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

SIOUX FALLS EDUCATION ASSOCIATION PART II SOUTHEASTERN TECHNICAL INSTITUTE,

Petitioner,

v.

SIOUX FALLS SCHOOL DISTRICT # 49-5 and BOARD OF EDUCATION,

Respondent.

6 U, 2011/12

DECISION

This matter came before the Department of Labor and Regulation when the Sioux Falls Education Association Part II Southeastern Technical Institute, filed a Petition for Hearing on Unfair Labor Practice, dated December 7, 2011. The Sioux Falls School District and Board of Education filed an Answer dated December 19, 2011.

The matter was heard by Donald W. Hageman, Administrative Law Judge on July 25, 2012 at Sioux Falls, South Dakota. Anne Plooster represented the Sioux Falls Education Association. The Sioux Falls School District and Board of Education were represented by Susan Simons. After presenting its case at hearing, the Sioux Falls School District and Board of Education filed a Motion for Directed Verdict. The Department declined to rule on the motion until it had considered the parties post-hearing briefs.

Issue:

Whether the Sioux Falls School District and Board of Education, committed an unfair labor practice when they reduced the salaries of the Southeastern Technical Institute instructors without a corresponding reduction in work duties?

Facts:

1. The following facts are found by a preponderance of the evidence:

2. Sioux Falls Education Association Part II Southeast Technical Institute (Association) and the Sioux Falls School District # 49-5, Southeastern Technical Institute and Board of Education (STI or Board as appropriate) pursued a course of collective bargaining concerning the salaries of STI's instructors for the 2011-2012 academic year pursuant to a reopener clause (Article IV, Section E) of the 2010-15 Collective Bargaining Agreement. Article IV, Section E states in part the following:

Section E - Schedules and Guides

1. Only salary schedule and guide in Article IV Section E, 2, (i-iv) will be negotiated on a yearly basis for the duration of the collective bargaining agreement. Language will not be negotiated on a yearly basis.

2. Southeast Technical Institute Salary Schedule and Guide FY 2010-2011 - See Appendix A

    a. Instructors will receive a 2.0 percent total increase.

    b. The District will pick up the District portion of the benefit increase costs. However, the District will increase its share of the health insurance premium no greater than five (5) percent a year not to exceed eighty-one (81) percent of the total premium for a 1.0 FTE.

    c. In year one (1) of this contract, salary enhancement will be at 2.0 percent. The funding will be as follows: Salary Enhancement Rate minus lane change cost, minus step increases, minus hold harmless amounts, with the remainder to be added to the schedule. Step movement will occur if a step is available. Lane movements will occur if the instructor has attained the required qualifying point advancements.

    d. In this year one (1) of the contract, the minimum increase amount will be at $500.00 per instructor.

3. STI initially proposed a 3.85% salary reduction for its instructors during the negotiations. The proposal was based on a projected reduction in funding for the 2011-2012 academic year and STI's attempt to achieve "equity" based on the long-term impact of salary increases for all STI's employees over time. This "equity" analysis was conducted by Rich Kluin, STI's Vice President of Finance and Operations, and was based on a comparison of various wage indices and market comparisons.

4. Association rejected STI's initial salary proposal but has never challenged the validity of Mr. Kluin's "equity" analysis.

5. Later in the negotiations, STI made a second offer, moving from the 3.85% salary reduction to a 2.05% reduction. This action was taken after STI found additional funds. STI's second offer brought the salary reduction in line with the contracts that it had negotiated with its other bargaining units.

6. Association counter offered. It stated that it would accept the reduction in salary if there were a corresponding reduction in job duties.

7. STI and Board declined to negotiate a change in work duties because it would have required a change to the language of Article IV, Section E of the 2010-2015 bargaining agreement.

8. The parties were unable to reach agreement during the negotiations.

9. STI declared impasse on May 2, 2011.

10. Conciliation was held on July 27, 2011.

11. A fact finding hearing was held on September 23, 2011.

12. Board voted to impose its last best offer on October 24, 2011.

13. Additional facts may be discussed in the analysis below.

Analysis:

Directed Verdict:

STI and Board moved for a directed verdict pursuant to SDCL 1-26-18. That statute states in part:

> Opportunity shall be afforded all parties to respond and present evidence on issues of fact and argument on issues of law or policy. However, each agency, upon the motion of any party, may dispose of any defense or claim:
>
> 2. At the close of the evidence offered by the proponent of the defense or claim if it determines that the evidence offered by the proponent of the defense or claim is legally insufficient to sustain the defense or claim.

SDCL 1-26-18.

The Department again declines to rule on this motion. At this stage of the proceeding, the Department has the evidence and testimony presented by both parties and the time and effort it would take to "ferret out" and analyze only the evidence presented by the Association would serve no purpose which is not accomplished by considering all the evidence as a whole. Consequently, STI and Board's motion is denied.

Unfair Labor Practice:

In its case brief, Association contends that STI and Board committed an unfair labor practice when it imposed a reduction in the salaries of the instructors without a corresponding reduction in job duties. SDCL 3-18-3.1 describes an unfair labor practice by a public employer. 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.

SDCL 3-18-3.1.

