March 31, 2009

Anne Plooster
South Dakota
Education Association
411 East Capitol Avenue
Pierre, SD 57501

Letter Decision and Order

Sandra Hoglund Hanson
Davenport, Evens, Hurwitz
& Smith, LLP
PO Box 1030
Sioux Falls, SD 57101-1030

Re: HF No. 6G, 2008/09; 7G, 2008/09; 8G, 2008/09; 9G, 2008/09 – Sioux Falls Education Association v. Sioux Falls School District # 49-5 and Board of Education.

Dear Ms. Plooster and Ms Hoglund Hanson:

This decision addresses the Sioux Falls School District's Motions to Dismiss Petitions for Hearing on Grievance which were filed in the above referenced cases. These cases are consolidated for purposes of this decision because the motions and facts of the cases relevant to the motions are identical. This decision addresses the following submissions by the parties:

January 13, 2009	Affidavit of Darin Daby.
January 13, 2009	Affidavit of Pamela J. Homan.
January 14, 2009	[Respondent's] Motion to Dismiss Petition for Hearing on Grievance (4 separate submissions).
January 14, 2009	[Respondent's] Brief in Support of Motion to Dismiss Petitions for Hearing of Grievance.
February 3, 2009	Affidavit of Deb Merxbauer in Opposition to Respondent's Motion to Dismiss Petition for Hearing on Grievance (4 separate submissions).

February 6, 2008	Petitioner's Response to Respondent's Motion to Dismiss Petition for Hearing on Grievance. (4 separate submissions).
February 6, 2009	Petitioner's Brief in Support of Petitioner's Response to Respondent's Motion to Dismiss Petition for Hearing on Grievance (4 separate submissions).
February 18, 2009	[Respondent's] Reply Brief in support of Motion to Dismiss Petitions for Hearing on Grievance.

FACTS

The facts of these cases as reflected by the above submissions are as follows:

1. Sioux Falls Education Association (SFEA) and the Sioux Falls School District # 49-5 (School District) negotiated and implemented the following grievance policy:

   Section F - Formal Procedures

   3. Level Three – The Board

   If the aggrieved person is not satisfied with the disposition of his/her grievance at Level Two or if no decision has been rendered within fourteen (14) days after he/she has met with Superintendent, he/she may within fourteen (14) days of the written response or fourteen (14) days after meeting with the Superintendent, refer the grievance to the Board.
2. On September 26, 2008, SDEA filed four class action grievances with the School District at Level II, Superintendent Level.
3. On October 24, 2008, the grievances were heard by the School District's Superintendent, Pamela Homan in a meeting with SFEA, in accordance with grievance policy.
4. After the October 24, 2008, meeting, the grievance policy required Superintendent Homan to issue a written determination regarding the grievances by November 7, 2008. If the Superintendent failed to issue her determination by that date, SFEA was required to refer the grievances to Level III, the Board of Education by the same November 7, 2008 date.
5. SFEA president, Deb Merxbauer, hand delivered the referral for all four grievances to the Board of Education at the School District's administrative offices at 4:30 pm on November 7, 2008. The School District hand delivered Superintendent Homan's written determinations to SFEA at SFEA offices at approximately 4:45 pm, on the dame day.

6. On November 10, in a phone conversation between President Merxbauer and Superintendent Homan, Merxbauer agreed that SFEA's, Level III, grievance filings were premature in light of the fact that Superintendent Homan's determinations had been issued on November 7, 2008. Merxbauer agreed that Homan could shred SFEA's grievance filings.
7. Once Superintendent Homan issued her determinations on November 7, 2008, the grievance policy required SFEA to refer the grievances to Level III, the Board of Education by November 21, 2007.
8. On November 19, 2008, President Merxbauer mailed the four grievance filings to Darin Daby, President of the Sioux Falls Board of Education at his residence by certified mail return receipt requested.
9. President Daby signed for SFEA certified letter and received the grievance filings on November 24, 2008.

MOTION TO DISMISS PETITION FOR HEARING ON GRIEVNCE

In its Motion to Dismiss Petition for Hearing on Grievance, the School District contends that the Department of Labor lacks jurisdiction in these cases because SFEA failed to timely file its Level III grievances. SDCL 3-18-15.1 requires school districts to enact, "by agreement" a procedure which its employees may follow for prompt informal disposition of grievances. A grievance is defined by statute as "a complaint by a public employee or group of public employees based upon an alleged violation, misinterpretation, or inequitable application of any existing agreement …." SDCL 3-18-1.1.

"The Department's jurisdiction is lost if the grievance is not timely filed in accordance with grievance procedures." Cox v. Sioux Falls Sch. Dist. 49-5, 514 N.W.2d 868, 871 (S.D. 1994) quoting Reninger v. Bennett County Sch. Dist., 468 N.W.2d 423, 428 (S.D. 1991). See also Bon Homme County Commission v. American Federation of State, County, and Municipal Employees, Local 1743A, 2005 SD 76, 699 N.W.2d 441; Larson v. Mitchell School Dist., 2000 WL 1920462 (SD Dept. Labor HF No. 3G, 1999/00 October 5, 2000).

