

**SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT**

**NORTHEAST EDUCATIONAL
SERVICES COOPERATIVE
EDUCATION ASSOCIATION, UNIT 1,**

HF No. 4U, 2007/08

Petitioner,

DECISION

v.

**NORTHEAST EDUCATIONAL
SERVICES COOPERATIVE AND
BOARD OF DIRECTORS,**

Respondent.

The above entitled matter came on for hearing before the Department of Labor, Division of Labor and Management, Donald W. Hageman, Administrative Law Judge, on December 18, 2008, at Watertown, South Dakota. This matter comes before the Department pursuant to SDCL 3-18-3.1, 3-18-4 and ARSD 47:02:03:01. Anne Plooster appeared on behalf of Petitioner, Northeast Educational Services Cooperative Educational Association, Unit 1 (Association). Rodney Freeman represented Respondent, Northeast Educational Services Cooperative and Board of Directors (Coop and Board, respectively).

Issues:

Whether the Northeast Educational Services Cooperative and its Board of Directors committed an unfair labor practice by failing to negotiate in good faith, when it reduced the number of days worked by its occupational therapists and certified occupational therapists assistances for 230 days per year to 200.

Facts:

Based upon the testimony at the hearing and the record, the following facts are found by a preponderance of the evidence:

1. Coop consists of twenty-five k-12 school districts located in the northeastern portion of South Dakota. The cooperative provides its school districts with special services for their students. Those services include occupational therapy. The costs of these services are then assessed to the individual school districts based on the amount of services provided to each district.

2. Association is a collective bargaining unit who negotiates employment contracts with the Coop on behalf of its OT and COTA members.
3. Association and Coop entered into negotiations for a collective bargaining agreement for the 2007-08 school year. During those negotiations, Coop proposed a reduction of the number of work days for occupational therapists (OTs) and certified occupational therapy assistants (COTAs) from 230 days per year to 200 with a corresponding reduction in salary.
4. At the negotiations, Coop stated that its rationale for reducing the OT and COTA's work days was to reduce its costs. Association was aware of this rationale during the discussions.
5. The Director of the Coop received a directive from the Board that all programs of the Coop must be looked at for efficiencies since the assessments to the member districts had escalated. During the 2004-05 and the 2005-06 fiscal years, the assessments had risen 13% and 10% respectively.
6. The Board feared that member districts would drop out of the Coop and provide their own services if the Coop's costs kept rising. If districts began to dropped out of the Coop, it may have a "snowball affect" on the Coop which would cause the cost to increase even more.
7. Coop proposed a reduction in the days worked by the read recovery teacher from 210 days to 200 or 205. This was the only non-administrative employee other than the OTs and COTAs who was working over 200 days.
8. The Association's contract with the OTs and COTAs that existed prior to the 2007-08 negotiations employed the OTs and COTAs on a full-time basis for the full year of July 1st through June 30th. 230 days represented a full year minus holidays, two weeks off for Christmas, and weekends.
9. As part of the Board's cost cutting directive, the Coop conducted a study utilizing the OT and COTA's time sheets. While under contract for 230 days per year, the OTs and COTAs were paid for 180 days during the school year and 50 days during the summer. The time sheets indicated that that during the summer of 2006, the OTs and COTAs worked an average of 19.38 days and 3.53 hours per day. Consequently, the Board concluded that 200 days represented the actual time worked by these employees.
10. To address the concerns of the OTs and COTAs during the negotiations, that they may be required to work additional days at no pay, the parties negotiated specific language that was added to the negotiated agreement.

- That language provided that any days worked over 200 days per year would be paid at the same rate per day as the OT or COTA would have gotten under their current wage scale.
11. The Coop offered the OTs and COTAs a compromise of 220 days. The offer was put forth as part of a package. This offer was contingent on the Association acceptance of the entire package. Association rejected the package.
 12. Association and Coop were unable to reach agreement on a collective bargaining agreement. Coop declared impasse on June 20, 2007. The parties participated in conciliation on August 9, 2007, and the fact finding hearing on September 19, 2007.
 13. Rich Mittelstedt, Association's chief negotiator, testified in reference to the Coop, "I think they wanted to get it settled. It just wasn't enough."
 14. Coop voted to implement its last offer on October 15, 2007, including the reduction in OT and COT work days during the year. This unfair labor practice ensued.
 15. The Coop adopted cost cutting measures other than the reduction in the OT and COTA's work days. These included, reduction in the days worked by the read recovery teacher, the closing of the Sioux Valley center based program; a reduction in program coordinators for school psychology and occupational therapy, a reduction of the fund balance for the Coop, the modification of its automobile use and mileage reimbursement policy, it did not replace an administrative assistant director, and eliminated three other positions.
 16. Mr. Mittelstedt testified that the Coop looked at other programs for cost cutting measures.
 17. Since Coop implemented the reduction in work days, several of the OTs and COTAs previously employed by the Coop have resigned. The Coop has acquired the services of OTs and COTAs from area health providers since that time.
 18. South Dakota Department of Labor statistics show that the average wage for OTs in eastern South Dakota is \$28.02 per hour. The Coop's 200 day contract pays an hourly wage of \$29.58. The average hourly wage of COTA's in eastern South Dakota is \$15.61, the Coop pays \$18.81.
 19. The year following the contract changes, the Coop member's assessments increased 1.85%. This was a significant drop in the rate of increase from the prior two years, which were 13% and 10%, respectively.

