

**SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION
DIVISION OF LABOR AND MANAGEMENT**

IUOE LOCAL 49,

HF No. 11 G, 2011/12

Grievant/Petitioner,

v.

DECISION

CITY OF EDGEMONT,

Respondent.

This matter came before the Department of Labor and Regulation when Grievant, International Union of Operating Engineers Local 49, filed a Petition for Hearing on Grievance dated January 6, 2012, pursuant to SDCL 3-18-15.2. The case was heard by Donald W. Hageman, Administrative Law Judge on April 24, 2012, in Rapid City, South Dakota. Gil Koetzle appeared on behalf of Grievant. Donald P. Knudsen represented Respondent.

Issues:

This case raises the following legal issues:

1. Whether the Department of Labor and Regulation has jurisdiction in this case?
2. Whether the City of Edgemont violated the terms of the Collective Bargaining Agreement in effect during 2011 when it terminated the employment of Kirk Marriott on December 5, 2011, without giving him two weeks written notice?

Facts:

The facts of this case are as follows:

1. The International Union of Operating Engineers Local 49 (Union) is the designated representative and bargaining unit for the employees of the City of Edgemont, South Dakota (City).
2. On December 1, 2011, the City council called a special meeting to discuss budget shortfalls. The City council instructed Mayor Turner to lay off three part time and one full time employee.

3. On December 5, 2011, the City gave Kirk Marriott written notice that his employment was terminated effective at the end of the work day of that same day.
4. On December 14, 2011, Scott Niles, Marriott's Union Representative, had a telephone conversation with Mayor Turner about a grievance that was going to be filed by the Union concerning Marriott's termination. Niles and the Mayor agree that the Department Heads were not in the "loop" and that the grievance should go directly to the City council.
5. On December 15, 2011, Scott Niles hand delivered the Union's grievance to Mayor Turner who agreed to take it to the City council.
6. After being informed that the City council had rejected the grievance, the Union filed a Petition for Hearing before the Department of Labor and Regulation.
7. Mayor Turner does not have a vote on the City council.
8. The City and the Union negotiated a Collective Bargaining Agreement effective January 1, 2011 through December 31, 2011 (CBA). Article X of the CBA contains the City's Grievance and Appeal Procedures. Section 2 of Article X states in part:

[I]f a matter cannot be resolved informally, the employee and/or Union Representative shall submit a written grievance to the Department Head within fourteen (14) calendar days after the grievance occurred.

CBA, Article X, Section 2.

9. Additional facts may be discussed below

Jurisdiction:

The Department's role in grievance cases is triggered by SDCL 3-18-15.2. That statute states in part:

If, after following the grievance procedure enacted by the governing body, the grievance remains unresolved . . . it may be appealed to the Department of Labor . . . 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.

SDCL 3-18-15.2. It is undisputed that neither Marriott nor Scott Niles submitted the grievance to the Department Head. It is also clear that the directive in Article X, Section 2, of the CBA is mandatory and that the appeal to the Department which is authorized by SDCL 3-18-15.2 is contingent on complying with the grievance procedures at city

level. The grievance procedures were not followed here, consequently, the Department lacks the authority, i.e. jurisdiction, to consider the issue raised here by the Union.

The South Dakota Supreme Court dealt with agency jurisdiction in Kierstead v. City of Rapid City, 248 N.W.2d 363, 368 (S.D. 1976). In that case, the Court stated:

The remaining provisions of Article XVIII set forth procedures to be followed in presenting grievances, which were not complied with by appellant. The trial court properly found that the appellant herein did not exhaust his administrative remedies by adhering to the grievance procedures adopted by the City under the mandate of the law and that, therefore, the department of labor and management relations was without jurisdiction.

Id. In this case, the Union's appeal to the Department must suffer the same fate as the appeal in Kierstead.

The Union contends that Mayor Turner agreed to bypass the Department Head and present the grievance directly to the City council. Therefore, the City should be bound by that agreement.

The Department must reject this argument. First, the Mayor and Scott Niles are unable to alter the terms of the CBA without an affirmative vote from both the City council and the Union membership to do so. Second, the Mayor and Niles cannot agree to the Department's jurisdiction.

The South Dakota Supreme Court has discussed the jurisdictional limitation of the Department of Labor and Regulation in grievance cases. In O'Toole v. SD Retirement System, 2002 S.D. 77, 648 N.W.2d 342 (2002) the Court stated:

The general rule is that administrative agencies have only such adjudicatory jurisdiction as is conferred upon them by statute. Johnson v. Kolman, 412 N.W.2d 109, 112 (SD 1987) (citing Springville Com. Sch. Dist. v. Iowa Dept. of Pub. Inst., 252 Iowa 907, 109 N.W.2d 213 (1961); Montana Bd. of Nat. Res. & Con. v. Montana Power Co., 166 Mont. 522, 536 P.2d 758 (1975); 2 Am.Jur.2d Administrative Law § 328). Furthermore, "[an administrative agency] may not acquire jurisdiction by estoppel or consent, and, where it acts without jurisdiction, its orders are void." Montana Bd. of Nat. Res. & Con., 536 P.2d at 762 (quoting 73 CJS Public Administrative Bodies and Procedures § 116). See also Pickering v. Illinois Human Rights Com'n, 496 N.E.2d 746 (111App2Dist 1986); and Powell v. Khodari-Intergreen Co., 303 N.W.2d 171 (Ia 1981).

Id. (emphasis added).

Conclusion and Order:

The Department of Labor and Regulation lack jurisdiction to consider the Union's grievance in this matter. Consequently, it is Ordered that this case is dismissed with prejudice.

Dated this 3rd day of July, 2012.

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION

 /s/ Donald W. Hageman
Donald W. Hageman
Administrative Law Judge