

Chapter

VI

SD ASSOCIATION OF COUNTY HIGHWAY SUPERINTENDENTS

Certification Manual



County Officer and Employee Liability, Benefits and Restrictions

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SUBJECT

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Purposes and limitations of the Manual

This manual was updated in the summer of 2018 at the direction of the South Dakota Association of County Highway Superintendents as a resource for county highway superintendents. This Manual is not all encompassing but is instead presented as a general outline of state statutes governing the operation of county highway departments. This manual does not include every statute and court opinion related to county highways and does not constitute legal advice. Further, laws, and the courts' interpretation of such laws, often change. If you are confronted with a particular issue, contact your state's attorney to research how the latest law applies to such issue.

Liability of the County and the County Board

The question of the liability of a county and its governing body acting as an agent of the state has been the subject of extensive litigation, and the South Dakota Supreme Court has laid down rules which give some degree of clarity to the subject. The county board is not liable for damages in the performance of governmental functions caused by neglect to perform such duties consisting of acts of omission only, unless such cause of action is expressly given by statute (Plumbing Supply Co. v. Board of Education 32 SD 270, 142 NW 1131 (1913)).

In another case the court reaffirmed this general rule when it states that no action lies against a county to recover for negligence of its officers, agents or employees in absence of a statute imposing such liability (Arms v. K] County, 69 SD 164, 7 NW 2d 722 (1943)).

Counties are quasi-corporations created for governmental purposes and as such are a part of the state. They are liable for damages only expressly given by statute and are immune from any liability or action under the common law. (AGR 1953-54, pp. 288-289)

Establishment of a Liability Insurance Pool and Insurance

The 1986 state legislature established a public entity pool for liability insurance for counties and all other governmental entities. Statutes involved are in SDCL 3-22-1 and 2 (partial). Sovereign immunity and insurance can be found in SDCL 7-18-8 and 21-32A.1.

3-22-1. Public entity pool for liability established--Coverage provided--Effect on certain claims and defenses. There is hereby established the South Dakota public entity pool for liability effective March 1, 1987. PEPL shall provide defense and liability coverage for any state entity or employee as provided for within the coverage document issued by PEPL. Nothing in this chapter may be construed to require payment of a particular claim or class of claims, to create any cause of action, nor to waive or limit any immunity or legal defense otherwise available to any covered claim. Punitive damages may not be recovered pursuant to this chapter. No claim for indemnity or contribution by the United States, arising directly or indirectly from the acts or omissions of the South Dakota National Guard, its agents, officers, members, or employees, which is cognizable under the Federal Tort Claims Act may be prosecuted under this chapter.

Source: SL 1986, ch 413, § 1; SL 1993, ch 46; SL 2010, ch 24, § 1.

The following notes of decision are no longer listed in West's annotated SDCL. They are retained here for historical reference purposes.

Award of attorney's fees

After a jury awarded a pretrial detainee damages in her 42 U.S.C.S. § 1983 action against a correctional officer trainee, the Lawrence v. Westerhaus factors weighed in favor of a lower percentage of the damages being used to satisfy the attorneys' fees under 42 U.S.C.S. § 1997e(d)(2) because (1) the jury found a high level of culpability on the officer's part; (2) the officer had the apparent ability to satisfy the attorneys' fees portion of the judgment through the South Dakota Public Assurance Alliance risk pool under S.D. Codified Laws § 3-22-1; (3) the detainee had been hugely successful, while the officer had not; and (4) the legislative history of the Civil Rights Act regarding an award of attorneys' fees was relevant and weighed heavily in favor of a lower percentage of the damages being used to satisfy the attorneys' fees award. Kahle v. Leonard, 2010 U.S. Dist. LEXIS 13752 (Feb. 17, 2010).

Sovereign immunity

In a negligence suit brought by injured parties in a car accident against employees of the Department of Transportation (DOT), sovereign immunity applied to the duty to post additional traffic control signs at an intersection of a traffic engineer for the DOT, under

S.D. Codified Laws § 31-28-6, because such duties were discretionary. Truman v. Griese, 2009 SD 8, 762 N.W.2d 75, 2009 S.D. LEXIS 10 (Feb. 11, 2009).

Actions not within the scope of employment

When an employee who was on call spent most of his evening sightseeing and going to bars before he had a motorcycle accident while on his way home, the employee's injuries were not within the scope or course of his employment, even though he inspected a job site that evening. South Dakota Pub. Entity Pool for Liab. v. Winger, 1997 SD 77, 566 N.W.2d 125, 1997 S.D. LEXIS 77 (July 2, 1997).

Opinions of Attorney General

*Law enforcement risk pool, A.G. Opinion No. 86-46; 1986 Op. Atty Gen. S.D. 280.
Relationship of the State to the Pepl Fund, A.G. Opinion No. 87-37; 1987-1988 Op. Atty Gen. S.D. 104.*

*Purchase of Insurance, A.G. Opinion No. 88-38; 1987-1988 Op. Atty Gen. S.D. 273.
Structure and operation of Airline Authority, A.G. Opinion No. 89-40; 1989-1990 Op. Atty Gen. S.D. 143.*

3-22-2. Terms defined. Terms used in this chapter mean:

- (1) "PEPL," the public entity pool for liability established pursuant to this chapter;
- (2) "Bureau," the Bureau of Administration;
- (3) "Covered claim," a claim or civil action arising in tort from the operation of a motor vehicle, a ministerial act, or another act for which coverage is provided under the PEPL coverage document;
- (4) "Coverage document," the written agreement between the director and the Governor setting forth the terms, conditions, limits, and scope of coverage provided by PEPL for a covered claim;
- (5) "Director," the director of PEPL appointed by the commissioner of administration pursuant to this chapter;
- (6) "Employee," any permanent or temporary employee or elected or appointed officer of any state entity whether compensated or not;
- (7) "Fund," the public entity pool for liability fund established pursuant to this chapter; and
- (8) "State entity," the State of South Dakota and all of its branches, agencies, boards and commissions.

