

October 20, 2020

Paul A. Gallego
609 Hummingbird Circle
Box Elder, SD 57719

LETTER DECISION AND ORDER

Michael M. Hickey
Bangs, McCullen, Butler, Foye
& Simmons, LLP
P.O. Box 2670
Rapid City, SD 57709-2670

RE: HF No. 2G, 2019/20 – Paul A. Gallego v. Rapid City Area Schools

Dear Mr. Gallego and Mr. Hickey:

This letter addresses Respondent's Motion for Summary Judgment, Memorandum of Law in Support of Motion for Summary Judgment, Respondent's Statement of Undisputed Facts, and Affidavit of Michael M. Hickey submitted August 26, 2020; Petitioner's Letter in Response submitted September 23, 2020; and Respondent's Reply Brief in Support of Summary Judgment and Affidavit of Kristen M. Strissel submitted October 5, 2020.

Paul A. Gallego (Gallego) worked for Rapid City Area Schools (RCAS) as a Computer Support Specialist starting March 25, 2013. At all times pertinent, there was a collective bargaining agreement (Agreement) between RCAS and the Administrator/Technician Association. While employed by RCAS, Gallego was evaluated annually by his supervisor. In these evaluations, Gallego was repeatedly informed that there was concern about his manner of communication with customers and a need to improve his demeanor towards them.

In his Conference Review on August 23, 2019, Gallego was informed that although he had been given time and guidance regarding the matter of his customer service, he had not sustained improvement in that area. The reviewing supervisor recommended termination of Gallego's employment. Gallego was informed that the recommendation would be submitted to the Board of Education following the timeline outlined in the Agreement. At the time of the review meeting, the conference review was read to Gallego and his representative, he was provided a copy of the conference review, and he signed the copy of the review acknowledging that the conference review had been discussed. Gallego was also informed that details related to the dismissal of employees and any appeal rights could be found in the Agreement. He was further informed that if he had additional information that he wanted to have considered, that he could submit it to his supervisor for inclusion in the record. Gallego sent a letter to RCAS on August 29, 2019. The School Board reviewed and considered materials detailed in the Conference Review and Gallego's response. A letter was sent to Gallego advising him that the Board agreed with the recommendation for termination. Gallego filed this grievance on October 3, 2019.

RCAS has brought this Motion for Summary Judgment on the grounds that Gallego failed to follow the grievance procedure established by the Agreement and therefore, the Department of Labor & Regulation (Department) does not have jurisdiction. The Department's role in reviewing grievances is established by SDCL 3-18-15.2 which states:

If, after following the grievance procedure enacted by the governing body, the grievance remains unresolved, except in cases provided in § 3-6D-15, the grievance may be appealed to the Department of Labor and Regulation by filing an appeal with the department within thirty days after the final decision by the governing body is mailed or delivered to the employee. The department shall conduct an investigation and hearing and shall issue an order covering the points raised, which order is binding on the employee 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; or
- (2) At the close of the evidence offered by the proponent of the grievance, defense, or claim if the department determines that the evidence offered by the

proponent of the grievance, defense, or claim is legally insufficient to sustain the grievance, defense, or claim.

The Department only has jurisdiction over Gallego's grievance once he has fully availed himself of RCAS grievance procedure. Regarding a request for hearing before the Board of Education, Article XIX of the Agreement states, in pertinent, part:

In the event,[sic] the District desires to terminate the employment of any employee covered by this agreement, it shall provide written notice to the employee. The notice shall include the reasons for the proposed decision and shall provide the administrator with an opportunity to request a hearing before the Board of Education. Within seven (7) working days from the date of the notice, the administrator may request a hearing before the Board.

Therefore, Gallego has seven days following the August 23, 2019 conference review to request a hearing before the Board of Education.

On August 29, 2019, Gallego sent a letter to Human Resource Manager Kristen Strissel. In this letter, he provided his view of the events that led to the issuance of the conference review. At the end of the letter Gallego wrote,

If the board feels my attitude is beyond improvement I will accept their decision. I simply request these facts as I've stated to be included in my records. Please feel free to contact me at your earliest convenience.

Gallego asserts that he intended for this letter to act as a request for hearing. Gallego began the letter by stating, "[t]his letter is to clarify and provide additional information on several issues regarding the incident that occurred on the 15 August, [sic] 2019." Gallego acknowledges that the word "hearing" does not appear in the letter.

RCAS did not consider the letter as a request for hearing. On September 16, 2019, RCAS sent a letter to Gallego advising him that his letter would be placed in his personnel file and that a copy of the Conference Review and his response would be presented to the Board of Education for its review at its next scheduled meeting. Gallego was informed that no formal hearing would be held by the Board. Gallego did not respond to RCAS's letter. RCAS argues that Gallego did not request a hearing within the seven days required by Article XIX of the Agreement and therefore, Gallego did not follow the required procedure before appealing to the Department. Gallego asserts that the rebuttal letter he submitted was a request for hearing.

Gallego further asserts that he followed up on the letter by calling RCAS on September 5, 2019 and speaking with Ms. Strissel. Gallego claims he called to confirm his request for a hearing was received and her reply was, "I don't know how to ask for a hearing, but I will contact the Rapid City Area School Superintendent, Dr. Lori Simon." Gallego asserts that he believed this response from Ms. Strissel indicated that his request for a hearing was made within the seven-day time requirement. The phone call has been uncorroborated by Ms. Strissel and RCAS has argued that it is hearsay. The Department has decided to include it in this analysis, because even if the statement was used to prove an issue of fact in this matter, the only fact it could support is that Ms. Strissel does not know how to ask for a hearing and intended to ask Dr. Simon. Ms. Strissel's lack of knowledge does not prove that Gallego had properly submitted a request for hearing.

Upon review of the parties' submissions and the record as whole, the Department is persuaded that Gallego did not properly avail himself of RCAS's grievance procedure, and therefore, the Department does not have jurisdiction over this grievance. According to Article XIX of the Agreement, Gallego had seven working days to request a hearing before the board. The Department concludes that Gallego's letter sent on August 29, 2019 did not properly alert RCAS that he was requesting a hearing. The word hearing was not present in the document, and the introduction of the letter specifically established the purpose of the letter was to clarify and provide additional information. Therefore, RCAS Motion for Summary Judgment is granted.

ORDER:

Respondent's Motion for Summary Judgment is GRANTED.

Gallego's Grievance is DISMISSED.

This letter shall constitute the order in this matter.

Sincerely,

A handwritten signature in blue ink that reads "Michelle Faw". The signature is written in a cursive, flowing style.

Michelle M. Faw
Administrative Law Judge