

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

**WILLIAM SWEENEY,**

**HF No. 15G & 18G, 2006/07**

**Petitioner,**

**v.**

**DECISION**

**SOUTH DAKOTA BOARD OF  
REGENTS AND UNIVERSITY OF  
SOUTH DAKOTA,**

**Respondents.**

This matter comes before the Department of Labor (Department) based on Petitions for Hearing on Grievances filed pursuant to SDCL 3-18-15.2. Attorney Anne Plooster represented Petitioner, William Sweeney (Grievant). Attorney Robert Frieberg represented Respondents, South Dakota Board of Regents and the University of South Dakota (Respondents). A hearing was conducted in this matter on May 14, 2008 in Vermillion, South Dakota. Based upon the testimony and evidence submitted during hearing and the compiled record, Grievant's requests for relief are denied.

**ISSUES**

1. Whether the South Dakota Board of Regents, the University of South Dakota and/or its agents violated, misinterpreted, and/or inequitably applied the negotiated agreement in denying Grievant's request for overload compensation or documented release time from other duties in research and service for the Fall 2005 and Spring 2006 semesters?
2. Whether the South Dakota Board of Regents, the University of South Dakota and/or its agents violated, misinterpreted, and/or inequitably applied the negotiated agreement in denying Grievant's request for overload compensation or documented release time from other duties in research and service for the Fall 2006 and Spring 2007 semesters?

**FACTS**

Grievant is a full-time tenured professor in the School of Education in the Division of Curriculum and Instruction and within the Special Education Program. Grievant has been employed by Respondents for 13 years. Grievant is the state vice president for the Council of

Higher Education (COHE) and the USD COHE chapter president. Grievant is also a member of the COHE Negotiations Team. The COHE Agreement is negotiated between the South Dakota Board of Regents and the Council of Higher Education (an affiliate of the South Dakota Education Association and the National Education Association). The COHE Agreement that Grievant's contract was based upon, was effective July 1, 2005.

Grievant filed the first of four grievances in the Fall of 2005. He filed a similar grievance in the Spring of 2006. Both grievances were based upon Grievant's workload and filed pursuant to the COHE Agreement. While the grievances for the 2005-2006 academic year were proceeding, Grievant filed grievances for the Fall 2006 and Spring 2007 semesters. All four grievances challenged the manner in which the University of South Dakota (USD) workload policy was implemented by the Department of Education. USD denied relief to Grievant in these four grievances. Grievant appealed the denials to the Board of Regents. The Board of Regents had hearings on the grievances on October 12, 2006 and September 18, 2007. The Board of Regents adopted the hearing officer's recommendations, thereby denying the Grievant's petitions. The grievances were consolidated for purpose of appeal to the Department of Labor.

The COHE Agreement outlines the Workload policy of Respondents. A full-time workload, such as what was expected from Grievant, is equivalent to 30 workload units of undergraduate instruction or its equivalent per academic year. Graduate didactic units are counted on a 4 to 3 basis with undergraduate units; 3 graduate level units equals 4 undergraduate units, for the purpose of workload calculation. Non-didactic units are added onto the workload calculations in the same manner as didactic units.

Grievant did not receive a workload calculation document from Respondents for the Fall 2005 Semester. In the Fall 2005 Semester, Grievant taught: SPED 100 (3 workload units, undergraduate); SPED 703 (4 workload units, graduate); SPED 815 (2.66 workload units, graduate); 1 independent study (.67 workload units, graduate); and SPED 894 (.67 workload units, graduate). Grievant taught a total amount of 11 didactic workload units in the Fall of 2005. Respondents added 3 non-didactic units to the calculation for advising, research/scholarship, and service for a total of 14 units.

In the Fall 2005 Semester, Grievant calculated that his workload was 18 units. He requested an additional 1 unit for undergraduate portfolio reviews, 2 units for graduate advising, and 1 unit for a large enrollment in SPED 100 as well as the fact that he had made SPED 100 a writing intensive course.

Grievant did not receive a workload calculation document from Respondents for the Spring 2006 Semester. In the Spring of 2006, Grievant taught: SPED 431 (2 sections, 6 workload units, undergraduate); SPED 715 (4 workload units, graduate); SPED 794 (.66 workload units, graduate); SPED 896D (.66 workload units, graduate); and SPED 897 (1 workload unit, graduate). Grievant taught a total amount of 12.32 didactic workload units in the Spring of 2006. Respondents calculated Grievant's workload at 15.34 units, giving Grievant 3 units for advising, research and service.

