May 3, 2021

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LETTER DECISION AND ORDER

Jessica Rogers
Office of the City Attorney
300 Sixth Street
Rapid City, SD 57701-2724

RE: HF No. 5G, 2020/21 – Jeffrey Otto v. City of Rapid City

Dear Mr. Hagg and Ms. Rogers:

This letter addresses City of Rapid City's (Respondent) Motion for Summary Judgment and Jeffrey Otto's (Otto) Cross Motion for Summary Judgment. All responsive briefs have been taken into consideration.

Background

Otto was hired by Respondent as a police officer on July 25, 2016. As a member of the Fraternal Order of Police (FOP) bargaining unit, Otto's employment was governed by the collective bargaining agreement (Agreement) that had been negotiated between the City and the FOP for the period from January 1, 207 through December 31, 2020.

On November 12, 2020, Otto was transporting a juvenile to her foster home, when he observed a vehicle with out-of-state plates make a prolonged stop at flashing red lights at the intersection of Maple and Anamosa Streets in Rapid City. Otto

concluded that there was reasonable suspicion to stop the vehicle, but he was unable to do so due to the minor in his vehicle. Instead, he radioed for assistance.

Otto continued to follow the vehicle. While he was waiting for backup, Otto observed the driver and reported him as a "young Native American male driving a really new Mercedes car." When the driver exited the vehicle, Otto reported "Alright, so I watched it park, and it's actually a middle-aged Asian guy that got out. So yeah, it's going to be nothing."

As a result of the incident, Otto was called into speak with his supervisor, Sergeant Christopher Hunt. They discussed what happened and Otto was sent home for the remainder of his shift. On November 13, 2020, Otto was informed by letter from Lieutenant Tim Doyle that he was being suspended with pay, pending an investigation of the incident. On November 16, 2020, Otto and his union representative met with Lieutenant Tim Doyle. They discussed the incident that occurred on November 12, 2020, and Lt. Doyle questioned Otto's reasoning for first requesting assistance and then later determining a stop was not necessary. On November 17, 2020, Otto was notified by letter from Chief Don Hedrick that his employment was being terminated for racial profiling.

Pursuant to the Agreement, Otto first appealed his termination to Chief Hedrick. The Agreement breaks down the grievance process into multiple Steps. The Step I meeting was held on December 1, 2020. On December 3, 2020, Chief Hedrick denied his appeal by letter. Otto then appealed to Mayor Steve Allender. The Step II grievance meeting was held on December 18, 2020. On December 28, 2020, Mayor Allender denied the Step II grievance.

On January 20, 2021, Otto submitted a Notice of Appeal and Petition for Hearing on Grievance Pursuant to SDCL 13-18-15.2 to the Department of Labor & Regulation (Department). On February 12, 2021, Otto served Respondent with the Request for Admissions. On March 18, 2021, the Department entered its Scheduling Order setting the date for the conclusion of discovery as June 15, 2021. On April 16, 2021, Respondent provided its Answer to the Request for Admissions.

Additional facts may be developed in the issue analysis below.

Analysis

Both parties have moved for summary judgment in this matter. The Department's role in reviewing grievances and authority to dispose of grievances prior to hearing 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 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.

To prevail in a motion for summary judgment, the moving party must prove that no issue of material fact remains and that it is entitled to judgment on the issue or issues as a matter of law.

Otto has moved for summary judgment on the issue of whether Respondent violated his due process rights by failing to provide a pre-termination hearing. He also

asserts that Respondent has failed to answer his Request for Admissions in a timely manner and the Admissions are therefore deemed admitted. Admissions are governed by SDCL 15-6-36(a) which states, in pertinent part,

> The matter is admitted unless, within thirty days after service of the request, or within such shorter or longer time as the court may allow or as the parties may agree to in writing, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of forty-five days after service of the summons and complaint upon him.

Otto served the Request for Admissions on Respondent on February 12, 2021. Respondent provided its answer on April 16, 2021, after the thirty days required by SDCL 15-6-36(a). Respondent argues that the discovery deadline the Department set in the March 18, 2021, Scheduling Order requires discovery to be concluded by June 15, 2021, and therefore, Respondent had until that time to respond to discovery requests.

The South Dakota Supreme Court (Court) has addressed discovery delays related to late admissions in *Tank v. Munstedt.* In *Tank*, the Munstedts responded late to a request for admissions, and the Tanks moved for summary judgment based on the assertion that the admissions were admitted pursuant to SDCL 15-6-36(a). The Munstedts moved to permit late service of the answers and were denied. On appeal, the Court concluded that the Munstedts should have been allowed to serve the late answers as it is preferred to resolve issues on the merits and the Tanks had not shown they would be prejudiced by the service.

The Court held,

> [W]hile the district court has considerable discretion over whether to permit withdrawal or amendment of admissions, that discretion must be exercised within the bounds of this two-part test: 1) the presentation of the merits must

> be subserved by allowing withdrawal or amendment; and 2) the party that obtained the admissions must not be prejudiced in its presentation of the case by their withdrawal.

Id. at 868 citing *American Auto. Ass'n v AAA Legal Clinic*, 930 F. 2D 1117 (5th Cir. 1991)

The Court further held,

> Provision is made for withdrawal or amendment of an admission. This provision emphasizes the importance of having the action resolved on the merits, while at the same time assuring each party that justified reliance on an admission in preparation for trial will not operate to his prejudice.

Id. at 869 (citations omitted).

Otto argues that the late Answers denied him information he needed to supplement his response to Respondent's Motion for Summary Judgment. Inability to respond to a motion would amount to prejudice against Otto, because he potentially could not provide necessary evidence. However, Otto has now received Respondent's Answers, and in his reply brief in support of his Motion for Summary Judgment, he does not supplement his argument. Instead his support for his motion points to his brief filed in response to the Respondent's Motion for Summary Judgment. The additional argument in his motion's supportive brief relies on Respondent's failure to provide Answers in a timely manner. Thus, he did not use any new information from the late Answers beyond the discovery deadline. Otto's choice not to use the information provided in the Answers indicates he was not prejudiced by lacking the information when drafting his initial brief.

In *Tank*, the Court held that it is preferred "that matters be resolved on their merits and not on technical violations of the discovery rules." *Id*. at 868 (S.D.1993*)*. The Department will follow the guidance provided by *Tank*, deny Otto's Cross Motion for Summary Judgment, and decide this matter on its merits.

Upon consideration of the motions and submissions provided by the parties, the Department has concluded that issues of material fact remain in this matter and issues raised by both Respondent's and Otto's Motions for Summary Judgment will best be resolved through hearing.

Order

In accordance with the decision above, Respondent's Motion for Summary Judgment is DENIED; and

Otto's Cross Motion for Summary Judgment is DENIED.

This letter shall constitute the order in this matter.

Sincerely,

Michelle M. Faw
Administrative Law Judge