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RE: HF Nos. 1U 2017/18, 2U 2017/18, 4U 2017/18, 5U 2017/18 – Oglala Lakota Education Association v. Oglala County School District 65-1 Board of Education

HF No. 6G 2017/18, 7G 2017/18 – Oglala Lakota Classified Education Association v. Oglala County School District 65-1 Board of Education

Dear Ms. Plooster and Mr. LaFleur:

This matter comes before the Department of Labor based on two grievances and four unfair labor practice complaints filed by Petitioners, Oglala Lakota County Education Association and Oglala Lakota County Classified Education Association (Associations), pursuant to SDCL 3-18-15.2, SDCL 3-18-3.3 and ARSD 47:02:03:04. Anne Plooster represented the Associations. Jon LaFleur represented Oglala Lakota County School District and Board of Education (District). A hearing was held before Administrative Law Judge Joe Thronson on August 30, 2018. The parties agreed to hold the hearing in Rapid City, South Dakota.

ISSUES PRESENTED:

ISSUE I: WERE PETITIONERS' PETITIONS FOR GRIEVANCES AND UNFAIR LABOR PRACTICES TIMELY?

ISSUE II: IS THE NUMBER OF PAY PERIODS IN A YEAR A MANDATORY TOPIC OF NEGOTATION

ISSUE III: DID OGLALA LAKOTA SCHOOL DISTRICT VIOLATE, MISINTERPRET AND/OR INEQUITABLY APPLY ITS POLICIES, RULES OR REGULATIONS, OR NEGOTIATED AGREEMENT WHEN IT UNILATERALLY CHANGED THE NUMBER OF PAY PERIODS FROM 24 TO 26?

ISSUE IV: DID OGLALA LAKOTA SCHOOL DISTRICT COMMIT AN UNFAIR LABOR PRACTICE WHEN IT UNILATERALLY CHANGED THE NUMBER OF PAY PERIODS FROM 24 TO 26?

FACTS

The Oglala Lakota County School District is located on the Pine Ridge Indian Reservation and operates four schools, Batesland, Wolf Creek, Rockford, and Red Shirt. The District employs approximately 375 full and part time employees. However, substitutes for classroom or classified positions constitute between 25 and 50 other employees. These employees are divided into three categories: classified, certified, and administration. Classified and certified staff are each represented by a local union. Every two years, each Association negotiates a collective bargaining agreement (CBA) with the District. The most recent certified CBA was in effect July 1, 2016 until June 30, 2018. The current classified CBA was in effect from July 1, 2017 to June 30, 2019. Both CBAs contained provisions stating that employees were to be paid on the 8th and 23rd of each month, 24 times a year. In the event either pay day fell on a weekend or holiday, staff were paid the day before resulting in a slight fluctuation in the number of days between pay periods. While most were 14 days, an early payday could result in a subsequent pay period contained as many as 17-18 days. Del Rae LaRoche, president of the certified association, testified that the language establishing 24 pay periods has been included in the certified staff CBA for at least 27 years. Allen Ecoffey, president of

the classified association, testified that the same language had been part of the classified since that group was formed in 2006.

In 2017, the District decided to change the number of pay periods from 24 to 26, and the actual paydays from fixed dates to every other Friday, thereby insuring that the length of pay periods would not be disrupted by weekends or holidays. Its reasoning for doing so was that consistent time frames between paydays would make the process more efficient. The District's superintendent, Dr. Anthony Fairbanks also testified that individual staff members had approached him from time to time and complained about the varying length of pay periods. A first reading of the proposed change occurred at a school board meeting on May 24, 2017. A second reading of the change was read at a meeting on June 21, and a final reading was held on July 25 of that year. None of the notices printed before these meetings or the subsequent minutes specifically referenced a change in the pay dates. Rather, the notices mentioned only a general "change in District Policy Manual." The school board passed a resolution at its November 2017 meeting to implement the 26 pay periods beginning in January 2018. Though, again, no reference to the change in pay schedule was listed in the November meeting notice. Employees were officially notified of this change by letter from business manager Coy Sasse on January 3, 2018, two days before the District implemented the change.

