

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

**LISA BRASEL & AFSCME LOCAL  
3968,**

**HF No. 1G, 2017/18**

**Petitioner,**

**v.**

**DECISION**

**CITY OF YANKTON,**

**Respondent.**

This matter came before the Department of Labor & Regulation when Lisa Brasel and AFSCME Local 3968 filed a Petition for Hearing on Grievance pursuant to SDCL 3-18-15.2 on August 10, 2017. The Department conducted a hearing on November 3, 2017, in Yankton, South Dakota. The matter was heard by Michelle M. Faw, Administrative Law Judge. Petitioner, Lisa Brasel and AFSCME Local 3968 was represented by Tim Hoss. Lisa Marso represented Respondent, City of Yankton.

This case presents the following legal issues:

Whether the City of Yankton violated Petitioner's procedural due process rights when Petitioner was terminated.

Whether the City of Yankton terminated the Petitioner without just cause in violation of Article 20 of the parties' collective bargaining agreement and Section 708 of the City Personnel Manual.

Facts:

AFSCME Local 3968 and the City of Yankton are parties to successive collective bargaining agreements, the most recent being effective by its terms from January 1, 2017 through December 31, 2019.

In 2000, the City of Yankton (City or Respondent) hired Lisa Brasel (Brasel or Petitioner) as an animal control officer.

On April 25, 2017, Brasel's horses and other animals were attacked at her residence by dogs owned by the granddaughter of Donna Steinbach (Steinbach), secretary with the Yankton Police Department. Brasel did not work the next day.

On April 28, 2017, Chief of Police Brian Paulsen (Chief Paulsen) instructed Brasel to go home, gather herself, and "start anew on Monday."

On May 1, 2017, Brasel forward to Chief Paulsen screenshots of Facebook Conversations regarding the April 25 incident that had been posted by the owner of the dogs. Chief Paulsen reviewed the posts and concluded they had nothing to do with the workplace.

On June 16, 2017, Kellee Irvin (Irvin), Steinbach's granddaughter and the owner of the dogs that attacked Brasel's animals, visited the Yankton Police Department to speak with Donna. While Irvin was visiting with Steinbach in the parking lot, Brasel drove into the parking lot with her animal control vehicle. Brasel exited her vehicle, and, while observing Irvin and Steinbach, held up her phone as if she were taking a picture of or recording Irvin. Steinbach later reported the incident to Chief Paulsen who subsequently completed an investigation.

Chief Paulsen contacted the Yankton County Sheriff's Department to determine whether Brasel had obtained a protection order against Irvin. Chief Paulsen learned that, while Brasel had filed a petition for protection order against Irvin and others, and while a hearing had been set for June 16, 2017, Brasel sent a text message to an employee in the Sheriff's Department, Jennifer Palsma, indicating that she had decided not to attend the hearing. When Brasel did not appear for the hearing, it was dismissed. Chief Paulsen interviewed Steinbach and Marietta Sprakel (Sprakel), another employee at the Police Department, and obtained written statements from Brasel and Steinbach.

After the June 16, 2017 incident, Brasel removed a coffee pot from a low table in the office. Brasel had purchased the coffee pot and low table. Steinbach is confined to a wheelchair and regularly used the coffee pot. Steinbach then brought her own coffee pot and placed it on the low table. Brasel removed the low table from the office and set Steinbach's coffee pot on the floor.

On June 20, 2017, Chief Paulsen reviewed the City of Yankton Personnel Manual, the Police Department policies and procedures, and Brasel's personnel file. As a result of his review and previous investigation, Chief Paulsen drafted a memorandum for City Manager Amy Nelson recommending that Brasel be placed on a paid three-day suspension and that her employment be terminated.

On June 20, 2017, Chief Paulsen met with Brasel. Following the meeting with Brasel, Chief Paulsen spoke with City Manager Nelson, who approved of his decision to suspend Brasel and terminate her employment.

On June 28, 2017, Brasel filed a grievance regarding the termination of her employment. The next day, she was notified that a grievance hearing would be held on July 10, 2017.

On July 10, 2017, Brasel, her husband, her union representative, Chief Paulsen, and Sue Berke-Hanson, the City's Human Resource Coordinator, appeared at the hearing. After the presentation of testimony and argument at the grievance hearing, City

Manager Nelson issued Brasel a letter upholding the decision to terminate her employment.

On August 10, 2017, Brasel submitted a petition for hearing on grievance to the Department of Labor and Regulation (Department)

Additional facts may be developed in the issue analysis below.

### **Analysis:**

The Department's authority to review grievances is granted by SDCL 3-18-15.2 which states, in part, "[i]f, after following the grievance procedure enacted by the governing body, the grievance remains unresolved ... it may be appealed to the Department of Labor and Regulation..."

