

SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

**NORTHEAST EDUCATIONAL SERVICES
COOPERATIVE EDUCATIONAL
ASSOCIATION ON BEHALF OF GWEN
HOLINKA AND CHARLA SHOEMAKER,**

HF No. 17 G, 2006/07

Grievant,

v.

DECISION

**NORTHEAST EDUCATIONAL SERVICES
COOPERATIVE AND BOARD OF DIRECTORS,**

Respondent.

This matter comes before the Department of Labor based on a grievance complaint filed by the Northeast Educational Services Cooperative Educational Association on behalf of Gwen Holinka and Charla Shoemaker (NESCEA) pursuant to SDCL 3-18-15.2. Anne Plooster represented NESCEA. Rodney Freeman represented the Northeast Educational Services Cooperative and Board of Directors (Cooperative).

At the hearing, Exhibits 1 through 20 were offered and received into evidence. Four witnesses, including Gwen Hawley-Holinka (Holinka), Charla Shoemaker (Shoemaker), Cheryl DeWitt, and Jerry Aberle (Aberle), were called and presented sworn testimony. The sole issue presented was whether the Cooperative and/or its agents violated, misinterpreted and/or inequitably applied its policies in failing to follow Article VIII, Termination and Non-Renewal of Employees, of the Employee Policy Handbook when the Cooperative non-renewed Holinka and Shoemaker.

FACTS

Based upon the Department's record and the live testimony at the hearing, the following facts have been established by a preponderance of the evidence.

1. Holinka began working for the Cooperative on October 1, 2000, as a licensed Occupational Therapist (OT).
2. For the 2006-07 school year, the Cooperative employed Holinka as a licensed OT. Holinka's OT Contract with the Cooperative was effective for one year, from July 1, 2006, through June 30, 2007.
3. Holinka does not possess a teaching certificate from the South Dakota Department of Education (DOE).
4. Shoemaker began working for the Cooperative on July 1, 2005, as a licensed Certified Occupational Therapy Assistant (COTA).
5. For the 2006-07 school year, the Cooperative employed Shoemaker as a licensed COTA. Shoemaker's COTA Contract with the Cooperative was effective for one year, from July 1, 2006, through June 30, 2007.
6. Shoemaker does not possess a teaching certificate from the DOE.

7. During the 2006-07 school year, the Cooperative maintained an Employee Policy Handbook (Handbook) that contained terms and conditions of employment for Cooperative employees. Both parties agreed that Holinka and Shoemaker were covered by the Handbook and subject to the terms and conditions in the Handbook.

8. On April 16, 2007, the Cooperative voted to non-renew Holinka and Shoemaker for the 2007-08 school year “based on NESCEA program needs.” Aberle credibly testified the Cooperative non-renewed Holinka and Shoemaker based “on student caseloads and the needs of the cooperative.”

9. NESCEA filed a Petition for Hearing on Grievance with the Department of Labor and the hearing followed.

10. At the hearing, the Cooperative made a Motion to Dismiss the grievance as moot based upon the grounds that the requested remedy already had been granted by the Cooperative. The Department reserved ruling on the Motion to Dismiss until after conducting its investigation and reviewing the parties’ post-hearing briefs.

11. Other facts will be developed as necessary.

ISSUE

WHETHER THE COOPERATIVE AND/OR ITS AGENTS VIOLATED, MISINTERPRETED AND/OR INEQUITABLY APPLIED ITS POLICIES IN FAILING TO FOLLOW ARTICLE VIII, TERMINATION AND NON-RENEWAL OF EMPLOYEES, OF THE HANDBOOK WHEN THE COOPERATIVE NON-RENEWED HOLINKA AND SHOEMAKER?

SDCL 3-18-1.1 defines a grievance as:

[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 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.

SDCL 3-18-15.2 provides, in part:

If, after following the grievance procedure enacted by the governing body, the grievance remains unresolved, except in cases provided for in § 3-6A-38, it may be appealed to the Department of Labor, if notice of appeal is filed with the department within thirty days after the final decision by the governing body is mailed or delivered to the employee. 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 [] board’s decision by the department in a grievance review under SDCL 3-18-15.2.” Cox v. Sioux Falls Sch. Dist. 49-5, 514 N.W.2d 868 (S.D. 1994). The burden of proof is on NESCEA, the party alleging the violation. Rininger v. Bennett County Sch. Dist., 468 N.W.2d 423 (S.D. 1991).