In the Spring 2006 Semester, Grievant calculated that his workload was 16.34 units. He added 1 unit for electronic portfolio reviews, 1 unit for graduate level advising, 1 unit for research, and 1 unit for service responsibilities. There is a difference of 1 unit between the two calculations.

In the Fall of 2006, Respondents provided a workload calculation to Grievant that shows Grievant taught: SPED 100 (3 workload units, undergraduate); SPED 405 (3 workload units, undergraduate); SPED 740 (4 workload units, graduate); SPED 898 (3.795 workload units, graduate) and SPED 794 internship (.165 workload units, graduate). The workload calculation added 0.026 units for Grievant's general teaching load and .046 units for supervising student teachers. Respondents added 3 units for advising, research, and service for a total calculation of 17.033 units.

In the Fall 2006 Semester, Grievant calculated his total workload units as 18.96 units, a difference of about 2 workload units. Grievant calculated his workload units by adding an additional 1 unit for undergraduate electronic portfolio reviews, 1 unit for a writing intensive course (SPED 100), as well as the 3 units for advising, research, and service.

Respondents' calculation of units for the Spring of 2007 shows that Grievant taught: SPED 350 (2.004 workload units, undergraduate); supervised 2 student teachers (1.668 workload units, undergraduate); SPED 498 - 1 undergraduate independent study (0.075 units); SPED 794 - 1 graduate internship (.165 workload units); SPED 795 - 1 graduate practicum (.165 workload units); and SPED 898D – 2 doctoral dissertations (5.175 workload units, graduate). Respondents added 3.006 units for advising, research, and service. The calculation shows that Grievant taught a total amount of 12.258 workload units in the Spring of 2007.

In the Spring of 2007, Grievant calculated his total workload as 13.42 total units. He added 1 unit for undergraduate portfolios, 1 unit for graduate advising, and 1 unit for both research and service.

Respondents calculated that Grievant taught 29.34 units in 2005-2006. Grievant calculated that he taught 34.34 units in 2005-2006. Respondents calculated that Grievant taught 29.29 units in 2006-2007. Grievant calculated that he taught 32.38 units in 2006-2007.

Grievant is expected to teach a total of 24 units per year, with an additional 6 units of release-time for advising, research and service, for a maximum total of 30 workload units per academic year. The calculation of the didactic teaching units is not in dispute. Grievant is disputing the amount of release-time allowed (as counted in workload units) for other activities required of Grievant, as well as the amount of workload units that may be added under special circumstances. These non-didactic workload units are classified and defined in the COHE Agreement, Appendix J (USD Workload Policy) sections 7, 8, and 9.

**7. Release-time for baseline activities.** Ordinarily, six units of release-time per academic year (taking the remaining annual workload to 24 units) will be granted for tenured or tenure-track faculty members above the rank of instructor. This time is assigned for the purpose of fulfilling responsibilities of research/creative activity, service, and advising/mentoring. This release-time will be granted provided that in the previous annual evaluation, the faculty member has been rated at “meeting expectations” or higher in teaching, research/creative activity, and service, as defined in the document, *“Expectations of the Faculty at The University of South Dakota.”*

**8. Release-time for research/creative activity, service, or special assignments.** With the specific written approval of the chair or next level supervisor, in consultation with the Dean, further release time (resulting in a remaining annual workload of less than 24 units) may be granted to faculty members who are:

- a. Engaged in research or creative activity on an ongoing basis that results in peer-reviewed dissemination of results in a manner and through a forum appropriate to the discipline, and at a rate commensurate with active scholars at other institutions offering equivalent degree programs.
- b. Engaged in professional service activity that has significant impact beyond the campus.
- c. Engaged in special assignments for the benefits of the University.
- d. Engaged in externally-supported projects that specifically fund a portion of the faculty member's salary or otherwise carry expectations of a significant time commitment necessary for successful completion of the project.
- e. Engaged in clinical or other professional activity for the purpose of maintaining expertise or certification.

**9. Special circumstances.** With the specific written approval of the chair or next level supervisor, in consultation with the Dean, the workload calculation may reflect special circumstances including:

- a. Active involvement, interpreted to mean serving as the advisor of students, in thesis- or dissertation-intensive programs, including graduate programs, undergraduate research, or the Honors program.
- b. Teaching in high-enrollment classes.
- c. Teaching in writing or evaluation intensive classes.
- d. Serving as a course coordinator.
- e. Engaging in major curricular development or assessment beyond that normally expected of an active teacher.
- f. Teaching classes that require intensive technological innovation.
- g. Teaching in situations where student contact hours significantly exceed course credit hours, including internships, laboratories, clinical supervisions.