The Associations objected in writing to the changes in the policy by letters to Dr. Fairbanks on December 4, and December 5, 2017. Dr. Fairbanks responded with a letter dated December 21, 2017 dismissing the grievance as untimely. Dr. Fairbanks explained "You are grieving [the policy change] more than 30 days after the board

passed this policy, so it appears that your grievance was not timely with regard to the policy itself."

On January 23, 2018, each association filed a grievance and unfair labor practice alleging that the District had violated the CBA by enacting the new pay schedule without negotiating the issue. While the petitions were pending, the certified staff began negotiations for the 2018-20 CBA. Though the issue of the number of pay dates was not negotiated, the District issued contracts for the 2018/19 school year containing language establishing 26 pay periods.

ISSUE I: WERE PETITIONERS' PETITIONS FOR GRIEVANCES AND UNFAIR LABOR PRACTICES TIMELY?

The District first argues that neither the grievances nor the unfair labor practices filed by Petitioners were timely. Both CBAs provide "[w]henever any employee or a group of employees have a grievance, he/she or they shall meet on an informal basis with the immediate supervisor of the employee within thirty (30) days after the employee, through the use of reasonable diligence, should have knowledge of the occurrence that gave rise to the grievance."

The District contends that the Associations had constructive notice of the District's intent to change the number of pay periods with the May 2017 board meeting where the proposal was first read. In this case, the District's notice of its intent to change the number of pay periods from 24 to 26 was insufficient to establish notice before the November 2017 meeting. Neither the public notices nor the board minutes specifically reference the District's intent to change in the number of pay periods in a year. This was perplexing given that, during the November 2017 board meeting, the

school board did specifically list several other proposed changes to the district policy for a first reading. Del Rae LaRoche testified that she attended each of the three schoolboard meetings in 2017 but was never provided a copy of an agenda for each.

Even if the Associations had constructive knowledge of the changes in May 2017 as the District contends, this is not necessarily the point at which the 30-day limit commenced. The South Dakota Supreme Court considered a similar issue in *AFSCME Local 1025 v. Sioux Falls Sch. Dist.,* 2011 S.D. 76, 809 N.W.2d 349. In that case, the union filed a grievance with the district over a proposed wage increase which it felt was contrary to the language of the negotiated agreement. The parties could not agree upon a percentage increase due to a dispute over the interpretation of a legislative bill dealing with a change in the state education funding formula. The district dismissed the grievance as untimely, relying on language in the agreement which required that a grievance be filed "within thirty days of the alleged 'violation,' or within thirty days of when through reasonable diligence the violation should have been discovered." *Id.* at ¶ 7. It argued that it had given the union notice of its intent by interpreting the appropriations bill. The union appealed the grievance to the Department, which dismissed it as untimely. The circuit court then reversed and remanded to the Department which then ruled in favor of the union. The district appealed that decision, first to the circuit court and then the South Dakota Supreme Court, arguing that the grievance was untimely. The Supreme Court disagreed. It examined the language of the negotiated agreement and noted:

> In determining when the last grievable "violation" occurred, the District incorrectly focuses on the word "interpretation" to the exclusion of the word "application" in the definition of grievance. Under the parties' agreements, a grievance could be filed "concerning the interpretation of *or application* of the existing provisions of this

> agreement." (Emphasis added.) "In its ordinary sense, the term 'or' is a conjunction indicating an alternative between different things or actions.

Id. at ¶ 14 (internal citations omitted).

