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DECISION on MOTION FOR SUMMARY JUDGMENT

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RE: HF No. 7U / 8U, 2011/12 – AFSCME Council 59-Local 169 v. City of Huron

Dear Mr. Sandven and Mr. Kaufman:

The Department has received and reviewed the City of Huron's (hereinafter Respondent) Motion for Summary Judgment, the American Federation of State Local and Municipal Employees' (hereinafter Petitioner) Response, and the Final Reply by Respondent, as well as supporting affidavits and evidence submitted by the parties. The Motion for Summary Judgment is hereby granted in all respects.

Respondent's Motion for Summary Judgment is made pursuant to SDCL §1-26-18 which reads in pertinent part:

> However, each agency, upon the motion of any party, may dispose of any 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;

SDCL §1-26-18.

The Unfair Labor Practice Complaints were filed by Petitioner on December 12, 2011. On January 4, 2012, by agreement of the parties, the Complaints were combined as they dealt with the same issue.

Petitioner alleges that Respondent denied union representation to Todd Larsen and other employees of Respondent covered by AFSCME Co. 59 Local 169, during an investigation into allegations of misconduct and that denial by Respondent was an Unfair Labor Practice (ULP).

Petitioner also alleges that Respondent allowed personal attorneys and not union representation in hearings that concerned potential discipline and /or termination of employees and that this practice of allowing attorneys is an incentive for nonparticipation in employee organizations and discriminates against employee organizations. Petitioner also alleges that Respondent interfered in the Petitioner's ability to administrate proper investigations into alleged incidents, in violation of the collective bargaining agreement Article 12.12. Petitioner alleges these actions of Respondent were Unfair Labor Practices in violation of SDCL 3-18-3.1(1), (2), (3), and (6). The pertinent statutes read:

> It shall be an unfair practice for a public employer to:
>
> (1) Interfere with, restrain or coerce employees in the exercise of rights guaranteed by law;
>
> (2) Dominate, interfere or assist in the formation or administration of any employee organization, or contribute financial or other support to it; provided, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;
>
> (3) Discriminate in regard to hire or tenure or employment or any term or condition of employment to encourage or discourage membership in any employee organization;
>
> (6) Fail or refuse to comply with any provision of this chapter.

SDCL § 3-18-3.1. The pertinent section of the imposed collective bargaining agreement (CBA) between the parties is as follows:

> Article 12.12 Miscellaneous – (a): any accredited representative of Council 59 or the AFSCME International Union may investigate or present any grievance during work hours provided that such action does not take more than a reasonable amount of time.

FACTS:

The facts material to the outcome of this case are: (1) whether Respondent refused to allow Petitioner to have union representation present during an investigation and (2) whether there was a grievance pending against Respondent by Petitioner. The remainder of this case involves questions of law. Disputes of fact are not material unless they change the outcome of a case under the law. *Hall v. South Dakota Dept. of Transportation*, 2011 SD 70, ¶9 n.3 (citing *Jerauld Cnty. v. Huron Reg'l Med. Ctr., Inc.*, 2004 S.D. 89, ¶ 41 n.4, 685 N.W.2d 140, 149 n.4). There are no other facts that would change the outcome of this case.

Respondent admits that employees Richard Skorheim and Todd Larsen requested union representation at an internal investigation conducted by a third party investigator, Lisa Hanson Marso. Ms. Marso was not hired as an attorney for Respondent for this specific investigation, but as a neutral investigator. Ms. Marso's investigation is not protected under the attorney-client privilege. Mr. Skorheim requested the presence of his attorney during the investigation. Ms.

Marso allowed Mr. Skorheim's personal attorney to be present. Mr. Skorheim's attorney is also the attorney for Petitioner in this case.

Ms. Marso refused to allow Mr. Skorheim or Mr. Larsen to have union representation during the interviews. This has been admitted by Ms. Marso. Respondent required employees to participate in the investigation and did not allow union representation to be present. Private attorneys were allowed to represent their client in their individual interview with Ms. Marso.

