OFFICIAL OPINION NO. 72-10, School boards need not negotiate non-material conditions of employment

STATE OF SOUTH DAKOTA
OFFICE OF
THE ATTORNEY GENERAL

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**School boards need not negotiate non-material conditions of employment**

Dear Mr. Mickelson:

We have received your request for an official opinion on the following factual situation:

Negotiations pursuant to SDCL Chap. 3-18 are currently taking place between the school board of the "X" Independent School Districtand an organization representing the teachers in the school district.

The board is willing to negotiate on matters of salary, fringe benefits, school calendar, pay for unused sick leave upon retirement, and amendments to present negotiation policy. It does not feel that it can be required to negotiate on class size, teacher loads, release time, clerical and technical systems, addition of special teachers in certain fields, time for class planning during the date, establishment of a petty cash fund, mechanical additions and payroll deductions. In other words, the school board feels that there are certain matters which properly fall within the jurisdiction of the board in its administration of the school system.

The Commissioner of Labor and Management Relations has been asked by the representative of the employees to conciliate the parties to the controversy pursuant to SDCL 60-10-1. The Commissioner, in a letter to the school board, has already indicated that all of the items appear to him to be negotiable.

In connection with the above factual situation, you have asked the following questions:

1. What is meant by the term "other conditions of employment" as used in SDCL 3-18-3?

2. May the following items properly be the subject matter of negotiations between a school board and the representative of its teaching employees or are these items non-negotiable:

A. Smaller class size

B. Teacher loads

C. More clerical and technical assistance for teachers.

D. Regularly scheduled release time for curriculum planning, textbook evaluation, and department meetings and more voice in curriculum planning.

E. A special art teacher for the elementary schools.

F. A business english teacher and a reading teacher for the high school.

G. More time for lesson planning during the school day.

H. Relief from playground, hallway, and study hall duties.

I. Establishment of a petty cash fund in each building for teachers to use in purchasing supplementary materials during the year.

J. More mechanical aids for teachers.

workbooks, staplers, chalk, tape recorders, rulers, screens for overhead projector, other small equipment.

K. Payroll deductions for such things as association dues, United Fund, etc?

3. What should the position of the school board be in relation to the impending conciliation procedure?

The authorization for negotiations between public employees, (i.e. employees of the state or of any of the state's agencies or political subdivisions) and public employers is contained in the Public Employees' Unions Law, SDCL Chap. 3-18. Section 3 of that Act provides:

Representatives designated or selected ... by the majority of the employees in a unit ... shall be the exclusive representatives of all employees in such unit for the purpose of representation in respect to rates of pay, wages, hours of employment, or **other conditions of employment** ...

The interpretation of the phrase "terms and conditions of employment" was the subject matter of the case of **Westinghouse Electric Corp. v. N.L.R.B.** (1967) 387 S. 2d. 542. The case involved the prices charged employees by an independent caterer in the employer's cafeteria and was based upon the statutory phrase "conditions of employment." The court held that the phrase in question was NOT intended to be used in its broadest sense as encompassing virtually everything which bears upon the employment relationship. The court found [hat, rather the phrase was used only because Congress did not desire to enumerate specific bargaining subjects.

The Court went on to state:

In the instant case we arrive at the conclusion, one which we believe is not inconsistent with past pronouncement of this court, that since practically every managerial decision has some impact on wages, hours, or other conditions of employment, the determination of which decisions are mandatory bargaining subjects must depend upon whether a given subject has a significant or material relationship to wages, hours, or other conditions of employment.

Other courts interpreting the same phrase have reached similar conclusions that employers are not required to negotiate every item affecting employment. See: **McCall Corporation v. N.L.R.B.** (4th Circuit, 1970) 432 F. 2d 187 (Food prices where employer had total control of food service) **Seattle 1st National Bank v. N.L.R.B.** (9th Circuit, 1970) 444 F. 2d 30 (investment services provided to employees); **District 50, United Mines Workers, Local 13942 v. N.L.R.B.** (4th Circuit, 1966) 358 F. 2d 234 (employer's decision to contract work out); and **N.L.R.B. v. King Radio Corp**. (l0th Circuit, 1969) 416 F. 2d 569 (contracting out bargaining unit's work). In each of these cases, the court held that the employers did not have to negotiate the working conditions as they were not material working conditions.