Article VIII, Termination and Non-Renewal of Employees, of the Handbook provided:

- A. All employees will be terminated or non-renewed pursuant to South Dakota law.
- B. Staff reduction: In the event the Northeast Educational Services Cooperative Director determines that a staff reduction is necessary, the following procedures will be observed in the order listed.
 - 1. An effort shall be made to effect the reduction through normal attrition.
 - 2. Positions held by persons with less than full certification for their current teaching assignment (defined as holder of Authority to Act as a Substitute or Limited Certificate) shall be deemed open if the position is desired, as set forth, by a tenured employee who has been notified their position has been reduced.
 - 3. In the event that a continuing contract employee's position is terminated due to staff reduction the Board of Directors or its designee will determine which continuing contract employee or employees are to be released using the following criteria, if applicable.
 - a. Student needs.
 - b. Accreditation Standards (State and NCA).
 - c. Certification.
 - d. Additional (training) preparations in the identified areas should be considered.
 - e. Experience in this or similar positions.
 - f. Total years employed within the Northeast Educational Services Cooperative.
 - g. Continuing contract employees in the regular program would be offered any vacant position for which they qualify.
 - [h.] The Board shall provide the staff a list of names of all teachers employed by the Coop; such a list shall include the date each teacher was initially employed by the Cooperative, each teacher's total years of service to the Coop, the area of certification as shown on the teacher certificate.

Article VIII, Section B of the Handbook is not applicable to this discussion because Holinka and Shoemaker were non-renewed by the Cooperative and were not subject to a staff reduction.

The Cooperative must abide by the terms of the Handbook. See Wessington Springs Educ. Ass'n v. Wessington Sch. Dist. No. 36-2, 467 N.W.2d 101, 104 (S.D. 1991). "Disputes over the meaning of terms in [a policy or negotiated agreement] are resolved under the general principles of contract law." Gettysburg Sch. Dist. 53-1 v. Larson, 2001 SD 91, ¶ 11. Terms in a contract are to be given "their plain and ordinary meaning." Harms v. Northland Ford Dealers, 1999 SD 143, ¶ 12 (citation omitted).

“When the terms of a negotiated agreement are clear and unambiguous, and the agreement actually addresses the subject that it is expected to cover, “there is no need to go beyond the four corners of the contract.” Wessington Springs, 467 N.W.2d at 104 (citation omitted). The Handbook is clear and unambiguous and the terms shall be given their plain and ordinary meaning.

There is no dispute that the Handbook pertains to all Cooperative employees, including Holinka and Shoemaker. The Handbook, pursuant to Article VIII, Section A, required the Cooperative to terminate or non-renew its employees in accordance with South Dakota law. NESCEA argued the Cooperative failed to follow state law when the Cooperative non-renewed Holinka and Shoemaker because the Cooperative did not follow the provisions of SDCL 13-43-6.1 to 13-43-6.9, statutes that pertain to the termination of teachers.

The Cooperative agreed that the Handbook required it to follow state law when it non-renewed Holinka and Shoemaker. However, the record clearly established that Holinka and Shoemaker were not teachers certified by the DOE. SDCL Chapter 13-43 applies strictly to teachers. As Holinka and Shoemaker were not teachers, the Cooperative was not required to follow the provisions of SDCL 13-43-6.1 to 13-43-6.9 when it non-renewed Holinka and Shoemaker.

SDCL 60-4-2 provides that employment is terminated “[b]y expiration of its appointed term[.]” Holinka’s and Shoemaker’s employment contracts with the Cooperative were effective for one year, from July 1, 2006, through June 30, 2007. Neither contract required the Cooperative to provide either Holinka or Shoemaker with notice if her contract was not going to be renewed. Holinka and Shoemaker were employees on one-year contracts who were non-renewed in accordance with state law. The Cooperative followed the dictates of the Handbook when it non-renewed Holinka and Shoemaker.

The Cooperative and/or its agents did not violate, misinterpret and/or inequitably apply Article VIII of the Handbook when the Cooperative non-renewed Holinka and Shoemaker. NESCEA’s grievance is denied in all respects and the Petition for Hearing on Grievance is denied and dismissed with prejudice. Based on this Decision, it is unnecessary to address the Cooperative’s Motion to Dismiss.

The Cooperative shall submit Findings of Fact, Conclusions of Law, and an Order consistent with this Decision, and if necessary, proposed Findings and Conclusions within fourteen days from the date of receipt of this Decision. NESCEA shall have fourteen days from the date of receipt of the Cooperative’s Findings 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, the Cooperative shall submit such Stipulation, along with an Order in accordance with this Decision.

Dated this 6th day of August, 2008.

SOUTH DAKOTA DEPARTMENT OF LABOR

Elizabeth J. Fullenkamp
Administrative Law Judge