

May 15, 2009

Allison Jensen
2045 12th Avenue
Belle Fourche, SD 57717

LETTER DECISION

Thomas E. Brady
Brady & Pluimer Law Firm
135 E. Colorado Blvd.
Spearfish, SD 57783

RE: HF No. 12G, 2008/09- Allison Jensen v. Butte County Equalization

Dear Ms. Jensen and Mr. Brady:

I am in receipt of Respondent's Motion for Summary Judgment in the above-referenced matter. I am also in receipt of Respondent's Brief in Support of Motion for Summary Judgment, Affidavit of Butte County Auditor Elaine Jensen, and Petitioner's Response to the Motion for Summary Judgment and Respondent's Reply Brief in Support of Motion for Summary Judgment. Having carefully considered each of these submissions, the Department finds that Respondent is entitled to summary judgment as a matter of law because no genuine issues of material fact exist.

Facts

Petitioner, Allison Jensen, began working as the Deputy Director of Equalization in January 2003. On January 1, 2008, the Butte County Commissioners adopted the Butte County Informational Booklet. An Acknowledgment Form which accompanied the booklet included the following language:

4. The contents of this manual do not constitute an express or implied contract of employment.
5. I understand that Butte County maintains the At-Will status for all employees in accordance to state law.

Ms. Jensen signed the Acknowledgment Form on January 23, 2008, indicating that she received and understood the contents of the Butte County Informational Booklet.

On January 29, 2009, Ms. Jensen was terminated by the Butte County Director of Equalization, Polly Odle. Ms. Jensen spoke with the Butte County State's Attorney to ask about filing a grievance based on her termination. The State's Attorney informed her there was no formal county policy on filing a grievance, but he did offer to speak with Ms. Odle about Ms. Jensen's termination. The State's Attorney later informed Ms. Jensen that Ms.

Odle did not feel there was any benefit to sitting down and talking to her. Ms. Jensen was not given an exit interview. Ms. Jensen filed a Petition for Hearing on Grievance based on her termination with the Department of Labor dated February 5, 2009.

Analysis

SDCL § 3-18-15.2 governs the Department of Labor's authority to grant summary judgment. SDCL § 3-18-15.2 provides in relevant part,

[T]he department, upon the motion of any party, may dispose of any grievance, defense, or claim:

- (1) 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[.]

The South Dakota Supreme Court has set forth guidelines for the grant of a motion of summary judgment.

- (1) Evidence must be viewed most favorable to the non-moving party;
- (2) The burden of proof is on the movant to show clearly that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law;
- (3) Summary judgment is not a substitute for a court trial or for trial by jury where any genuine issue of material fact exists;
- (4) Surmise that a party will not prevail upon trial is not sufficient basis to grant summary judgment on issues which are not shown to be sham, frivolous, or so unsubstantial that it is obvious that it would be futile to try them;
- (5) Summary judgment is an extreme remedy which should be awarded only when the truth is clear and reasonable doubts touching the existence of a genuine issue as to material fact should be resolved against movant;
- (6) When no genuine issue of fact exists, summary judgment is looked upon with favor and is particularly adaptable to expose sham claims and defenses.

Laber v. Koch, 383 NW2d 490, 491(SD 1986) (citing *Wilson v. Great Northern Railway Company*, 83 SD 207, 212, 157 NW2d 19, 21 (1968)).

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 Butte County Informational Booklet Disclaimer provides,

The purpose of this Butte County Informational Booklet is to provide Butte County employees with a common reference to the basic information that governs an individual's employment with the county.

The authority to enforce the provisions set forth in this manual rests with the Commission. Supervisors are encouraged to adopt and enforce such policies and procedures as are unique to a specific department but are not inconsistent or in conflict with the policies and procedures adopted by the Commission.

This manual neither implies nor establishes a contract between Butte County and the employee. The contents of this Butte County Informational Booklet summarize current county policies and programs and are intended as guidelines only. Butte County retains the right to change, modify, suspend, interpret, or cancel whole or in part any of the published or unpublished personnel policies or practices of the county, without advance notice, without having to give just cause or justification to any employee. Recognition of these rights and prerogatives is a term and condition of employment and continued employment. As such, the contents of this manual do not constitute the terms of an employment contract. Employment with this county is on an "at-will" basis, meaning that employment terms can be terminated by either party, employer or employee, for any reason not expressly prohibited by law.

Section 1.3 of the Butte County Informational Booklet provides,

Butte County recognizes that South Dakota is an employment at-will state and the intent of the county is to maintain the employment at-will status of all employees.