Turning to each of the CBAs in this case, both contain definitions of "grievance" similar to that in *AFSCME Local 1025*. Both define a grievance as "a complaint by an employee, group of employees, or the Association, based upon an alleged violation, misinterpretation, or inequitable application of any existing agreements, contract, policies rules, or regulations of the Oglala Lakota County School District." Under the CBAs' definitions of a grievance, a grievance could be based upon either the interpretation of policy or the application of existing provisions. The board's vote to adopt the change in policy at the November 28, 2017, school board meeting constituted a misapplication of a current policy. The Associations' notices of grievance fell well within the 30-day time frame as set by the CBA and were therefore timely.

Relying on the same argument. the District also argues that the Associations' petitions alleging unfair labor practices were not timely. However, "it was not the implementation of the clause that constituted an unfair practice. Rather, it was the [respondent's] failure to provide a rationale for its implementation. " *Bon Homme Cty. Comm'n v. Am. Fed'n of State, Cty., & Mun. Employees (AFSCME), Local 1743A,* 2005 S.D. 76, ¶ 43, 699 N.W.2d 441, 460. In this case, changing the number of pay periods was never a subject of negotiation and therefore the 60-day time limit had not commenced. As the issue was never negotiated, the District did not provide any rationale for the change. The District also argues that the Associations waived the right to file an unfair labor practice by not demanding negotiation on the issue. To support this argument, it cites a Minnesota State Supreme Court case, *Foley Educ. Ass'n v.*

Indep. Sch. Dist. No. 51, 353 N.W.2d 917, (Minn. 1984). The Foley Court found that the Association was given adequate notice of the District's intent to increase class load and reduce staff when it passed a resolution to do so several months before negotiations *began.* It noted, "we have held that an employer may not be charged with an unfair labor practice in the absence of a demand for negotiation following the union's receipt of information of a planned change in a term or condition of employment." Id. at 921. However, it opined:

> [W]e have also held that a union's failure to demand bargaining regarding a change in a term or condition of employment will not constitute waiver of the right to negotiate unless the record shows that the employer gave both adequate and timely notice of its intended action. *General Drivers Union Local 346 v. Independent School District No. 704,* 283 N.W.2d 524 (Minn.1979). And while the notice given need not be formal, it must be sufficient under the circumstances to inform the union "a decision has been made, or that one is imminent, before that decision is implemented.

Id.

In *Oberle v. City of Aberdeen*, 470 N.W.2d 238, 244 (S.D. 1991), our Supreme Court examined *Foley* while considering a similar question. The City notified the union of its intent to abolish three captain positions within the fire department during negotiations. The parties subsequently agreed to a new CBA for 1989 without resolving the issue of the captain positions. Three days before the union was set to vote on a new CBA, the City posted its intent to abolish the positions. The union ratified the agreement and later filed an unfair labor practice. Relying on *Foley,* the Court rejected the city's argument that the union had waived its right to file an unfair labor practice. Rather, the court distinguished *Foley* from the facts of that case, explaining:

> City argues that the four-day interval between the agreement by the negotiators and the ratification by the Union membership was a sufficient time in which Union could have demanded bargaining. We disagree. Union did not waive its right to

> bargain. The two-month interval between the posting of the notice and the effective date of the unilateral termination is not the issue. Rather, it is the three-day interval between the posting and Union's ratification meeting that is pertinent to this issue. *See NLRB v. Cone Mills Corp.,* 373 F.2d 595 (4th Cir.1967) (one month is a sufficient amount of time for union to request bargaining on a proposed unilateral change). To condone City's unilateral changes immediately after arriving at an agreement with Union would make a farce of collective bargaining.

Id. at 244.

One key difference in Foley was that there was that there was no dispute over whether the proposed changes were mandatory subjects of negotiation. Therefore, the association in *Foley* could reasonably be charged with notice of the district's intent to implement changes. The same cannot be said in this case. Since the District claimed that it did not have to negotiate a change in the number of pay periods, it would have been futile for the Associations to request the issue be negotiated. The District cannot now claim that the Associations waved their respective rights to negotiate this issue. The facts of this case more closely mirror those of *Oberle* to the extent that the District adopted a change to its policy without giving the Association adequate time to request negotiation.

