

SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

ANNETTE GEHRING,

HF No. 11G, 2007/08

Grievant,

v.

DECISION

**CORSON COUNTY BOARD OF
COUNTY COMMISSIONERS,**

Respondent.

This matter comes before the Department of Labor based on Grievant's Petition for Hearing on Grievance filed pursuant to SDCL 3-18-15.2. Grievant Annette Gehring appeared personally and through her attorney of record, Thomas M. Tobin. Jack Heib represented Respondent Corson County Board of County Commissioners. The Department of Labor conducted a hearing in Pierre, South Dakota. Upon consideration of the live testimony given at hearing, the evidence presented at hearing, and the parties' written submissions, Grievant's Petition for Hearing and request for relief is hereby denied.

Issue:

Did Respondent violate, misinterpret, or inequitably apply the Agreement when Annette Gehring was terminated from her employment with Corson County?

Facts:

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

Virginia Sauer (Sauer) has been serving as the full time elected Register of Deeds for 15 years and worked part time in that office for 15 years prior to her election. Annette Gehring (Gehring) worked part-time beginning in 1994, as the Deputy Corson County Register of Deeds. Gehring worked full- time for a brief period of time when Sauer was on medical leave.

Sauer was responsible for supervising Gehring and completed her employee evaluations. On August 14, 2001, Gehring received a written reprimand from Sauer concerning several issues. The first issue addressed in that reprimand was Gehring's attempt to voucher for holiday pay even though as a part-time employee, Gehring was ineligible for holiday pay. The second issue addressed was Gehring's refusal to follow proper grievance procedure to lodge a complaint. And lastly, the reprimand addressed

Gehring's workplace attitude towards Sauer and need to address Sauer in a polite, courteous, and professional manner. The written reprimand stated that future similar behavior would be subject to further disciplinary action. Gehring and Sauer both signed the reprimand and it was placed in Gehring's file.

On August 14, 2006, Gehring received another written reprimand. This reprimand addressed Gehring's tardiness, lack of concentration, doing personal mail and calls during business hours, leaving the office during business hours, and Gehring's attitude. Once again, Gehring and Sauer both signed the reprimand and it was placed in Gehring's file.

Despite continued warnings from Sauer, Gehring's tardiness and attitude continued to be a problem. On April 3, 2007, Gehring received yet another written reprimand. This reprimand stated "you are late for work many times since I warned you August 14, 2006. If you are late one more time you will be released from your job." The April 3, 2007, reprimand also addressed continued problems with taking personal calls and opening personal mail during business hours, poor quality of work and Gehring's attitude. The written reprimand went on to state, "this is the last time I will warn you, I have discussed this with the Commissioners before and I can let you go at any time with all these problems." Once again, Gehring and Sauer both signed the reprimand and it was placed in Gehring's file.

On January 15, 2008, Gehring was on a phone call during office hours. Sauer believed she heard Gehring give legal advice to the called. Sauer reminded Gehring that she was not allowed to give legal advice. After the phone call, Sauer again reiterated that they were not allowed to give legal advice. Gehring responded in a raised voice that she was not giving legal advice, but rather that it was a personal call. Immediately following this incident on January 15, 2008, Gehring was terminated by Sauer.

By letter dated January 15, 2008, Sauer explained to Gehring that she had been terminated effective immediately due to gross insubordination, including, "tardiness, giving of legal advice, conducting personal business on County time, [her] attitude, work product and courtesy." The letter went on to say that Gehring's "public display of temper and absolute rudeness have no place in this office where we serve the public."

Gehring filed a grievance with the Corson County Board of Commissioners based on her termination of employment by Sauer. On February 5, 2008 the Corson County Commission voted to deny the grievance. On May 6, 2008, the Commission held a second vote and based on the testimony and evidence presented, the appeal was again denied and the termination upheld. This appeal to the Department of Labor followed.

Other facts will be determined as necessary.

Issue:

SDCL 3-18-1.1 defines a grievance:

The term “grievance” as used in this chapter means a complaint by a public employee or group of public employees based upon an alleged violation, misinterpretation, or inequitable application of any existing agreements, contracts, ordinances, policies or rules of the government of the state of South Dakota or the government of any one or more of the political subdivisions thereof, or of the public schools, or any authority, commission, or board, or any other branch of the public service, as they apply to the conditions of employment. Negotiations for, or a disagreement over, a nonexisting agreement, contract, ordinance, policy or rule is not a “grievance” and is not subject to this section.

