

October 22, 2009

Ms. Irene M. Jones
2219 Alamo Drive
Rapid City, SD 57702

LETTER ORDER

Mr. Michael M. Hickey
Bangs, McCullen, Butler, Foye & Simmons, LLP
PO Box 2670
Rapid City, SD 57709-2670

RE: HF No. 2G, 2009/10 – Irene M. Jones v. Rapid City Area School District #51-4

Dear Ms. Jones and Mr. Hickey:

Petitioner, Irene M. Jones (Petitioner), filed with the South Dakota Department of Labor (Department) a Petition for Hearing on Grievance on July 7, 2009. An Answer to the Petition was filed by Respondent, Rapid City Area School District #51-4 (Respondent), on August 4, 2009.

Respondent, by and through their attorney, Michael M. Hickey, filed a Motion for Summary Judgment on September 11, 2009. A Response was received from Petitioner on September 28, 2009. Respondent filed a Reply Brief to the Response on October 13, 2009. The Department has reviewed the Motion, the Response, the accompanying Briefs and Affidavits, as well as the Reply, and the entirety of the current record in this case.

The Department has jurisdiction to hear the grievance appeals of public employees, under the authority granted by SDCL 3-18-15.2.

Petitioner is employed by Respondent, a public agency, as a member of the food service staff. The Food Service Staff operates under a policy book entitled "Policies relating to the Food Service Staff." Article VIII of the Policy sets out the grievance procedure and appeals process

participating employees must follow. Section 1 (a) defines a “grievance” as “a complaint by an employee or employees, employed by the District that there has been a violation, misinterpretation or inequitable application of any of the terms of this policy, except that the term “grievance” shall not apply to any matter as to which (a) the method of review is prescribed by law, or (b) the board is without authority to act. The Policy sets out three (3) Levels which an employee must follow locally before the grievance is appealed to the Department.

The Informal Level provides, “A potential grievance will first be discussed with the employee’s immediate supervisor with the objective of resolving the matter informally, at which time the employee may discuss the potential grievance personally or may request that a representative of the employee accompany them and/or act on their behalf.

Level 1 of the grievance procedure follows the informal level. The grievance must be submitted in writing to the supervisor or the Office of Human Resources. The Supervisor must then hold a Level 1 meeting with the employee within ten (10) calendar days of the request. The Supervisor is required to render a decision within ten (10) calendar days of the Level 1 meeting.

According to the policy, Level 2 is filed with the Superintendent’s office within 10 days after the grievance decision of Level 1 or if no decision has been made at Level 1. Within 10 days of the receipt of the Level 2 grievance, the Superintendent or designee shall meet with the grievant. A decision shall be made within 10 days of the meeting with the Superintendent.

If the employee disagrees with the Level 2 decision, she may, within 30 days, initiate an appeal to the Department pursuant to SDCL § 3-18-15.2 and § 1-26. This is equivalent to Level 3, according to Respondent’s Policy handbook.

The Policy specifically limits the time deadline for filing a grievance. Section 5 (d) states:

No grievance shall be recognized unless it shall have been presented at the appropriate level within twenty (20) days after the aggrieved person knew, or should have known, of the act or condition on which the grievance is based, and if not so presented, the grievance will be considered as waived, provided that a grievance filed under the first paragraph of Miscellaneous Provisions shall not be recognized at Level 2 unless it is filed with the Superintendent’s office within at least thirty (30) days after the act or condition upon which it is based occurred.

The “first paragraph” referred to in this section refers to a grievance affecting a group of employees from more than one building. This type of grievance may be submitted in writing directly to the Superintendent’s office and commenced at Level 2.

On or about November 6, 2008, Respondent cancelled work for Petitioner due to inclement weather. Petitioner returned to work on November 12 after the Veteran’s Day Holiday. Petitioner made a request to her kitchen manager to take emergency leave for the two “snow” days. This request was denied.

On February 26, 2009, a snowstorm compressed the school day and Petitioner lost one hour of work due to the shortened workday. Petitioner made a request for emergency leave to her kitchen manager. The kitchen manager denied the request and suggested that Petitioner visit with Human Resources. The Human Resources secretary informed Petitioner that Respondent would return Petitioner’s inquiry. Petitioner did not receive any immediate response from Respondent regarding this inquiry.

On March 23 and 24, 2009, Respondent called two snow days and work was cancelled for those days. The kitchen manager again denied Petitioner’s request for emergency leave. Petitioner was approached by co-workers regarding whether she had received a response from Respondent in regards to any of the previous requests. At this time, Petitioner was still waiting to hear from Respondent regarding the inquiry in February. The following week, March 30 and 31, 2009, Respondent called two more snow days.

On April 14, 2009, the kitchen manager and the director of food services met with Petitioner regarding her request for emergency leave for the lost hour on February 26. Respondent, through the director of food services, denied the request for emergency leave.

On April 17, 2009, Petitioner and her food service co-workers received a form entitled “Year End Work Days.” This form gave food service workers two options, (1) to work until June 9 or (2) to work after June 9 to make up an additional 2 days of work. Respondent did not give the option of claiming up to two days of emergency leave.

Petitioner filed her initial grievance on April 20, 2009. Respondent rejected the submission of the initial grievance as it affected the whole food service staff. Petitioner and her co-workers filed a joint grievance on April 24, 2009.

On May 7, 2009, Respondent responded and denied the grievance. It was noted by Respondent that the grievance was filed at Level 1 and not Level 2. One of Petitioner's co-workers, Gail Miller, who had signed on the April 24 grievance, filed an appeal to Level 2. On May 28, the director of food services denied the grievance at level 2. Respondent hand delivered copies of the denial to Petitioners and the other grievants on May 29, 2009.

Petitioner filed an appeal with the Department on July 7, 2009, 40 calendar days after the Level 2 denial was given to Petitioner. This appeal to the Department is pursuant to SDCL 3-18-15.2.

Respondent has made a Motion for Summary Judgment as the issue raised by Petitioner in her Grievance was not grieved in a timely manner; moreover, Respondent argues that Petitioner failed to properly bring the grievance on an informal basis. Respondent argues that Department lacks jurisdiction over the matter.

"The Department's jurisdiction is lost if the grievance is not timely filed in accordance with grievance procedures." Cox v. Sioux Falls School Dist., 94 SDO 279, 514 NW2d 868 (SD 1994) (quoting Rininger v. Bennett Co. Sch. Dist., 468 NW2d 423, 428 (SD 1991) (citing Schloe v. Lead-Deadwood Indep. Sch. Dist. No. 106, 282 NW2d 610, 614 (SD 1979))).

SD Codified Law §3-18-15.2 reads in pertinent part:

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. ...

SDCL 3-18-15.2 (emphasis added).

Respondent's Policy is clear. If a Grievance is filed on behalf of employees in more than one location, the Grievance does not have to go through the Informal Level or at Level 1, but starts at a Level 2 grievance. Petitioner met the internal grievance policy inasmuch as the Informal Level and Level 1 do not have to be met in order to file a Level 2 Grievance on behalf of a number of staff from more than one building. However, the Grievance was not filed in a timely manner with the Department of Labor. There are no statutory exceptions to the 30-day limit for filing. The Department does not have jurisdiction over an issue that was not timely filed.

The Department hereby does Dismiss Petitioner's Grievance for Lack of Jurisdiction.

This letter shall serve as the Department's Order.

Sincerely,

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