

SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

**INTERNATIONAL BROTHERHOOD,
OF ELECTRICAL WORKERS, LOCAL 426,**

HF No. 1 G, 2007/08

Grievant,

v.

DECISION

BROOKINGS MUNICIPAL UTILITIES,

Respondent.

This matter comes before the Department of Labor based on a Petition for Hearing on Grievance filed pursuant to SDCL 3-18-15.2. MacDonald Smith of Smith & McElwain Law Offices, Sioux City, Iowa and Nicole Emerson of Lynn, Jackson, Shultz & Lebrun, PC, Sioux Falls, South Dakota, appeared on behalf of Grievant. A. Stevenson Bogue of McGrath, North, Mullin & Kraatz, PC, LLO, Omaha, Nebraska, appeared on behalf of Respondent. A hearing was held before the Department of Labor, Division of Labor and Management on June 17, 2008, in Brookings, South Dakota.

At hearing, Exhibits 1 through 13 were offered and received into evidence. Four witnesses, including Timothy O. Olson, Steve Miller, Bruce Dixon, and Tammy Krumm were called and presented sworn testimony. Upon consideration of live testimony and evidence presented at hearing, the Grievant's Petition for Hearing and request for relief is hereby denied.

Issues

1. Whether the filing of the grievance was timely?
2. Whether there was a violation, misinterpretation, or inequitable application of the agreement during the hiring process in denying Timothy O. Olson for the Tech III position?

Facts

Based upon the record and the live testimony at hearing, the following facts are found by a preponderance of the evidence:

1. Local 426 of the International Brotherhood of Electrical Workers (Union) is the recognized collective bargaining representative for all regular employees of Brookings Municipal Utilities (BMU).

2. The Collective Bargaining Agreement Between the Brookings Municipal Utilities and Local Union No. 426 of the International Brotherhood of Electrical Workers, AFL-CIO (Agreement) governs the parties and is at issue in this matter.
3. Timothy O. Olson (Olson), a Union member, is employed by Swiftel Communications, which is owned by the Brookings Municipal Utilities.
4. Olson currently holds a Tech II¹ position with Swiftel and maintains a BCSI² certification.
5. Olson applied for a Telecommunications Technician III³ (Tech III) position in response to a job posting.
6. Article VI, Section 7 of the Agreement governs hiring.
7. Article III of the Agreement addresses management's rights including hiring.
8. Nineteen candidates submitted applications, 7 were interviewed.
9. The final candidates for the Tech III position were tested and scored in the areas of IP technology, Wiring, Leadership, and Systems Key/PBX.
10. Dan Kruse (Kruse) and Olson were the top candidates, with scores of 60.60% and 58.60% respectively.
11. Kruse scored higher in the area of IP technology knowledge and skills; Olson scored higher in the area of Systems knowledge and skills.
12. Supervisor Bruce Dixon credibly testified that his decision was based on which employee was better suited for the position based on where he felt BMU was moving, placing the most emphasis on the IP technology skills.
13. Olson was informed on May 29, 2007 that he was not chosen to fill the Tech III position. Also on May 29, 2007, Olson informed his employer that he intended to file a grievance.
14. BMU posted notice on May 29, 2007, that the position was filled by Kruse.
15. Article IV, Section 5 details the grievance procedure in the Agreement.
16. The Union contacted Steve Miller (Miller), the business manager for the Union, on June 7, 2007; however he was out of the office on vacation until June 12, 2007.
17. Miller filed a formal grievance on June 15, 2007 alleging a violation of Article VI, Section 7, and the misuse of Article III.
18. James Adkins, the Network Operations Manager, denied the grievance on June 25, 2007.
19. On July 3, 2007, in compliance with Step Two of the grievance procedure in Article IV, Section 5B, Miller requested further consideration of the grievance.
20. Steve Meyer, the General Manager, again denied the grievance in its entirety on July 6, 2007,

¹ Olson testified his job duties as a Tech II position includes cabling, taking care of phone systems, responding to trouble tickets, and other general duties.