SDCL 3-18-1.1 defines "grievance" in pertinent part as "[t]he 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..."

As an employee of the Yankton Police Department, Brasel is a public employee as defined by SDCL 3-18-1. SDCL 3-18-1 states in part "[t]he words "public employees" as used in this chapter shall mean any person holding a position by appointment or employment in the government of the State of South Dakota or in the government of any one or more of the political subdivisions thereof, or in the service of the public schools, or in the service of any authority, commission, or board, or any other branch of the public service."

The first issue to be addressed in this matter is whether the City of Yankton violated Brasel's procedural due process rights when Brasel was terminated. The Supreme Court of the United States has established that employees under a negotiated agreement have a property interest in their employment and "the Due Process Clause provides that certain substantive rights – life, liberty, and property – cannot be deprived except pursuant to constitutionally adequate procedures." Cleveland Bd. Of Educ. v. Loudermill, 105 S. Ct. 1487, 1493 (1985). In Loudermill, the Court defined what procedure satisfies the due process requirement in matters of the termination of tenured employees. "The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." Loudermill, Id at 1495. The Department must now establish whether Brasel was afforded these three elements in order to meet the due process requirement.

Brasel has argued that she did not receive adequate notice as she was not informed of the purpose of the meeting with Chief Paulsen, and, therefore, was not given adequate opportunity to introduce evidence, call witnesses, or contest the charges in a meaningful manner. In this matter, the Department finds the 8th Circuit's decision in Sutton v. Bailey, 702 F. 3d 444, (8th Cir. 2012) persuasive. In Sutton, Sutton was asked to attend a meeting without being told the subject of the meeting. At the meeting, Sutton was terminated due to a comment he had made on social media. The Court stated, "We have rejected the contention that there "must be a delay between the 'notice' and the 'opportunity to respond' accorded to a public employee." Id., at 7. Applying the reasoning of the Court to this matter, the Department concludes that Brasel had adequate notice.

At the meeting with Chief Paulsen, Brasel was given an opportunity to discuss the issues that had arisen between her and Steinbach. Brasel and Chief Paulsen discussed the situation and Brasel was able to explain her side of the story and clarify a written statement she had submitted to him. At some point during this meeting, Chief Paulsen provided Brasel with a document stating she was terminated and for what reason. The evidence is not clear at what point this document was given to Brasel. Brasel states that it was given to her immediately upon her arrival at the meeting. Chief Paulsen testified that he delayed giving the document to her at the meeting as he was still deciding whether to go through with termination. A written transcript of the meeting does not indicate when Brasel first received the document but only when she was asked to sign that she had received it. What is clear is that Brasel did receive the document indicating why she was being considered for termination and she was given opportunity to present her side of the story. "...the pretermination "hearing," though necessary, need not be elaborate." Sutton at 7. Furthermore, the Negotiated Agreement in Article 20 section 4 states in pertinent part, "The employee shall have the right to receive a written statement of the reasons for the dismissal which shall be provided to the employee at the time of the dismissal." Such a statement was provided to Brasel and she was afforded the opportunity to respond to charges against her.

Brasel has asserted that the meeting did not meet due process requirements, because the decision to terminate was made prior to the meeting. Before the meeting, Chief Paulsen had discussed Brasel's situation with City Manager Nelson. Nelson told Chief Paulsen to listen to Brasel's side before deciding whether to terminate as there may be information they did not yet know. Chief Paulsen testified that, although he had drafted the document recommending termination, he had not made a final decision on what course to take in regard to Brasel's employment. In Sutton, the 8th Circuit stated, "Due Process ... does not require *predecision* hearings. It only requires an opportunity to be heard prior to the termination of benefits." Sutton, citing Jackson v. St. Joseph State Hosp., 840 F.2d 1387, 1391 (8th Cir.) (Emphasis added by Court.) According to the reasoning in Sutton, as long as Brasel had an opportunity to present her side and attempt to correct any misunderstanding before the termination of the benefits went into effect the due process requirement has been met.

Brasel was given a written notice of the charges against her, an explanation of the evidence, and an opportunity to respond. Therefore, she was afforded due process as

required by Loudermill, 105 S. Ct. 1487, 1493 (1985). The City of Yankton did not violate Brasel's procedural due process rights when she was terminated.

The second issue is whether the City of Yankton terminated Brasel without just cause in violation of Article 20 of the parties' collective bargaining agreement and Section 708 of the City Personnel Manual.

In this matter, the negotiated agreement is an express contract between the parties. Within this express contract, the parties have agreed that termination of employment will only be for just cause. The Supreme Court of South Dakota has established that an employer can surrender its at-will employment power. "An express surrender occurs when the employer affirmatively indicates such intent by adopting written personnel policies or manuals that explicitly state that a for-cause termination procedure must be followed." Aberle v. City of Aberdeen, 718 N.W.2d 615, 9 -12 (2006). Both the Collective Bargaining Agreement between the parties and the City's Personnel Manual require that the City shall not dismiss an employee without just cause unless that employee is in his/her training period. Brasel was not in a training period, and, therefore, the City requires just cause to terminate the employment.

