

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

**WAGNER EDUCATION
ASSOCIATION,**

**HF No. 19 G, 2009/10
3 U, 2009/10**

Petitioner,

v.

DECISION

**WAGNER COMMUNITY SCHOOL
DISTRICT # 11-4 and BOARD
OF EDUCATION,**

Respondent.

This matter came before the Department of Labor & Regulation when Petitioner, Wagner Education Association filed a Petition for Hearing on Grievance and Petition for Hearing on Unfair Labor Practice on June 2, 2010, pursuant to SDCL 3-18-15.2, 3-18-3.4 and ARSD 47:02:03:01. The cases were consolidated and the Department conducted a hearing on February 2, 2011, in Lake Andes, South Dakota. Anne Plooster appeared on behalf of Petitioner. Rodney Freeman represented Respondent.

Issues:

This case raises the following legal issues:

1. Whether the Wagner School District #11-4 and Wagner Board of Education violated, misinterpreted or inequitably applied the provisions of the negotiated agreement or the policies of the school district when they required Wagner Education Association members to make-up time not worked due to late starts and early dismissals caused by inclement weather during the 2009 and 2010 school year?
2. Whether the Wagner School District #11-4 and Wagner Board of Education committed an unfair labor practice when they required Wagner Education Association members to make-up time not worked due to late starts and early dismissals caused by inclement weather during the 2009 and 2010 school year?

Facts:

The facts of this case are as follows:

1. The Wagner Education Association (Association) negotiated a contract (Negotiated Agreement) with the Wagner Community School District 11-4 and Board of Education (District) for the 2009-2010 school terms.
2. The Negotiated Agreement set the teachers' term at 178.5 days, of which 3.5 days were designated for staff development and in-service activities.

- During the 2009-2010 school year, the Wagner School District (District) missed the following days or partial days:

Date Missed	Reason	Amount of Time
October 15	early dismissal – water break	3 hours, 32 minutes
November 19	state volleyball	all day
November 20	state volleyball	all day
January 6	inclement weather	all day
January 7	inclement weather	all day
January 8	inclement weather	all day
January 25	inclement weather	all day
January 26	late start – inclement weather	2 hours
February 8	early dismissal – inclement weather	2 hours, 32 minutes
February 9	late start – inclement weather	2 hours
February 16	late start – inclement weather	2 hours
February 26	state wrestling	all day

- On February 17, 2010, Superintendent Smit sent an email to staff indicating that teachers would be required to make up one day of student contact for the time missed due to late starts and early dismissals
- On April 12, 2010, the Wagner Board of Education (Board) adopted the make-up schedule discussed in Smit’s February 17, 2010 email. On May 19, 2010, the teachers worked the make-up without compensation.
- Article VII, General Policies, Section 5.0, Hours of Duty of the Negotiated Agreement states,

Teachers are expected to be in the building at 8:00 a.m. and to remain in the building until 4:00 p.m. each day except the last day of the school week when the teachers may leave as soon as the last bus has departed, unless presence is requested by the administration. Any deviation from these hours must be approved by the Administration. Teachers shall be expected to report for duty at school unless notified to the contrary whenever schools are closed due to weather and road conditions.

- Article IV, Calendar/In-Service Policies, Section 1.0 School calendar, of the negotiated Agreement states:

The Wagner School Board shall determine the school calendar in accordance with South Dakota Statute and South Dakota State Board of Education Rules. To the extent allowed by law and rules, the Board will seek suggestions for the calendar from the Wagner Education Association prior to the adoption of an official calendar for the ensuing school year. The Wagner Education Association shall appoint a committee to meet with the superintendent prior to the time that the superintendent submits a proposed calendar to the Board to

advise the superintendent of the Association's wishes regarding the school calendar. The Board shall make the final determination of the official school calendar. School will be dismissed at 2:30 on the last day of school prior to the following holidays: Thanksgiving, Christmas and Easter.

8. The school calendar for the 2009-2010 school year states in part:

Four (4) 4-hour mid-term Parent-Teacher conferences are scheduled. Students will be dismissed at 2:30 p.m. and conferences will be held from 3:30 to 7:30 p.m. The dates include September 24th (Thursday), November 24th (Tuesday), February 1st (Thursday), and March 25th (Thursday). These hours may be counted as two (2) days of student contact time under SDCL 13.26.1.

Two (2) days of Parent-Teacher conferences plus 10.5 days of professional development and in-service before and during school year plus 171 days of student contact equal 183.5 days. Teachers have a 178.5-day contract. Five days are built into the calendar for snow and other emergency dismissal and cancellations. If these emergency days are not needed during the school year, the school ending date will be adjusted up to a maximum of five days or other considerations may be made such as four-day weeks in May. Snow and emergency days have normally been made up at the end of the school year, but consideration will be given to the use of other days should an excessive number of days be required for snow or emergencies during the school year.

9. Other facts will be developed as needed.

Analysis:

Grievance:

The Association initiated this case when it filed a grievance with the District. SDCL 3-18-1.1 defines, "grievance" as follows:

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.

SDCL 3-18-1. The Department's role in grievance cases is set forth in SDCL 3-18-15.2. That statute states 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.