Source: *SL 1986, ch 413, § 2; 1987, ch 40, § 1; 1995, ch 323 (Ex. Ord. 95-7), §§ 17, 18; 2010, ch 24, § 2.*

Notes of Decisions/Attorney General Opinions:

Constitutional provisions

"Open courts" provision of South Dakota Constitution precluded extension of sovereign immunity to water user districts. SDCL 3-22-2, 3-22-2(1), 21-32A-3, 46A-9-3; Const. Art. 3, § 27. Aune v. B-Y Water Dist., 1990, 464 N.W.2d 1.

Statute defining public entities entitled to sovereign immunity is unconstitutional to extent that it purports to extend sovereign immunity to water user districts. SDCL 3-22-2(1). Aune v. B-Y Water Dist., 1990, 464 N.W.2d 1.

Member

The PEPL board, in its agreement, may specify whether the sub pool is one entity member, or as many entities as there are members in the sub pool in any case where the sub pool is a separate legal entity. Where the sub pool is not a separate legal entity, but is a joint powers arrangement, the board must count each of the signatories to the joint powers agreement as a distinct member. In addition, in order for any such agreement to

be made, the requirement of the 30 public entities members found in § 3-22-25 must be met. Op. Atty. Gen. Opinion No. 87-37, 1987 WL 341034.

The following notes of decision are no longer listed in West's annotated SDCL. They are retained here for reference purposes.

Water district not "public entity"

Where purchasers of land filed suit against a water district on account of refusal by the water district to turn on the water until the purchasers paid the accrued monthly minimum charges for the two years the water had been off by the purchasers' grantor, an attempt by the water district to receive governmental immunity from suit under S.D. Codified Laws § 21-32A-3 as a so-called "public entity" under S.D. Codified Laws § 3-22-2 was unconstitutional. *Aune v. B-Y Water Dist.* 464 N.W.2d 1, 1990 S.D. LEXIS 173 (Dec. 5, 1990).

Beyond the scope of employment

When an employee who was on call spent most of his evening sightseeing and going to bars before he had a motorcycle accident while on his way home, the employee's injuries were not within the scope or course of his employment, even though he inspected a job site that evening. *South Dakota Pub. Entity Pool for Liab. v. Winger*, 1997 SD 77, 566 N.W.2d 125, (July 2, 1997).

Opinion of Attorney General

Relationship of the State to the Pepl Fund, Opinion No. 87-37; 1987-1988 Op. Atty Gen. S.D. 104.

7-18-8. Liability insurance and agreements obtained for county – Protection for officers and employees. Any board of county commissioners may obtain and pay for all forms of liability insurance, or in lieu thereof, make other arrangements, including entering into agreements with others, which agreements may create separate legal or administrative entities pursuant to chapter 1-24, to protect and assist the county in meeting obligations arising from such acts or omissions for which the county may be legally liable. The liability insurance coverage or other arrangement obtained shall protect the county officers and employees in the performance of official duties and against acts committed by them that could be reasonably considered to be within the scope of their official duties.

Source: SL 1949, ch 28; SDC Supp 1960, § 12.1810; SL 1975, ch 80; 1978, ch 50, § 1; 1987, ch 75, § 2.

Commission Note.

Section 5, ch 75, SL 1987, provides that any agreement entered into prior to the effective date of the act designed to affect the purposes of the act is authorized.

Amendments.

The 1987 amendment rewrote the first sentence, which formerly read "Any board of county commissioners may obtain and pay for all forms of liability insurance protecting and insuring the county against such acts or omissions for which the county may be legally liable", and in the second sentence substituted "coverage or other arrangement obtained shall protect" for "coverage obtained shall provide protection for."

Notes of Decisions/Attorney General Opinions:

Statutory Liability

Where statute making county liable for damage resulting from defective highway or bridge prescribed nature and extent of duty imposed on county, standard of care could not be predicated on principles of common-law negligence, and county's liability was determinable from standard of conduct imposed by statute and not standard of reasonably prudent person. SDC 1960 Supp. 28.0913. *Dohrman v. Lawrence County*, 1966, 82 S.D. 207, 143 N.W.2d 865.

At common law no right of action existed against county for recovery of damages resulting from defective highway or bridge, and source of liability for damages of that character is statutory. SDC 1960 Supp. 28.0913. Dohrman v. Lawrence County, 1966, 82 S.D. 207, 143 N.W.2d 865.

Duty to guard and repair

Failure to install adequate signs warning of danger incident to sharp curve or steep hill is not violation of duty to guard and repair damaged or destroyed highway within statute imposing liability on county for breach of such duty. SDC 1960 Supp. 28.0913. Dohrman v. Lawrence County, 1966, 82 S.D. 207, 143 N.W.2d 865.