The word "material" is defined by Webster's Seventh New Collegiate Dictionary as meaning "having real importance or great consequence." With this as a background, the answer to your first question is that the term "other conditions of employment" as used in SDCL 3-18-3 means conditions of employment which **materially** affect rates of pay, wages, hours of employment, and working conditions. School boards should concern themselves with items affecting wages or hours, but not those other items which are petty, which can be used for harrassment purposes, or which are inapplicable to the bargaining process.

Before answering your second question, it would be well to examine the general authority that school boards and public unions have been given.

It is a well settled rule that a legislature may delegate a portion of its legislative powers to govern matters which are local in scope to political subdivisions such as school districts. **Streich v. Board of Education** (1914) 34 S.D. 169, 147 N.W. 779.

The Legislature, in the exercise of its powers, has delegated to our local school boards the "general charge, direction, and management of the schools of the district." SDCL 13-8-39. Of course, school boards are restricted to their statutory authorizations and cannot exceed their enabling statutes, but they do have the general power and duty of management of the schools.

It is equally well settled that a legislature may not delegate legislative functions to private persons or organizations. **House of Seagram, Inc. v. Assam Drug Co.** 176 N.W. 2d 491. Clearly, an attempt to delegate the power to manage schools to a teachers' association or union is patently unconstitutional. However, a valid delegation of powers, as to a school board, may be subject to any restrictions or limitations the legislature places upon it. In the instant case the legislature has abridged the school Boards' powers somewhat by the passage of the "Public Employees' Unions Act," which requires school boards to negotiate with their employees "in respect to rates of pay, wages, hours of employment, or other conditions of employement," when the employees elect to have themselves represented for the purposes of obtaining a new employment con tract. This is a circumscription of school boards' delegation power, rather than the delegration of power to a private organization.

A casual reading of the law might lead a layman to think that permission to negotiate "conditions of employment" allows employees to have a voice in any of the school boards'

decisions which might remotely concern their employment. Such a construction of the law would be repugnant to the constitutional limitations on delegations of power. See **Schryner v. Schirmer** (1969) 84 S.D. 352, 171 N.W. 2d 634 in which our Supreme Court held an initiated ordinance requirement that salaries of firemen and policemen be computed on basis of future wage scales of specific skilled workers constituted unlawful de1egation of legislative power to fix salaries to trade unions and employers of union members. The only constitutionally permissable interpretation of the law is that the duty to manage the schools remains in the school boards of the state, but before making new employment contracts they must negotiate with a representative of their employees. The distinction is subtle, but very important. The employee's interpretation would, in effect, allow a private association to run the schools. The second interpretation would leave management of the schools with the school boards, but would restrict their authority to set employee's wages and hours, until after they had gone through the negotiations procedure.

For a further discussion of the constitutionality of this law, I would recommend an excellent article PUBLIC EMPLOYEES AND PUBLIC EMPLOYEES UNIONS: Their Rights and Limitations in South Dakota, written by Prof. Marion R. Smyser in the winter 1972 issue of the South Dakota Law Review, Volume 17, Number l.

Although in the actual negotiation procedure, it may appear that the employees are dictating to the board, in effect the board would still set wages and hours, but such could not go into effect until representatives of the board and the employees had negotiated about it.

Management of the schools at all times must remain exclusively in the hands of the school board.

Management of schools was one of the topics discussed in **Jefferson Par. Sch. Dist. v. Jefferson Par. Dem. Ex. Com.** (1964) 246La. 51, 163 S. 2d 348:

Webster's New World Dictionary, College Edition, defines "management" as follows:

the act, art, or manner of managing, or handling, controlling, directing, a being managed, 2. skillful managing; careful, tactful treatment, 3. skill in managing; excessive ability ...

... 'Management' is defined as government; control; superintendence; physical or manual handling or guidance; the act of managing by direction or regulation; administration, - as

the management of a family, or of a household, or of servants, or of great enterprises, or of great affairs.....In re Sanders, 53 Kan. 191,36 P. 348, 349, 23 L.R.A. 603.

... The word management may be defined as, conduct, administration, guidance, control, judicious use of means to accomplish an end. The words general management are sufficiently comprehensive to convey to the mind a legislative intent to confer upon the department of education authority to deal with the conduct of the State teachers colleges in all of the details of their control and administration ...**Lynch v. Commissioner of Education**, 317 Mass. 73,56 N.E. 2d 896, 900. See **Roberts v. City of Madison**, 250 Wis. 317, 27 N.W. 2d 233, 236.