School District has implemented a negotiated grievance policy in accordance with SDCL 3-18-15.1. That policy required SFEA to, "refer the grievance (or grievances) to the Board" by November 21, 2008. The question in this case then becomes, whether SFEA "referred" its grievances to the board within the meaning of the grievance policy, when Merxbauer mailed the grievance filings on November 19, 2008?

The contracts negotiated between public school districts and teachers are like any other collective bargaining agreement, and disputes over the agreement are resolved with reference to general contract law. Wessington Springs Education Association v. Wessington Springs School District Dist. No. 36-2, 467 NW2d2d 101, 104 (SD 1991) citing, 78 CJS Schools and School Districts 192 (1952);

Cords v. Window Rock School 8, 22 Ariz.App. 233, 526 P2d 757 (1974). "When the terms of a negotiated agreement are clear and unambiguous, and the agreement actually addresses the subjects that it is expected to cover, "there is no need to go beyond the four corners of the contract." Wessington Springs, at 104.

"A contract is not rendered ambiguous simply because the parties do not agree on it proper construction or intent upon executing the contract." Ducheneaux v. Miller, 488 NW2d 902, 909 (SD 1992) (internal citations omitted). "In cases such as this one where the parties to a contract cannot agree on the interpretation of a word in the contract, this Court will apply the "plain and ordinary" meaning of the disputed term." Prudential Kahler Realtors v. Schmitendorf, 2003 SD 148, ¶10, 673 NW2d 663, 665 citing, Opperman v. Heritage Mutual Insurance Co., 1997 SD 85, ¶4, 566 NW2d 487, 490; Economic Aero Club, Inc. v. Avemco Ins. Co., 540 NW2d 644, 645 (SD 1995) (additional citations omitted)).

Courts routinely determine the "plain and ordinary" meaning of a word or phrase in a contract by looking to the dictionary definition of the word or phrase. See Prude Prudential Kahler Realtors, 203 SD 148, ¶ 10. In its brief, SFEA references Merriam-Webster Online Dictionary, www.merriam-webster.com. That source defines "refer" as, "2 a**:** to send or direct for treatment, aid, information, or decision." Likewise, Answers.com Online Dictionary, www.answers.com defines "refer" as, "4. [t]o submit (a matter in dispute) to an authority for arbitration, decision, or examination."

It seems clear from these definitions that the grievance policy in this case only required the SFEA to send, direct, or submit the grievance filings by November 21, 2008. That was accomplished when Merxbauer mailed the documents on November 19, 2008. These definitions do not suggest that physical delivery of the filings.

The School District argues that past practice required hand delivery of SFEA's grievance filings at the School District's administrative office. Its argument falls short. Past practice is discussed in Oberle v. City of Aberdeen, 470 NW2d 238, 246-247 (SD 1991). That case states

> If a past practice which does not derive from the express terms of a bargaining agreement becomes a part of the employer's structure and conditions of employment, it takes on the same significance as the other terms of employment and is protected from unilateral change. Mid-Michigan Educ. Ass'n v. St. Charles Community Schools, 150 Mich.App. 763, 389 NW2d 482 (1986); Board of County Comm'rs of Orange County v. Central Fla. Professional Fire Fighters Ass'n, 467 So.2d 1023 (Fla.Dist.Ct.App. 1985). The key to determining whether time trading is part of the collective bargaining agreement is the intention of the parties to be bound by their agreement. Daniel Const. Co. v. International

> Brotherhood of Teamsters, Local Union No. 991, 364 FSupp 731,737 (SD Ala. 1973). Here, the time trading policy is not only well established, but it has also enjoyed recognition by City over the years. By their conduct, both City and Union have manifested their intention to be bound by a policy which permits firemen to trade their work hours with permission. We agree that the time trading policy has become a condition of employment and is a part of the collective bargaining agreement. As such, the policy is a mandatory subject of negotiation and cannot be unilaterally changed.

Here, the School District referenced only one occasion where the parties hand delivered their respective filings. That does not constitute a "well established practice". In addition, both parties did not "manifest their intent to be bound" by the practice. Merxbauer mailed the grievance filings on November 19, 2008, well ahead of the November 21, 2008, deadline. Had she deemed it necessary to hand deliver the documents, there was ample time to do so. SFEA did not sit on their rights here. Obviously, Merxbauer did not feel bound to hand deliver the documents.

School District cites several cases to support its. Those cases are distinguishable from the case at bar. The language in most of those cases required one party "to provide notice" to the other party, in other words "to provide notification". These terms dictate that a transfer of knowledge take place. That is clearly a higher level of responsibility than the language in this case demands. The parties in those cases are required to do more than send or direct documents. Information must also be delivered before transfer of knowledge can take place.

In this instance, the grievance policy only required SFEA to refer or send the grievance filings. Therefore, it must be concluded that SFEA "referred" its grievances to the board within the meaning of the grievance policy, when Merxbauer mailed the grievance filings on November 19, 2008.

ORDER

For the reasons discussed above, the School District's Motions to Dismiss Petition for Hearing on Grievance are denied.

Sincerely,

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Donald W. Hageman
Administrative Law Judge