

April 4, 2013

Andrew Shiers  
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Edmond, OK 73034

*Letter Decision and Order*

Terry N. Prendergast  
Murphy, Goldammer & Prendergast LLP  
P.O. Box 1535  
Sioux Falls, SD 57101

Re: HF No. 4 G, 2012/13 – Andrew Shiers v. Board of Regents

Dear Mr. Shiers and Mr. Prendergast:

***Submissions:***

This letter addresses the following submissions by the parties:

February 5, 2013	Respondents' Motion to Dismiss Grievance for Lack of Jurisdiction and Supporting Authority;
	Respondents' Response to Petitioner's Grievance Appeal;
February 19, 2013	Petitioner's Response to Respondents' Motion to Dismiss;
March 4, 2013	Respondents' Reply to Petitioner's Response to Respondents' Motion to Dismiss

***Facts:***

The relevant facts of this case are as follows:

1. Andrew Shiers (Shiers) was employed for the 2011-2012 school year at Dakota State University in Madison, South Dakota (DSU) as an Assistant Professor of

Mathematics. Shiers was employed under the 2011 Interim Terms of the University Faculty Collective Bargaining Agreement (the Agreement) between the Council on Higher Education (COHE) and the South Dakota Board of Regents (Board). Shiers was employed on a one-year term contract, dated May 26, 2011, for the period of August 22, 2011 to May 21, 2012.

2. Prior to the end of the 2011-2012 school years, DSU notified Shiers that his contract would not be renewed for the next school term.
3. On May 21, 2012, Shiers filed a complaint with the Title IX/EEO Coordinator (Coordinator). In that complaint, Shiers alleged that his supervisor, DSU Dean of the College of Arts & Science (Dean) had sexually discriminated against him. He contended that the Dean created a hostile work environment due to her sexual harassment of him as a male. Shiers filed that claim pursuant to Section 7.1, of the Agreement which states in part:

In those cases where the grievance rests in whole or in part on allegations that an institutional action involved prohibited discrimination, the grievance will be pursued using the procedures stipulated in Board Policy No. I: 18, attached as Appendix J.

Agreement, Section 7.1.

4. After Shiers filed his discrimination complaint, the Coordinator conducted an investigation of his allegations as required by the provisions of the Board's Policy 1:18. After conducting her investigation, the Coordinator sent a letter to Shiers dated September 10, 2012, in which she stated that she had not found a reasonable basis to believe that Shiers had been subject to sexual harassment or a hostile work environment. The Coordinator then offered to meet with Shiers and the Dean in accordance with the provisions of Policy 1:18(12) (A) to discuss the circumstance which resulted in Shiers complaint. Shiers refused to meet with the Coordinator and the Dean.
5. Shiers appealed the Coordinator's determination to the Interim President of DSU (President) in a letter dated September 13, 2012. In that letter, Shiers also demanded a "full and complete" explanation of the investigations findings and conclusions.
6. In a letter dated September 28, 2012, the President stated that, "I have determined the investigation of the complaint was completed in accordance with the Human Rights Procedures, South Dakota Board of Regents Policy 1:18." The President also stated that he found that the findings and conclusions of the investigating were based on substantial evidence collected during the investigation and that he concurred with the investigation determination. The letter also set forth some of the key evidence collected during the investigation which led to the determination.

7. In a letter dated October 4, 2012, Shiers appealed the President's determination to the Board's Executive Director (Executive Director). In that letter, Shiers also stated that the President had failed to address his demand for a full explanation of the investigations findings and conclusions and again demanded that explanation.
8. The Executive Director wrote Shiers on December 6, 2012, stating that he found no basis for the Board to intervene in the matter.
9. Shiers requested a review of his discrimination complaint by the South Department of Labor & Regulation (Department) pursuant to SDCL chapter 20-13. Claimant was notified of the Department's determination on November 6, 2012.
10. In a letter dated December 17, 2012, Shiers appealed the Executive Director's denial of his demand for an explanation of the investigations findings and conclusions to the Department pursuant to SDCL chapter 3-18. The Department deals with that appeal here.
11. Additional facts may be discussed in the analysis below.