The Department’s role in resolving a grievance is defined by SDCL 3-18-15.2.

SDCL 3-18-15.2 reads, in part:

If, after following the grievance procedure enacted by the governing body, the grievance remains unresolved . . . it may be appealed to the department of labor . . . The department of labor shall conduct an investigation and hearing and shall issue an order covering the points raised, which order is binding on the employees and the governmental agency.

The burden of proof is on the grievant. *Rininger v. Bennett County Sch. Dist.*, 468 N.W.2d 423 (S.D. 1991).

Gehring argues that by terminating her on the spot, Sauer violated the County policy that required termination to be done only upon the approval of the County Commission. Gehring argues that the County Commission had not authorized Sauer to terminate Gehring at the time of the termination.

The Corson County discipline and termination policy is set forth in Section 9 of the Employee Handbook. Section 9.1.5 of the Employee Handbook, provides:

The Department Head with the approval of the County Commission may terminate an employee from County employment for disciplinary purposes.

Sauer testified at the hearing that she did not seek the permission of the County Commission immediately prior to terminating Gehring on January 15, 2008. Section 9.1.5 does not elaborate the procedure for seeking Commission approval whether it be before or after a Department Head chooses to terminate an employee. The evidence presented at hearing supports Sauer’s testimony that she had spoken to the Commission previously regarding Gehring’s behavior, attitude and performance. The

written reprimand dated April 3, 2007 stated "I [Sauer] have discussed this with the Commissioners before and I can let you go at any time with all these problems." Following the Gehring's termination on January 15, 2008, Sauer wrote the County Commissioners explaining that it had become necessary to terminate Gehring and seeking approval of her actions in accordance with 9.1.5. Not once, but twice, the County Commission upheld Gehring's termination, further supporting that the County Commission approved Gehring's termination. Gehring failed to meet her burden to show that a violation of Section 9.1.5 of the Employee Handbook occurred.

Gehring further argues that that by terminating her on the spot there was a violation of Section 9.1.8 of the Employee Handbook in that proper procedures were not followed before Gehring was dismissed.

Section 9.1.8 of the Employee Handbook sets forth the procedure for a disciplinary interview as follows:

Before formal disciplinary actions are taken (suspension without pay, demotion, or dismissal), the decision-making authority shall:

1. Notify the employee in writing of the proposed disciplinary action. The notice shall state the reason(s) for the action, including any prior disciplinary actions and the facts of any other incidents upon which the present disciplinary action is based.
2. Hold a disciplinary interview to give the employee an opportunity to present reasons, orally or in writing, why the action should not be taken.
3. Inform the employee in writing of the final decision, effective date of the disciplinary action, and his/her right to appeal such decision to the County Commission, as followed in 9.2.4, by filing a written notice of disagreement with the Chairman of the Board within 5 working days of receiving the response. If the employee fails to appeal the decision within 5 working days the action shall become final.

Gehring admitted at hearing that several of the issues regarding her attitude behavior and performance had come up before and that she had discussed them with Sauer, as evidenced by her signature on each of the written reprimands and the accompanying discussion page) Gehring acknowledged that there was "room for improvement", however it is clear from Gehring's continued problems that there was no improvement.

Prior to Gehring's termination on January 15, 2008, Gehring was not given a disciplinary interview as required in Section 9.1.8 of the Employee Handbook. While technically, this constitutes a violation of a policy as set forth in SDCL 3-18-1.1, Gehring has failed to show that she is entitled to any damages or reinstatement. Gehring had been warned numerous times that her actions may result in termination and twice the County

Commission denied her grievance and approved her termination. Grievant's Petition for Hearing and request for relief is hereby denied.

Respondent shall submit proposed Findings of Fact, Conclusions of Law, and an Order consistent with this Decision within ten (10) days from the date of receipt of this Decision. Grievant shall have ten (10) days from the date of receipt of Respondent'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, Respondent shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 11th day of September, 2009.

SOUTH DAKOTA DEPARTMENT OF LABOR

Taya M. Dockter
Administrative Law Judge