The interviews and investigation took place on December 8 and 9, 2011. At that time, none of the employees or Petitioner had filed a grievance against Respondent, pursuant to the collective bargaining agreement and state law. The investigation was not regarding a grievance. Sixteen employees were interviewed by Ms. Marso on December 8. On December 9, 2011, Ms. Marso interviewed one employee by telephone. The investigation involved an allegation of sexual harassment by employees, specifically Mr. Skorheim and Mr. Larsen, towards their immediate supervisor.

At the time of the investigation and interviews, Petitioner alleged and informed Ms. Marso that these claims of harassment were leveled against Mr. Skorheim and Mr. Larsen because of their union involvement. Mr. Skorheim is the union steward and Mr. Larsen was the incoming union president. Ms. Marso addressed those allegations in her report. Ms. Marso did not make any recommendations regarding the discipline of any employees nor was she given any authority to discipline the people she interviewed. The interviews were conducted as an independent fact-finding and not as a disciplinary hearing or interview.

Petitioner alleges that the interviews were disciplinary in nature. As a result of the investigation, Respondent made the decision to discharge Mr. Larsen. Ms. Marso did not recommend discharge in her report. The exact nature of the interviews will not change the outcome of the case, under the law, even when the evidence is seen in a "light most favorable to the nonmoving party." *Stone v. Von Eye Farms*, 2007 S.D. 115, ¶6, 747 N.W.2d 767, 769.

ANALYSIS

South Dakota has separate and distinct statutes regarding public and private employee unions or organizations. Public sector employee union statutes are set out at SDCL Ch. 3-18 and private sector employee union statutes are found at SDCL Ch. 60-9 through 60-10. Respondent is a public employer and therefore the public sector union laws apply.

Petitioner's argument is based upon rights that are guaranteed to private sector union employees by federal law. Private sector unions are given extra protection by federal regulations. "In 1935 Congress enacted the National Labor Relations Act (NLRA) (29 U.S.C.A. § 151 et. seq.), commonly referred to as the Wagner Act. … The Wagner Act was amended in 1947 by the National Labor Management Relations Act (29 U.S.C.A. § 41 et. seq.), known as the Taft-Hartley Act. That act guaranteed employees the right to refrain from participating in any, or all, union activities." *Mathews v. Twin City Const. Co., Inc.*, 357 N.W.2d 500, 503 (S.D. 1984).

As pointed out by both parties in their briefs, the NLRA does not apply to all employers. More specifically, the NLRA does not apply to public employers unless the State statute or law allows the NLRA to apply to public entities.[1] In states where this question has been litigated, 19 of 22 state courts have found that the NRLA does apply to public employees in their states, based upon their state statutes. [2] Petitioner argues that the NLRA should apply to public employees in South Dakota based upon the language contained within SDCL §3-18-2.

In the seminal U.S. Supreme Court case of *National Labor Relations Board v. Weingarten*, 420 U.S. 251 (1975), the Court answered the question of whether a private sector employer had committed an unfair labor practice when denying an employee's request to have a representative present during an investigatory interview with the employee. 420 U.S. at 253. The Court stated:

> The Board's holding is a permissible construction of "concerted activities for . . . mutual aid or protection" by the agency charged by Congress with enforcement of the Act, and should have been sustained.
>
> The action of an employee in seeking to have the assistance of his union representative at a confrontation with his employer clearly falls within the literal wording of § 7 that "[e]mployees shall have the right . . . to engage in . . . concerted activities for the purpose of . . . <u>mutual aid or protection</u>."

Weingarten, 420 U.S. at 260-261 (quoting *Mobil Oil Corp.* v. *NLRB,* 482 F. 2d 842, 847 (CA7 1973)) (emphasis added). Known today as "Weingarten" rights, the right of union representation in investigatory meetings or interviews is now part of the union employee/employer lexicon and is a right guaranteed by federal law for private sector employees that are under the NLRA. *Id.*

Weingarten also gave private union employees other rights not at issue in this matter. See *Weingarten*, 421 U.S. at 258-260.

