

June 18, 2009

Anne Plooster  
SDEA/NEA  
411 East Capitol Avenue  
Pierre, SD 57501

LETTER DECISION

Susan Brunick Simons  
Davenport, Evans, Hurwitz & Smith LLP  
PO Box 1030  
Sioux Falls, SD 57101-1030

RE: HF No. 6U, 2008/09 and 14G, 2008/09 – Sioux Falls Education Assistants  
Association v. Sioux Falls School District and #49-5 Board of Education

Dear Ms. Plooster and Ms. Simons:

The Department has received the Respondent's Motion to Dismiss Petition for Hearing on Unfair Labor Practice and Motion to Dismiss Petition for Hearing on Grievance in the above-referenced matters. The Department has also received the Respondent's Motion to Consolidate HF No. 6U, 2008/09 and 14G, 2008/09.

**Motion to Consolidate**

Respondent moves to consolidate the above referenced matters because both cases involve the same issue and the same parties. Petitioner did not object, therefore the Respondent's Motion to Consolidate is hereby granted.

**Motions to Dismiss**

The Department has carefully considered the following submissions in addressing the Motions to Dismiss:

Respondent's Brief in Support of Motion to Dismiss Petition for Hearing on Grievance as Untimely,

Respondent's Brief in Support of Motion to Dismiss Petition for Hearing on Unfair Labor Practice as Untimely,

Petitioner's Response to Respondent's Motion to Dismiss Petition for Hearing on Grievance, Petitioner's Brief in Support of Petitioner's Response to Respondent's Motion to Dismiss Petition for Hearing on Grievance,

Petitioner's Response to Respondent's Motion to Dismiss Petition for Hearing on Unfair Labor Practice, Petitioner's Brief in Support of Petitioner's Response to Respondent's Motion to Dismiss Petition for Hearing on Unfair Labor Practice,

Affidavit of Bonnie Melbrech, Affidavit of Sue Nipe, Affidavit of Jan Dalseide,

Respondent's Reply Brief in Support of Motions to Dismiss Petitions for Hearing on Unfair Labor Practice and Grievance as Untimely.

**Facts**

Sioux Falls Education Assistants Association (SFEAA) and the Sioux Falls School District # 49-5 (District) have a Negotiated Working Agreement (Agreement). Article 1.01 of the Agreement states:

The Sioux Falls School District 49-5 (hereinafter "District") pursuant to SDCL Chapter 3-18 recognizes the Sioux Falls Education Assistants Association (hereinafter "Employee Union/Organization"), as the sole and exclusive formal representative with respect to rates of pay, wages, hours of employment, and other conditions of employment for the following defined unit:

Those Education Assistants regularly employed by the School District working 20 or more hours per week on the average in positions which are staffed at least four (4) months during the school year, primarily involved in the performance of the work of an education assistant. In no event shall the unit include supervisory employees of the District.

With regard to discipline, Article 12.02 of the Agreement states:

Except in the case of an oral reprimand under 12.03.01, on any occasion in which an employee receives disciplinary action which may affect his/her employment status, the employee shall be provided reasonable notice of such meeting in advance and notified of his/her right to have an employee union/organization representative represent.

On November 13, 2008, Superintendent of the District, Dr. Pamela Homan, issued a Memorandum addressing the issue of bargaining unit representation during disciplinary meetings. A copy of the Memorandum was provided to SFEAA. The Memorandum states "in all disciplinary meetings, other than oral reprimand, the representative that may be present with the employee is limited to a representative from the employee union/organization stated in Article 1 of the applicable working agreement. This is true regardless of the fact that employees may be a paying member of more than one bargaining unit." The Memorandum identified SFEAA as the recognized unit for Educational Assistants. The Memorandum went on to state,

[i]f a representative from an employee union/organization other than the union/organization recognized in the applicable working agreement appears for a

disciplinary meeting, that individual may not attend the meeting. Do not allow the meeting to proceed. If the employees refuse to attend the meeting without that individual present, the meeting shall be cancelled and the employee notified in writing of the conduct that is expected, what conduct is not to occur and the consequences of further misconduct.