Alleged failure of county to place warning signs on sharp curve of steep hill was at most negligence in construction, maintenance and design of highway and was not sufficient to constitute a nuisance imposing liability on county for death of decedent who drove his automobile off curve. Dohrman v. Lawrence County, 1966, 82 S.D. 207, 143 N.W.2d 865.

Complaint for wrongful death of decedent who was killed when he allegedly drove his automobile off unmarked, sharp curve on steep hill on county road did not allege breach of county's duty to guard and repair damaged or destroyed highway and stated no cause of action against county under statute imposing liability for breach of such duty. SDC 1960 Supp. 28.0913. Dohrman v. Lawrence County, 1966, 82 S.D. 207, 143 N.W.2d 865.

Under 1939 revision of statute imposing liability upon counties for damages resulting from defective highway or bridge, county's obligation is confined to specific duty to guard and repair damaged or destroyed highway. SDC 1960 Supp. 28.0913. Dohrman v. Lawrence County, 1966, 82 S.D. 207, 143 N.W.2d 865.

Liabilities of officers

Where wrongful death action was brought against county highway superintendent in his official capacity only, his liability was subject to same statutory limitations as that of county. SDC 1960 Supp. 28.0304, 28.0913. Dohrman v. Lawrence County, 1966, 82 S.D. 207, 143 N.W.2d 865.

Procurement of liability insurance

That county procured liability insurance did not create cause of action for wrongful death of decedent who was killed when he allegedly drove his automobile off unmarked, sharp curve on steep hill on county road where none existed in absence of insurance. SDC 1960 Supp. 12.0823, 28.0913. Dohrman v. Lawrence County, 1966, 82 S.D. 207, 143 N.W.2d 865.

21-32A-1. Waiver of sovereign immunity to extend of risk sharing pool or insurance coverage. To the extent that any public entity, other than the state, participants in a risk sharing pool or purchases liability insurance and to the extent that coverage is afforded thereunder, the public entity shall be deemed to have waived the common law doctrine of sovereign immunity and shall be deemed to have consented in this section and any other party may be sued. The waiver contained in this section and 21-32A-2 and 21-32A-3 is subject to the provisions of §3-22-17.

Sources: SL 1986, ch 175, § 1; 1987, ch 163, § 1.

Notes of Decisions/Attorney General Opinions:

In general

When all the statutory requirements have been met for the waiver of sovereign immunity, sovereign immunity is waived at that time. SDCL 21-32A-1. Cromwell v. Rapid City Police Dept., 632 N.W.2d 20, 2001 S.D. 100.

If there is to be a departure from the rule of governmental immunity, it should result from legislative action. SDCL 21-32A-1. Cromwell v. Rapid City Police Dept., 632 N.W.2d 20, 2001 S.D. 100.

Retroactive applications

Statute which waives sovereign immunity when public entity has purchased liability insurance was not to be applied retroactively in action brought against school district, coaches and superintendent. SDCL 21-32A-1 to 21-32A-3. Gasper v. Freidel, 1990, 450 N.W.2d 226.

Risk sharing pools

City's participation in risk-sharing pool waived immunity for injuries resulting from police car chase of fleeing suspect. SDCL 21-32A-1, 21-32A-2. Hall v. City of Watertown ex rel. City of Watertown Police Dept., 636 N.W.2d 686, 2001 S.D. 137, rehearing denied.

State does not waive sovereign immunity by participating in risk sharing pool. SDCL 21-32-16, 21-32A-1. Wilson v. Hogan, 1991, 473 N.W.2d 492.

Scope of immunity

Like other forms of immunity, sovereign immunity protects a state not only from liability for money judgments, but also from being required to appear and defend itself against the claims of private parties. SDCL 21-32A-1. Cromwell v. Rapid City Police Dept., 632 N.W.2d 20, 2001 S.D. 100.

When the state has waived sovereign immunity to the extent of participation in a risk-sharing pool or the purchase of liability insurance, a state employee sued in his official capacity can no longer avail himself of the defense of sovereign immunity except in defense of alleged negligence arising from the performance of a discretionary act. SDCL 21-32A-1 to 21-32A-3. Hansen v. South Dakota Dept. of Transp., 584 N.W.2d 881, 1998 S.D. 109.

Statute permitting suit against insured public entity in the same manner that any other party may be sued did not permit public entity to be sued for breach of any duty for which any other party could be sued and did not permit suit against township for failure to erect signs warning of danger of sharp curve on road; "in the same manner" referred to mode of procedure and not basis upon which township could be sued. SDCL 21-32A-1. Gulbranson v. Flandreau Tp., 1990, 458 N.W.2d 361.

Public duty rule

Despite conditional waiver of sovereign immunity, law continues to observe public duty rule, which declares government owes duty of protection to public, not to particular persons or classes. SDCL 21-32A-1. Tipton v. Town of Tabor, 567 N.W.2d 351, 1997 S.D. 96, rehearing denied.

Exclusions from insurance coverage

City was immune under South Dakota law from liability for state law claims of nuisance and negligence arising from its operation of municipal lagoon because liability for pollution was expressly not covered by city's insurance policy. SDCL 21-32A-1. Patterson Farm, Inc. v. City of Britton, S.D., 1998, 22 F.Supp.2d 1085.

Withdrawal of waiver

One who intentionally relinquishes the right to sovereign immunity cannot, without consent of his adversary, reclaim it, for a waiver once made is irrevocable, even in the absence of consideration, or of any change in position of a party in whose favor the waiver operates. SDCL 21-32A-1. Cromwell v. Rapid City Police Dept., 632 N.W.2d 20, 2001 S.D. 100.