This manual does not confer a contract of employment. The policies, procedures, rules and benefits contained herein are subject to change. These policies are provided as a reference of present policies and not a guarantee of employment or specific employment benefits.

Butte County does not recognize verbal or implied contracts for employment. Only the Commission has the authority to enter into any agreement of employment for specified durations. Such employment agreements will only be valid and binding on Butte County when the agreement is set forth in a written document signed by the employee and Commission.

Section 9.0 of the Butte County Informational Booklet provides,

Supervisors and employees are strongly encouraged to discuss job performance and goals on an informal, day-to-day basis. A formal written performance evaluation may be conducted at the end of an employee's initial period of hire, known as training period (90 days from hire date). Additional information performance evaluations of new employees may be conducted at the supervisor's discretion. This evaluation is to provide both the supervisor and the employee with the opportunity to discuss job tasks, identify and correct weakness, encourage and recognize strengths, and discuss positive, purposeful approaches for meeting goals.

Butte Couth recognizes that South Dakota is an employment at-will state and the intent of the county is to maintain the employment at-will status of all employees.
[Italics in the original]

Section 10.0 of the Butte County Informational Booklet provides,

All employees who are leaving his/her job with Butte County for any reason are asked to participate in an exit interview. On an employee's last day of employment, he/she is required to return all county property to his/her Supervisor. Final paychecks are mailed to a worker's home address or directly given to the employee on the next regular payday. Butte County makes every effort to ensure that all terminations and separations from employment are conducted in accordance with all provisions and requirements of applicable federal and state law.

Section 10.4 of the Butte County Informational Booklet provides,

In South Dakota, an employment having no specified duration may be terminated at the will of either the employee or the employer on notice to the other. This handbook is not intended to alter that principal in anyway. *Since employment with the county is based on mutual consent, both the employee and the county have the right to terminate employment at-will at any time.* [Italics in the original]

Respondent argues there is no genuine issue of material fact and it is entitled to judgment because Petitioner's employment was terminable at will and no contract, policy or rights were violated by termination of her employment.

Ms. Jensen argues in her resistance to this motion,

I believe that terminating me despite no misconduct on my part, and simply because I worked under a former director, constitutes a violation, or at minimum, an inequitable application of the policies and rules of Butte County and the State of South Dakota.

Ms. Jensen also argues that under SDCL § 10-3-11, deputy directors have the same powers and duties as the director of equalization, and therefore she was entitled to a hearing prior to her termination pursuant to SDCL §10-3-5. Ms. Jensen's argument is without merit. SDCL §10-3-11 provides,

The county commissioners may appoint deputies to the county director of equalization. Such *deputies shall hold office at the pleasure of the county commissioners* and are subject to the recommendations of the director of equalization and have the same powers and duties as the director of equalization [Emphasis added].

The position of deputy director is not the same as the director. No written contract existed for the deputy director position. No contract of employment can be implied from statute or the Butte County Informational Booklet. *Aberle v. City of Aberdeen*, 2006 SD 60, 718 NW 2d 615. The position of deputy director is an at-will position and no hearing is required prior

to termination. The statute clearly states that the deputy serves at the pleasure of the county commissioners.

Ms. Jensen further argues in her resistance to this motion,

In addition, based on the employee hand book, I also believe that the county violated its own employee handbook when it failed to give me an exit interview, even after my request for one.

Section 10.0 of the Butte County Informational Booklet states “employees who are leaving his/her job with Butte County for any reason are asked to participate in an exit interview.” The language in Section 10.0 does not require that the employee participate in an exit interview, only that the employees would be asked. Further, Section 10.0 does not state who was responsible for conducting the exit interview. In this case, Ms. Jensen spoke with the State’s Attorney about her termination. He informed Ms. Jensen that he would talk to the Director regarding Ms. Jensen’s termination. The State’s Attorney later informed Ms. Jensen that the Director did not feel there was any benefit to sitting down and talking to Ms. Jensen. There was no violation, misinterpretation of inequitable application of the county policy when Ms. Jensen was not given a formal exit interview with the Director.

Conclusion

There are no genuine issues of any material fact exist pertaining to whether Petitioner’s employment was terminable at-will. Respondent is entitled to judgment as a matter of law. Respondent’s Motion for Summary Judgment is hereby granted. Respondent is directed to submit an Order consistent with this decision.

Dated this 15th day of May, 2009.

Taya M. Dockter
Administrative Law Judge