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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Williston Education Association,	)	
	)	Supreme Court No. 20150256
Plaintiff/Appellee,	)	Williams Co. No. 53-2013-CV-431
	)	
vs.	)	
	)	
Williston Public School District No. 1,	)	
	)	
Defendant/Appellant.	)	

ON APPEAL FROM THE
NORTHWEST JUDICIAL DISTRICT
WILLIAMS COUNTY, NORTH DAKOTA
THE HONORABLE JOSHUA B. RUSTAD

Appeal from Order dated August 26, 2015
and Judgment dated August 28, 2015

BRIEF OF APPELLANT WILLISTON PUBLIC SCHOOL DISTRICT NO. 1

Submitted by:

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STATEMENT OF THE ISSUES

1. Whether the district court erred in granting summary judgment in favor of the Williston Education Association in deciding as a matter of law that neither the teachers nor the Williston Education Association needed to exhaust the administrative remedies laid out in the Negotiated Agreement.
2. Whether the district court erred in granting summary judgment in favor of the Williston Education Association in deciding as a matter of law that the middle school teachers taught more than six class periods in the 2012-2013 school year.

STATEMENT OF THE CASE

[¶1] The Williston Education Association ("WEA") and the Williston Public School District No. 1 ("District") have entered into a series of negotiated agreements over the years. Included in the 2011-2013 Negotiated Agreement is language that a middle school teacher who consents to more than six class periods shall receive extra compensation. Appellant Appendix ("App.") 32. During the 2011-2012 school year, the middle school teachers were assigned five class periods. App. 28. Three middle school teachers received extra compensation after agreeing to teach a sixth class during their prep period. Those three teachers did not receive extra compensation for teaching *more than six class periods* but instead received extra compensation for teaching during their prep period. App. 46-51, 53-55, 57, 70-71, 74, 76, 80-81, 84, 102. It is undisputed that the District has always compensated teachers when the teachers have given up their prep period.

[¶2] The following school year, 2012-2013, all middle school teachers were assigned six class periods - not more than six. App. 36-37. In September 2012, the WEA

brought a grievance alleging all middle school teachers should receive extra compensation because they were teaching an additional class from what they taught the year prior. App. 38. The Superintendent denied the grievance because the grievance procedure requires a teacher bring a grievance, not the association, and because the grievance was untimely. App. 40. The Board President agreed and also denied the grievance. App. 45. The WEA then sued the District.

[¶3] Both parties brought motions for summary judgment. The district court granted the WEA's motion for summary judgment, finding (1) neither the WEA nor the teachers needed to exhaust the administrative remedies laid out in the Negotiated Agreement, and (2) prime time was considered a class period. The District timely appealed.

STATEMENT OF FACTS

[¶4] The WEA is the authorized representative organization for the teachers employed by the District. On or about June 3, 2011, the parties entered into a Negotiated Agreement for July 1, 2011 through June 30, 2013. App. 30. Included in the 2011-2013 Negotiated Agreement is the following language: "A 7-8 grade teacher who consents to be assigned more than six (6) class periods shall receive 1/7th of his/her schedule salary for the seventh class period." App. 32. At the District, the middle school consists of grades 7 and 8.

I. 2011-2012 School Year

[¶5] For the 2011-2012 school year, most middle school teachers' school day consisted of five class periods, prime time, lunch, a team time period, and a prep/plan period. App. 28. Prime time in 2011-2012 lasted forty minutes. App. 28. For the 2011-

2012 school year, three middle school teachers agreed to give up their prep/plan period in order to teach an additional class. These three teachers received supplemental contracts. App. 29, 34-35. Dr. Viola LaFontaine, Superintendent, testified that these three teachers received supplemental contracts because they did not receive a prep time. App. 71. Marcia Bartok, the middle school principal at the time, testified that these teachers received a supplemental contract because they agreed to give up their prep/plan period to teach a class, not because they taught six content periods. App. 50. Principal Bartok continuously testified that she requested those three teachers receive extra compensation because they were giving up their plan/prep period. App. 51.

