

September 9, 2010

Anne Plooster
General Counsel
SDEA/NEA
411 E. Capitol Ave.
Pierre, SD 57501

LETTER DECISION & ORDER

Sue Simons
Asst. Superintendent HR/Legal
201 East 38th Street
Sioux Falls, SD 57101

RE: HF No. 21 G, 2009/10 – Sioux Falls Education Association v. Sioux Falls School District #49-5 and Board of Education

Dear Ms. Plooster and Ms. Simons:

I am in receipt of Respondent's Motion to Dismiss in the above-referenced matter. I have also received Petitioner's Response to Respondent's Motion to Dismiss and Respondents Reply Brief in Support of Motion to Dismiss along with supporting affidavits and documentation.

Pursuant to SDCL §§3-18-15.2(1) and 1-26-18. Respondent brings this motion to Dismiss. SDCL §1-26-18 provides in relevant part,

[e]ach agency, upon the motion of any party, may dispose of any defense or claim:

(1) If the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and a party is entitled to a judgment as a matter of law[.]

SDCL § 3-18-15.2(1) provides,

If, after following the grievance procedure enacted by the governing body, the grievance remains unresolved, except in cases provided for in § 3-6A-38, 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. However, the department, upon the motion of any party, may dispose of any grievance, defense, or claim:

- (1) If the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and a party is entitled to a judgment as a matter of law[.]

Petitioner, Sioux Falls Education Association (SFEA) filed a grievance alleging a violation, misinterpretation or inequitable application of Article VI of the negotiated agreement. Superintendent Pam Homan denied the grievance on April 8, 2010; it was received by the SFEA on April 9, 2010. SFEA filed a level III grievance on April 23, 2010. The Board denied the grievance on April 29, 2010 based on untimeliness. A request for reconsideration was made on May 5, 2010. On May 7, 2010, the Board indicated it was willing to hear the grievance on its merits, but would retain its right to assert the timeliness issue. A level III hearing was scheduled for May 18, 2010.

Respondent argues that SFEA's appeal was untimely because the Superintendent rendered her decision on April 8, 2010, SFEA then hand delivered its Level III grievance on April 23, 2010, which was 16 days later. The Collective Bargaining Agreement (CBA) requires that an appeal from the superintendent's decision be referred to the Board "within 14 days of the written response" of the superintendent. "Days" are defined by the CBA to mean calendar days. Respondent argues that SFEA's failure to appeal the Superintendent's decision within 14 days deprives the Department of jurisdiction in this matter.

Although the Board did not believe that SFEA had timely appealed the Superintendent's decision, in the interest of resolving the grievance in a timely manner and of resolving grievances at the local level, the Board agreed to hear SFEA's grievance, so long as SFEA was willing to agree that such a hearing would not constitute a waiver of the timeliness issue. Respondent argues that despite giving appropriate notice of a hearing before the Board, SFEA chose not to participate in the Board's grievance hearing. Respondent argues that SFEA failed to follow the grievance procedure set forth in the CBA by not participating in good faith at Level III of the grievance proceedings before the District's Board. By not following the procedure, the Department is deprived of jurisdiction.

Petitioner argues that SFEA was present at the scheduled grievance proceedings on May 18, 2010, however there was an issue as to who was allowed to attend the proceedings and in what capacity. A dispute arose over whether the Board's attorney and members of the administration would be present in the room during SFEA's presentation. Kent Alberty, the Board President informed SFEA that Ms. Simons, the

Boards attorney would remain in the room and the administration would leave during SFEA's presentation.

SFEA agreed that due to Ms. Simons presence, they would not present their grievance because their union representative, Sue Nipe was not present. Deb Merxbauer, SFEA president informed Mr. Alberty that SFEA Grievance Committee did not feel comfortable presenting since Simons was present but Ms. Nipe was not. Mr. Alberty agreed to postpone the hearing. The members SFEA Grievance Committee then left. When Mr. Alberty informed the Board of the situation, they decided not to reschedule and wanted to hear the grievance at that time. Mr. Alberty informed the remaining members of the SFEA Grievance Committee that they would not be able to postpone and he had misspoke earlier as he did not have the exclusive authority to reschedule. Ms. Merxbauer was unable to contact the remaining members of SFEA before they left; she went before the Board and stated that SFEA was unprepared to go forward at that time. The Board then rendered a decision against SFEA. Petitioner argues that the Board's actions prevented SFEA from presenting, not SFEA failing to appeal before the board.

The grievance policy contained in the CBA states,

If the aggrieved person is not satisfied with the disposition of his/her grievance at Level Two or if no decision has been rendered within fourteen (14) days after he/she has first met with the Superintendent, he/she may within 14 days of the written response or fourteen (14) days after the meeting with the Superintendent, refer the grievance to the Board.

SFEA argues that it filed the Level III grievance on April 23, 2010, which is the 14th day from April 9, the date SFEA received the Superintendent's decision and therefore timely. SFEA argues the Boards assertion that the fourteen day requirement should begin on April 8, the day of the Superintendent's decision contradicts SDCL §2-14-14 which states,

The time in which any act provided by law is to be done is computed by excluding the first day and including the last, unless the last is a holiday and then it also is excluded.

Dismissal is appropriate when the Department lacks jurisdiction over the subject matter. Pursuant to SDCL § 3-18-15.2, the Department of Labor has jurisdiction only after the grievance procedure enacted by the governing body, in this case the grievance procedure set forth in the CBA, has been followed and the grievance remains unresolved. "The Department's jurisdiction is lost if the grievance is not timely filed in accordance with grievance procedures." *Cox v. Sioux Falls Sch. Dist.*, 94 SDO 279, 514 NW2d 868 (SD 1994) (citing *Rininger v. Bennett County Sch. Dist.*, 468 NW2d 423, 428 (SD 1991); *Schloe v. Lead-Deadwood Indep. Sch. Dist. No. 106*, 282 NW2d 610, 614 (SD 1979)).

“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.” *Wess. Spgs. Ed. Assc. v. Wess. Spgs. Sch. Dst.* 467 NW2d 101(citations omitted). “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.” *Id.*

Petitioner’s argument is without merit. SDCL §2-14-14 is not applicable in this case. The CBA addresses the terms of the grievance and the computation of time and there is no need to go beyond the four corners of the contract to define the terms. *Id.* The contract language contained in the CBA is clear and unambiguous. The time for referring the Level III grievance to the Board begins on the date of the Superintendent’s written response, which in this case was April 8, 2010. Because the Level III grievance was not referred to the Board within 14 days of the Superintendent’s written response as required by the negotiated agreement, the Department lacks jurisdiction over the grievance. Respondent’s Motion to Dismiss is hereby granted.

This letter shall serve as the Department’s Order

Sincerely,

Taya M. Dockter
Administrative Law Judge