

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

**JACQUE HUINER,
Grievant,**

HF No. 17G, 2010/11

v.

DECISION

**ARLINGTON SCHOOL DISTRICT 38-1
And BOARD OF EDUCATION,
Respondents.**

This matter comes before the Department of Labor and Regulation based on Grievant's Petition for Hearing on Grievance filed pursuant to SDCL 3-18-15.2. Anne Plooster appeared on behalf of Grievant Jacque Huiner. Richard J. Helsper represented Respondent, Arlington School District 38-1 and Board of Education. The Department of Labor and Regulation conducted a hearing in Brookings, South Dakota. Upon consideration of the live testimony given at hearing and the evidence presented at hearing, Grievant's Petition for Hearing and request for relief is hereby dismissed.

Issues

1. Respondent's Motion to Dismiss
2. Whether the conduct of Principal Rhonda Gross constituted harassment in violation of the negotiated agreement.

Facts

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

Jacque Huiner (Huiner) was employed by Arlington School District (District) beginning in January of 2003. She was hired by Principal Rhonda Gross (Gross) as a K-12 Art teacher. Huiner and Gross had a good relationship and did not have any major problems prior to August 2010.

In August of 2010, Huiner was assigned to teach the Credit Recovery class. Credit Recovery was a class where students who have failed required classes can do assignments to make up for the failed work and get a passing grade. The original teachers for each content area design the assignments, and the Credit Recovery teacher serves as a monitor for the class. Huiner questioned whether she should be teaching the class because she was only certified to teach K-12 Art and not credit recovery.

On August 17, 2010, Huiner went to Gross to discuss the Credit Recovery assignment, Lifetouch, and her planning period. The conversation escalated and Huiner was upset and crying. Gross found her conduct to be out of character. Other instances during the 2012 school year that were of concern to Gross included a dramatic increase in referrals being made out of Huiner's classroom, Huiner allowing inappropriate and offensive artwork created by students to be displayed in the hall, and a general change in Huiner's actions and behaviors.

In September 2010, Principal Gross's daughter, a student in Huiner's Art class, was reprimanded for talking during a quiz in Huiner's classroom. Not long after this incident, Gross called Huiner into her office to discuss a list of areas of concern. Gross also concluded that it was necessary for her to have more regular contact with Huiner including classroom visits. Gross also increased her visits to Huiner's classroom to deal with students that had been referred to the Principal due to behavior issues.

A Plan of Assistance was developed for Huiner to assist her in keeping better control of her classroom, keep her students on track, etc. The goal was to help Huiner return to the level of professionalism she had demonstrated in the past. The plan of assistance was implemented on December 10, 2012.

Huiner believed that Gross failed to assist her in meeting her goals outlined in the Plan of Assistance. She also believed that the increased observations by Principal Gross in her classroom crossed the line into harassment.

On February 24, 2011, Huiner filed a grievance against Principal Gross. Her grievance was submitted to the principal and superintendent. Huiner alleged that Principal Gross's actions amounted to harassment that affected her work performance. On May 10, 2011, the grievance was brought before the Arlington School Board. On May 31, 2011, the Board issued a written decision denying the grievance. On June 1, 2011, Huiner filed a Petition for Hearing on Grievance with the Department of Labor.

Analysis

A grievance is defined by SDCL 3-18-1.1 as:

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.

Deference is not given to the school board's decision by the department in a grievance review under SDCL 3-18-15.2. Rather, the department issues a binding order based upon its own investigation and hearing. A grievance proceeding under SDCL 3-18-15.2, a complaint filed by a public employee is reviewed by the Department to determine if there is a violation of an existing agreement, policy, rule or regulation. *Cox v. Sioux Falls Sch. Dist.*, 94 SDO 279, 514 N.W.2d 868 (S.D. 1994). The burden of proof is on the grievant. *Rininger v. Bennett County Sch. Dist.*, 468N.W.2d 423 (S.D. 1991).

Motion to Dismiss

At the beginning of the hearing, District filed a Motion to Dismiss. The Department declined to grant the Motion at that time, but requested that the parties address the issue in their briefs. District argues that Grievant's Petition for Hearing on Grievance should be dismissed because Grievant failed to follow the Grievance procedure set forth in the Master Contract Between the Arlington Education Association and the Arlington Board of Education (Contract).

Article VII of the Contract contains the Grievance procedure. The Formal Grievance Procedure in Section 6 reads as follows:

A. Level One: School Principal

1. If an aggrieved person is not satisfied with the disposition of his/her problem through informal procedures, he/she may submit his/her claim as a formal written grievance to his/her principal.
2. The principal shall within five (5) days render his her/her decision and its rationale in writing to the aggrieved person, with a copy to the Association school representative for his/her file.
3. The principal shall keep on file a statistical summary of the numbers and types of grievance processed, not to include the individual names or details of the grievance.
4. A teacher who is not directly responsible to a building principal may submit his/her formal written grievance claim to the administrator to whom he/she is directly responsible. Said administrator shall carry out the aforementioned responsibility of the principal.