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[1] 29 U.S.C. §152 (2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, <u>or any State or political subdivision thereof,</u> or any person subject to the Railway Labor Act [45 U.S.C. § 151 et seq.], as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

NLRA 29 U.S.C. §152 (2) (emphasis added).

[2] The Petitioner outlined cases from 17 of the 19 jurisdictions that have adopted the NLRA. The remaining two states are Connecticut and Texas. A Texas Supreme Court case is the most recent, however not cited by Petitioner. *City of Round Rock v. Rodriguez,* 317 S.W.3d 871 (2010). The winning TX Appellee's Brief was uncited; however, the majority of Petitioner's brief before the Department contains <u>*exactly the same*</u> argument and information as the TX brief. Find the TX Appellee's Brief at *2010 WL 718498 (2010)* or at h*ttp://www.supreme.courts.state.tx.us/ebriefs/files/20100666.htm*. To be certain, Petitioner's lack of originality in brief writing does not affect the outcome of this case.

The Supreme Court referenced Section 7 of the NLRA, or 29 U.S.C. 157. The section entitled “Rights of Employees” states:

> Sec. 7. [§ 157.] Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or <u>other mutual aid or protection,</u> and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

NLRA 29 U.S.C. §157 (emphasis added). That Federal Statute is the basis of the Supreme Court’s decision in *Weingarten*. South Dakota has a similar statute that guarantees the rights for private sector employees. That statute is found at SDCL §60-9A-2 and is almost identical to the above federal statute including the magic words “of mutual aid and protection.” However, the South Dakota Legislature granted separate and distinct rights to public union employees and has not amended them to reflect the NLRA or the *Weingarten* decision.

Of the 19 states in which this similar controversy has been determined by the states’ highest court, and in which Weingarten rights to public employees have been granted, 11 states have a public employee statute for which contain the NLRA wording of “mutual aid and protection,” 4 states have a specific statutory right for representation, and 2 state jurisdictions applied a grievance related statute to come to the conclusion.

Three jurisdictions refused to apply Weingarten rights to public employers.[3] In each of these three jurisdictions, the court found that state’s public sector union laws were not similar to §7 of the NLRA. In West Virginia, the court went so far as to say that the rights guaranteed to the public employees were greater than the Weingarten rights of §7. As the South Dakota Supreme Court has written in the past, “We are not particularly impressed with characterizations of a doctrine as the `majority' or `minority.' We will give due consideration to all decisions of other jurisdictions but will be persuaded only by the soundness of their reasoning and their consistency with our State's law. *Am. Fam. Mut. Ins. Co. v. Auto-Owners Ins. Co.,* 2008 S.D. 106, ¶ 33, 757 N.W.2d 584, 594 (quoting *Koch v. Spann*, 193 Or.App. 608, 616 n. 2, 92 P.3d 146, 150 n. 2 (2004)). See also *Bertelsen v. Allstate*, 2011 S.D.13, ¶50, fn.7.

The other states’ laws are not consistent with South Dakota’s law. Furthermore, the South Dakota statute providing rights to public employees is not similar to §7 of the NLRA, in that the statutory language relied upon by the U.S. Supreme Court in *Weingarten* is not contained in SDCL §3-18-2. The South Dakota public union statute reads in full:

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[3] West Virginia, Swiger v. Civil Service Commissioner, 365 S.E.2d 797 (1987); New York, New York Transit Authority v. Public Employment Relations Board, New York Court of Appeals, 864 N.E.2d 56 (N.Y. 2007); and Delaware, American Ass’n of University Professors v. University of Delaware, 1977 WL 4519 (Del.Ch.1977).