ISSUE II: IS THE NUMBER OF PAY PERIODS IN A YEAR A MANDATORY TOPIC OF NEGOTATION?

The issue of which subjects are mandatory topics of negotiation was considered by the South Dakota Supreme Court *in W. Cent. Educ. Ass'n v. W. Cent. Sch. Dist. 49-4*, 2002 S.D. 163, 655 N.W.2d 916. In *West Central*, the local association gave notice to the district that it wished to make the calendar an issue for negotiation. When the district refused to negotiate, the association filed an unfair labor practice. The Department found that the district was not obligated to negotiate the school calendar.

Rather, the beginning and ending of the school year was part of the district's inherent authority to administer the school district. The association appealed to the circuit court which reversed the Department. Upon appeal of the circuit court's decision, the Supreme Court reversed, reinstating the original Department decision. In determining whether the school calendar was a mandatory subject of negotiation, the court opined: "To determine whether a subject is negotiable, the Court must balance the competing interests by considering the extent to which collective negotiations will impair the determination of governmental policy." *Id.* at ¶ 13. The Court examined three criteria to make this determination:

> 1. A subject is negotiable only if it intimately and directly affects the work and welfare of public employees.
>
> 2. An item is not negotiable if it has been preempted by statute or regulation.
>
> 3. A topic that affects the work and welfare of public employees is negotiable only if it is a matter on which negotiated agreement would not significantly interfere with the exercise of inherent management prerogatives pertaining to the determination of governmental policy.

Id. at ¶ 14.

The Court determined that the third criterion applied to the adoption of a school calendar and therefore was not a mandatory subject of negotiation. It explained its reasoning:

> [T]he school calendar not only effects teachers, but also the other school employees, students, parents, taxpayers, other school districts and cooperatives providing joint programs and activities, and in some cases, the entire community. Therefore, the school calendar is a matter of general public interest that requires basic judgments about how the government should best educate the state's children. Yet, as Association conceded at oral argument, were we to adopt its position, none of these vitally interested parties have any right to participate in the collective bargaining process that the Association wants to utilize to determine the school calendar.

Id. at ¶ 17.

Appling the court's three-part test, the Department finds that the frequency of payment is a mandatory negotiation topic. First, the frequency of payment directly affects the work and welfare of staff members. It is true that frequency of pay does not affect the overall amount each member is paid. However, staff members plan their monthly budgets around pay periods. Both associations offered testimony that a change in the frequency caused hardship on members who were forced to rearrange their budgets to accommodate the new pay schedule, and in some cases, incurred penalties because they had insufficient funds to cover bills which were automatically deducted from their accounts. Ecoffey testified that the change was especially difficult for classified members because they generally earned less than certified staff.

Second, nothing in statute prevents the parties from negotiating the frequency of pay periods. Finally, the District fails to demonstrate how negotiating this issue interferes with its ability to manage its schools or has any impact on the education of its students. Unlike the school calendar, whether teachers are paid 24 or 26 times a year has no impact on the District's overall mission of educating students. Just as staff members earn the same regardless of whether their pay is spread out over 24 or 26 pay periods, so too is it true that the cost in wages and salaries are the same to the District. The District's stated purpose for changing the number of pay periods was to assist the payroll staff in gathering payroll data to the administrative office. It argues that changing the number of pay dates to 26 will make it easier for staff to complete deadlines. However, the nature of the work necessary to complete payroll is the same. If anything,

the District is increasing the amount of work it must perform because it now must process payroll two more times per year.

ISSUE III: DID OGLALA LAKOTA SCHOOL DISTRICT VIOLATE, MISINTERPRET AND/OR INEQUITABLY APPLY ITS POLICIES, RULES OR REGULATIONS, OR NEGOTIATED AGREEMENT WHEN IT UNILATERALLY CHANGED THE NUMBER OF PAY PERIODS FROM 24 TO 26?