SDCL 3-18-15.2. In this case, the Department must determine whether the District and Board violated, misinterpreted or inequitably applied the terms of the Negotiated Agreement or the District's policies when they required Wagner Education Association members to make-up time not worked due to late starts and early dismissals caused by inclement weather during the 2009 and 2010 school year.

As the grievant, the burden of proof falls on The Association. Rininger v. Bennett County School District, 468 NW2d 423 (SD 1991). "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." Wessington Springs Education Association v. Wessington Springs School District #36-2, 467 NW2d 101, 104 (SD 1991) citing Schnabel v. Alcester School District, 295 NW2d 340 (SD 1980). "The contracts negotiated between public school districts and teachers are like any other collective bargaining agreement, and disputes over the agreement are resolved with reference to general contract law." Id. (internal citations omitted).

The Association argues that the Negotiated Agreement sets the 2009-2010 school term at 178.5 days and that the District cannot unilaterally convert those days into hours for the purpose of piecing the 12 hours and 4 minutes missed, due to weather, together to form an additional day. The District argues that the Board has the authority under the Negotiated Agreement to set the school calendar and re-schedule the missed time.

There is no question that the Negotiated Agreement and the school calendar recognize that a "day" can be something other than 8 hours for purposes of teacher compensation. For example, Article VII. Section 5.0, only requires the teachers to work 7 ½ hours on Fridays. Likewise, Article IV., Section 1.0 states, "[s]chool will be dismissed at 2:30 on the last day of school prior to the following holidays: Thanksgiving, Christmas and Easter." In addition, the 2009-2010 school calendar dictates that the students will be dismissed at 2:30 pm on the 4 days that Parent-Teacher conferences were scheduled.

There is also no question that the Negotiated Agreement and school calendar in some cases acknowledge portions of days and hours for purposes of compensation. The Negotiated Agreement provides for a term of 178.5 days. Presumably, the half day is equivalent to 4 hours or something near 4 hours, certainly something less than a whole day. Article III., Section 1.0, provides that, "[e]ach certified employee will be granted 80 hours of sick leave at the beginning of each school year." Likewise, Article III., Section 2.0, states that, "[t]eachers shall receive 16 hours of personal leave with full pay upon notifying the administration. Finally, the school calendar states in part:

Four (4) 4-hour mid-term Parent-Teacher conferences are scheduled. Students will be dismissed at 2:30 p.m. and conferences will be held from 3:30 to 7:30 p.m. The dates include September 24th (Thursday), November 24th (Tuesday), February 1st

(Thursday), and March 25th (Thursday). These hours may be counted as two (2) days of student contact time under SDCL 13.26.1.

The Negotiated Agreement grants the Board the final determination of the school calendar. Article IV. Section 1.0. Under that authority, the Board consolidated four, 4-hour time segments into 2 days for purposes of compensating the teachers. There is nothing in the record to suggest that the Association questioned the Board's authority to do so. If the Board has the authority under Article IV., Section 1.0 to "piece together" the Parent-Teacher conferences into 2 paid days, it also has the authority to "piece together" four, 2-hour time segments to make-up for early dismissals and late starts.

The Association argues that the last sentence of Article VII., Section 5.0, supports its position. The Department disagrees. That provision states:

Teachers shall be expected to report for duty at school unless notified to the contrary whenever schools are closed due to weather and road conditions.

While this provision excuses the teachers from reporting for duty when notified due to inclement weather, it does not state that the time lost cannot be made-up. The Negotiated Agreement and school policies were not violated by the District and Board's actions in this case.

Unfair Labor Practice:

The Association also contends that the District and Board's action constituted an unfair labor practice. State law defines an unfair labor practice as follows:

It shall be an unfair practice for a public employer to:

- (1) Interfere with, restrain, or coerce employees in the exercise of rights guaranteed by law;
- (2) Dominate, interfere, or assist in the formation or administration of any employee organization, or contribute financial or other support to it; provided, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;
- (3) Discriminate in regard to hire or tenure or employment or any term or condition of employment to encourage or discourage membership in any employee organization;
- (4) Discharge or otherwise discriminate against an employee because he has filed a complaint, affidavit, petition, or given any information or testimony under this chapter;
- (5) Refuse to negotiate collectively in good faith with a formal representative;
and
- (6) Fail or refuse to comply with any provision of this chapter.

SDCL 3-18-3.1. In accordance with the analysis above the Association has failed to show that the District and Board have violated any of the provision of this statute under the facts in this case.

Order:

The Wagner School District #11-4 and Wagner Board of Education did not violate, misinterpret or inequitably apply the provisions of the Negotiated Agreement or the policies of the school district when they required Wagner Education Association members to make-up time not worked due to late starts and early dismissals caused by inclement weather during the 2009 and 2010 school year. The Petitioner's grievance is dismissed. The Wagner School District and Board of Education did not commit an unfair labor practice when they required the District's teachers to make-up time not worked due to late starts and early dismissals caused by inclement weather.

Respondent's attorney shall submit Proposed Findings of Fact and Conclusions of Law, and an Order consistent with this Decision within 20 days from the date of receipt of this Decision. Petitioner's attorneys shall have 20 days from the date of receipt of Respondent's Proposed Findings of Fact and Conclusions of Law to submit objections and/or 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, Respondent's attorney shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 16th day of May, 2011.

South Dakota Department of Labor & Regulation

 /s/ Donald W. Hageman
Donald W. Hageman
Administrative Law Judge