> Public employees shall have the right to form and join labor or employee organizations, and shall have the right not to form and join such organizations. Public employees shall have the right to designate representatives for the purpose of meeting and negotiating with the governmental agency or representatives designated by it with respect to grievance procedures and conditions of employment and after initial recognition by the employer, it shall be continuous until questioned by the governmental agency, labor or employee organization, or employees, pursuant to § 3-18-5. It is a Class 2 misdemeanor to discharge or otherwise discriminate against an employee for the exercise of such rights, and the governmental agency or its designated representatives shall be required to meet and negotiate with the representatives of the employees at reasonable times in connection with such grievance procedures and conditions of employment. The negotiations by the governmental agency or its designated representatives and the employee organization or its designated representatives shall be conducted in good faith. Such obligation does not compel either party to agree to a proposal or require the making of a concession but shall require a statement of rationale for any position taken by either party in negotiations. It shall be unlawful for any person or group of persons, either directly or indirectly to intimidate or coerce any public employee to join, or refrain from joining, a labor or employee organization.

SDCL §3-18-2 (emphasis added). The above statute grants the right of public employee union representatives to meet and negotiate with their respective public employers in connection with grievance procedures and conditions of employment. However, it does not grant an automatic right of union representation for internal investigations, such as the case between Petitioner and Respondent.

SDCL §3-18-2 does not specify that the purpose of public employee unions are for the "mutual aid or protection" of its members. The language above is not similar to the language of NLRA §7. Therefore, the unions and their members which fall under SDCL §3-18-2 are not given Weingarten rights, unless it is otherwise provided for within the jurisdictions' collective bargaining agreements.

The South Dakota Legislature could have added this language or these rights to §3-18-2 as they had amended it to the private union statutes. The private union statute has this language in §60-9A-2, but it is specifically not included in §3-18-2. The South Dakota Legislature has chosen not to place the public union employees and employers under the NLRA and the NLRB. As written by our Supreme Court:

> The purpose of statutory construction is to discover the true intention of the law which is to be ascertained primarily from the language expressed in the statute. *Appeal of AT & T Information Systems*, 405 N.W.2d 24 (S.D.1987). The intent of a statute is determined from what the legislature said, rather than what the courts think it should have said, and the court must confine itself to the language used. *Id*.

> Words and phrases in a statute must be given their plain meaning and effect. *Id*. When the language of a statute is clear, certain and unambiguous, there is no reason for construction, and the Court's only function is to declare the meaning of the statute as clearly expressed. *Id*.
>
> Since statutes must be construed according to their intent, the intent must be determined from the statute as a whole, as well as enactments relating to the same subject. *Id*. But, in construing statutes together it is presumed that the legislature did not intend an absurd or unreasonable result. *Id*. When the question is which of two enactments the legislature intended to apply to a particular situation, terms of a statute relating to a particular subject will prevail over general terms of another statute. *Nelson v. School Bd. of Hill City S.D.*, 459 N.W.2d 451 (S.D.1990). Moreover, it is presumed that the legislature does not intend to insert surplusage in its enactments. And, where possible, the law must be construed to give effect to all of its provisions. *Id*. at 455.

US West Com. v. Public Utilities Com'n, 505 NW 2d 115, 123 (S.D. 1993). The language of §3-18-2 is more specific than the language of §60-9A-2 and applies to a more focused and specific group of employees and employers. If the SD Legislature wanted the rights of §60-9A-2 and the NLRA to apply to all employees within the state, they would not have kept Chapter 3-18, but would have repealed the Chapter (or at least amended it) after the *Weingarten* ruling.

South Dakota Public employee unions or organizations are not given statutory *Weingarten* rights, absent a separate provision within the collective bargaining agreement. There is no provision in the collective bargaining agreement between Petitioner and Respondent. Therefore, Respondent's Motion for Summary Judgment is granted in regard to the *Weingarten* rights or the right to union representation in an investigatory interview.

The second part of this ULP Complaint is Petitioner's allegation that Respondent's practice of allowing attorneys to represent employees in investigatory interviews is an incentive for nonparticipation in employee organizations and discriminates against employee organizations. There was no argument put forward in this Motion by the parties regarding this allegation, therefore, it is deemed waived.