Once the right of sovereign immunity is waived, the waiver cannot be withdrawn without the consent of the other party, even if subsequent events prove the right waived to have been more valuable than was anticipated. SDCL 21-32A-1. Cromwell v. Rapid City Police Dept., 632 N.W.2d 20, 2001 S.D. 100.

Open-courts provision of state constitution prevented city from withdrawing its waiver of sovereign immunity to negligence suit by guardian for motorist injured in police chase, where city waived immunity by participating in state risk pool, motorist did not consent to withdrawal of waiver, motorist was thereby entitled to relief against city to the same extent as against a private party, and there was no statutory basis for reassertion of immunity. Const. Art. 6, § 20; SDCL 21-32A-1. Cromwell v. Rapid City Police Dept., 632 N.W.2d 20, 2001 S.D. 100.

Counties

County waived its sovereign immunity against prisoner's negligence claim, under South Dakota law, when it either participated in risk sharing pool or purchased liability insurance, to the extent of its coverage thereunder. SDCL 3-22-2(12), 21-32A-1, 21-32A-2. Webb v. Lawrence County, 1998, 144 F.3d 1131.

Registers of deeds

Sovereign immunity barred action by title insurer against register of deeds seeking indemnity for negligent indexing; fact that county purchased liability insurance did not operate to waive sovereign immunity. SDCL 21-32-15, 21-32-16, 21-32A-1 et seq. Siefkes v. Watertown Title Co., 1989, 437 N.W.2d 190.

Jails and correctional facilities

County's purchase of liability insurance did not result in waiver of statutory immunity from liability for death of arrestee who died after being transferred to hospital, under the statute providing that public entities waived common law sovereign immunity by purchasing liability insurance or participating in risk sharing pool; because immunity in the specific area of the operation and maintenance of jails and correctional facilities, and administration of prisoner release was created through legislative enactment, the general common law waiver provisions did not apply. Unruh v. Davison County, 744 N.W.2d 839, 2008 S.D. 9, rehearing denied.

Schools and school districts

Sovereign immunity existed for school district's school bus which was involved in a collision with another vehicle, but was waived to the extent of liability insurance. SDCL 3-21-1 et seq., 3-21-1(1), 13-5-1, 13-8-39, 21-32A-1 to 21-32A-3. Brown v. Egan Consol. School Dist. No. 50-2, 1989, 449 N.W.2d 259.

Municipal corporations

City faced liability to plaintiff restaurant owners for damages, for ultra vires act of providing food service in municipal bar, to the extent coverage was afforded by city's liability insurance, and was deemed to have waived its sovereign immunity in that respect. Olesen v. Town of Hurley, 691 N.W.2d 324, 2004 S.D. 136.

City waived its sovereign immunity from negligence suit by guardian of motorist injured in police chase on date when accident occurred and cause of action accrued; on that date, all statutory requirements for waiver of sovereign immunity were completed. SDCL 21-32A-1. Cromwell v. Rapid City Police Dept., 632 N.W.2d 20, 2001 S.D. 100.

City could not, by ceasing to participate in state risk pool, reclaim waiver of sovereign immunity from negligence suit brought by guardian for motorist injured in police chase, where city had waived immunity by participation in pool, and motorist had not consented to city's reclaiming waiver. SDCL 21-32A-1. Cromwell v. Rapid City Police Dept., 632 N.W.2d 20, 2001 S.D. 100.

Review

Whether public employees are protected by sovereign immunity is a question of law, reviewed de novo, with no deference given to the trial court's legal conclusions. SDCL 21-32A-1. Cromwell v. Rapid City Police Dept., 632 N.W.2d 20, 2001 S.D. 100.

Law Reviews

33 S.D. L. Rev. 131. Note, Bego v. Gordon: An Analysis of Immunity Protection for International Torts and Other UltraVires Acts of Public Official, 33 SD Lrev 131 (1988).

42 S.D. L. REV. 327, Note: Kyllö V. Panzer: The South Dakota Supreme Court Declares Statutes Unconstitutional Which Limited State Employee Liability.

43 S.D. L. REV. 706, Note: Gleason v. Peters: An Application of the Public Duty Rule as a Judicial Resurrection of Sovereign Immunity

County Officers Authorization to Attend Meetings

The following county officials are authorized by resolution of the board of county commissioners to attend educational conferences, meetings and conventions within or without the state of South Dakota which pertain to the betterment and advancement of county government: commissioners, highway superintendents, auditors, treasurers, register of deeds, state's attorneys, sheriffs, county assessing officers and county coroners. (SDCL 7-7-25 and 7-7-26).

7-7-25. Meetings of county officials for advancement of county government –

Authorization. County commissioners, highway superintendents, auditors, treasurers, register of deeds, state's attorneys, sheriffs, county assessing officers and county coroners are hereby authorized to attend educational conferences, meetings, and conventions held and conducted within or without the state of South Dakota pertaining to the betterment and advancement of county government as authorized by resolutions of the board of county commissioners.

Source: SL 1931, ch 119; SL 1933, ch 69, § 1; SDC 1939, § 12.1913; SL 1951, ch 28; SL 1953, ch 25; SL 1959, ch 30; SL 1961, ch 36; SL 1964, ch 29; SL 1965, ch 28, § 1; SL 1968, ch 16, § 2; SL 1972, ch 40, § 1; SL 1974, ch 55, § 11; SL 1975, ch 75, § 1.

