SOUTH DAKOTA DEPARTMENT OF LABOR

OFFICE OF THE SECRETARY

DECLARATORY RULING 1D, 2007
Re: SDCL §§3-18-2, 3-18-3.1, 3-18-8.2

This matter comes before Pamela Roberts, the Secretary of the South Dakota Department of Labor, as a petition for declaratory ruling under SDCL §1-26-15 and ARSD §47:01:01:04. The parties have stipulated to the submission of the facts on briefs. Petitioner, Rapid City Education Association, is represented by Anne Plooster, SDEA; Respondent, Rapid City Area School District, is represented by Michael M. Hickey, Bangs, McCullen, Butler, Foye & Simmons.

The Department has been provided the following facts:

1. Petitioner is the exclusive formal representative for a bargaining unit designated as all classroom, special education, resource teachers, (i.e. library media specialists, therapists, dean of students, teachers on special assignments), counselors, nurses, and degreed non-certified staff (i.e. social workers, Title VII resource facilitator, homeless student project specialist) employed in the District.
2. Respondent is a political subdivision of the State of South Dakota and is responsible for the administration of the Rapid City Area School District in accordance with the laws and Constitution of the State of South Dakota and of the United States, including but not limited to the rights and responsibilities set forth in Title 13 of South Dakota Codified Laws.
3. Over the years the parties have entered into a series of collective bargaining agreements that set forth the terms and conditions of employment for members of the bargaining unit.

4. In 2005 the parties entered into an agreement, which became effective as of the commencement of the 2006-07 school year and continued in effect until the commencement of the 2008-09 school year. The agreement also provided that either party could bring forth one issue for the 2006-07 school year which was in addition to the other subjects of negotiations set forth in the agreement.
5. Pursuant to that authorization Respondent proposed an amendment to Article XVIII, O. Leaves of Absence for Association Business.
6. Thereafter the parties attempted to reach agreement on the provisions of Article XVIII, O. Leaves of Absence for Association Business, but were unable to do so. Consequently, impasse was declared.
7. On November 15, 2006, the Department conducted impasse conciliation between the parties, but the same was unsuccessful.
8. On November 17, 2006, Respondent requested the Department to conduct an impartial investigation into the matters in difference between the parties as authorized by SDCL §60-10-2.
9. The Department held a fact-finding session on December 18, 2006.
10. On January 3, 2007, the Department issued its Fact-Finder's Report, finding for Respondent on all issues.
11. On January 15, 2007, Respondent voted to impose the terms of its negotiated agreement for the 2006-07 school year.
12. By imposing the terms of the agreement Respondent implemented its last best offer concerning Article XVIII, O. Leaves of Absence for Association Business.
13. In accordance with the terms of the existing negotiated agreement, the agreement was reopened for the purposes of negotiating wages and group insurance for the

2007-08 school year. In addition either party was authorized to bring forth one additional issue for negotiations for the 2007-08 school year.

14. On January 29, 2007, Petitioner sent notification to Respondent seeking a reopening of negotiations. In that communication Petitioner sought negotiations on wages and group insurance, and the additional issue of Article VIII – Teaching Day. Respondent has provided a copy of the notification for the record.

15. In that notification Petitioner also sought to conduct negotiations on Article XVIII – Association Leave, which Petitioner claimed was automatically reopened.

16. On March 9, 2007, Respondent responded that it did not agree the issue of Association Leave was automatically reopened. Respondent did, however, agree that the issue of Association Leave could be a topic of negotiations if designated as the one additional issue as authorized by the negotiated agreement. Respondent has provided a copy of the response for the record.

17. The parties subsequently agreed to the terms of a new negotiated agreement, subject to this issue being submitted to the Department for its declaratory ruling.

The parties have asked the Department to provide its positions on the following question: How long can Respondent continue to impose its position on Association Leave?

The ruling requires the interpretation of the following statutes:

> 3-18-2. 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.

