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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

NO. 20130350

Dickinson Education Association,

Petitioner/Appellee,

vs.

Dickinson Public School District,

Respondent/Appellant.

Appeal from District Court, Stark County, North Dakota
Southwest Judicial District
Honorable William A. Herauf

BRIEF OF APPELLEE DICKINSON EDUCATION ASSOCIATION

Submitted by,

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STATEMENT OF THE ISSUE

1. Whether the District Court correctly issued its Order of Mandamus requiring the School District to issue a negotiated agreement for the 2013-14 school year.

STATEMENT OF CASE

[¶ 1] On August 6, 2013, the Dickinson Education Association ("DEA") filed its Petition for Writ of Mandamus, Application for Temporary Restraining Order and other supporting documents with the Court. Judge Dann Greenwood reviewed the documents and signed an Alternative Writ of Mandamus on August 8, 2013, suspending the continuing contract offers made by the Dickinson School Board ("Board") for the 2013-14 school year prohibiting the school from requiring that those contract offers be returned until further order of the Court and ordering the Dickinson Public School District ("District") to execute a negotiated agreement for school year 2013-14. (Appendix, Pp. 4-41).

[¶ 2] On September 10, 2013, after holding a telephone conference with counsel, the Court issued an Order Quashing the Alternative Writ of Mandamus to the extent that the prohibition concerning the signing of contracts was removed and members of the DEA were allowed to sign and return their contracts no later than September 13, 2013. The District agreed not to raise the issue of waiver. The Petition for Writ of Mandamus remained in effect and the parties were in agreement that the issue before the Court was whether a school district could unilaterally issue contracts, in this case, for the 2014-15 school year based upon the negotiation process. (App., P. 155).

[¶ 3] The District Court held a hearing on October 7, 2013 on the issue of granting a Writ of Mandamus requiring the District to issue a negotiated agreement for the 2013-14 school year. Prior to the hearing, the Court and parties agreed that this case presented only a legal issue and there was no factual dispute as to what occurred during the negotiation process between the DEA and the District. At the conclusion of the hearing, the Court ruled in favor of the DEA and held that under Dickinson Education Association

v. Dickinson Public School District, 499 N.W.2d 120, 123 (N.D. 1993) ("DEA II"), the District was limited to unilaterally issuing a negotiated agreement and individual contracts for the 2013-14 school year. (App., Pp. 203-38). On October 25, 2013, Findings of Fact, Conclusions of Law and Order for Judgment were filed. (App., P. 272). Judgment was thereafter entered on October 30, 2013. (App., P. 279). An appeal by the District was taken thereafter.

STATEMENT OF THE FACTS

[¶ 4] DEA, pursuant to N.D.C.C. Ch. 15.1-16, is the authorized representative organization for teachers employed by the Respondent School District for the 2013-14 school year and for years prior to that school year. (App., P. 272).

[¶ 5] The District is a duly organized political subdivision of the state of North Dakota, created, existing and operating under the laws of the State of North Dakota. The District operates a public school in and around Dickinson, North Dakota, which is located in Stark County. (App., P. 272).

[¶ 6] For several years prior to the 2013-14 school year, DEA and the District have conducted negotiations pursuant to N.D.C.C. Ch. 15.1-16 and have developed and agreed upon a series of negotiated master agreements. (App., P. 273).

[¶ 7] The prior negotiated agreements between the DEA and the District contained the terms and conditions of employment between the certified staff and the District. The terms and conditions of the prior negotiated agreement carry over to the next year unless the conditions are modified, changed or deleted. The DEA and the District have negotiated and agreed to a two-year negotiated agreement for the last ten years. (App., P. 273).

[¶ 8] On October 1, 2012, the DEA delivered a petition for recognition to the central administration office of the District. (App., P. 273).

[¶ 9] For purposes of formulating a negotiated agreement, the parties entered into a negotiation process under N.D.C.C. Ch. 15.1-16 and had meetings between December 11, 2012 and May 22, 2013. The meetings ended with the declaration of impasse, as the District determined that continued negotiations were nonproductive. Both the DEA and the District agreed they were at impasse at the May 22, 2013 meeting. (App., P. 273).