The Personnel Manual states what behaviors are expected of City employees. Section 709 of the Personnel Manual states:

C. Behavior. Employees shall maintain a constructive, businesslike attitude which strives to promote harmony among coworkers and respect for positions of authority at all times. Employees who are unable or unwilling to get along with superiors, coworkers, or the public, or who persist in exhibiting a negative or uncooperative attitude toward the job may be subject to disciplinary action.

D. Employees shall conduct themselves in a manner appropriate to their position as public servants and not reflect discredit upon the City.

1. All municipal employees and volunteer staff are expected to maintain high standards of conduct and cooperation in their relationships with their fellow employees, Department Heads, City officials, and the general public.

...

H. Insubordination. All employees are expected to carry out any lawful, just, and legitimate instruction or order of their superiors including compliance with these personnel rules and policies. Failure to do so may result in disciplinary action up to and including dismissal.

I. Job Performance. As job performance is the basis for reaching all goals, completing all projects, and maintaining the standards expected by the public, all employees will strive for the highest level of performance in their position.

Chief Paulsen testified that following his investigation into the situation between Brasel and Steinbach, he concluded that Brasel was not maintaining the City's expectations for its employees. After returning to work on April 25, 2017, Brasel's behavior, speaking loudly on her cell phone and making accusations against Steinbach's family, resulted in Chief Paulsen directing Brasel to go home, gather herself, and "start anew on Monday." Brasel also continued to bring Facebook posts to Chief Paulsen's attention after he told her that such online social media posts were not related to her job.

Brasel has argued that because these online posts were allegedly threats of violence, she was reporting to Chief Paulsen that she was being harassed. Section 1001 section A of the Personnel Manual states "[t]he City of Yankton maintains a zero-tolerance policy towards workplace violence, or the threat of violence, by any of its employees, customers, the general public, and/or anyone who conducts business with the city." Section 1003 section A of the Personnel Manual requires that "[e]ach incident of violent behavior, whether the incident is committed by another employee or an external individual such as a customer, vendor, or citizen, should be report to the Department Head." The language of the Personnel Manual states that presumed threats of violence or harassment are intended to be reported to the head of each department. As Chief Paulsen would receive such reports in Brasel's department, reporting these online posts was not improper and will not be considered an element of just cause.

Brasel has further argued that she did not create a hostile work environment justifying discipline under Section 709 of the Personnel Manual, because her behavior in the workplace prior to her termination did not rise to a level warranting discipline. Brasel claims that not speaking with a coworker, having her phone out in a manner suggesting she was photographing a co-worker and her granddaughter, and removing personal property from the workplace do not constitute ground for terminating for just cause. She also states that Steinbach, in her position as police secretary, would not let her in to the police station or take her calls. Brasel testified that Steinbach would transfer the call to dispatch instead of talking to her, and that Steinbach was not disciplined for engaging in similar behavior to Brasel. Steinbach denied Brasel's claims.

The City has argued that communication with the police secretary is an important aspect of Brasel's position but Brasel refused to speak to Steinbach after the April 25, 2017 incident. The City has further argued that speaking poorly of a co-worker's family and purporting to record a coworker's family is inconsistent with the standards of conduct that Brasel was expected to maintain as an animal control officer.

The Department finds the City's arguments in this matter the most persuasive. As an employee of the Yankton Police Department, Brasel was expected to behave in a manner which promotes "harmony among coworkers and respect for positions of authority at all times." Personnel Manual section 709. While Brasel was understandably upset by the incident with the dogs on her property, her behavior towards Steinbach created a hostile work environment. Talking loudly on her phone about Steinbach and her family, failing to behave in a professional manner in regard to interactions with Steinbach, and the incident with the coffee pot all indicate that Brasel was not

concerned with promoting harmony or showing respect to Steinbach or any of the other employees affected by her behavior. Brasel denies she engaged in such behavior, but the majority of the testimony and evidence contradicts her denial.

Order:

The City of Yankton did not violate Brasel's procedural due process rights when Petitioner was terminated, and Brasel was terminated with just cause in accordance with Article 20 of the parties' Collective Bargaining Agreement and Section 708 of the City Personnel Manual. Therefore, the City of Yankton did not violate, misinterpret or inequitably apply the provisions of the Negotiated Agreement or the policies of the City of Yankton Personnel Manual. The Petitioner's grievance is dismissed.

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 day 27 of March, 2018

SOUTH DAKOTA DEPARTMENT OF LABOR  
& REGULATION



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Michelle M. Faw  
Administrative Law Judge