

**SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT**

**JERAMIE SOLANO,
Grievant,**

HF No. 3 G, 2003/04

v.

DECISION

**CITY OF RAPID CITY,
Respondent.**

This matter comes before the Department of Labor based on Grievant Jeramie Solano's Petition for Hearing on Grievance filed pursuant to SDCL 3-18-15.2. Paul Aylward appeared on behalf of Grievant Jeramie Solano. Michael Booher represented Respondent City of Rapid City. The Department of Labor conducted a hearing on August 19, 2004, in Rapid City, South Dakota. Upon consideration of the live testimony given at hearing and the evidence presented at hearing, Grievant's Petition for Hearing and request for relief is hereby denied.

Issue

Whether Respondent violated the terms of the negotiated agreement by not considering Grievant's seniority and qualifications, including experience.

Facts

1. Grievant began working for Respondent in 1996 as a sanitation pitcher.
2. In May of 2003, Grievant applied for a sanitation driver position with Respondent.
3. It was at this time that Respondent had updated its sanitation trucks to fully automated trucks, which eliminated the need for a sanitation pitcher.
4. Respondent interviewed Grievant for the sanitation driver position, along with several other applicants, including the applicant who ultimately received the position.
5. Grievant did not receive the promotion.
6. Grievant filed a grievance with Respondent.
7. Respondent followed the grievance procedure set forth in the negotiated agreement between the parties.
8. The grievance remained unresolved and Grievant petitioned the Department of Labor alleging that Respondent did not consider Grievant's seniority and experience as required by the negotiated agreement.
9. The negotiated agreement between the parties provides (emphasis added):

Section 8.11. Promotions.

If a permanent job vacancy occurs and it is the City's decision that such job shall be filled, the job will be posted for a period of five (5) working days, during which time all permanent employees will be permitted to bid the job. Posting will be accomplished by posting on the bulletin board at the plant, the shop, and the field office. At the end of five (5) working days, bids will be closed. If more than one

vacancy occurs for the same position in a 30 day period, the Human Resources Director and the President of AFSCME or their designees, may by mutual agreement waive this five day posting period. **The City shall take into account the following: seniority, relative qualifications and abilities, physical fitness for the position, and productivity and performance in the current or previous position. The City will select the employee to fill the job and, if any of the employees who submitted bids have greater seniority than the employee selected, the City will notify such employee or employees in writing as to why they were not selected.**

10. The negotiated agreement also provides a definition of seniority. It states at Section 8.01:

Seniority is preference or priority by length of service when vacancies occur, or new positions are created, the purpose of which is to provide declared policy of work security measured by length of service.

11. In considering each applicant for the driver position, Respondent followed its usual interview procedure, including using an interview form for each applicant.
12. The interviewers were Jerry Wright, Larry Grass and Ted Vore.
13. Jerry Wright has been the Superintendent of Solid Waste Operations for Respondent for more than seventeen years.
14. Larry Grass has been Respondent's Sanitation Supervisor for more than eight years and has been employed by Respondent for thirty-four years.
15. Ted Vore was the Assistant Public Works Director for Respondent at the time he conducted the interviews for the driver position. He is now the Acting Public Works Administrator.
16. The interview form used by Wright, Grass, and Vore included scoring an applicant in several areas and in response to several questions.
17. The interview form allowed for the consideration of seniority by each of three interviewers.
18. Each of the interviewers gave a score based upon an applicant's seniority.
19. An applicant's actual working experience was considered by each of three interviewers.
20. The interview form allowed for the consideration of each applicant's qualifications, including experience. The applicant was asked how his experience qualified him for the driver position.
21. The applicant who was selected received lower scores for seniority than Grievant from each of the three interviewers.
22. The employee selected for the driver position had less seniority than Grievant.
23. Respondent notified Grievant in a letter dated May 2, 2003, that he had not been selected for the driver position. That letter reads in relevant part:

Upon completion of the interviews and review of the applications, another applicant was selected for the position of Sanitation Truck Driver. Final selection is based upon the overall scores obtained in the interviews, review of application, and checking references.

Areas where you could improve your ability to score higher when applying for this particular job are:

1. Experience in driving and operation [of] solid waste trucks such as the fully automated rear loaders and roll-off trucks.
2. Obtain increased experience in operating equipment such as listed above to increase your confidence and operator capabilities.

We would encourage you to strengthen your knowledge, ability, skill and experience in the operation of the division trucks, including solid waste, automated, rear loaders and roll-off trucks. If you wish to visit with me on this issue, please let me know and we can set a time to meet. We appreciate your continued service and dedication to the City of Rapid City.

24. Grievant continues to work for Respondent at its recycling facility as a garbage sorter.

Issue

Whether Respondent violated the terms of the negotiated agreement by not considering Grievant's seniority and experience.

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. SDCL 3-18-15.2 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 . . . 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. Bennett County Sch. Dist., 468 N.W.2d 423 (S.D. 1991). Grievant has failed to demonstrate that Respondent violated, misinterpreted or inequitably applied the negotiated agreement. At the outset, Grievant's argument that Respondent has ulterior motives for not selecting him for the driver position fails. Having had the opportunity to observe the demeanor and attitude of each of the witnesses, the Department finds that each of the witnesses testified credibly. However, the evidence upon which Grievant relies is not sufficient to show

that he was unjustly denied the promotion because of an incident between him and Vore.

The negotiated agreement requires that Respondent take into account seniority and other factors when filling a permanent job vacancy. Each of the three interviewers considered Grievant's seniority and scored him higher on seniority than the applicant ultimately given the driver position. The negotiated agreement does not require that the applicant with the most seniority be automatically promoted. Respondent did not fail to consider Grievant's seniority.

Respondent also did not fail to consider Grievant's relative qualifications and abilities, including his experience. Grievant's answers to the interview questions were considered by each of the three interviewers. Respondent's interview questions took into consideration everything that the negotiated agreement requires. Grievant was given proper notice as to why he was not selected. Grievant was also given suggestions for improving his chances in the future. Grievant has failed to demonstrate that Respondent violated, misinterpreted or inequitably applied the negotiated agreement when he did not receive the promotion to the sanitation driver position.

Respondent shall submit proposed Findings of Fact and 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 receipt of Respondent's proposed Findings of Fact and Conclusions to submit objections thereto or to submit his own 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 26th day of October, 2004.

SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

Heather E. Covey
Administrative Law Judge