

**SOUTH DAKOTA DEPARTMENT OF
LABOR & REGULATION**

ASHLEY SAND

HF No. 9G 2021/22

Petitioner,

v.

RULING ON MOTION TO DISMISS

MITCHELL SCHOOL DISTRICT,

Respondent.

This matter is before the Department by way of Ashley Sand's (Petitioner's) Notice of Appeal and Petition for Hearing filed February 2, 2022; Mitchell School District No. 17-2 (Respondent) filed its Motion to Dismiss Appellant's Notice of Appeal and Petition for Hearing on December 19, 2022. The Department is hereby granting Respondent's motion and dismissing the matter with prejudice based on the following facts and discussion:

Facts:

1. Petitioner is a tenured teacher with Respondent district; she was a part-time teacher for Gertie Belle Rogers Elementary School at the times pertinent to this ruling.
2. On August 30, 2021, Respondent's School Board (Board) passed a mask mandate requiring all District students and staff to wear masks to school due to the COVID-19 pandemic. The mandate became effective September 1, 2021.
3. On September 1, 2021, Petitioner reported to work without wearing a mask and advised her supervisor, Principal Gubbrud, that she was not comfortable with the mandate and she would not follow it.

4. At the time the mandate became effective, Respondent and the Mitchell Education Association, collective bargaining agent for the employee unit which included Petitioner, had a negotiated agreement which included a grievance policy.
5. Said policy required an employee with a grievance to discuss the matter with the appropriate administrator for the matter involved.
6. Petitioner did not discuss a grievance about the mask mandate with Principal Gubbrud, or any other administrator or board member.
7. On October 8, 2021, Petitioner's attorney, Timothy Whalen, sent a letter to Respondent requesting a grievance hearing based on wrongful termination.
8. Respondent replied with a letter saying Petitioner had not been terminated, but placed on leave without pay and could return to work when she complied with the mask mandate.
9. Petitioner refused to return to work after Respondent's response.
10. On November 29, 2021, Petitioner's new attorney, R. Shawn Tornow, sent a letter to Respondent's attorney referencing Whalen's October 8, 2021 letter, and requesting Respondent process Petitioner's grievance.
11. On December 2, 2021, Respondent's attorney sent a letter saying Petitioner's grievance would be processed at the Superintendent's level, as Principal Gubbrud had no authority to adjust the mask mandate.
12. On December 10, 2021, Respondent's Superintendent Joseph Graves, sent a letter to Tornow dismissing Petitioner's grievance on the grounds that Petitioner had not been terminated, making the topic ungrievable; that Petitioner had not filed her grievance within twenty days of its occurrence, as required by the collective bargaining agreement; and Petitioner did not allege that any provision in the

collective bargaining agreement to which she was subject was violated (she referred to a contract between Respondent and the Mitchell Classified Education Association, which has no application to her.)

13. The mask mandate was lifted effective November 9, 2021.

14. Respondent's attorney informed Petitioner's attorney about lifting the mandate, and informed him she was able to return to work; the position she had held was filled, but an alternate position was available which Petitioner was certified to perform.

15. Additional facts will be discussed as necessary.

Discussion:

SDCL chapter 3-18 authorizes the Department to hear and decide grievances which remain unresolved following the procedure of the controlling governing body. *South Dakota Bd of Regents v Meierhenry*, 351 N.W.2d 450, 452 (SD 1984). Petitioner has no entitlement to relief until local administrative procedures have been properly exhausted. *South Dakota Bd. of Regents v Heege*, 428 N.W.2d 535, 539 (SD 1988). Petitioner did not ever take her grievance to her immediate supervisor as the contract required; that could be overlooked, as Respondent's Superintendent acknowledged the supervisor was in no position to address it. At the earliest, however, Claimant filed her grievance on October 8, 2021, well past the twenty days (beginning September 1, 2021) called for by the contract between her collective bargaining agent and Respondent, and Respondent ultimately dismissed her grievance on that ground. Petitioner did not exhaust her administrative remedies, and therefore could not seek relief from the Department.

Further, the Department agrees Petitioner's claim was based on wrongful termination, and the uncontested facts establish she was never terminated. On the contrary, despite her refusal to comply with the district's policy concerning masks, they offered her a return to work

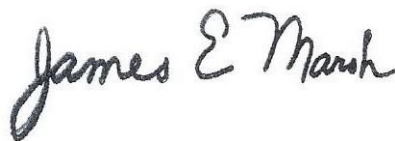
when the mandate was lifted, and she simply refused. The job was within the scope of her teacher certificate, and she had no reasonable basis to refuse it.

Any procedural issues she claims Respondent caused were rendered moot by her failure to timely pursue her grievance with Respondent. Respondent's motion to dismiss is therefore GRANTED, and Petitioner's appeal and petition are DISMISSED with prejudice.

Counsel for Respondent is directed to prepare Findings of Fact, Conclusions of Law and an Order consistent with this ruling, along with any objections to the same, for my signature within twenty (20) days of her receipt of my Decision. Counsel for Petitioner shall have twenty (20) days from the receipt of Petitioner's submissions to submit his proposed Findings, Conclusions, Order, and Objections.

Dated this 10th day of May, 2023.

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION

A handwritten signature in black ink that reads "James E. Marsh". The signature is written in a cursive, flowing style.

James E. Marsh
Staff Attorney