Notes of Decisions/Attorney General Opinions:

In general

Since miles traveled to attend § 7-7-4 meetings are in the discharge of official duties, it is reasonable to conclude that attendance at § 7-7-25 educational conferences, meetings, and conventions (including legislative meetings) is in the discharge of official duties, therefore, mileage expenses incurred as a result thereof are within the ambit of the actual and necessary expenses which may be reimbursed pursuant to § 7-7-26. Op.Atty.Gen. Opinion No. 88-44, 1988 WL 483259.

The following opinions are no longer listed in West's annotated SDCL. They are retained here for reference purposes.

Opinions of Attorney General

Clerk of courts attending meeting called by director of vital statistics, authority of county to pay expenses, Report 1945-46, p. 79.

Convention of school superintendents called by superintendent of public instruction, mileage and living expenses allowed, Report 1935-36, p. 188

Deputy assessor not entitled to expenses unless serving as principal assessing officer, Report 1959-60, p. 136.

Deputy may attend convention on behalf of principal and receive expenses, Report 1957-58, p. 113.

Director of equalization may attend convention and receive expenses, Report 1957-58, p. 113.

Dues of state's attorney is national district attorney's association and in South Dakota state's attorneys association paid by county, Report 1965-66, p. 309; 1967-68, p. 236.

Expense fund computed on percentage of total amount budgeted for per diem, compensation and mileage, Report 1953-54, pp. 152, 347.

Expenses in attending meetings and conventions, per diem not included, Report 1959-60, p. 78.

Expenses may include hotel and meal expenses, per diem and mileage, Report 1963-64, p. 178.

Expenses may include tuition, room and board, Report 1959-60, p. 136.

Sheriff attending meeting at request of FBI agent, expenses not allowed, Report 1939-40, p. 702.

Sheriff attending peace officers' meeting where attendance was voluntary, expenses not allowed. Report 1943-44, p. 228.

Lobbying – in the form on providing legislative committees with instruction, information or testimony pertaining to the betterment and advancement of county government – is among the official duties of county officials. Thus, any actual and necessary expenses they incur may be reimbursed provided the county commissioners have given their prior authorization and approval, (superseding Attorney General's Report 1937-38, p. 538), Opinion No. 88-44.

Since miles traveled to attend § 7-7-4 meetings are in the discharge of official duties, it is reasonable to conclude that attendance at §7-7-25 educational conferences, meetings, and conventions (including legislative meetings) is in the discharge of official duties, therefore, mileage expenses incurred as a result thereof are within the ambit of the actual and necessary expenses which may be reimbursed pursuant to 7-7-26, Opinion No. 88-44.

7-7-26. Prior authorization required for reimbursement of expenses for attending meetings – Vouchers for payment. No charge for expenses in attending any such meeting shall be a charge against the county unless authorized and approved by the county commissioners prior to conveying of any such meeting. Upon the actual officers as designated in § 7-7-25 shall be paid their actual necessary expenses on duty executed vouchers submitted to the board.

Source: SL 1931, ch 119; SDC 1939, § 12.1913; SL 1951, ch 28; SL 1953, ch 25; SL 1959, ch 30; SL 1961, ch 36; SL 1964, ch 29; SL 1965, ch 28, § 1; SL 1968, ch 16, § 2.

Notes of Decisions/Attorney General Opinions:

In general

Since miles traveled to attend § 7-7-4 meetings are in the discharge of official duties, it is reasonable to conclude that attendance at § 7-7-25 educational conferences, meetings, and conventions (including legislative meetings) is in the discharge of official duties, therefore, mileage expenses incurred as a result thereof are within the ambit of the actual and necessary expenses which may be reimbursed pursuant to this section. Op.Atty.Gen. Opinion No. 88-44, 1988 WL 483259.

The following opinions are no longer listed in West's annotated SDCL. They are retained here for reference purposes.

Opinions of Attorney General

Actual necessary expenses must be paid county employees, once commissioners approve official travel under this section, Opinion No. 75-2.

Lobbying — in the form of providing legislative committees with instruction, information, or testimony pertaining to the betterment and advancement of county government—is among the official duties of county officials. Thus, any actual and necessary expenses they incur may be reimbursed provided the county commissioners have given their prior authorization and approval, (overruling Attorney General's Report 1937-1938, p. 538), Opinion No. 88-44.

Life and Health Insurance

The county commissioners have the power to enter into group life and group health insurance contracts for the protection and benefit of its officers and employees, and their immediate families. The board may pay all or part of the premium for its officers and employees and pay not more than one-half of the premiums for their families.

7-8-26.1. Life and health insurance contracts for county officers and employees. The board of county commissioners may enter into group life and group health insurance contracts for the protection and benefit of its officers and employees, and their immediate families. The board may pay all or part of the necessary premiums for its officers and employees and for the immediate families of those officers and employees.

Source: SDC 1939, § 12.0617 as added by SL 1969, ch 19; SL 1983, ch 41, § 2; SL 1983, ch 42, § 1; SL 1991, ch 59, § 2.

Notes of Decisions/Attorney General Opinions:

In general

Competitive bidding not required for county group health insurance. Op.Atty.Gen. Opinion No. 65, 1977 WL 36003.