In unfair labor practice cases, the burden of proof lies with the party alleging the violation. Rininger v. Bennett Co. Sch. Dist., 468 N.W.2d 423, 425 (S.D. 1991). SDCL 6-18-2 requires public entities and public employees to enter into collective bargaining in good faith. Bon Homme County Comm'n v. AFSCME, Local 1743A, 699 N.W.2d 441, 452 (S.D. 2005). "[H]owever, such obligation does not compel either party to agree to a proposal or make a concession." Rapid City Educ. Assn. v. Rapid City Sch. Dist. No. 51 4, 522 N.W.2d 494, 497 (S.D. 1994) citing SDCL 3-18-2, 3.1, & 3.2.

SDCL 3-18-2 requires "that parties to negotiations who neither agree nor concede to a proposal must present a legitimate and specific rationale for their positions." Bon Homme County, 2005 SD 76, ¶ 22. Additionally, good faith negotiations "require a meaningful statement of rationale for each position taken." Id. at ¶ 25. Failing to do so can result in the conclusion an unfair labor practice has been committed. Id. Association, as Petitioner, has the burden of proof in this matter. Rininger v. Bennett County School District, 468 NW2d 423 (SD 1991).

Per se Unfair Labor Practice:

Association first argues that the Department should find that a reduction in salary for the instructors without a corresponding reduction in work duties constitutes a per se unfair labor practice. The case law in South Dakota seems clear on this point.

Whether a party has refused to negotiate collectively in good faith is determined from a review of all the facts and circumstances surrounding the complained of acts. Armour Education Association v. Armour School District, HF No. 17U, 1977/78. 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). Our Supreme Court stated in Bon Homme County Commission v. AFSCME, Local 1743A, 2005 SD 76, 699 NW2d 441:

> Our laws prevent a "union from having a unilateral veto over the terms that the employer desires, from thwarting governmental objectives, and from disturbing the efficiency of governmental operation."

Id. at ¶ 25 (citation omitted). These cases, suggest that a per se standard for determining an unfair labor practices without considering the facts of the case is inappropriate.

Association argues that a per se unfair labor practice standard prohibiting a reduction in wages with a corresponding reduction of duties is appropriate because strikes by public employees is prohibited by state law. It argues that absent that standard an employer can slash wages at will. This argument lacks merit. The protection for the employees is provided by SDCL 3-18-2, which requires the employer to provide a specific and legitimate rationale for its position. In addition, if an employer were placed in the situation where it could never reduce salaries without a corresponding reduction in duties, it could put an employer in a situation someday where it could, simply, no longer function.

Association argues that STI could have negotiated a change in work duties by agreeing to change the language contained in Article IV, Section E of the barging agreement. While this point is technically true, STI was not obligated to do so and its refusal to do so is, certainly, not an unfair labor practice. Particularly in light of the fact that changing the language of the agreement actually violates the terms of the section being changed, that only salaries will be negotiated on a yearly basis.

Finally, Association contends that our Supreme Court has never stated that no "per se unfair labor practices" can ever exist. This too, is true. On the other hand, the case law in this state seems to indicate that a determination that STI did not negotiate in good faith can only prevail if the facts show that the employer did not have a specific and legitimate rationale for its position as required by SDCL 3-18-2. The Department will deal with that issue next. With regards to the per se argument, the Department finds that STI has not committed a "per se unfair labor practice" in this case.

Specific and Legitimate Rationale:

STI's rationale for its original proposal of a 3.85% reduction in salary was based on a projected revenue shortfall and STI's attempt to bring "marketplace equity" between the salaries of its instructors and its other staff. Association has never disputed the validity of STI's "equity analysis".

During the parties' negotiations, STI found additional funds in its budget. Consequently, it modified its offer, proposing instead, a 2.05% salary reduction which brought the instructor's salary reduction in line with STI's other bargaining units. The rationale for STI's second proposal was still based on a revenue shortfall which it was still projecting. Association concedes that STI must balance its budget. However, Association initially disputed the validity of STI's projected funding shortfall.

During cross-examination, Association's witness conceded that STI's revenue projections were, in fact, reasonably accurate. It became clear during this testimony that Association had initially made some mathematical errors in its calculations when it concluded that STI's figures were wrong. As a result of this revelation, Association has abandoned its contention that STI's revenue projections were erroneous during the briefing stage of this proceeding. Consequently, Association has failed to show that STI's rationale for its final salary proposal was not specific and legitimate.

Conclusion:

In accordance with the decision above, the Department finds that STI did not commit a "per se unfair labor practice" when it imposed a reduction in its instructor's salaries without a corresponding reduction in job duties. Association also failed to meet its burden of proof by showing that STI did not have a specific and legitimate rationale for its final salary proposal. Therefore, Association's Petition for Hearing on Unfair Labor Practice is dismissed with prejudice.

STI and Board shall submit Findings of Fact and Conclusions of Law, and an Order consistent with this Decision within twenty (20) days from the date this Decision is received. STI and Board may also submit Proposed Finding of Facts and Conclusions of Law at that time. The Association shall have twenty (20) days from the date of receipt of STI and Board's proposed Findings of Fact and Conclusions of Law to submit objections thereto and/or Proposed Findings of Fact and Conclusions of Law. The parties may stipulate to a waiver of Findings of Fact and Conclusions of Law and if they do so, STI and Board shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 19th day of October, 2012.

/s/ Donald W. Hageman
Donald W. Hageman
Administrative Law Judge