· .. And our courts have defined the word Management, as applied to a vessel, to mean the direction and physical or manual control of such vessel. .. **Whiteman v. Rhode Island Ins. Co.** D.C. 78 F. Supp. 624.

MANAGEMENT. A word of comprehensive meaning, usually signifying positive, rather than negative, conduct, and relating to guidance and control.

It is variously defined as administration; care; conduct; control; direction; guidance; physical or manual handling or guidance; superintendence; government; carrying on.

The contents of the curriculum would be a different matter. Subjects of study are within the scope of basic educational policy and additionally are not related to wages, hours and conditions of employment.

I concur with the cases cited, and in my opinion the following are areas of public education which cannot be negotiated: school curriculums, methods of teaching, grade leveling, time schedules, classroom procedure, some aspects of discipline and conduct, physical training, some aspects of financing, and other matters directly related to the general charge, direction, and management of the schools of South Dakota.

The following are areas of public education which can be negotiated: wages, salaries, hours of employment, the number of days during which school will be conducted, within the range set by statute, and which particular days school will be opened and closed. Neither this nor the preceding list is all inclusive. It would be impossible to write an opinion covering every possible contingency. Of course, nothing is negotiable that is preempted by statutes or state

regulations. For specific statutes preempting the power to negotiate school calendars, see SDCL Ch. 13-26.

While the school calendar is a negotiable item, the board must remember that it is negotiable with **all** of its employees. The school calendar will affect the working hours and days of cooks, bus drivers, custodians, teachers' aides, etc., as well as of the teachers. The board cannot let anyone employees' association dictate the working hours and days of all of the other employees.

Therefore, to answer your specific question - Items A and B are not negotiable items, as decreasing class sizes would require the building of additional class units and the hiring of additional teachers. The building of additional classroom units must be decided by the voters in a bond issue election and the number of teachers to be hired is a managerial decision which must be decided upon by the school board. The number of pupils in a teacher's classroom would not affect her rate of payor hours of employment.

Item "C" relates to the employment of personnel other than teachers and is not negotiable.

Items "D", "E" and "F" relate to curriculum and are not negotiable.

Items "G" and "H" relate to work which is delegated to the employees. Control of work is a management prerogative which is not negotiable.

Items "I" and "]" are non-negotiable as they are not related to hours or wages and are de rninimus insofar as working conditions are concerned.

Item "K" is negotiable as it is specifically authorized by statute. SDCL 3-10-8. Although the specific items are not negotiable in the legal sense, common sense and good management policy would dictate that these subjects should be "discussed" with the employees. This discussion should not take place during the negotiations meetings, in order to prevent confusion between subjects being negotiated and those merely being discussed. A discussion does not require any commitment afterwards on the part of the board.

You have indicated that the Commissioner of Labor and Management has been called in pursuant to SDCL 60-10. Under this law, his function is to conciliate the parties and if that is unsuccessful, to issue a fact-finding report. Such a contingency was discussed in the joint School Dist. No.8 case, **supra**. The court commented upon the fact that employees of

school districts were allowed to confer and negotiate which is similar to the South Dakota authorization to meet and negotiate, but the Wisconsin teachers are not, (as the South Dakota teachers are also not) allowed to collectively bargain with their employers.

If the school calendar was subject to collective bargaining in the conventional sense in which that term is used in industrial labor relations under sec. 111.02(5), Stats., there would be merit to the argument of the school board that its legislative function is being delegated or surrendered and thus the calendar could not constitutionally be a subject of negotiation although it fell within the broad terms of the statute. However, under sec. 111.70 the school board need neither surrender its discretion in determining calendar policy nor come to an agreement in the collective-bargaining sense. The board must, however, confer and negotiate and this includes a consideration of the suggestions and reasons of the Teachers. But there is no duty upon the school board to agree against its judgment with the suggestions and it is not a forbidden practice for the school board to determine in its own judgment what the school calendar should be even though such course of action rejects the Teachers wishes. The refusal to come to a "settlement" may, of course, place the school board in a position where the Teachers can invoke the fact-finding procedure, but the findings of the fact finder if adverse to the board are not binding upon it. The force of the fact-finding procedure is public opinion, and the legislative process thrives on such enlightenment in a democracy.

I concur with this opinion also. While school boards must meet and negotiate, they are not required to come to an agreement in the collective bargaining sense. The Commissioner's fact-finding decision will carry moral weight, but the Board of District "X" will not be legally bound to comply with it.

Respectfully submitted,

Gordon Mydland
Attorney General