Public Employee Union

Chapter 3-18 governs public employee union. Public employees have the right to form and join labor of employee organizations, and have the right not to form and join such unions. Public employees have the right to designate representatives for the purpose of meeting and negotiating with the governmental agency with respect to grievance procedures and conditions of employment (SDCL 3-18-2). The department of labor enforces statutes governing unfair practices of employers and employee organizations (SDCL 3-18-10). The commissioners may apply for injunctive relief upon the existence of a strike. (SDCL 3-18-14)

3-18-2. Rights relating to labor organizations – Designation of representatives – Discrimination against employees exercising rights as misdemeanor – Good faith negotiations – Intimidation. Public employees shall have the right to form and join labor of employee organizations and shall have the right not to form and join labor 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 which 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 be the governmental agency or its designated representatives and the employee organization or its designated representative 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.

Source: *SL 1969, ch 88, § 7, subdiv 2; SL 1970, ch 26, § 1; SL 1973, ch 31; SL 1974, ch 33; SL 1980, ch 24, § 48.*

Cross-References.

Penalties for classified misdemeanors, § 22-6-2.

Notes of Decisions/Attorney General Opinions:

In general

South Dakota law provides public employees with the opportunity to collectively bargain with their employers. Winslow v. Fall River County, 909 N.W.2d 713, 2018 S.D. 25.

Subjects of bargaining

Public employers are required to negotiate matters of pay, wages, hours of employment, or other conditions of employment. Winslow v. Fall River County, 909 N.W.2d 713, 2018 S.D. 25.

Public employees are permitted to negotiate matters of pay, wages, hours of employment, or other conditions of employment through collective bargaining. International Union of Operating Engineers v. City of Pierre, 800 N.W.2d 738, 2011 S.D. 37.

As part of the collective bargaining process, public employers are required to negotiate matters of pay, wages, hours of employment, or other conditions of employment. Bon Homme County Com'n v. American Federation of State, County, and Mun. Employees (AFSCME), Local 1743A, 699 N.W.2d 441, 2005 S.D. 76.

Public employees do not have the right to engage in negotiations over all issues relating to rates of pay, wages, hours and other conditions of employment. SDCL 3-18-2, 3-18-3. West Central Educ. Ass'n v. West Central School Dist. 49-4, 655 N.W.2d 916, 2002 S.D. 163.

In determining whether the issue of employment negotiations with public employees is one properly decided by the political process or by collective negotiations, the interests of the parties must be balanced to decide whether negotiations will significantly impair the state's ability to make policy decisions. SDCL 3-18-2, 3-18-3. West Central Educ. Ass'n v. West Central School Dist. 49-4, 655 N.W.2d 916, 2002 S.D. 163.

School calendar is an inherently managerial subject that is not a mandatory subject of collective bargaining between teachers' association and school districts; calendar affects school employees, students, parents, taxpayers, and others, not just teachers, and thus is a matter of general public interest, and legislature requires school boards to determine most aspects of the calendar, including number and length of days. SDCL 3-18-2, 3-18-3. West Central Educ. Ass'n v. West Central School Dist. 49-4, 655 N.W.2d 916, 2002 S.D. 163.

Public employee collective bargaining law requires public employers to negotiate matters of pay, wages, hours of employment, or other conditions of employment. SDCL 3-18-1 et seq. Council of Higher Educ. v. South Dakota Bd. of Regents, 645 N.W.2d 240, 2002 S.D. 55.

The Public Employees' Unions Law does not mandate board of education to negotiate conditions which are not considered material working conditions and which under reasonable interpretations should be the prerogative of the board as in management. SDCL 3-18-1 et seq. Aberdeen Ed. Ass'n v. Aberdeen Bd. of Ed., Aberdeen Independent School Dist., 1974, 88 S.D. 127, 215 N.W.2d 837.

The phrase "other conditions of employment" as used in Public Employees' Unions Law means conditions of employment which materially affect rates of pay, wages, hours of employment and working conditions. SDCL 3-18-1 et seq. Aberdeen Ed. Ass'n v. Aberdeen Bd. of Ed., Aberdeen Independent School Dist., 1974, 88 S.D. 127, 215 N.W.2d 837.

The phrase "other conditions of employment" as used in the Public Employees' Unions Law does not include, so as to require board of education to negotiate with respect to, elementary conferences, teachers' aides, elementary planning, class size, audio-visual expansion, budget allowances, schoolwide guidance and counseling program, and mandatory retirement of administrators. SDCL 3-18-1 et seq., 3-18-3. Aberdeen Ed. Ass'n v. Aberdeen Bd. of Ed., Aberdeen Independent School Dist., 1974, 88 S.D. 127, 215 N.W.2d 837.

Bargaining agreements

Union representing state employees may not, by contract with State, choose at its whim which legislative action it will accept and which it will not. SDCL 3-18-1 et seq. American Federation of State, County and Mun. Employees (AFSCME) Local 1922 v. State, 1989, 444 N.W.2d 10.

Good faith negotiations

Counties failed to "negotiate collectively in good faith" with union representing highway employees when counties insisted on management rights clauses in collective bargaining agreements, and thus committed an "unfair labor practice," where counties refused to make concessions regarding the clauses, and only rationale provided by the counties for the clauses was their desire for more flexibility in decision making. Bon Homme County Com'n v. American Federation of State, County, and Mun. Employees (AFSCME), Local 1743A, 699 N.W.2d 441, 2005 S.D. 76.

Public employers are not under a stricter good faith standard for deciding whether a public employer has bargained in good faith on the ground that public employees are not vested with the right to strike. Bon Homme County Com'n v. American Federation of State, County, and Mun. Employees (AFSCME), Local 1743A, 699 N.W.2d 441, 2005 S.D. 76.