² BCSI refers to a certification held by some employees that deals with industry standards and codes.

³ Tech III position is summarized in the job description as a professional Telecommunication Technician. Technicians duties are to provide technical expertise in the installation, repair and maintenance of customer and company owned telecommunications equipment, design system installations and prepare price quotations.

21. Union appealed the denial of the grievance to the Department of Labor.
22. Other facts will be developed as necessary.

Issue 1

Whether filing of the grievance was timely?

SDCL 3-18-1.1 defines a grievance:

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.

The Department's role in resolving a grievance is defined by SDCL 3-18-15.2, which reads 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, 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.

The burden of proof is on the grievant. *Rininger v. Bennet County Sch. Dist.*, 468 NW2d 423 (SD 1991).

Article IV, Section 2, of the Agreement defines a grievance as follows:

Grievance means a complaint by an employee concerning the interpretation or application of the specific provisions of this Agreement or of specific rules or regulations which govern personnel practices or conditions where the complaint has not been resolved satisfactorily in an informal manner between the employee and his immediate supervisor as specified in Section 5 below.

Article IV, Section 5 of the Agreement provides:

Any employee believing he or she has a potential grievance shall discuss such grievance with his or her immediate supervisor. If his or her immediate supervisor

has failed to resolve the problem, the employee and/or his representative has five (5) working days after the occurrence of the grievance to submit to the head of his department a written grievance conforming to the standards set forth in Section 4 above. Within six working days the department head shall submit his decision in writing to the employee.

Grievant argues that filing of the grievance was timely under the terms of the Agreement which required a formal written grievance to be filed within five working days of the occurrence of the grievance. Claimant argues that under Article IV, Section 5A, Step One of the grievance procedure, the "occurrence of the grievance", which starts the five working day deadline for a filing of a formal, written grievance, does not arise unless and until actual discussions between the affected employees and management have taken place and failed. Grievant argues that until those discussions take place the five day deadline is not triggered. Grievant contends that an informal attempt at resolution never took place and therefore the five day deadline was never triggered.

Respondent argues that the grievance occurred on May 29, 2007, the day that Kruse was selected for the Tech III position and the date Olson was informed of this decision.

Dixon informed Olson that he was not chosen for the Tech III position. Olson asked why he not been selected for the position. Dixon testified that in his experience, it was an emotional time and he did not go into the why's at that time. Dixon informed Olson that if he wanted to meet at another time and discuss what he could do to improve his chances for future positions, he could. Olson testified that he did not think it was his responsibility to arrange for a future meeting.

Olson told Dixon and Tammy Krumm, the Human Resources Coordinator, on May 29, 2007, that he intended to file a grievance. Olson testified at the hearing that he had made up his mind that day [May 29, 2007] that he intended to file because he felt he was the better suited candidate. On the day that he was informed of Kruse's hire, Olson testified that he contacted the union steward to get the process started. Olson testified that he never sought out either Krumm or Dixon to discuss further the reasons he was not chosen for the Tech III position.

The alleged grievance occurred on May 29, 2007. The formal written grievance was filed on June 15, 2007, which was well past the five working day deadline. Given that the grievance was not filed within five working days as required by the Agreement, the filing was not timely. "The department's jurisdiction is lost if the grievance is not timely filed in accordance with the grievance procedures." *Cox v. Sioux Falls School Dist.*, 94 SDO 279, 514 NW2D 868, 871 (SD 1994) (quoting *Rininger v. Bennett Co. Sch. Dist.*, 468 NW2d 423, 428 (SD 1991)).

Although the timely filing issue is a threshold issue, and must be met before relief can be granted, the Department gives the analysis and ruling on the remaining issue

Issue 2

Whether there was a violation, misinterpretation or inequitable application of the Agreement during the hiring process in failing to select Timothy O. Olson for the vacant Tech III position?