[¶6] In the spring of 2012, discussions began regarding changing the middle school schedule for the following school year, with one of the options to include assigning teachers another class period in lieu of a team time period. App. 72-73. Karen Toavs, a middle school teacher for the District at that time, testified that the middle school teachers knew of the changes that would have to occur for the 2012-2013 school year in the spring of 2012. App. 98. She stated,

> [Toavs] . . . As a staff, we had talked about increased enrollment, meaning that we would have to offer another class period of the core classes. And so we knew leaving the school year that spring that we would likely have to be teaching another class and possibly not have team. That was the early conversations.
> [Counsel for the District] Q. And you -- you remember that being the spring of 2012?
> [Toavs] A. Yes.

App. 98. Sara Faulkner, a middle school teacher for the District, testified that Principal Bartok told the teachers in a staff meeting at the end of the 2011-2012 school year that team time might be gone for the 2012-2013 school year and they had to figure out a way to get all the classes covered. App. 68. In addition, Dr. LaFontaine met with the middle

school staff in April 2012 and explained to them about the change in the schedule for the 2012-2013 school year, informing the teachers they would be teaching six classes. App. 40.

II. 2012-2013 School Year – First Semester

[¶7] Because of the concern of class sizes and increased enrollment, the middle school schedule changed for the first semester of the 2012-2013 school year. App. 36[1]. For the first semester of the 2012-2013 school year, team time was taken away and another class period was added. *Id.* The middle school teachers had six class periods, a 15-minute prime time, lunch, and a plan/prep period. *Id.*

[¶8] On or about August 28, 2012, a meeting was held between Dr. LaFontaine, Principal Bartok, and two members of the WEA (Greg Svihl and Lanny Gabbert). App.40. Dr. LaFontaine testified regarding this meeting:

> [LaFontaine] A. [Svihl and Gabbert] felt that the -- the teachers should be compensated for teaching during the team time.
> [Counsel for the WEA] Q. Okay. Did you respond to that issue?
> [LaFontaine] A. Yes.
> [Counsel for the WEA] Q. And in what way did you respond?
> [LaFontaine] A. I told them that they weren't teaching an addition -- more than six classes, and that I had explained to the teachers why we were having them teach during their team time and that we needed to keep the schedule as it is because we had students, you know, scheduled in everybody's classes then, by that time.

App. 75. Principal Bartok testified that she attended that meeting and that the "discussion was about the teachers not having a team time -- . . . – and compared to their loss of plan the year before." App. 56. She further testified that the three teachers were given

[1] The middle school schedule for the first semester of 2012-2013, illustrated in Deposition Exhibit 15 (App. 36), changed for teachers Karen Toavs and Lucy Kulla because it was determined that Kulla was not certified to teach language arts. Toavs, who was licensed for language arts, then agreed to teach seven class periods and give up her prep time. App. 97.

supplemental contracts in 2011-2012 because they gave up their plan/prep time, not because they had six periods a day. App. 56. Principal Bartok further testified:

> [Counsel for the WEA] Q. Okay. It had nothing to do with the fact that they were in front of kids for six periods a day?
> [Bartok] A. No.
> [Counsel for the WEA] Q. Is that the position that WEA took?
> [Bartok] A. No. The discussion at that time was not about that, because in the Negotiated Agreement, it talks about more than six, and it wasn't more than six. So that wasn't even -- again, I thought the issue was about loss of team time and plan time.

App. 56. Principal Bartok again reiterated the three teachers in 2011-2012 "were given that supplemental because they didn't have a plan [prep time]." App. 57.

[¶9] On or about September 20, 2012, the WEA submitted a grievance. App. 38. The District's grievance procedure is laid out in the 2011-2013 Negotiated Agreement. App. 31. It states:

> A grievance shall mean an alleged violation, interpretation or application of any specific provision of the negotiated agreement or conditions of employment.
>
> In the event of a grievance, the teacher shall:
>
> Step 1: Meet informally with the principal and discuss the problem at hand. (A grievance involving the act of an administrator other than a principal shall be filed with the administrator involved.)
>
> Step 2: If the problem is not settled to the teacher's satisfaction, the teacher may then file a formal grievance, in writing, to the principal. This grievance must be filed within ten (10) days of when the alleged violation should have become known to the teacher. The principal will provide the aggrieved teacher with a written answer to the alleged violation within ten (10) days.
>
> A formal grievance shall give the following information:
>
> 1. The name of the grievant.
> 2. The date of the alleged violation.
> 3. The section of the negotiated agreement in question or alleged improper action of an administrator.