While under a duty to negotiate in good faith, a public employer is not required to agree to a contract or any specific rates of pay, wages, hours of employment or other conditions of employment. Bon Homme County Com'n v. American Federation of State, County, and Mun. Employees (AFSCME), Local 1743A, 699 N.W.2d 441, 2005 S.D. 76.

A public employer may unilaterally implement disputed provisions if the parties have bargained in good faith and a legitimate impasse exists. Bon Homme County Com'n v. American Federation of State, County, and Mun. Employees (AFSCME), Local 1743A, 699 N.W.2d 441, 2005 S.D. 76.

Requirement that public employers and employees "negotiate collectively in good faith" means that the parties must seriously work to resolve differences and reach a common understanding. Bon Homme County Com'n v. American Federation of State, County, and Mun. Employees (AFSCME), Local 1743A, 699 N.W.2d 441, 2005 S.D. 76.

Statement of rationale

Requirement that a party in a public employment negotiation, in order to negotiate collectively in good faith, provide a statement of rationale when it refuses to agree to a proposal or make a concession does not permit any reason to suffice; rather the party must present a legitimate and specific rationale for its positions. Bon Homme County Com'n v. American Federation of State, County, and Mun. Employees (AFSCME), Local 1743A, 699 N.W.2d 441, 2005 S.D. 76.

Discharge of employees

Human rights commission did not clearly err in discounting former employer's evidence of decreasing net profits as an economic reason for terminating former employee on same day he learned that the human rights division investigator had found probable cause regarding a sex discrimination complaint previously filed by former employee; therefore, sufficient evidence supported the commission's findings and conclusion of retaliatory discharge based on the previous complaint. State, Div. of Human Rights ex rel. Miller v. Miller, 1984, 349 N.W.2d 42.

Statutory right of county register of deeds to remove deputies from his office at his pleasure was limited by statute giving public employees right to form and join labor or employee organizations. SDCL 3-18-2, 7-7-21. Lindsey v. Minnehaha County, 1979, 281 N.W.2d 808.

Mere fact of a discharge of a deputy by county register of deeds does not in and of itself warrant an inference that discharge was improperly motivated. SDCL 1-26-1 et seq., 3-18-1 et seq., 3-18-2, 3-18-3.1(1, 3, 6). Lindsey v. Minnehaha County, 1979, 281 N.W.2d 808.

Sheriff's right to discharge deputies is limited by statute giving public employees right to form and join labor or employee organizations. SDCL 3-18-2, 7-7-21. General Drivers and Helpers Union v. Brown County, 1978, 269 N.W.2d 795.

Schools and school districts

Contracts negotiated between teachers and public school districts are like any other collective bargaining agreement. Hanson v. Vermillion School Dist. No. 13-1, 727 N.W.2d 459, 2007 S.D. 9.

Disputes over collective bargaining agreements negotiated between school districts and teachers are settled by application of general contract principles. Hanson v. Vermillion School Dist. No. 13-1, 727 N.W.2d 459, 2007 S.D. 9.

Nontenured teacher who was not renewed for a third year did not have right to grieve either nonrenewal of contract or statement of reasons for nonrenewal given her at informal conference. SDCL 3-18-2, 3-18-3.1(1, 3, 4, 6), 3-18-3.3, 3-18-10, 3-18-15, 13-43-10.2. Jensen v. Bonesteel-Fairfax School Dist. No. 26-5, 1991, 473 N.W.2d 467.

Contracts negotiated between public school districts and teachers are like any other collective bargaining agreement, and disputes over agreement are resolved with reference to general contract law. SDCL 3-18-1 et seq. Wessington Springs Educ. Ass'n v. Wessington Springs School Dist. No. 36-2, 1991, 467 N.W.2d 101.

Policies of school district, especially those negotiated with bargaining representatives for protection of teachers, have full force and effect of law, and legally bind school district. SDCL 3-18-1 et seq. Wessington Springs Educ. Ass'n v. Wessington Springs School Dist. No. 36-2, 1991, 467 N.W.2d 101.

Agreement negotiated between school district and teachers' union did not allow school board to consider factors not listed in agreement in granting or denying teacher transfer requests, and thus, board could not consider additional factors, such as disruption of classes and students, when filling vacancies. SDCL 3-18-1 et seq. Wessington Springs Educ. Ass'n v. Wessington Springs School Dist. No. 36-2, 1991, 467 N.W.2d 101.

Vacancy/transfer policy of agreement negotiated between school district and teachers' union provided standard by which district had bound itself to fill vacancies, and thus, Supreme Court was not required to disregard that negotiated contract and give deference to district's decision in filling vacancies. SDCL 3-18-1 et seq. Wessington Springs Educ. Ass'n v. Wessington Springs School Dist. No. 36-2, 1991, 467 N.W.2d 101.

Provision in agreement negotiated between school district and teachers' union stating factors that teachers should include in their application when making transfer requests did not indicate that school board could consider factors not listed in agreement in granting or denying teacher transfer requests. SDCL 3-18-1 et seq. Wessington Springs Educ. Ass'n v. Wessington Springs School Dist. No. 36-2, 1991, 467 N.W.2d 101.