[¶ 10] During the negotiation process, the parties discussed various issues. One of which was the parties' attempts to negotiate a two-year agreement which would cover the 2013-14 and 2014-15 school years; however, there was no agreement between the DEA and the District on the establishment of a two-year negotiated agreement. (App., P. 273).

[¶ 11] During the negotiation process, the DEA changed its position on the two-year agreement and informed the District negotiating team of its desire to only enter into a one-year negotiated agreement, which would cover the 2013-14 school year. DEA also informed the District negotiating team of its desire to enter into negotiations for school year 2014-15. (App., Pp. 273-74).

[¶ 12] After the negotiation meeting on May 22, 2013, the North Dakota Education Fact Finding Commission was notified of the impasse between the District and the DEA. Both the DEA and the District were required to submit pre-hearing material to the Education Fact Finding Commission. On June 13, 2013, a hearing of the Education Fact Finding Commission was held to assist the parties in resolving the impasse between the DEA and the District. (App., P. 274).

[¶ 13] On or about June 19, 2013, the Education Fact Finding Commission issued its report and recommendations which recommended, (1) a two-year contract; (2) that all items previously agreed to remain in the agreement; (3) the Board's final offer on salary in year one and year two of the two-year contract; and (4) the addition of one professional development day in year two of the contract. (App., P. 274).

[¶ 14] On June 19, 2013, the Education Fact Finding Commission delivered its report to the DEA and District pursuant to N.D.C.C. § 15.1-16-15(4). (App., P. 274).

[¶ 15] On July 11, 2013, pursuant to N.D.C.C. § 15.1-16-15(4), the Education Fact Finding Commission, published its findings and recommendations in the Dickinson Press. (App., P. 274).

[¶ 16] On July 24, 2013, negotiating teams for the DEA and the District met to negotiate and discuss the Education Fact Finding Commission Report and recommendations and any public comment regarding its publication. The parties are required to meet to continue the good faith negotiation process at least once after the Fact Finders' Report has been published. (App., P. 274).

[¶ 17] At the July 24, 2013 meeting, after discussions lasting approximately one hour, the District indicated to the DEA that it intended to accept the Fact Finders' Report in total and unilaterally issue contracts based upon the Fact Finder Commission's recommendations. The essence of this decision on the part of the District would be to unilaterally issue contracts for the 2013-14 school year as soon as possible and issue contracts for the 2014-15 school year as early as March 1, 2014. (App., P. 275).

[¶ 18] The final offer made by the District to the DEA contained terms and conditions which could not be performed during the 2013-14 school year, namely, a salary

schedule for the 2014-15 school year. (App., P. 275).

[¶19] Prior to the issuance of individual contracts to the members of the DEA and the issuance of the proposed 2013-15 negotiated agreement, the District had notice of the teachers' desire to negotiate a one-year negotiated agreement for the 2013-14 school year. (App., P. 275).

[¶ 20] On July 29, 2013, the District notified certified staff members that packets were ready, and that each packet included a memo, two copies of their 2013-14 teacher's contract, two copies of their data sheet, and a copy of the Professional Negotiated Agreement 2013-2015. The memo required each certified staff member to return his or her contract to the Central Administration Office no later than September 3, 2013 by 4:00 p.m. On August 1, 2013, those certified staff members who did not pick up their packet from the Central Administration Office were mailed their packet. (App., P. 275).

[¶ 21] At the same time the District issued individual contracts to teachers and members of the DEA, the District also provided to the DEA a copy of the new negotiated agreement for school years 2013-14 and 2014-15. (App., P. 275).