4. Remedy asked for by the grievant.

Step 3: If the grievance is not settled to the teacher's satisfaction at step two, the teacher may submit the written grievance as presented at step two to the Superintendent of Schools within ten (10) days after receipt of the decision made or the time limit lapses without an answer from the Principal as outlined in step two. The Superintendent will respond within twenty-five (25) days of the receipt of the grievance.

Step 4: If the aggrieved teacher still feels the matter has not been adequately settled, the teacher may within ten (10) days of the receipt of the decision of the superintendent, present the notification of the grievance to the president of the Board of Education. The Board shall, at a regular or special session, hear the grievance as presented in the previous steps. The Board shall respond to the grievance within thirty-five (35) days of receipt of the written grievance. The Board will make an effort to respond to the grievance in a shorter time than the thirty-five (35) day limit.

Step 5: In rare cases, with extenuating circumstances, the aggrieved teacher may by-pass the principal and superintendent and takes the complaint directly to the President of the Board. In this instance, the Board shall respond within forty (40) days. The Board will make an effort to respond to the grievance in a shorter time than the forty-day limit. Notice of the date of the meeting with the aggrieved teacher shall be given at least fifteen (15) days prior to the meeting.

Step 6: The teacher may have a representative of the local education association or legal counsel present at the meeting if he or she so desires. Notice of legal counsel must be given at least ten (10) days before the meeting date with the Board of Education.

Step 7: The District will provide forms for filing of a written grievance.

Step 8: The decision of the Board of Education is final.

App. 31.

[¶10] Since the grievance was not filed by a teacher and since it was untimely, Dr. LaFontaine notified the WEA that she declined to look into the grievance any further. App. 40. After receiving a response by the WEA, Dr. LaFontaine notified the WEA that

her decision stands that a grievance needs to be filed by a teacher and the grievance was untimely. App. 42. On November 2, 2012, the WEA submitted its grievance to the School Board President, claiming that steps one and two of the grievance procedure were handled in person October 1, 2012. App. 43-44. On or about November 16, 2012, Susan Brokaw, the Board President at the time, responded that the WEA does not have standing since a teacher must bring a grievance, not the local association. App. 45.

III. 2012-2013 School Year – Second Semester

[¶11] For the second semester of the 2012-2013 school year, the middle school teachers had six class periods, a 15-minute prime time, lunch, a plan/prep period, and a team time period. Periods were shorter in length, the schedule changed to an 8-period day, and teachers again received a team time period. App. 37, 94. Principal Bartok testified as to the difference between the first and second semesters of 2012-2013: "The difference would be that the team times came back, the core teachers who had an extra elective no longer had the elective, and we formalized our SSL [Supporting Student Literacy] program." App. 57. One middle school teacher, Karen Toavs, received a supplemental contract in 2012-2013 for teaching a seventh class period and giving up her prep/plan period. App. 58-59, 97.

[¶12] During the 2012-2013 school year, middle school teachers taught six class periods, with the exception of Karen Toavs who received a supplemental contract. *See* App. 68-69, 90, 93-94. Angela Stoczynski, a middle school teacher in Williston, testified as to what her understanding of the lawsuit is: "Well, I understand that the year before I got here, so that would be 2011-12, there were three teachers who were teaching six classes and they had an extra contract. And then the year I got here, 2012-13, we all were

teaching six. . . ." App. 93. She testified that this was her understanding of the grievance as well. App. 95. Several middle school teachers, who are also members of the WEA, testified that they did not believe they would be getting extended or supplemental contracts for the 2012-2013 school year. App. 63, 69, 90.

[¶13] In April 2013, the WEA brought a lawsuit against the District requesting the Court order the District to pay each middle school teacher an additional 1/7 of their salary for the 2012-2013 school year. The Complaint specifically acknowledges that for the 2011-2012 school year, middle school teachers were assigned five class periods, and for the 2012-2013 school year, they were assigned six class periods. App. 8-9, ¶¶ 6, 11. Neither the grievance nor the Complaint alleges that teachers taught more than six class periods or that prime time should be considered a class period.

[¶14] Both parties filed motions for summary judgment and oral argument was held on November 17, 2014. For the first time, the WEA argued that prime time should be considered a class period in its summary judgment brief. On August 6, 2015, the district court issued an order granting the WEA's motion for summary judgment. On August 26, 2015, the district court entered its Order for Judgment. Judgment was entered on August 28, 2015. The District timely appealed.