As a general statement, matters of teacher employment rest exclusively and absolutely with the school board, but there are limitations to a school board's authority in matters of teacher employment, including teacher tenure statutes and requirement that school board adopt an official teacher evaluation policy. SDCL 3-18-2, 13-8-39, 13-10-2. Fries v. Wessington School Dist. No. 2-4, 1981, 307 N.W.2d 875.

Colleges and universities

University board of regents was entitled to seek writ of prohibition against circuit court to determine whether bargaining agent for university faculty members had improperly bypassed administrative remedies in labor dispute between parties given need for quick and speedy adjudication and uncertainties as to length of time it would have taken for circuit to decide case on merits followed by request for expedited appeal. SDCL 21-30-2. South Dakota Bd. of Regents v. Heege, 1988, 428 N.W.2d 535.

Statute, which requires commissioner of labor and management relations to define appropriate bargaining unit to collectively bargain with Board of Regents, which leaves intact ability of Regents to unilaterally cut salaries, discharge employees, establish employment qualifications, and leaves untouched Regents' basic right of control over state educational institutions, is permissible restriction on exercise of control which Constitution gives Board of Regents over such institutions. (Per Doyle, J., with Chief Justice concurring and one Justice concurring in opinion.) SDCL 3-18-1 et seq., 3-18-2, 3-18-4; Const. art. 14, § 3. Board of Regents v. Carter, 1975, 89 S.D. 40, 228 N.W.2d 621.

Injunctions

Bargaining agent for university faculty members was not entitled to injunction against action of board of regents in sending faculty members individual contracts that would have maintained salary and compensation at level set by previous collective bargaining agreement pending negotiation of new master contract between regents and bargaining agent, as action was not unfair labor practice, and bargaining agent was not entitled to seek relief in circuit court without first exhausting administrative remedies before State Department of Labor. SDCL 3-18-3.1. South Dakota Bd. of Regents v. Heege, 1988, 428 N.W.2d 535.

Collateral References

Labor relations 1-8, 52, 86-88, 342, 510.

3-18-3.3. Rules on unfair practices. The Department of Labor and Regulation shall promulgate rules pursuant to chapter 1-26 to specify procedures to enforce the provisions of §§ 3-18-3.1 and 3-18-3.2.

Source: SL 1973, ch 30, § 3; SL 1993, ch 375, § 3; SL 2011, ch 1 (Ex. Ord. 11-1), § 33, eff. Apr. 12, 2011.

Notes of Decisions/Attorney General Opinions:

Jurisdiction

Nontenured teacher's unfair labor practices complaint came within jurisdiction of Department of Labor as complaint was original proceeding and not appeal of hiring decision; teacher complied with procedure by filing complaint with Department alleging that basing hiring decision on her labor activities and grievances resulted in restraint of free expression and freedom of association rights and discrimination. SDCL 3-18-2, 3-18-3.1(1, 3, 4, 6), 3-18-3.3, 3-18-10, 3-18-15, 13-43-10.2. Jensen v. Bonesteel-Fairfax School Dist. No. 26-5, 1991, 473 N.W.2d 467

3-18-15.5. Grievance procedures for employees of political subdivisions. The provisions of § 3-18-15.1 do not apply to employees of political subdivisions unless those employees are members of a public employee union or the governing body of a political subdivision has adopted an ordinance or resolution establishing a grievance procedure for all employees of the political subdivision.

Source: SL 2013, ch 23, § 1.

3-18-10. Strikes prohibited – Right to submission of grievance. No public employee shall strike against the state of South Dakota, any of the political subdivisions thereof, any of its authorities, commissions, or boards, the public school system or any other branch of the public service. Provided, however, that nothing contained in this chapter shall be construed to limit, impair or effect, the right of any public employee to the expression or communication of a view, grievance, complaint or opinion on any matter related to the conditions or compensation of public employment or their betterment with the full faithful and proper performance of the duties of employment.

Source: SL 1969, ch 88, § 2.

Notes of Decisions/Attorney General Opinions:

Good faith negotiations

Public employers are not under a stricter good faith standard for deciding whether a public employer has bargained in good faith on the ground that public employees are not vested with the right to strike. Bon Homme County Com'n v. American Federation of State, County, and Mun. Employees (AFSCME), Local 1743A, 699 N.W.2d 441, 2005 S.D. 76.

The following notes of decision is no longer listed in West's annotated SDCL. It is retained here for reference purposes.

Public Employee Rights

While state employees, through legislative grace, have been granted certain rights, there is no question that the legislature has restricted certain employee rights and actions at S.D. Codified Laws § 3-18-9, such as the right to strike per S.D. Codified Laws § 3-18-10. American Fed'n of State, County & Mun. Employees Local 1922 v. State, 444 N.W.2d 10, 1989 S.D. LEXIS 115 (July 5, 1989)

Collateral References

Interference with production by concerted action of employees, short of formal strike, as effected by labor relations acts, 25 ALR 2d 315.

Right of public employees to strike or engage in work stoppage, 37 ALR3d 1147.

Who are employees forbidden to strike under state enactments or state common law rules prohibiting strikes by public employees or stated classes of public employees, 22 ALR 4th 1103.

Work stoppage, damage liability of state or local public employees union or union officials for unlawful work stoppage, 84 ALR 3d 336.

3-18-14. Injunctive relief in case of strike. The governing boards of the state and its political subdivisions may apply for injunctive relief in circuit court immediately upon the existence of a strike or related activities, and the state's attorney of every county shall have the same duty and enforcement of the chapter.

Source: *SL 1969, ch 88, § 6; 1973, ch 32.*

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