Exhibit 1, COHE Agreement, eff. July 1, 2005 through June 30, 2008 (emphasis added).

Grievant requested that Respondents award Grievant overload compensation, as defined in the COHE Agreement. The pertinent sections in the Agreement, 19.5, 9.1, and 9.2 are as follows:

**19.5 Overload, Summer Term and Self-Support**

During any academic term in which faculty unit members teach four courses of undergraduate instruction, or three courses if at least one course is a graduate course, they may be offered additional course assignments to be taught on

overload, or self-support bases. Faculty unit members who are not under contract to perform externally funded research may be offered course assignments to teach during the summer session. Faculty unit members who accept such assignments will be compensated at the rate of seven percent of academic year base salary for each three credit hour course taught; provided that the rate maybe increased by up to two percentage points to address exceptional circumstances.

When determining whether additional compensation is warranted, the administration will take into account faculty effort required to prepare and to deliver the course, institutional resources provided to conduct the course and institutional opportunities deriving from the course. Among the factors considered in these connections, without limitation, will be current workload, extent of necessary new preparation, projected enrollments, availability of assigned assistants, technological resources and market driven limitations on course costs.

If a course exceeds or falls short of three credit hours, the compensation will be adjusted pro rata. When a course fails to meet the specified minimum enrollment, the contract may be voided by the administration, or the faculty unit member may request an opportunity to teach the course at reduced compensation. The administration of each university will determine the minimum enrollment needed, consistently with sound fiscal practices, to justify offering a class. Faculty unit members will be advised of the minimum enrollments specified by the university administration at the time that the contract is offered. When the university administration determines that it will schedule a course for the summer term or as a self-support offering, it will advise faculty unit members in the relevant department of the employment opportunity.

### **9.1 Unit Member Responsibilities**

Upon accepting an appointment, a faculty unit member may be assigned responsibility in any of three (3) areas: teaching, research and scholarship, and service unless otherwise specified under item 6 of §8.5; provided that faculty unit members who have been assigned to full thirty credit hour undergraduate instruction load or its equivalent may be relieved of some responsibilities for research and scholarship. Faculty unit member who have been relieved of some responsibilities for research and scholarship remain subject to shared-governance service obligations that are normally incidental to any full-time faculty appointment, including, without limitation, participation in curriculum review, faculty or student qualifications and expectations or academic unit programming or operations. A representative list of duties within these areas is found in Appendix G. In addition, a faculty unit member is expected to perform assigned responsibilities in accordance with recognized standards of professional ethics and departmental policy.

## **9.2 Workload and Technological Course Delivery**

The telecommunicated course delivery, by whatever means now known or to be developed in the future, will be treated as part of faculty unit member course load for all purposes, including assignment and evaluation. The parties recognize that in some instances development of materials for use in telecommunicated instruction or preparation of class presentations may require additional time or resources. The department head will consult with faculty unit members to determine, case by case, whether and to what extent particular telecommunications assignments should be treated as requiring adjustment in standard workload expectations under the respective institutional workload policies.

COHE and the Board recognize the value of workload policies which regulate workload based on credit hours, contact hours, preparation, clinical work, research, service and other factors deemed appropriate by the parties. The standard two-term workload is presumed to require thirty credit hours of undergraduate instruction, or its equivalent, per academic year. Reasonable release time will be granted to faculty members who actively engage in research, scholarship, or creative artistic activity or who actively pursue professional service activities related to their disciplines; ordinarily reasonable release time will involve six credit hours of undergraduate instruction, or its equivalent, per academic year. Institution may adjust this presumed requirement to assure that faculty unit members have adequate time to address their responsibilities for research and scholarship, or service, or as deemed necessary in light of the nature of the instruction that faculty unit members undertake. Institutional workload policies may allow faculty unit members to carry light course loads in one term, provided that the course load for the academic year conforms to the thirty credit hour requirement. The workload policy for each institution will be in Appendix J to this agreement and is hereby incorporated by reference as are any changes thereto. Such changes will be provided to the COHE chapter presidents within ten (10) days of approval.

An institutional workload committee will be established if either COHE or the president identifies a need for change in the policies. Any changes agreed upon by such committee will be recommended to the president for approval. If agreement cannot be reached by the Institutional Workload Committee or their recommendations are not approved by the president, the issues may be submitted by either party to the Board for its decision. In such case the previously established workload policies, with agreed upon changes, will remain in effect until the Board's decision. This will not preclude either party from introducing such issues into negotiations.