LEGAL ARGUMENT

I. Standard of Review

[¶15] "Summary judgment is a procedural device for the prompt and expeditious disposition of a controversy without a trial." *Schuck v. Montefiore Pub. Sch. Dist. No. 1*, 2001 ND 93, ¶ 6, 626 N.W.2d 698. A grant of summary judgment is proper "if the pleadings, depositions, answers to interrogatories and admissions on file, together with

the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.D.R.Civ.P. 56(c). The evidence, however, must be viewed in the light most favorable to the party opposing the motion, who must be given the benefit of all favorable inferences which can reasonably be drawn from the evidence. *Mandan Educ. Ass'n v. Mandan Pub. Sch. Dist. No. 1*, 2000 ND 92, ¶ 6, 610 N.W.2d 64. The party opposing the motion "cannot simply rely on factual assertions in a brief or pleadings and cannot rely on unsupported allegations; such conclusory assertions are insufficient to raise an issue of material fact." *Schuck*, at ¶ 6 (citing *Jones v. Barnett*, 2000 ND 207, ¶ 5, 619 N.W.2d 490). Factual issues are appropriate for summary judgment "when reasonable minds can draw but one conclusion from the evidence." *Opp v. Source One Mgmt., Inc.*, 1999 ND 52, ¶ 16, 591 N.W.2d 101. Whether the trial judge properly granted summary judgment is a question of law and is reviewed de novo. *Garofalo v. St. Joseph's Hosp.*, 2000 ND 149, ¶ 6, 615 N.W.2d 160.

II. The District Court Misapplied the Law Regarding Whether the Teachers Were Required to Exhaust the Administrative Remedies Laid Out in the Negotiated Agreement

[¶16] Under North Dakota law, it is well-established that when administrative remedies are available and the remedies provide adequate relief, those remedies must be exhausted before a plaintiff is allowed to seek a judicial remedy. *Brown v. State ex rel. State Bd. of Higher Educ.*, 2006 ND 60, ¶ 8, 711 N.W.2d 194; *Schuck v. Montefiore Pub. Sch. Dist.*, 2001 ND 93, ¶¶ 8-9, 626 N.W.2d 698; *Thompson v. Peterson*, 546 N.W.2d 856, 861 (N.D. 1996). Under the exhaustion doctrine, this Court has consistently held a litigant's failure to fully exhaust the available administrative remedies precludes the litigant from seeking a judicial remedy, unless such exhaustion proves to be futile or if

the administrative remedies are unable to provide adequate relief. *See Brown*, at ¶ 8 (student, whose doctoral degree was revoked, was required to exhaust administrative remedies before seeking judicial remedy); *Peterson v. North Dakota Univ. Sys.*, 2004 ND 82, ¶ 14, 678 N.W.2d 163 (dismissed faculty member was required to exhaust administrative remedies before bringing an action in district court); *Schuck*, at ¶ 8 (disgruntled teacher was required to exhaust available administrative remedies prior to pursuing a claim in court); *Tracy v. Central Cass Pub. Sch. Dist.*, 1998 ND 12, ¶ 13, 574 N.W.2d 781 (holding teacher's failure to exhaust administrative remedies deprived court of subject matter jurisdiction); *Long v. Samson*, 1997 ND 174, ¶ 14, 568 N.W.2d 602 (holding a discharged university employee failed to exhaust administrative remedies and therefore was precluded from raising those claims to the district court); *Soentgen v. Quain & Ramstad Clinic, P.C.*, 467 N.W.2d 73, 82 (N.D. 1991) (stating a physician is required to exhaust all available internal remedies provided by a hospital before instituting a judicial action for damages arising from exclusion or expulsion); *Transp. Div. of the Fargo Chamber of Commerce v. Sandstrom*, 337 N.W.2d 160, 162–63 (N.D. 1983) (affirming district court's dismissal of action for failure to exhaust administrative remedies because appellant did not follow the statutorily mandated procedures for challenging a rate increase before suing in court).