20. Additional facts may be discussed in Analysis below.

Analysis:

Relevance of Exhibits

Coop offered Respondent's Exhibits 7, 8, 9 and 10 at the hearing. These exhibits are the Fact Finding Reports from the 2007-08 negotiations between the parties and the 2008-09 negotiations and summaries. These documents deal with the same work day reduction dispute involved in this matter. Association objected to the exhibits on the basis of relevancy. The Department deferred ruling on the objection until this decision.

SDCL 19-12-1 defines relevant evidence as follows:

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

These documents are not precedential. Coop states that the exhibits were offered to show that a rationale existed for reduction of the OTs and COTAs work days. However, their value in that regard is nil. The fact finding process uses different evidentiary and decision making standards than used here. More is required here than the mere showing of a rationale. As discussed later in this decision, that rationale must be legitimate and specific. Those requirements do not exist in the fact finding process.

The fact that the parties participated in the conciliation and fact finding hearing is already in the record. Any value these documents may offer in addition to that in this case is outweighed by their potential for prejudice. Therefore, the documents are excluded from evidence. Association's objection is granted.

Unfair Labor Practice

Association alleges that Coop committed an unfair labor practice when it reduced the OT and COTA's yearly work days from 230 to 200. The burden of proof falls on Association. Rininger v. Bennett County School District, 468 NW2d 423 (SD 1991).

SDCL 3-18-3.1 defines unfair labor practice. SDCL 3-18-3.1 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;
- (2) Dominate, interfere or assist in the formation or administration of any employee organization, or contribute financial or other support to it;
- (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.

Specifically, Association alleges that the Coop failed to negotiate in good faith as set forth in SDCL 3-18-3.1 (5). Whether an unfair labor practice has been committed may be inferred from the totality of the employer's conduct throughout the negotiations of the parties. National Labor Relations Board v. Milgo Industries, Inc., 567 F2d 540 (2d Cir. 1977). An employer's entire course of conduct or the totality of the circumstances may show a lack of good faith, although none of its specific acts amounts to proscribed conduct. NLRB v. Advanced Business Forms Corp., 474 F2d 625 (2nd Cir. 1973). The obligation of good faith bargaining is to make a sincere attempt to achieve an agreement, and is not satisfied by merely meeting several times to have a general "discussion" of the contract proposals. NLRB v. Generac Corporation, 354 F2d 625 (7th Cir. 1965). See also Waubay Education Association v. Waubay Board of Education, HF No. 2U, 1997/98.

The good faith required in such negotiations is described in SDCL 3-8-2. That statute 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.

[emphasis added]. In Bon Homme County Commission v. AFSCME, 2005 SD 76, ¶ 22, 699 NW2d 441, the South Dakota Supreme Court discussed the statement of rationale requirement. There the Court stated:

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 NW2d 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.

In this matter, the rationale provided by the Coop for the work day reduction was legitimate and specific. The Coop needed to reduce its costs. During the 2004-05 and the 2005-06 fiscal years, the Coop's assessments to its member districts had increased 13% and 10% respectively. The Board feared that districts would begin to drop out of the Coop if the increases continued.

The legitimacy of the Coop's rationale is reinforced by the cost cutting measures that the Coop took in other programs. These included, the closing of the Sioux Valley center based program, a reduction in program coordinators for school psychology and occupational therapy, a reduction in the work days of the reading recovery teacher and other cuts.

Coop demonstrated good faith during its negotiations. Coop addressed the concerns of the OTs and COTAs that the therapists may not get paid if they were required to work more than 200 days per year. Coop agreed to pay the OTs and COTAs for all days worked beyond the 200 at their prior contract rate for all additional days worked. The Coop also offered the OTs and COTAs a compromise of 220 days. The offer was put forth as one part of a package. Association rejected this offer.

In summary, even the Association's chief negotiator, Rich Mittelstedt, admitted in his testimony that the Coop sought a resolution of the dispute. He stated, "I think they wanted to get it settled. It just wasn't enough." What Mr. Mittelstedt describes here is the essence of a good faith negotiation. Consequently, Association failed to show by a preponderance of the evidence that Coop did not negotiate in good faith.

Conclusion

Coop negotiated in good faith and did not commit an unfair labor practice when it reduced the number of days worked by its occupational therapists and certified occupational therapists assistants from 230 days per year to 200. Coop provided a legitimate and specific rationale for its position during the negotiations.

Coop and Board shall submit proposed Findings of Fact and Conclusions of Law, and an Order consistent with this Decision within twenty (20) days from the date of receipt of this Decision. Association shall have twenty (20) days from the date of receipt of Coop and Board's proposed Findings of Fact and Conclusions to

submit objections thereto or to submit proposed Findings and Conclusions. The parties may stipulate to a waiver of Findings of Fact and Conclusions of Law and if they do so, Coop and Board shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 1st day of June, 2009.

SOUTH DAKOTA DEPARTMENT OF LABOR

 Donald W. Hageman
Donald W. Hageman
Administrative Law Judge