Sue Nipe is the South Dakota Education Association (SDEA) UniServ Director. Among her job responsibilities include the representation of SDEA members and SDEA affiliates. SFEAA is affiliated with SDEA. On December 11, 2008, Sue Nipe attempted to represent a former member of the Specialist Association at a settlement conference call regarding the former member's grievance proceeding. When Dr. Holman became aware of Ms. Nipe's participation, the call was ended.

Prior to January 20, 2009, no member of SFEAA had been the subject of discipline by the District. On January 20, 2009, Sue Nipe attempted to represent a member of SFEAA at a disciplinary meeting. Sue Nipe was not permitted to participate in that meeting. Jan Dalseide, President of SFEAA, also attended the disciplinary meeting and was permitted to participate. On January 26, 2009, SFEAA filed a grievance at Level II, Superintendent level, pursuant to Article 6 of the Agreement.

The grievance proceeded to Level III, School Board level. The Board's March 27, 2009, decision deemed the grievance to be untimely filed. On March 18, 2009, SFEAA filed a petition for Unfair Labor Practice based upon the preceding events.

***Motion to Dismiss Petition for hearing on Grievance***

Pursuant to SDCL 3-18-15.2(1), the Department, "upon the motion of any party, may dispose of any grievance, defense, or claim 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 [.]"

A grievance is defined by SDCL 3-18-1.1 as "a complaint by a public employee or group of public employees based upon an alleged violation, misinterpretation, or inequitable application of any existing agreement [.]"

SFEAA and the District have negotiated a grievance policy within the Agreement. Article 6 of the Agreement outlines the grievance procedure. Relevant portions of Article 6 provide:

6.02 The parties hereto acknowledge that it is usually most desirable for an employee and the immediately involved supervisor to resolve problems through informal communications. If, however, the informal process fails to resolve the matter, a grievance may be processed as follows:

6.02.01 Level I. The employee shall file and sign a formal written grievance within thirty (30) days of when the alleged violation

was discovered, or through reasonable diligence should have been discovered. The employee or the employee union/organization shall present the signed grievance in writing to the immediately involved supervisor, who will arrange for a meeting to take place within ten (10) days after the receipt of the written grievance. The grievant, and if he or she chooses a designated representative and the immediately involved supervisor shall be present for the meeting. Within ten (10) days of the meeting, the grievant shall be provided with the supervisor's written response, including reasons for the decision.

6.02.02 Level II. If the grievance is not resolved at Level I, then the grievant may refer the formal written grievance to the Superintendent or his/her official designee within ten (10) days of the receipt of the Level I response. The Superintendent shall arrange with the grievance for a meeting to take place within ten (10) days of the Superintendent's receipt of the appeal. Each party shall have the right to include in its representation such witnesses and counselors as it deems necessary.

6.02.03 Within ten (10) days of the meeting, the grievant shall be provided with the Superintendent's written response, including the reason for the decision

6.05 Class Grievance- Class grievances involving more than one employee may be initially filed in writing at the appropriate level by the employee unit/organization. The grievance shall include a list of the individual grievant, or a description of the class sufficiently to identify the individuals.

"The Department's jurisdiction is lost if the grievance is not timely filed in accordance with grievance procedures." *Cox v. Sioux Falls Sch. Dist.*, 94 SDO 279, 514 NW2d 868 (SD 1994) quoting *Rininger v. Bennett County Sch. Dist.*, 468 NW2d 423, 428 (SD 1991).

The Respondent argues that SFEAA knew or through reasonable diligence should have known by November 13, 2008 that the Memorandum encompassed SDEA representation. Respondent argues that SFEAA filed the grievance after the 30 day deadline set forth in the Agreement.