***Analysis:***

***Grievances***

This case involves two grievances by the Claimant. The first involves Claimant's complaint that the Dean had allegedly sexually discriminated against him. Claimant properly filed that complaint in accordance with the Board's Policy 1:18. Discrimination complaints are then reviewable by the Department of Labor & Regulation pursuant to SDCL chapter 20-13. The Claimant was notified on November 6, 2012, that the Department had completed its review in that case.

The second grievant arose during the investigation of the first complaint. In that complaint, Claimant alleges that the Coordinator failed to comply with the provisions of Board Policy 1:18(12) (A) by not providing him with a complete explanation of her findings and conclusions. Grievances of this nature are reviewable by the Department pursuant to SDCL chapter 3-18. SDCL 3-18-1.1 defines a "grievance" as "a complaint by a public employee ...based upon an alleged violation, misinterpretation, or inequitable application of any existing agreements, ... 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."

***Jurisdiction:***

The Department's role in reviewing grievances under SDCL 3-18 is triggered by SDCL 8-15.2. That statute states 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.

SDCL 3-18-15.2.

The Board's procedures for filing discrimination complaints are set forth in Board's Policy 1:18. The procedures for filing all other complaints are found in the Agreement at Article VII. Contract Disputes, Part A – Faculty Grievance Rights. Claimant's second grievance does not allege that the Coordinator's failure to provide an explanation of her findings and conclusions was due to discrimination. Therefore, it must be shown that Claimant followed the procedures set forth in Article VIII before the Department has jurisdiction to in this matter.

Section 8.7 of the Faculty Grievance Rights states in part:

A grievant must first present a grievance, identified as such, in writing, personally executed by an individual grievant, . . . and informally, in accordance with the prescribed grievance form [Appendix B--Grievance Form--Step 1], at the lowest administrative level having authority to dispose of the grievance and with the COHE chapter president. The grievance must be filed within fifteen (15) working days of the date on which the grievant knew or should have known of the action or condition which occasioned the grievance.

Agreement, Section 8.7. If the grievance is not resolved at Step 1, the Grievant can appeal to the president of the institution with "a prescribed grievance form [Appendix C--Grievance Form--Step 2]".

Claimant did not comply with the procedure's set forth in Section 8.7 of the Agreement. Claimant knew about the Coordinator's failure to explain her findings and conclusions when he sent his letter to the President on September 13, 2012. Yet, he did not file a grievance at the lowest administrative level on the prescribed form with 15 days.

Instead, he demanded the explanation in his letters to both the President and the Executive Director. It was not until Claimant filed his appeal with the Department on December 17, 2012, that Claimant attempted to form his demands into a complaint.

Even if Claimant had complied with Step 1 of Section 8.7, his appeal to the President was not on the prescribed form. Hence, he would have failed to comply with Step 2 of the procedure.

It appears Claimant attempted to get the grievance concerning the Coordinator's alleged failure to comply with Policy 1:18 (12) (A) before the Department by "boot strapping it to his discrimination appeal. That, he cannot do.

The two complaints are separate and distinct grievances. The only link between the two is that one allegedly occurred while investigating the other. The grievances allege different offenders. They are based on different sets of facts and allege violations of different policies. In addition, as stated above, Claimant does not allege that the Coordinator's failure to comply with Policy 1:18 was due to discrimination.

In Kierstead v. City of Rapid City, 248 N.W.2d 363, 368 (S.D. 1976), the South Dakota Supreme Court dealt with the Department's jurisdiction in a case with facts similar to those here. In that case, the Court stated:

The remaining provisions of Article XVIII set forth procedures to be followed in presenting grievances, which were not complied with by appellant. The trial court properly found that the appellant herein did not exhaust his administrative remedies by adhering to the grievance procedures adopted by the City under the mandate of the law and that, therefore, the department of labor and management relations was without jurisdiction.

Id. In this case, too, Claimant failed to comply with the grievance procedures and, the Department is without jurisdiction.

**Order:**

For the reasons stated above, the Department lacks jurisdiction in this matter and must grant the Board's Motion to Dismiss. This case is dismissed with prejudice. This letter shall constitute the Order in this matter.

Sincerely,

/s/ Donald W. Hageman  
Donald W. Hageman  
Administrative Law Judge