requirements and expectations are at a higher level compared to the Community Trainer job description. The Community Facilitator job description includes new requirements not included in the Community Trainer position. The essential functions and duties of the Community Facilitator exceed those required of the Community Trainer. Significantly, Community Facilitators are no longer working in the direct supervision of teachers and are required to exercise more independent thinking, decision making, and judgment. The increasing job responsibility and complexity is reflected in a significant pay increase. The new job description includes increased responsibilities and a Community Facilitator, when evaluated, will be expected to perform up to the job description of that position.

Becky Dorman, Respondent's human resources supervisor, compared the new Community Facilitator position with other positions in the Sioux Falls school system, using a classification system first developed by Lee Anderson. Anderson is the human resources expert who first created Respondent's job classification structure and system. He has 50 years of experience as a human resources management consultant. Most of his work has been with school districts. Anderson first worked with the Sioux

Falls school system in 1988, assisting in establishing Respondent's entire classified employment structure. His method classifies jobs according to knowledge, complexity, supervision and other significant factors. Using Anderson's classification method, Dorman concluded that the new Community Facilitator position was closer to the existing specialist positions than the education assistant positions.

Although Dorman had trained with Anderson and was confident in her ability to use his methods, to confirm her decision she asked Anderson to complete an independent classification of the Community Facilitator position. Anderson's evaluation was independent of Dorman's in the sense that he was not advised of what was happening in the Sioux Falls school system at the time he was asked to do his analysis. Anderson's analysis agreed that the Community Facilitator position matched other specialist positions. Ultimately he was asked to complete an evaluation specifically to determine whether the new job description was appropriately an education assistant position or specialist position. He determined that the new position is properly a specialist position.

Dorman and Anderson independently reviewed the new position and determined that it should be in the specialist bargaining unit. Both testified live and provided analysis of the Community Facilitator position and its comparison to other specialist positions. Both witnesses were credible. Petitioner provided no expert evidence to the contrary, but relied only on the argument that the Community Trainer position had not changed and should not be moved to a different bargaining unit.

The Community Facilitator positions should not remain with, be contained in and defined as being within the existing education assistants bargaining unit, but should be placed in the specialists bargaining unit.

Respondent is hereby directed to submit proposed Findings of Fact and Conclusions of Law, and a proposed Order, each consistent with this Decision, within 10 days of receiving this Decision. Petitioner will be allowed additional 10 days from the date of receipt of these original proposals to submit objections or proposals of its own.

Dated: January 5, 2007.

SOUTH DAKOTA DEPARTMENT OF LABOR
Division of Labor and Management

Randy S. Bingner
Administrative Law Judge