LAW AND ARGUMENT

1. Standard of Review.

[¶ 22] The pre-requisites for the issuance of a Writ of Mandamus are well-established. DEA must show that it has no plain, speedy and adequate remedy in the ordinary course of law and that it has a clear legal right to the performance of the particular act sought to be compelled by the Writ. (See DEAII). The fact that the Court will be forced to construe or interpret a statute or examine the facts as to which a statute applies does

not necessarily preclude the remedy of Mandamus. More frequently than not, statutes defining the duties of an officer will lend themselves to different constructions or interpretations by the parties involved and will require a judicial construction. Because some judicial interpretation may be required to enunciate specifically the duties of the officer does not necessarily preclude a court from employing a Mandamus procedure. Case law in North Dakota supports this concept. Fargo Education Association v. Paulsen, 239 N.W.2d 842, 845 (N.D. 1976). Issuance of a writ of mandamus is left to the sound discretion of the District Court and this Court will not reverse the District Court unless the Writ should not issue as a matter of law, or if the District Court abused its discretion. A court abuses its discretion when it acts arbitrarily, unconscionably, or unreasonably, or when its decision is not the product of a rational mental process. Frank v. Traynor, 1999 ND 183 § 9, 600 N.W.2d 516. See also Edinger v. Governing Authority of Stutsman County, 2005 ND 79 ¶ 8, 695 N.W.2d 447. (Misapplies or misinterprets the law).

2. Historical Background.

[¶ 23] It has been 20 years since this Court has had to review the scope of a school board's authority to unilaterally issue contracts to members of an education association after impasse. DEA believes that it is important to review the cases which have established the parameters as well as the limitations on school board authority in the negotiation process with teachers.

[¶ 24] In 1969, in direct response to the Minot teachers' strike which took place in the spring of 1969, the North Dakota legislature enacted N.D.C.C. Ch. 15-38.1 to provide for a negotiation process between teachers and public school districts in the state of North Dakota. The law provided for a good faith negotiation process and the establishment of

a fact finding commission. However, the original enactment in 1969 did not establish a process to provide for the issuance of negotiated agreements or individual contracts if the parties continued to be at impasse after the good faith negotiation process had concluded.

[¶ 25] In Edgeley Education Association v. Edgeley Public School District No. 3, 231 N.W.2d 826 (N.D. 1975) ("Edgeley I"), this Court for the first time was asked to interpret the provisions of N.D.C.C. Ch. 15-38.1. In Edgeley I, the Education Association questioned the school board's authority to issue contracts during the negotiation process. This Court in dissolving a temporary restraining order, held that the school board had negotiated in good faith and had not violated any of the statutory provisions of N.D.C.C. Ch. 15-38.1. Justice Robert Vogel issued a lengthy dissent in that case in which he opined that the majority opinion rendered the negotiations chapter "meaningless". (J. Vogel dissenting, 231 N.W.2d 826, 834-836). The issue of issuing contract offers during negotiations raised in Edgeley I has been addressed by the legislature. The legislature has prohibited school boards from issuing contracts during the negotiation process. See N.D.C.C. § 15.1-15-04(4).

[¶ 26] Two years after Edgeley I, this Court issued an opinion in Dickinson Education Association v. Dickinson Public School District, 252 N.W.2d 205 (N.D. 1977) ("DEA I"). For the first time, this Court addressed the issue of a school board's authority to unilaterally issue contracts after the negotiation process had reached impasse and no agreement had been reached between the parties. This Court recognized the fact that the North Dakota legislature had not provided a mechanism to allow for the unilateral issuance of contracts to teachers. In DEA I, this Court addressed whether a school board is required to continue negotiations after it has received a report from the Fact Finding Commission,

has held a subsequent meeting with the teachers' negotiating unit and has found that impasse still existed. In resolving the issue in DEA I, this Court stated as follows:

> "We find that the statutory scheme set forth in Chapter 15-38.1, N.D.C.C. recognizes that there comes a point – after the conclusion of a good faith negotiation process – when a school board must be allowed to make contractual offers to the teachers of a school system, which contracts the teachers must choose either to accept or reject. It should be noted that the provision of such contracts so offered, relative to the status of negotiations, would be important factors in the determination of the school board's motive." 252 N.W.2d at 209.