3-18-3.1. 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;
(4) Discharge or otherwise discriminate against an employee because he has filed a complaint, affidavit, petition or given any information or testimony under this chapter;
(5) Refuse to negotiate collectively in good faith with a formal representative; and
(6) Fail or refuse to comply with any provision of this chapter.

3-18-8.2. Any school district issuing contracts to teachers for the ensuing year, but prior to reaching agreement with the representatives of the recognized employee unit, shall issue the contracts under the same terms and conditions as for the current year. If no agreement is reached in negotiations and the intervention of the labor department under § 3-18-8.1 fails to bring about an agreement, the board shall implement, as a minimum, the provisions of its last offer, including tentative agreements. If the labor department is not requested to intervene under the provisions of § 3-18-8.1, the board shall implement the provisions of its last offer, including tentative agreements, eleven days after an impasse is declared.

South Dakota law provides public employees with the opportunity to bargain collectively with their employers. This process requires public employers to negotiate matters of pay, wages, hours of employment, or other conditions of employment. Department of Labor conciliation may be requested by either party when an agreement cannot be reached. If that assistance does not provide a resolution, the parties may ask

the Department of Labor to investigate the situation and make a report with settlement recommendations. If an agreement is still not reached, the employer is required to impose its final offer, provided that the subject is a mandatory subject of bargaining, the employer has negotiated in good faith and a genuine impasse has been reached. Accordingly, the employer is not allowed to use its economic power to remove a subject from bargaining, but the employer is also not required to agree with the union's terms. Rather, the employer attempts to achieve its goals by imposing the final offer. This process prevents the union from having a unilateral veto over the terms that the employer desires, from thwarting governmental objectives, and from disturbing the efficiency of governmental operation. This process also prevents the employer from imposing its terms without first negotiating in good faith. Council of Higher Education v. South Dakota Board of Regents, 2002 SD 55, 645 N.W.2d 441, ¶7 (additional citations omitted.)

The term "negotiate collectively in good faith," means that the parties must seriously work to resolve differences and reach a common understanding. If an agreement still remains unattainable, South Dakota law provides that a public employer may unilaterally implement the disputed provisions if the parties have bargained in good faith and a legitimate impasse exists. Bon Homme County Commission v. AFSCME, 2005 SD 76, 699 NW2d 441, ¶13-14. (additional citations omitted.)

Here, the parties agreed to a three-year contract, running from 2005-06 to 2008-09. One of the agreed-upon items was that each side could only introduce one additional item in interim year negotiations. Respondent did so in 2006-07, bringing up the contested Association Leave provision, and eventually imposing it. (It is noted that Petitioner filed an unfair labor practice complaint with the Department on Respondent's imposition of its Association Leave proposal, and that action is still pending.) In 2007-08, Petitioner brought a proposal on the teaching day, and one on Association Leave. Respondent did

not refuse to discuss the proposal, but merely said that Petitioner had to decide whether that or the teaching day proposal would be Petitioner's "additional item" for the year.

In Rapid City Education Association on Behalf of Kechely v. Rapid City School District 51-4, 433 NW2d 566 (SD 1988), these same parties had agreed to a definition of "grievance" that was more limited than state law. Kechely attempted to file a grievance that was not covered by the contract and was denied on that basis. The Supreme Court held that the contract definition was binding because the parties had exercised their unlimited rights and opportunities in effectuating the final contract. Therefore, grievances over matters not covered by the agreement were precluded. Kechely, 433 NW2d at 569-70. Here, the parties agreed to the conditions under which bargaining would take place; for contract years 2006-07 and 2007-08 at least, only one item in addition to wages and insurance could be negotiated.

Therefore, the rulings of the Department of Labor are:

1. That, so long as negotiations are conducted in good faith, Petitioner and Respondent may be limited to one "additional item" to negotiate in each contract year. Each side is free to choose what that item will be, and to refuse to negotiate more than one item presented by the other.
2. That the "one additional item" condition the parties have negotiated may be enforced until the contract expires.

Dated this 2nd day of October, 2007.

Pamela S. Roberts
Secretary
South Dakota Department of Labor