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LETTER ORDER ON MOTIONS

Susan Brunick Simons
Sioux Falls School District
201 East Thirty-eighth Street
Sioux Falls SD 57105-5898

RE: HF No. 18 G, 2009/10 – Sioux Falls Education Association vs. Sioux Falls School District #49-5 and Board of Education

Dear Counsel:

A Petition for Grievance was filed with the Department on April 29, 2010. In response to the Petition, Respondent filed a Motion to Dismiss or in the Alternative, a Motion for Summary Judgment. Petitioner then filed a Motion to Amend the Petition and Responses to the Respondent's Motions as well as an Alternate Motion for Summary Judgment. Respondent filed a Response to the Motion to Amend and a Reply to the Responses. The Department has taken all submissions and attached affidavits into consideration.

Petitioner alleges that for the 2008-09 school year, Respondent "violated, misinterpreted or inequitably applied the agreements, contracts, ordinances, policies or rules of the school district in requiring non-Christian employees to take wellness leave or paid or unpaid leave to observe a religious holiday not accommodated by the school calendar while paying Christian employees to observe Good Friday, designated as Spring Break on the school calendar." Petitioner also alleges that Respondents actions "created an equity issue amongst school district employees" and was "arbitrary, capricious, discriminatory, and in violation of state and federal law." Petitioner details which school policies and sections of the collective bargaining agreement were violated, misinterpreted, or inequitably applied.

The evidence indicates that the 2008-2009 school calendar designated at least two school days off for Spring Break, including a Friday which coincided with Good Friday, a Christian religious holiday that occurs two days prior to Easter Sunday. All employees received paid time off for Spring Break. Not all employees are Christian. Any employee who wishes to take time off for religious purposes must request time off in advance.

Petitioner filed the grievance pursuant to the procedure set out in the collective bargaining agreement (CBA). The grievance was filed with the local administration and subsequently denied. Petitioner appealed the denial by filing with the Department pursuant to SDCL Chapter 3-18.

The Department hereby grants Petitioner's Motion to Amend, Denies Respondent's Motion to Dismiss and Grants Respondent's Motion for Summary Judgment. Analysis of each Motion follows.

**Allegations of Grievance**

Petitioner alleges that Respondent violated, misinterpreted or inequitably applied the School District Policies AC, ACD, and IMB; also that Respondent violated, misinterpreted or inequitably applied sections of the CBA: Article II, Section C; Article V, Section C; and Article X, Sections D and E.

Policy AC is a basic equal employment opportunity statement "The District prohibits discrimination in its policies, employment practices and programs on the basis of race, color, creed, religion, age, gender, sexual orientation, disability, national origin or ancestry."

Policy ACD reads in part:

> The Sioux Falls School District and its employees shall not promote any religious belief or non-belief, and none shall be disparaged. Instead, the School District shall encourage all students and staff members to appreciate and be tolerant of each other's religious views. The School District shall utilize educational opportunities to foster understanding and mutual respect among students and parents, whether it involves race, culture, economic background, or religious beliefs. In that spirit of tolerance, students and staff members shall be excused from participating in practices that are contrary to their religious beliefs unless there are clear issues of overriding concern that would prevent it.

Policy IMB states in part: "[t]he District's calendar should be prepared so as to minimize conflicts with religious holidays of all faiths."

Article II, Section C is entitled "Responsibilities and Rights" and is contained in the Section of "Negotiation Procedures". The Section contains seven (7) subsections. While not specified by Petitioner, subsections 1 and 3 deal with non-discrimination and Constitutional rights. These subsections grant to employees rights guaranteed under South Dakota and Federal Law and the Constitution of the United States.

Article V, Section C deals with the School Calendar, there are four (4) subsections. None of these subsections deal with religious holidays or leave due to religious reasons.

Article X, Sections D contains subsections on Adoptive Parent Leave, Court and Jury Leave, Political Activity Leave, Military Leave, Association Leave, and Personal Leave without Pay. Article X, Section E is in regards to Personal Leave and Wellness Leave (Discretionary Leave). Neither section specifies which type of Leave shall be granted to employees for the practice of religious holidays.

**Motion to Amend Petition**

The grievance as initially filed with Respondent on September 30, 2008, and as filed with the Department as a Petition for Hearing, requested the following remedy (in part): "The Sioux Falls School District will allow all employees to take at least one paid religious holiday."

The Petitioner seeks to amend the remedy sought in the Petition for Hearing. The Amended remedy would read (in pertinent part): "The Sioux Falls Board of Education, the Sioux Falls School District #49-5 and/or its agents be ordered to provide one day of paid religious leave for employees of non-Christian religions if the school district provides one day of paid religious leave for employees of Christian religions."