[¶17] "This requirement [to exhaust available administrative remedies before bringing a claim in court] allows the organization to minimize or eliminate any monetary injury to a person, enables the organization to use its expertise to resolve the issues, and promotes judicial efficiency by 'unearthing the relevant evidence' and providing a record for judicial review. *Schuck*, 2001 ND 93, ¶ 8, 626 N.W.2d 698. This Court has

described the exhaustion doctrine's purpose:

> The purpose of requiring exhaustion of remedies has its basis in the separation of powers doctrine. In *Soentgen* [*v. Quain & Ramstad Clinic, P.C.*, 467 N.W.2d 73, 82 (N.D. 1991)], we stated the rationale for requiring a party to exhaust available administrative remedies before suing for damages:
>
> > [A]n exhaustion of remedies requirement serves the salutary function of eliminating or mitigating damages. If an organization is given the opportunity quickly to determine through the operation of its internal procedures that it has committed error, it may be able to minimize, and sometimes eliminate, any monetary injury to the plaintiff by immediately reversing its initial decision and affording the aggrieved party all membership rights; an individual should not be permitted to increase damages by foregoing available internal remedies.
>
> Moreover, by insisting upon exhaustion even in these circumstances, courts accord recognition to the "expertise" of the organization's quasi-judicial tribunal, permitting it to adjudicate the merits of the plaintiff's claim in the first instance. Finally, even if the absence of an internal damage remedy makes ultimate resort to the courts inevitable, the prior administrative proceeding will still promote judicial efficiency by unearthing the relevant evidence and by providing a record which the court may review.

Schuck, at ¶¶ 8-9 (internal citations omitted).

[¶18] The parties have agreed to a grievance procedure that is included in the Negotiated Agreement. It defines a grievance: "A grievance shall mean an alleged violation, interpretation or application of any specific provision of the negotiated agreement or conditions of employment." App. 31. The claims in WEA's complaint clearly fall within this definition of a grievance. The grievance procedure further states that "[i]n the event of a grievance, the teacher shall" and then lays out eight steps of the procedure. *Id.* The grievance procedure has strict timeframes, including filing a formal grievance, in writing, "within ten (10) days of when the alleged violation should have become known to the teacher." *Id.*

A. Teachers Are Required to File Grievance

[¶19] The teachers failed to abide by the express terms of the grievance procedure specifically requiring a "teacher," not the WEA, file a formal grievance. App. 31. Despite the clear terms of the grievance procedure, no teacher ever filed a written grievance regarding the issues now before the Court; instead, the WEA filed the grievance. Initially, WEA argued that it could file the grievance on behalf of the teachers, but conceded to the district court that WEA did not have a right to file a grievance. The WEA argued to the district court that because the grievance procedure does not apply to WEA, it could bring a lawsuit on behalf of teachers (whom the grievance procedure does apply to) without exhausting administrative remedies.

[¶20] Despite the availability of adequate administrative remedies, the district court failed to properly apply the exhaustion doctrine in reaching its decision to grant summary judgment in favor of WEA. The district court incorrectly determined that the teachers did not need to exhaust administrative remedies. App. 18-19, ¶ 20. In making this determination, the district court misapplied the law. Specifically, the district court determined that because education associations have the power to enforce the terms and conditions contained in a negotiated agreement on behalf of itself and on behalf of its members, the teachers need not exhaust the administrative remedies provided in the Negotiated Agreement if the WEA sues on their behalf. App. 18-19, ¶ 20. This is illogical and would result in no need to require exhaustion of administrative remedies in any case involving a teacher and a school district, since if a teacher failed to file a grievance, the association could just sue on the teacher's behalf and circumvent the entire administrative remedies process. This is contrary to the exhaustion of remedies doctrine

and its purpose. The district court cites *Williston Educ. Ass'n v. Williston Pub. Sch. Dist. No. 1*, 483 N.W.2d 567 (N.D. 1992), as its rationale for this ruling; however, the teachers in that 1992 case did file a grievance before the WEA brought suit. *Id.* at 569. Exhaustion of administrative remedies was not an issue in the 1992 case because the teachers did go through the grievance procedure.

[¶21] The district court further improperly speculated as to what the outcome could have been had the teachers exhausted the available administrative remedies and, with very little explanation, seems to suggest such exhaustion was inadequate. App. 18-19, ¶ 20. Specifically, the district court stated:

> To have each teacher who was not paid the amount supposedly promised to them by the contract would have resulted in dozens of separate grievances, which could have resulted with various results, and would have been unfair. In addition, the grievance procedure says that "[t]he decision of the Board of Education is final." This would have made it impossible to enforce this agreement unless the school district assented, which they are obviously unwilling to do.

Id.

