July 31, 2009

Scott Niles
I.O.U.E. Local 49
PO Box 2127
Belle Fourche, SD 57717

Letter Decision and Order

Michael M. Hickey
Bangs McCullen Law Firm
PO Box 2670
Rapid City, SD 57709

RE: HF No. 3G, 2008/09 – I.O.U.E.Local 49 v. Rapid City School District No. 51-4.

Dear Mr. Niles and Mr. Hickey:

Submissions

This letter addresses the following submissions by the parties:

April 2, 2009	Affidavit of Steven Hengen;
April 3, 2009	[Respondent's] Motion for Summary Judgment;
April 3, 2009	[Respondent's] Memorandum of Law in Support of Motion for Summary Judgment.
May 11, 2009	[Petitioner's Resistance to Motion for Summary Judgment] – Letter from Gil Koetzle; and
November 19, 2008	[Respondent's] Reply Memorandum in Support of Motion for Summary Judgment.

Facts

The facts of this case as reflected by the above submissions and documentation are as follows:

1. I.O.U.E. Local 49 (Union) is a collective bargaining unit that currently represents custodians, head custodians and groundskeepers that work at the Western Dakota Technical Institute.

2. The Union and the District are parties to a negotiated agreement (Agreement) which established the terms and conditions of employment for Western Dakota Technical Institute's (District's) custodial and maintenance staff.

3. Article 30 of the Agreement provides the term of contract. That Article states the following:

> Section 1.
>
> This Agreement shall be in full force and effect from the date of its execution to and including June 30, 2010, and shall continue from year to year thereafter until and unless the parties enter into a successor Agreement.
>
> Section 2.
>
> Notwithstanding the above, the parties agree that this Agreement may be reopened by either party for the purposes of wage and group insurance.
>
> Section 3.
>
> Written notice of a desire to reopen or enter into negotiations shall be given by the:
>
> Step 1. Submission of Union proposals by March 15, 2008 and 2009.
> Step 2. Submission of Employer proposals by May 15, 2008 and 2009.
> Step 3. Negotiations to commence and continue thereafter at mutually agreeable times until an agreement is reached.

4. Article 10, Section 5 of the Agreement provides the grievance procedures. Article 10, Section 5 states the following:

> No grievance shall be recognized unless it shall have been presented at the appropriate level within twenty (20) days after the aggrieved person knew or should have known of the act or consideration on which the grievance is based, and if not so presented, the grievance will be considered waived.

5. On March 31, 2008, the Union filed a request to reopen negotiations and proposals.

6. On April 1, 2008, the District advised the Union that it would not waive the timeline established in Article 30 of the Agreements and would not renegotiate the 2008 agreement.

7. On July 31, 2008, the Union delivered its Step 1 grievance to the District because the District refused to re negotiate the Agreement. The District denied the grievance.

8. The Union appealed the denial through the grievance procedures and untimely filed an appeal with the Department of Labor on September 30, 2008.

Motion for Summary Judgment

The District has filed a Motion for Summary Judgment. The District argues that the Department of Labor lacks jurisdiction to consider the Union's grievance because the Union failed to timely file its level 1 grievance.

Summary Judgments are governed in this matter by ARSD 47:03:01:08: That regulation states:

> A claimant or an employer or its insurer may, anytime after expiration of 30 days from the filing of a petition, move with supporting affidavits for a summary judgment. The division shall grant the summary judgment immediately 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 that the moving party is entitled to a judgment as a matter of law.

The party seeking summary judgment bears the burden of demonstrating the lack of any genuine issue of material fact, and all reasonable inferences from the facts are viewed in the light most favorable to the non-moving party. Railsback v. Mid-Century Ins. Co., 2005 SD 64, ¶6, 680 N.W.2d 652, 654.

> The burden is on the moving party to clearly show an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law. *Estate of Elliott*, 1999 SD 57, ¶15, 594 NW2d 707, 710 (citing *Wilson*, 83 SD at 212, 157 NW2d at 21). On the other hand, [t]he party opposing a motion for summary judgment must be diligent in resisting the motion, and mere general allegations and denials which do not set forth specific facts will not prevent issuance of a judgment. *Breen v. Dakota Gear & Joint Co*., Inc., 433 NW2d 221, 223 (SD 1988) (citing *Hughes-Johnson Co., Inc. v. Dakota Midland Hosp.*, 86 SD 361, 364, 195 NW2d 519, 521 (1972)). See also *State Auto Ins. Companies v. B.N.C.*, 2005 SD 89, 6, 702 NW2d 379, 382. [T]he nonmoving party must substantiate his allegations with sufficient probative evidence that would permit a finding in his favor on more than mere speculation, conjecture, or fantasy. *Elliott,* 1999 SD 57, ¶16, 594 NW2d at 710 (quoting *Himrich v. Carpenter*, 1997 SD 116, 18, 569 NW2d 568, 573 (quoting *Moody v. St. Charles County*, 23 F3d 1410, 1412 (8thCir 1994))).

McDowell v. Citicorp USA, 2007 SD 53, ¶22, 734 N.W.2d 14, 21.

The first quest to be answered here is whether there are any genuine issues of material fact related to the District's Motion for Summary Judgment. Those facts as stated above are undisputed. Consequently, there is no genuine issue as to any material fact.

Jurisdiction

The second question then posed here is whether the District, based on those facts, is entitled to a judgment as a matter of law. In other words, does the Department of Labor have the jurisdiction, or legal authority, to review this case?

The governing law is well established. "The Department's jurisdiction is lost if the grievance is not timely filed in accordance with grievance procedures." Cox v. Sioux Falls Sch. Dist. 49-5, 514 N.W.2d 868, 871 (S.D. 1994) quoting Reninger v. Bennett County Sch. Dist., 468 N.W.2d 423, 428 (S.D. 1991). See also Bon Homme County Commission v. American Federation of State, County, and Municipal Employees, Local 1743A, 2005 SD 76, 699 N.W.2d 441; Larson v. Mitchell School Dist., 2000 WL 1920462 (SD Dept. Labor HF No. 3G, 1999/00 October 5, 2000).

The parties are currently bound by the terms and conditions of a negotiated Agreement. Article 10 of that Agreement sets forth the grievance procedures. Section 5 of that Article states the following:

> No grievance shall be recognized unless it shall have been presented at the appropriate level within twenty (20) days after the aggrieved person knew or should have known of the act or consideration on which the grievance is based, and if not so presented, the grievance will be considered waived.

The language used of this Section is both clear and mandatory. If the Union failed to file its grievance within twenty days after the Union learned that the District would not reopen the negotiations of the 2008 agreement, the Department of Labor is barred from hearing this case.

The District advised the Union that it would not waive the timeline established in Article 30 of the Agreement and would not negotiate the 2008 agreement on April 1, 2008. The Union did not deliver its Step 1 grievance to the District until July 31, 2008, well after the twenty day deadline. Consequently, the Department of Labor has no jurisdiction to consider this case.

Order

The District has demonstrated that there is no genuine issue as to any material fact and that the District is entitled to a judgment as a matter of law. The Department of Labor lacks jurisdiction in this matter. It is therefore, Ordered that this case is dismissed with prejudice. This letter shall constitute the order in this matter.

Sincerely,

_____

Donald W. Hageman
Administrative Law Judge