Petitioner argues that the District violated, misinterpreted and or/inequitably applied the policies, rules or regulations, or negotiated agreement of the school district by refusing to allow SDEA Uniserv Director, Sue Nipe to be the representative for a member who belongs to the SFEAA despite such representation being allowable under Article 12, Discipline of the parties' negotiated agreement. Petitioner further argues that January

20, 2009, was the first indication SFEAA had that the Memorandum excluded representatives from SDEA.

Petitioner argues that there was nothing in the Memorandum which could have put SFEAA on notice that the Memorandum encompassed SDEA representation, because the SFEAA is affiliated with SDEA.

The Agreement specifically defines “employee union/organization” in Article 2.04 as “the union/organization recognized by the District in the recognition clause of this agreement.” The recognition clause found in Article 1.01 of the Agreement, “recognizes the Sioux Falls Education Assistants Association (hereinafter “Employee Union/ Organization”), as the sole and exclusive formal representative...”

“Disputes over the meaning of terms in teacher contracts are resolved under the general principals of contract law.” *Gettysburg School Dist. 53-1 v. Larson*, 2001 SD 9, ¶11, 631 NW2d 196, 200.

When the terms of a negotiated agreement are clear and unambiguous, and the agreement actually addresses the subjects that it is expected to cover, there is no need to go beyond the four corners of the contract. The only circumstances in which we may go beyond the actual language of the collective-bargaining agreement are where the agreement is ambiguous or fails to address a subject that it is expected to address.

*Wessington Springs Educ. Ass’n v. Wessington Springs Sch. Dist. 36-2*, 467 NW2d 101, 104(SD 1991)(citations omitted). The contract between District and SFEAA specifically addresses employee union/organization representation. The Agreement language is clear and unambiguous. The Agreement does not provide for representation by *SFEAA and its affiliates*, the Agreement does provide that the sole and exclusive formal representative is SFEAA. The Memorandum established that the language of the Agreement would be followed. The November 13, 2008, Memorandum put SFEAA on notice or at the very least should have prompted an inquiry with reasonable diligence to further understand the District’s position on representation.

SFEAA filed its grievance on January 26, 2009, which was beyond the thirty days from when the alleged violation was discovered, or through reasonable diligence should have been discovered as required by the Agreement. Therefore the Department of Labor does not have jurisdiction to consider this matter. Respondent’s Motion to Dismiss Petition for Hearing on Grievance is granted.

### ***Motion to Dismiss Petition for hearing on Unfair Labor Practice***

The Department’s jurisdiction in unfair labor practice complaints is governed by SDCL 3-18-3.4, which provides,

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 or within sixty days after the complainant should have known about the offense.

The alleged unfair labor practice complaint is essentially the same as the grievance. SFEAA alleges that the District committed an unfair labor practice when District unilaterally limited representation in disciplinary matters. SFEAA filed its Unfair Labor Practice on March 18, 2009.

SFEAA argues that the time limit set forth in SDCL 3-18-3.4 was not triggered until January 20, 2009, when Sue Nipe was not permitted to represent a member of SFEAA at a disciplinary meeting. However the language of SDCL 3-18-3.4 indicates that something less than the implementation of a policy amounting to an unfair labor practice is required to trigger the time limit. The statute requires filing "within sixty days after the complainant should have known about the offense." SDCL 3-18-3.4.

The Memorandum sent by Dr. Homan established that the language of the Agreement would be followed. The November 13, 2008, Memorandum put SFEAA on notice or at the very least should have prompted an inquiry with reasonable diligence to further understand the District's position on representation. SFEAA should have known by November 2008, of the District's policy on representation. SFEAA failed to file its complaint within 60 days after they should have known of the offense, therefore, the Department lacks jurisdiction to consider this matter. Respondent's Motion to Dismiss Petition for Unfair Labor Practice is granted. Counsel for Respondent is directed to prepare an Order consistent with this decision.

Sincerely,

Taya M. Dockter  
Administrative Law Judge