[¶ 27] Four months after issuing its decision in DEA I, this Court once again was faced with the issue of a school board's authority to unilaterally issue contracts at the end of the good faith negotiation process. In Edgeley Education Association v. Edgeley Public School District N. 3, 256 N.W.2d 348 (N.D. 1977) ("Edgeley II"), this Court, after discussing its recent decision in DEA I and finding a parallel factual basis between Edgeley II and DEA I, once again affirmed the school board's authority to unilaterally issue contracts at the end of the good faith negotiation process by stating, "At such point, the good faith negotiation process established in Chapter 15-38.1, N.D.C.C., ceases. The legislature has failed to provide a mechanism by which the parties might resolve their remaining differences thus, the school board is permitted to issue contracts to the school district's teachers on the basis of its last offer." Id. at 354.

[¶ 28] Therefore, the status of the law governing teacher/school board negotiations which had reached impasse was that the school board had the unilateral right to issue contracts to its teachers based upon its last offer. This was the status of the negotiation process from 1977 through 1993.

[¶ 29] No significant decisions were issued by this Court during the next sixteen years which modified or expanded on the holdings in DEA I and Edgeley II. In 1993, in DEA II, this Court once again dealt with the authority of a school district to unilaterally issue contracts after the good faith negotiation process had concluded and an impasse still existed. In DEA II, the school board attempted to unilaterally issue contracts which contained provisions which were not included in the year which was being negotiated by the DEA and the District. In doing so, this Court determined that the school board's authority to unilaterally issue contracts on its last offer had to be limited from the prior holding in DEA I and Edgeley II. In limiting the authority of a school board to unilaterally issue contracts, this Court in DEA II, stated:

> "We recognize that N.D.C.C. Ch. 15-38.1 does not place school boards and public school teachers on equal footing in contract negotiations. In all contract negotiations conducted under N.D.C.C. Ch. 15-38.1, the school board always holds a trump card – a power to unilaterally issue last-offer contracts, which teachers must either accept or reject – ranking higher than any held by the teachers. Because of that tremendous disparity in bargaining power, we decline to extend Edgeley II to allow a school board to unilaterally issue last-offer contracts containing provisions that, while not applicable to the school year that is the subject of negotiations, are applicable to a future year not yet under negotiation." DEA II at 126.

[¶ 30] Therefore, the status of the law post-1993 DEA II was that school boards had the right to unilaterally issue contracts if the terms and conditions of the contract offers dealt with the school year being negotiated between the parties. In DEA II, this Court held that based upon the unequal bargaining power between school districts and education associations the school district did not have the right to issue individual contract offers or negotiated agreements which had terms and conditions not applicable to the school year under negotiation. In other words, this Court significantly limited the rights of school boards

to unilaterally issue contracts and negotiated agreements. The status of the negotiation process in North Dakota remained fairly constant after DEA II in regard to a school board's authority to unilaterally issue contracts after fact finding and impasse. This unequal bargaining power is based upon the fact that teachers do not have the option to engage in a strike and as such, teachers are often without the ultimate bargaining weapon that can pressure their employers into agreement. In order to compensate for the lack of a right to strike, the legislature enacted an impasse provision that allows for mediation and a fact-finding process through the Fact Finding Commission. The Commission does not have binding authority on the parties but does have the authority to make its findings public. See Kenmare Education Association v. Kemare Public School District No. 28, 2006 ND 136 ¶ 15, 717 N.W.2d 603 ("KEA"). This was recognized by the District Court. (App., P. 236)

3. The issuance of a two-year negotiated agreement is not in compliance with this Court's holding in DEA II.

[¶ 31] The DEA has set forth the legal background starting with Edgeley I and continuing through DEA II. The status of the law as established in 1993 was that a school district could not unilaterally issue contracts or a negotiated agreement for terms and conditions which would not apply to the current school year. There is no doubt that the unilateral issuance of individual contracts and a two-year negotiated agreement by the District in July of 2013 violated DEA II. The District, in an effort to justify its actions and to further diminish the rights of teachers to negotiate in North Dakota, attempts to distinguish its actions from the holding in DEA II. The District has argued that the District Court incorrectly granted the Writ of Mandamus. In essence, the District argues (1) since the parties discussed/negotiated a two-year agreement during the negotiation process, the

DEA is committed and the District has the right to unilaterally issue individual contracts and a negotiated agreement for two years; (2) DEA has either expressly agreed to or impliedly agreed to the issuance of a two-year agreement; and (3) in teacher negotiations in North Dakota, only the school board gets to change its bargaining position during the process and the education association once an issue has been discussed, does not.