The institutional Workload Committee will be composed of three (3) members appointed by the president and three (3) members appointed by COHE. The Committee will meet within ten (10) days of a written request by either COHE or the president.

The core of the grievances, stated in more precise terms, is whether under the COHE Agreement, Respondents are under a duty to award overload or additional compensation to Grievant for: 1) teaching SPED 100, a course that he designed to be writing intensive and that may be considered a large section class; and 2) performing undergraduate electronic portfolio reviews and graduate advising.

### **ANALYSIS & DECISION**

The rights and obligations of parties to a contract are determined solely by the contract language, which must be construed according to the plain meaning of its terms. Contract interpretation is a question of law.

*Yarcheski v. Reiner*, 2003 SD 108, ¶24, 669 NW2d 487 (internal citations omitted).

Respondents' calculations indicate that during the 2005-2006 and the 2006-2007 school years, Grievant accumulated less than 30 workload units. Grievant calculated his workload by adding units for graduate advising, undergraduate portfolio reviews, teaching a high-enrollment course, and teaching a writing intensive course.

The SPED 100 class is an undergraduate survey course that Grievant teaches in the Fall of each year. The School of Education only requires that the class members write a "philosophy of special ed." as part of its syllabus. This class is not typically "writing intensive." Grievant has always had writing assignments in the class. In 2004, Grievant changed the course to make his feedback on the writing more rigorous. Grievant believes that more intensive course feedback from the instructor makes the course an intensive writing course. Grievant based this decision to change his course requirements upon a University-wide directive or goal that professors and departments encourage more writing from their students. Grievant's supervisors did not request that Grievant make SPED 100 a writing intensive course. The syllabus for the course does not reflect that it is writing intensive. Grievant has never been given an extra workload unit because of the increased amount of writing he requires for SPED 100. Moreover, Grievant was denied the extra unit in 2005 yet continued with the extra writing requirements in 2006.

Grievant also argues that SPED 100 is a large section course and a workload unit should be granted because of the size of the class. Respondents investigated whether SPED 100 was a



large section class and determined that it was not. The classes in the Fall of 2005 and 2006 had less than 50 students in each class. All but two large-section classes at USD in 2005-2006, had over 100 students. Respondents followed the COHE Agreement when determining whether Grievant deserved additional compensation for teaching SPED 100. Respondents took into consideration the items required by the COHE Agreement, specifically, “faculty effort required to prepare and to deliver the course, institutional resources provided to conduct the course and institutional opportunities deriving from the course.”

Grievant also argues that he should be granted an additional workload unit for each semester he performs electronic portfolio reviews. USD and the Department of Education consider portfolio reviews as part of the three units given to professors each semester for research, scholarship and advising. The COHE Agreement clearly states that advising is part of the three units of release time. Furthermore, the Agreement does not differentiate between graduate and undergraduate advising. Under special circumstances, as outlined above in §9 of the Workload Policy, Respondents could have added additional workload compensation for a variety of things, including electronic portfolio reviews or graduate advising. However, Respondents chose not to give additional compensation, as is their management prerogative under the COHE Agreement.

The determination of additional compensation is based upon calculations that are variable depending upon the professor, his current workload, the type of course, institutional resources, the availability of staff or assistants, the class attendees, technological resources, and course costs. It is a prerogative of management, under the COHE Agreement, to determine whether Grievant has exceeded the number of workload units expected of him by Respondents. It is also a management prerogative to award overload compensation to Grievant, if he has exceeded the number of workload units.

Grievant was not ordered to and did not receive permission to make SPED 100 a writing intensive course, thereby increasing his workload compensation. Respondents did not determine that electronic portfolio reviews or his graduate advising deserved additional workload units. Grievant has not shown that Respondents violated, misinterpreted and/or inequitably applied the

COHE Agreement when they denied Grievant's request for overload compensation in the academic years of 2005-2006 and 2006-2007.

Respondents shall submit proposed Findings of Fact and Conclusions of Law, and an Order consistent with this Decision within twenty (20) days from the date of receipt of this Decision. Grievant shall have twenty (20) days from the date of receipt of Respondents' proposed Findings of Fact and Conclusions of Law to submit objections thereto or to submit 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, Respondents shall submit such stipulation along with an Order in accordance with this Decision.

Dated this 19th day of November, 2008.

SOUTH DAKOTA DEPARTMENT OF LABOR

*Catherine Duenwald*

Catherine Duenwald  
Administrative Law Judge