SDCL §15-6-15(a) provides, in part: "[A] party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." The South Dakota Supreme Court has written, "A trial court may permit the amendment of pleadings before, during, and after trial without the adverse party's consent." *Dakota Cheese, Inc. v. Ford*, 1999 SD 147, 603 NW2d 73 (internal citations omitted). This court further stated that "the most important consideration in determining whether a party should be allowed to amend a pleading is whether the nonmoving party will be prejudiced by the amendment." (quoting *Isakson v. Parris*, 526 NW2d 733, 736 (SD 1995)); See also *McDowell v. Citicorp Inc.,* 2008 SD 50, ¶16, 753 N.W. 2nd 209, 214.

The Amendment seeks to change the remedy. Respondent argues that the Amendment is futile and therefore should not be allowed. However, Respondent has not demonstrated how they will be prejudiced by the amendment to the Petition.

The Motion to Amend Petition is granted. The Motion to Dismiss and the Motion for Summary Judgment will be decided based upon the Amended Petition.

**Motion to Dismiss**

Respondent files the Motion to Dismiss based upon a lack of jurisdiction by the Department. Respondent argues that 1) the Department does not have jurisdiction over Respondent's policies or 2) that the Department does not have jurisdiction to hear issues regarding the U.S. Constitution.

The Grievance procedure for Public Employee Unions is found in SDCL Chapters 3-18 and 1-26, and ARSD Article 47:02. SDCL §3-18-1.1 defines "grievance" as follows:

> 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.

SDCL §3-18-1.1.

Respondent makes the argument that only the provisions contained within the CBA are grievable. However, South Dakota law allows for a grievance to be filed against a public employer regarding "an alleged violation, misinterpretation, or inequitable application of any existing agreements, contracts, ordinances, policies or rules of … the public schools… as they apply to the conditions of employment." SDCL 3-18-1.1. Therefore, Respondent's Policies, as applied to the conditions of employment, are proper issues for a grievance.

Respondent also argues that the Department lacks jurisdiction due to the nature of the grievance. The grievance is premised upon an allegation of religious discrimination in the application of the CBA and District Policies. The prohibition of religious discrimination and employer standards are codified at SDCL Chapter 20-13 and ARSD 20:03:10. This is based upon The Civil Rights Act of 1964, specifically Title VII which prohibits employment discrimination on the basis of race, color, religion, sex and national origin. 42 USC § 2000e et seq (as amended).

However, the CBA and the District Policies have the same or similar requirements as SDCL Chapter 20-13 and Title VII of the Civil Rights Act of 1964. Therefore, the grievance analysis of whether Respondent followed the CBA and the Policies will be similar to an analysis of whether a party violated SDCL Chapter 20-13 or Title VII.

To be clear, this grievance will not have the same remedies or rights as afforded a discrimination claim brought under Chapter 20-13, but only those rights and remedies given under Chapter 3-18.

The Motion to Dismiss is denied. The Department has jurisdiction over the grievance filed by Petitioner.

**Cross Motions for Summary Judgment**

The facts of this case are fairly simple and uncontroverted. Respondent schedules at least three breaks on the school calendar, including Winter, Spring, and Summer Break. For the 2008-2009 School Year, Respondent scheduled one of the days for Spring Break on the same date as the Christian Holy Day of Good Friday. All employees were given paid time off for Spring Break. It is Respondent's practice that employees who wish to be absent from work due to a religious Holy Day or requirement must request leave in advance. Religious leave is not necessarily paid leave.

Respondent and Petitioner have filed cross Motions for Summary Judgment. The law governing a summary judgment on a grievance is as follows:

> If, after following the grievance procedure enacted by the governing body, the grievance remains unresolved, except in cases provided for in § 3-6A-38, it may be appealed to the Department of Labor, if notice of appeal is filed with the department within thirty days after the final decision by the governing body is mailed or delivered to the employee. 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. 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 it determines that the evidence offered by the proponent of the grievance, defense, or claim is legally insufficient to sustain the grievance, defense, or claim.
> Nothing in this section may be interpreted as giving the department power to grant tenure or promotion to a faculty member employed by the Board of Regents.

SDCL §3-18-15.2.

The facts stated above are not at issue. The issues that remain are questions of law or mixed questions of law and fact. Did Respondent violate, misinterpret, or inequitably apply school district policies or the provisions within the CBA?

School Policy reflects state and federal law regarding discrimination on the basis of religion, in that Respondent shall not discriminate on the basis of religion. All employees were given paid time off for Spring Break. Petitioner argues that non-Christian employees should receive an alternative religious paid day off of their choice, instead of being paid for the Friday of Spring Break.