B. Level Two: Superintendent

1. If the aggrieved person is not satisfied with the disposition of his/her grievance at Level One, or if no decision has been rendered within five (5) days after presentation of the grievance in writing, he/she may file the formal written grievance with the Association's committee within three (3) days after the decision at Level One or eight (8) days after the grievance was presented, whichever was sooner.
2. Within ten (10) days after receiving the formal written grievance, the committee shall provide an opportunity for the aggrieved person to meet with the committee for the purpose of reviewing the grievance, and the committee shall give to the aggrieved person a written opinion regarding the merits of the cas[e].
3. Within three (3) days after receiving the committee opinion or within thirteen (13) days after the grievance was filed with the committee whichever is sooner, the aggrieved person may file a written appeals with the committee for a hearing by the Superintendent of Schools. Within two (2) days of its receipt, the committee through its chairman shall submit such appeal to the superintendent.
4. The Superintendent of Schools or his representative shall act for the administration at Level Two of the grievance procedure. Within ten (10) days after the receipt of the written appeal for a hearing by the Superintendent, the Superintendent shall meet with the aggrieved person and the representative of the committee for the purpose of resolving the grievance. A full record of such hearing may be kept by the aggrieved person or persons. The Superintendent shall within five (5) days of the hearing render his decision and its rationale in writing to the aggrieved person, with a copy to the committee.
5. Representatives of the Association's committee shall have the right to attend and participate in the meeting of the Superintendent with the aggrieved person relating to the grievance presented to the Superintendent.

C. Level Three: School Board

1. If the aggrieved person is not satisfied with the disposition of his/her grievance at Level Two, or if no decision has been rendered within five (5) days after he/she has first met with the Superintendent, he/she may file the grievance again with the Association's committee within five (5) days after a decision by the Superintendent, or ten (10) days after he/she first met with the Superintendent, whichever is sooner.
2. After receiving such further appeal, the committee through its chairman may refer the grievance to the Board of Education for consideration at its next regular meeting.
3. After receiving the written appeal, the Board may appoint a fact finder to review the grievance and its processing to this point and to report to the Board prior to its meeting with the aggrieved person and with

representatives of the committee for the purpose of resolving the grievance. The decision of the Board shall be rendered in writing within five (5) days.

D. Level Four: Arbitration

1. If the aggrieved person is not satisfied with the disposition of his/her grievance at Level Three, or if the decision has not been rendered within five (5) days after he/she first met with the Board, he/she may, within five days after a decision by the board or ten days after he/she has first met with the Board, whichever is sooner, request in writing to the committee and the Association that his/her grievance procedure be submitted to arbitration.
2. If after following the grievance procedure enacted by the governing body, the grievance remains unresolved, it may be appealed to State Law.

District argues that Huiner did not attempt arbitration after the Level Three grievance and that an appeal to the Department is not arbitration, but instead a legal remedy. District argues that because Huiner failed to follow the grievance procedure as enacted by the governing body, contained in the Contract, the grievance is improperly before the Department of Labor and Regulation.

Huiner contends that the Department appeal is the arbitration, defined as “the act of arbitrating; especially : the hearing and determination of a case in controversy by an arbiter.” www.meriam-webster.com/dictionary/arbitration.

“Policies of a school district, especially those negotiated with bargaining representatives for the protection of teachers, have the full force and effect of law, and legally bind the school district.” *Wess. Spgs. Ed. Assc. v. Wess. Spgs. Sch. Dst.* 467 NW2d 10, 104 (citing *Schnabel v. Alcester School District #61-1*, 295 NW2d 340 (SD 1980)).

The Grievance procedure set forth in the Contract clearly sets forth the required steps that an aggrieved teacher must take. Article VII, Section 6 (D)(2) requires that the matter be submitted to arbitration prior to an appeal to State Law.

“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”. *Id. at 104* (citations omitted).

It is not disputed that Jacque Huiner did not request in writing that her grievance be submitted for arbitration prior to appealing the matter to the Department of Labor and

Regulation. The Contract specifically references arbitration as a separate step to be taken prior to an appeal to State Law, it is clear and unambiguous that the matter must be submitted to arbitration before an appeal is made to the Department of Labor and Regulation, the legal remedy provided for by State Law. Because Huiner did not follow the grievance procedure enacted by the governing body, the Department of Labor is deprived of jurisdiction over this matter. Respondent's Motion to Dismiss is hereby granted.

Dated this 2nd day of August, 2012.

SOUTH DAKOTA DEPARTMENT OF LABOR

/s/ Taya M. Runyan

Taya M. Runyan
Administrative Law Judge