[¶ 32] From a factual perspective, there is no doubt that there was no agreement between the parties concerning the duration of the negotiated agreement. (App., P. 273 at ¶ 8). To support this finding, it is clear from the record that these parties, when the negotiations team came to a tentative agreement concerning a particular subject, moved it to the side and placed it on the upcoming agenda. There is no listing whatsoever of a tentative agreement between the parties on a two-year agreement. (App., P. 14, ¶¶ 6-7). Logically, it would follow that if the parties did come to an agreement during the negotiation process on the duration of the negotiated agreement, there would not have been a lawsuit. Clearly, from a factual perspective, there was no agreement.

[¶ 33] Furthermore, there is no doubt that during the ten negotiating sessions held between the parties and at the Fact Finding Commission, the DEA took various positions concerning a two-year agreement. During the negotiation process, the parties discussed various issues and the DEA and the District were attempting to negotiate a two-year agreement which would cover the 2013-14 and 2014-15 school years. During the negotiation process, the DEA changed its position on a two-year agreement and informed the District negotiating team of its desire to only enter into a one-year negotiated agreement which would cover the 2013-14 school year. DEA also informed the District negotiating team of its desire to enter into negotiations for the years 2014-15. (App., P.

273 ¶¶ 8 &9). These facts are undisputed.

[¶ 34] On July 24, 2013, after the Fact Finders' Report had been issued and published, the negotiating teams of the parties met. The District indicated to the DEA that it intended to accept the Fact Finders' Report in total and unilaterally issue contracts based upon the Fact Finding Commission's recommendations, specifically of a two-year contract. The essence of the decision on the part of the District would be to unilaterally issue contracts for the 2013-14 school year as soon as possible and to issue contracts for the 2014-15 school year as early as March 1, 2014. (App., P. 275). The District Court found that the final offer made by the District to the DEA contained terms and conditions which could not be performed during the 2013-14 school year, namely, a salary schedule for the 2014-15 school year. (App., P. 275).

[¶ 35] The legal issue before this Court is whether these actions of the DEA somehow magically allowed the District to unilaterally issue contracts and a negotiated agreement for a two-year period or whether, through its actions at the negotiations table, the DEA somehow committed itself to the issuance of a two-year agreement. In order to address these issues, this Court must once again review the definitions of "good faith", "negotiate" and its prior recognition of the unequal bargaining power between education associations and school boards.

[¶ 36] Since 1969, teachers and school boards have entered into an negotiation process provided to them by the legislature. One of the requirements of this process is that the parties negotiate in good faith. Good faith has been defined by the legislature as:

> "Good faith shall consist in an honest intention to abstain from taking any unconscientious advantage of another even through the forms or technicalities of law, together with an absence of all information or belief of

> facts which would render the transaction as unconscientious". See N.D.C.C. § 1-01-21. See Fargo Education Association v. Paulsen, 239 N.W.2d 842, 847 (N.D. 1976).

[¶ 37] In addition, this Court has provided to both teacher associations and school boards direction on the term "negotiate". In Fargo Education Association v. Paulsen, 239 N.W.2d at 847, this Court defined the term "negotiate" as follows:

> "As used in the statute, we believe to "negotiate" simply means to present proposals and offer counter proposals, to discuss proposals, to carry on a dialogue, the exchange ideas, all for the purpose of persuading or being persuaded by logic and reasoning. This means that the parties must also be willing to listen and not only talk. It is the art of friendly persuasion. The persuasion can result in an agreement, an understanding or a settlement of issues. It does not mean an agreement must be reached. Neither side is required by law to surrender or obligate any of its duties and responsibilities. Neither does it mean formal or binding arbitration.
>
> "From the foregoing definition and authorities, it becomes apparent that the term "negotiate in good faith" does not have any mysterious connotations of hidden meanings and as such it would not be too difficult to understand or to work with in its framework."