The paid time off for Spring Break is given to all employees without regard to any religious preference. Petitioner is only objecting to being paid for the Friday of Spring Break and not any of the other days scheduled for Spring Break. The evidence does not indicate that Respondent, when making the school calendar, took into consideration which religion, if any, employees practice. There is no indication from the pleadings or submissions, that there are more Christian employees than non-Christian employees or vice versa. There is also no evidence whether any non-Christian Holy Days also fall on the Friday prior to Easter.

In the recent Federal case of *Wigg v. Sioux Falls School District 49-5*, the United States Court of Appeals, Eighth Circuit wrote, "Of utmost importance in Establishment Clause inquires is whether the government regulation is neutral towards religion. The guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Wigg v. Sioux Falls School District 49-5*, 382 F.3d 807, 814 (8th Cir. 2004) (internal quotation omitted) (citing *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 839, 115 S. Ct., 2510 (1995)).

Respondent, in this case, has a neutral policy regarding time off for religious purposes, in that if a teacher wants time off, it is granted as personal leave. Respondent also showed neutrality in paying all employees for Spring Break, no matter if one of the days happened to land on a holy day or not. In the spring of 2009, all teachers were given the Friday, prior to Easter, off work for a paid Spring Break holiday. There is no evidence that any employees are Christian or that any employees even celebrate that Friday as Good Friday. Likewise, there is no evidence of how many teachers, if any, are not Christian and do not wish to be paid for one day of Spring Break that lands on Good Friday. The evidence only indicates that one day of the Spring Break landed on Good Friday and that all employees received paid leave for that day. It is clear that Respondent does not pay employees to observe Good Friday, but pays employees for time off due to Spring Break.

South Dakota law sets out how an employer must accommodate employees in the practice of religion. ARSD 20:03:10:01 states, "An employer must make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of

the employer's business." The filings indicate that Respondent's practice is to give leave to any employee who desires time off for the practice of religion. Petitioner has not argued that Respondent has not given leave for religious practice in the past.

The 10th Circuit Court of Appeals, in the case of *Pinsker v. Joint Dist. No. 28J of Adams & Arapahoe Counties*, was presented with a similar issue. In this case, an employee who practiced the Jewish faith brought suit against the school district for failure to reasonably accommodate his religious practices. Like the teacher in *Pinsker*, Petitioner has not requested more leave, only that the policy be changed to, in effect, determine whether teachers perceive the Friday before Easter as a religious holiday or not or whether they will receive a paid day off of their choosing for religious purposes.

In their decision, the Appeals Court affirmed the lower court's decision and wrote:

> Title VII requires reasonable accommodation. It does not require employers to accommodate the religious practices of an employee in exactly the way the employee would like to be accommodated. Nor does Title VII require employers to accommodate an employee's religious practices in a way that spares the employee any cost whatsoever. …Because teachers are likely to have not only different religions but also different degrees of devotion to their religions, a school district cannot be expected to negotiate leave policies broad enough to suit every employee's religious needs perfectly.

*Pinsker v. Joint Dist. No. 28J of Adams & Arapahoe Counties*, 735 F.2d 388, 390-91 (10th Cir. 1984). See also *Brener v. Diagnostic Center Hospital*, 671 F.2d 141, 145-46 (5th Cir. 1982); *Chrysler Corp. v. Mann*, 561 F.2d 1282, 1285 (8th Cir. 1977), cert. denied, 434 U.S. 1039, 98 S.Ct. 778, 54 L.Ed.2d 788 (1978).

Respondent schedules a number of different breaks during the year for both students and teachers. Each of these breaks may or may not land on a day that is recognized by a religion as being a Holy Day. Respondent's policy for scheduling does not promote or give weight to any specific religion. The evidence shows that Respondent followed this policy in making the calendar for the 2008-09 school year.

The standards for the granting of a motion for summary judgment are clear. The South Dakota Supreme Court has written:

> Summary judgment shall be granted '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 judgment as a matter of law.' … All reasonable inferences drawn from the facts must be viewed in favor of the nonmoving party. 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. 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.'

*Chilson v. Kimball School District No. 7-2*, 2003 SD 53, ¶7, 663 NW2d 667,669 (quoting *Greene v. Morgan, Theeler, Cogley & Petersen*, 1998 SD 16, ¶6, 575 NW2d 457, 459).

The pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that Respondent is entitled to judgment as a matter of law. The evidence does not show that Respondent violated, misinterpreted, or inequitably applied school policies and the CBA in the 2008-2009 school year.

In Conclusion, the Department grants Petitioner's Motion to Amend, Denies Respondent's Motion to Dismiss and Grants the Motion for Summary Judgment in favor of Respondent. This Letter serves as the Department's Order.

Dated this __19th___ day of August, 2010.

BY THE DEPARTMENT,

____/s/ Catherine Duenwald__
Catherine Duenwald
Administrative Law Judge