Grievant alleges a violation of Article VI, Section 7 of the Agreement which states,

The employer will cause all job openings and/or vacancy to be posted on the Company bulletin boards for five consecutive working days. The posting of the job openings and/ or vacancy shall not impose upon the employer any obligation to promote or transfer present employees to such vacancies and/or openings unless such employee is, in the sole discretion of the employer, as qualified as any other applicant.

Grievant argues that Article VI, Section 7 establishes a two step process for filling a vacant position. First, Section 7 grants BMU "sole discretion" whether to choose an existing employee to fill a position or to hire an applicant from outside BMU's existing workforce. Second, once BMU makes that decision, it is required not to abuse its general management discretion under Article III, Section 1 to promote and transfer existing employees

Grievant does not challenge BMU's decision to fill the position with a member of the existing workforce. However, Grievant argues that BMU abused its general management discretion under Article III, Section 1 in its failure to place Olson in the Tech III position.

Article III, Section 1 provides,

It shall be the exclusive function of the Utility to set standards of service to be offered to the public and exercise control over its organization and operations, subject to the express terms of this Agreement. It is expressly recognized that such rights, power, authority and functions include but are not limited to, the following:

The full and exclusive control, management and operation of the utility and the physical plant; the machinery and equipment to be utilized; the right to introduce new or improved procedures, methods, processes, techniques, machines or equipment or make technological changes; the right to establish work standards; the right to establish, change, combine or eliminate jobs, positions, job classifications and descriptions; the determinations of the number of employees, the assignment of duties thereto, and the right to change, increase or reduce the same, and the direction of the working forces, including but by no means limited to hiring,

selecting and training of new employees, and scheduling, assigning, laying off, recalling, promoting, rehiring, demoting, and transfer of its employees; the right to suspend or discharge for just cause; the right to maintain order and efficiency; the right to subcontract certain functions where it is deemed to be appropriate.

Grievant argues that Olson's seniority and tenure with BMU were not considered as part of the criteria for choosing an employee. Applicants were instead tested and evaluated on wiring, systems, IP technology and leadership. Grievant argues that failure to consider seniority as one of the criteria for the job was unreasonable. Grievant also contends that Kruse and Olson possessed essentially equal scores in a majority of those areas tested and the selection process unreasonably made determinative the applicants' existing skills and knowledge of IP technology.

"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.'" *Gettysburg Sch. Dist. 52-1 v. Larson*, 2001 SD 91 ¶11 (quoting *Wessington Springs Educ. Ass'n v. Wessington Sch. Dist. No. 36-2*, 467 NW2d 101, 104 (SD 1991)). The contract language in Article III and VI is unambiguous. Neither Article III nor Article VI requires management to consider seniority or tenure with BMU as a deciding factor in filling vacant positions. It is the sole discretion of the employer to determine the most qualified candidate.

The methodology for dealing with applicants was clearly thought out and pursued. Bruce Dixon, the plant superintendent with managerial authority over the Tech III job position concluded, as a result of feedback from BMU's customers, that the IP programming function should play a large role in the Technician III position. While the top two candidates, Tim Olson and Dan Kruse, had similar scores in many areas, Kruse scored significantly higher on the IP programming test.

Grievant also argues that Olson was more qualified because he had a BCSI certification, while Kruse did not. However the list of job qualifications that accompanies the job announcement posted February 20, 2007, did not list BCSI certification as a requirement for the job, only that the candidate needed to obtain one within the first year of eligibility.

Grievant has failed to establish by a preponderance of the evidence that Respondent violated, misinterpreted, or inequitably applied its agreement, contract, ordinances, policies, or rules. Grievant's requests for relief in its Petition for Hearing are denied.

Respondent shall submit proposed Findings of Fact, Conclusions of Law, and an Order consistent with this Decision, within ten (10) days from the date of receipt of this Decision. Grievant shall have ten (10) days from the date of Respondent'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, Respondent shall submit such stipulation, along with an Order in accordance with this Decision.

Dated this 19th day of August, 2008

SOUTH DAKOTA DEPARTMENT OF LABOR

Taya M. Dockter
Administrative Law Judge