[¶ 38] It is entirely clear that the basis for the District's argument is that since the DEA discussed/negotiated the possibility of a two-year agreement, they are somehow committed to a two-year agreement and therefore the District then has the right to circumvent the holding of DEA II and issue individual contracts and a negotiated agreement for two years. The District's argument totally ignores the concept of negotiations as set forth by this Court. As stated earlier, there is nothing in the record that indicates that the DEA agreed to a two-year agreement. The prior negotiated agreement for two years was set to expire and the DEA, pursuant to N.D.C.C. § 15.1-16-11, petitioned the school board in October, 2012 to negotiate for the next school year. There is nothing in the record which indicates that the DEA was prepared to negotiate only for a two-year

agreement. Quite simply, it is up to the DEA to determine for itself the length of the term of the negotiated agreement. It has the right to change its position on all sorts of issues in the negotiation process. That is what bargaining is all about and this Court has recognized that parties do have the right to change their positions during the negotiation process. See Belfield Education Association v. Belfield Public School District, 496 N.W.2d 12 (N.D. 1993) (The parties changed their final offer several times). There are numerous references in the record indicating the DEA's position. DEA wanted to settle on a one-year agreement towards the end of the negotiation process and also wanted to negotiate for the 2014-15 school year. DEA submitted petitions to negotiate for the 2014-15 school year.

[¶ 39] The reversal of the District Court's opinion would be a total disregard of this Court's holding in DEA II. Furthermore, a reversal of the District Court will have a chilling effect upon negotiations between school districts and education associations in the future. There is no doubt that it is convenient for both education associations and school boards to come to a two-year agreement. For the most part, this is based upon the legislature's funding of education over a two year biennium. Negotiators for both education associations and school boards have a fairly good idea of the funding which can be expected over that two-year period and therefore they can negotiate the same. However, if this Court agrees with the arguments brought forward by the District, that education associations commit themselves automatically to a two-year contract simply by mentioning it during negotiations, local education associations will be advised that they should never mention the term "two-year agreement" during their negotiation process with school districts for fear that they will give up their rights to petition for further negotiations in the upcoming school year and that they have somehow unwittingly agreed to a two-year

agreement. Moreover, there is nothing which would prevent school districts, during the negotiation process, from reducing salary or benefits previously offered during the negotiation process once the teachers have stated that they are interested in a "two-year agreement". It is not beyond the realm of possibility that a district, once it has the teachers caught up in the "two-year agreement" net, would reduce the amount paid for the second year of the two-year agreement. Tactics like this are examples of the great disparity in bargaining power.

[¶ 40] At the District Court, the District argued that the Kenmare Education Association case ("KEA") had some type of application to the present issue and stood for the proposition that this Court had recognized the unilateral issuance of a two-year agreement. The District Court disregarded KEA as not applicable. (App., P. 235). Furthermore, KEA is not applicable as the issue in KEA was whether the school district could unilaterally negotiate with an individual teacher as opposed to the education association. The District argues that this Court "clarified" DEA II in KEA. It is clear that DEA II did not need any clarification as it was clear on its face and the comments about DEA II in KEA are dicta. Any comment and opinion which is not essential to the determination of the case and which is not necessarily involved in the action is dictum and not controlling in subsequent cases. Bakke v. St. Thomas Public School District No. 43, 359 N.W.2d 117, 120 (N.D.1984).

[¶ 41] The District Court also recognized a precedential value of DEA II as it applied to the facts in this case. The District Court recognized the benefit of continued discussion and negotiations between the parties. It also recognized the fact that there was tremendous unequal bargaining power between education associations and school districts

as set forth by DEA II. In that regard, the District Court stated that it was the intent of the legislature and DEA II that school districts could unilaterally issue contracts, but must issue them on the "immediate issue" which was one year. (App., Pp. 236-37). The District Court was not willing to extend DEA II to a two-year period.