The last allegation of Petitioner's ULP Complaint, alleges that Respondent is interfering with the ability of Petitioner to adhere to their duty of fair representation that requires a union handle an employee's grievance fairly. Specifically, the Petition alleges that Respondent "violates the statutes by dominating, interfering in the union's ability to administrate proper investigation into alleged incidences that may lead to the adjustment of discipline or potential terminations of employees covered by the employee organization."

The Taft-Hartley Act (amendments to the NLRA), as cited above, also added a provision that, (with changes over the years), allows suits for breach of contract by employees against employers as well as the employee's unions. 29 U.S.C.A §301. These are known as Hybrid §301 claims, or a Breach of its Duty of Fair Representation. A Hybrid §301 claim can only be brought

against those employers to whom the NLRA applies, unless the duty is also found within another state statute. In a straight §301 action, an employee can sue their union or organization for Breach of Duty of Fair Representation.

The NLRA does not apply to South Dakota public employee unions or their members. There is not a cause of action for Breach of Duty of Fair Representation in South Dakota for public employee organizations or unions. The United States Supreme Court explained the cause of action in the case of *Vaca v. Sipes*, 386 US 171 (1967). The Court wrote:

> The statutory duty of fair representation was developed over 20 years ago in a series of cases involving alleged racial discrimination by unions certified as exclusive bargaining representatives under the Railway Labor Act, see *Steele* v. *Louisville & N. R. Co.,* 323 U. S. 192; *Tunstall* v. *Brotherhood of Locomotive Firemen,* 323 U. S. 210, and was soon extended to unions certified under the N. L. R. A., see *Ford Motor Co.* v. *Huffman, supra.* Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct. *Humphrey* v. *Moore,* 375 U. S., at 342.

Vaca v. Sipes, 386 US 171, 177 (Supreme Court 1967). This Supreme Court case changed how the cause of action could be brought against a union. Prior to *Vaca*, the NLRB was the sole authority in disputes between employees and their unions. However, in these causes of action the employer must be governed by the NLRA and NLRB. In South Dakota, public employee unions are not under the auspices of the NLRA or the NLRB. The NLRB decisions and opinions are not controlling authority in cases involving public employee unions.

Respondent does not have an affirmative duty to ensure that Petitioner follows the agreement the union has made with their members. Respondent's duty is to allow Petitioner to represent their members in accord with SDCL §3-18-3.1, without interference. There is no evidence that Petitioner was not allowed to make a separate investigation into allegations. Respondent is not required to force employees to meet with Petitioner for an investigation. Employees can choose to meet with Petitioner during working hours, "provided that such action does not take more than a reasonable amount of time." CBA §12.12. Respondent had the right to require that such an investigation by Petitioner take place at a different time as the sexual harassment investigation and interviews.

If Petitioner was allowed to be present at all the interviews and investigation into the sexual harassment issue, and Petitioner had conducted their own investigation at that same time, then the employees interviewed would not have the option of refusing to meet with Petitioner, as is their individual right under law. SDCL §3-18-2. A general investigation of employees, without a grievance pending, is not a right of public unions under SD Law. Public unions have the right to be present during an adjustment of a grievance, but not an investigation. SDCL §3-18-3. There was no pending grievance and no adjustment of a grievance between Petitioner and Respondent at the time of the interviews. Respondent could not legally require employees to

meet with Petitioner at the time of Ms. Marso's independent investigation into a personnel matter.

The claims of unfair labor practice by Petitioner against Respondent, in regards to the investigative interviews, are denied. Respondent's Motion for Summary Judgment is granted.

As this is a Motion for Summary Judgment, separate Findings of Fact and Conclusions of Law are not required.

Dated this 21st day of March, 2012, in Pierre, South Dakota.

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Catherine Duenwald
Administrative Law Judge
Division of Labor & Management
Department of Labor and Regulation