> 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.

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"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.'" *Wessington Springs Educ. Ass'n v. Wessington Springs Sch. Dist. No. 36-2*, 467 N.W.2d 101, 104 (S.D. 1991) (citing AFSCME Local 1922 *v. State,* 444 N.W.2d 10, 12 (S.D.1989)). There is no question that Section 4.24 of the CBA provides that staff are to be paid 24 times per year. Even if the District's argument that this issue was not a mandatory subject of negotiation is accepted, it does not change the fact that the District was bound by the language of the 2018-20 agreement. "It is a general principle of construction that a party will be held to the terms of their own agreement, and disputes will not be resolved by resort to what they might have included." *Wessington Springs Educ. Ass'n v. Wessington Springs Sch. Dist. No. 36-2,* 467 N.W.2d 101, 104 (S.D. 1991). To allow the District to unilaterally change a term in the contract would render the CBA

meaningless. The District was obliged to wait until the next round of negotiations to change it. Thus, the District violated the CBA by changing the number of pay periods from 24 to 26 before the expiration of the current CBAs.

ISSUE IV: DID OGLALA LAKOTA SCHOOL DISTRICT COMMIT AN UNFAIR LABOR PRACTICE WHEN IT UNILATERALLY CHANGED THE NUMBER OF PAY PERIODS FROM 24 TO 26?

"It is well established that as expressed in SDCL chapter 3–18, 'South Dakota law provides public employees with the opportunity to collectively bargain with their employers.'" *Council of Higher Educ. v. S.D. Bd. of Regents*, 2002 S.D. 55, ¶ 7, 645 N.W.2d 240, 242. "Under SDCL 3–18–3.1(1), it is an unfair labor practice for an employer to interfere with or restrain an employee's exercise of these rights." *Winslow v. Fall River Cty.,* 2018 S.D. 25, ¶ 16, 909 N.W.2d 713, 718. "The law requires public employers to negotiate matters of pay, wages, hours of employment, or other conditions of employment. *Sisseton Educ. Ass'n v. Sisseton Sch. Dist. No. 54-8*, 516 N.W.2d 301, 303 (S.D. 1994). "Unilateral changes cannot be made by a public employer regarding topics which are mandatory subjects of bargaining unless the employer and employees have reached a bona fide impasse and the employer has bargained in good faith. *Oberle,* 470 N.W.2d, at 242. (internal citations omitted).

In this case, the number of pay periods in a year was a mandatory subject of negotiation and the District was required to negotiate any change. At the time the District changed the number in November 2017, negotiations had not begun. Since there were not negotiations at that time, the District did not commit an unfair labor practice. Likewise, the current classified CBA is in effect until the end of 2019 and no

negotiations have begun on a new one. However, during negotiations for the 2018-20 CBA, the District did not attempt to negotiate a change, instead unilaterally inserting the language in each of the CBAs. The District therefore committed an unfair labor practice with regard to the change in the 2018-20 certified CBA.

CONCLUSION AND ORDER

The number of pay periods in the year is a mandatory topic of negotiation, and the District violated the CBA when it changed the number in the middle of the 2017-18 school. The Associations are directed to provide evidence of damages to their members caused by the breech to the Department within 30 days. The District may then have 30 days to dispute any submitted damages. Further, the District committed an unfair labor practice by refusing to negotiate the issue for the 2018-2020 certified CBA. Given the disruption that a mid-year switch would cause, the District may maintain the current pay schedule for the remainder of the 2018-19 school year. However, beginning with the 2019-20 school year, the number of pay periods shall revert to 24, and shall remain at this number unless a change is negotiated. Further, Petitioners shall wait until after the amount of damages has been considered by the Department to draft findings of fact and conclusions of law.

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION

/s/ Joe Thronson
Joe Thronson
Administrative Law Judge