[¶ 42] The entire position taken by the District is to disregard the holding of DEA II and to once again expand school board authority beyond what this Court has already recognized. An expansion of school board authority to unilaterally issue contracts, which has been in the law since 1977, will not further the process of negotiations between school boards and education associations. Rather, it will hinder it tremendously. Education associations recognize the holdings in Edgeley I, DEA I and DEA II. While they certainly would prefer another method in which to settle outstanding differences once the negotiation process has come to an end, they recognize there must be an end to negotiations and this Court has set forth the framework to do that. That framework, as it exists through the cases previously cited, is that a school board has the right to issue contracts and negotiated agreements for the school year under negotiation. Based upon the negotiation process between the parties, and the fact that there was no express or implied agreement on a two-year agreement, the term of the negotiations would be one year.

[¶ 43] Negotiations are fluid and the parties are allowed to change their positions as outlined herein. Furthermore, the law does not permit by indirection what cannot be accomplished directly. Langenes v. Bullinger, 328 N.W.2d 241, 246 (N.D. 1982); Production Credit Association of Fargo v. ISTA, 451 N.W.2d 118, (N.D.1990). If the District cannot get teachers to directly agree to negotiate only a two-year negotiated agreement,

it certainly cannot do it by implication. Education associations cannot be "hood-winked" or "ambushed" during the negotiation process into conceding to the issuance of a two-year negotiated agreement by simply discussing two-year agreements at the negotiations table and then have districts come back and argue that they have somehow agreed to a two-year agreement. Such a tactic on the part of a school board would never satisfy the good faith requirement, as it would indirectly require the education association to agree to a two-year agreement.

[¶ 44] While the District Court did find that both parties negotiated in good faith, it did so on somewhat of a mistaken premise that there had to be some type of "evil intention" on the part of either of the parties to amount to bad faith. This Court and the legislature have recognized that the good faith negotiation process does not require "bad intentions". To allow school districts to unilaterally issue contracts for two years based solely on the education association's negotiating team's mention of the possibility of a two-year agreement during the negotiation process would require education associations to waive their rights under N.D.C.C. Ch. 15.1-16 to negotiate on a yearly basis by merely mentioning the possibility of a two-year agreement. The negotiations law in North Dakota can never be construed to such an absurd result. A waiver of rights must be done knowingly, intelligently, and voluntarily. None of that is present here. To be effective, a waiver must be a voluntary and intentional relinquishment of a known existing advantage, right, privilege, claim or benefit. Tormaschy v. Tormaschy, 1997 ND 2, ¶ 19, 559 N.W.2d 813. The importance of rights involved in the bargaining position of the parties often fashions the specific requirement for a valid waiver in a particular case. See e.g., Brunsoman v. Scarlett, 465 N.W.2d 162, 168 (N.D. 1991). To have the District argue that

the DEA agreed to a two-year agreement or that it somehow, by implication, agreed to the same simply by mentioning a two-year agreement during the negotiation process, flies in the face of the law concerning a waiver of rights. DEA I is seen by education associations all over the state as the case which protects them from the almost unlimited power of school boards when it comes to negotiations. This protection has been recognized by school boards and education associations for more than 20 years. This is not a case in which this Court or the District Court were being asked by the parties to apply new law or break new ground with no direction from this Court. Rather, this is a case in which the facts and circumstances of a unilateral issuance of contract containing terms not applicable to the current school year was decided 20 years ago in a case involving the same parties. This Court is simply being asked to reaffirm established precedent which allows teachers some modicum of power in the bargaining process with school districts. This Court must affirm the issuance of the Mandamus Order which required the District to issue a negotiated agreement for the 2013-14 school year. Such a ruling will allow the DEA to negotiate for the 2014-15 school year.

CONCLUSION

[¶ 45] For all of the reasons cited herein, the DEA respectfully requests this Court to affirm the District Court's issuance of a Writ of Mandamus.

Dated this 4th day of February, 2014.

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IN THE SUPREME COURT

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CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2014, the following documents:

Brief of Appellee Dickinson Education Association

was filed electronically by e-mail with the Clerk of the North Dakota Supreme Court at supclerkofcourt@ndcourts.gov and were served electronically on the following:

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Dated this 4th day of February, 2014

/s/ Michael J. Geiermann
Michael J. Geiermann