[¶22] This Court has rejected arguments and refused to speculate as to the outcome had a plaintiff utilized the available administrative remedies, stating:

> A remedy is not inadequate simply because it may not result in the exact relief requested. Administrative resolution of [the employee's] nonrenewal may have eliminated or mitigated damages and developed a record to sharpen issues and avoid judicial proceedings. As in *Thompson*, we decline to speculate on the validity of [the employee's] claims if they had been raised in the designated administrative forum.

Long v. Samson, 1997 ND 174, ¶ 13, 568 N.W.2d 602 (internal citations omitted); *see Thompson v. Peterson*, 546 N.W.2d 856, 863 (N.D. 1996) (court will not speculate on the resolution of a litigants claims had those claims been raised in the designated administrative forum); *Southeast Human Serv. Center v. Eiseman*, 525 N.W.2d 664 (N.D.

1994) (declining to speculate on result if employee had complied with employer's reasonable request for employee to submit to doctor's examination). Rather than offering mere conjecture as to the efficacy of complying with the negotiated grievance procedure, the district court should have, as it was required, applied this Court's well-established law requiring exhaustion of the available administrative remedies before allowing the teachers, or anyone on their behalf, to pursue a judicial remedy. *See Schuck*, 2001 ND 93, ¶ 8, 626 N.W.2d 698.

[¶23] The district court's misapplication or outright failure to apply the law goes against the well-established exhaustion doctrine and its purpose. The teachers were required to exhaust their administrative remedies before they or anyone acting on their behalf seeks judicial redress. The WEA argued before the district court that neither the teachers nor the WEA needed to file a grievance before the WEA seeks judicial redress. However, the WEA did attempt to bring a grievance and acknowledged that teachers have that obligation. *See* App. 41 ("Rather than file individual grievances for each member, we are filing one grievance to cover all."). The WEA at that time alleged that it could file a grievance on behalf of a teacher, which the District disagreed pursuant to the grievance procedure language. The WEA has changed its stance on this and argued to the district court that neither WEA nor a teacher need to file a grievance if WEA sues on behalf of a teacher.

[¶24] WEA further argued that "the WEA satisfied the purpose of a grievance procedure by alerting the District to the issue" and that the "District had every opportunity to address the issue prior to litigation." Document #105 (WEA Reply Brief), ¶ 9. This is untrue. During the grievance process, the WEA did not allege that prime

time should be considered a "class period" under the Negotiated Agreement. The grievance itself makes no mention of prime time being considered a class period; instead, the WEA continuously argued up until its summary judgment brief that teachers should be paid for teaching a sixth class period. App. 38. The WEA has changed its claim since filing the grievance. The district court should have held the teachers were precluded from seeking a judicial remedy in regard to their claim for breach of contract as a result of their failure to file a grievance.

B. The Grievance was Untimely

[¶25] Not only did the teachers fail to abide by the express terms of the procedure that required a teacher, not the WEA, submit the grievance, the WEA's grievance also failed to comply with timeframes in the grievance procedure. The middle school teachers knew in the spring of 2012 that the middle school schedule was likely to change for the 2012-2013 school year. App. 68, 98. In addition, Dr. LaFontaine met with the middle school staff in April 2012 and explained to them about the change in the schedule for the 2012-2013 school year, informing the teachers they would be teaching six classes. App. 40. The teachers were certainly aware when school began in August 2012 that they were teaching six class periods. App. 36. They were not offered a supplemental contract for teaching a sixth class period and the teachers did not expect to receive a supplemental contract. App. 63, 69, 90.

[¶26] On or about August 28, 2012, two members of WEA met with the Superintendent and Principal to discuss the modified teaching schedule and WEA's request that teacher pay be increased. App. 40. Dr. LaFontaine testified that at this meeting the WEA representatives felt that "the teachers should be compensated for

teaching during the team time." App. 75. Dr. LaFontaine informed them at the meeting that the teachers were not teaching more than six classes. *Id.* Principal Bartok testified that during the meeting the "discussion was about the teachers not having a team time -- . . . – and compared to their loss of plan the year before." App. 56.

[¶27] The WEA and the teachers were aware of or should have been aware of the modified teaching schedule by August 28, 2012 at the latest. The teachers had ten days to file a formal, written grievance. The WEA, however, filed its grievance on September 20, 2012. The District rejected the grievance because it was untimely and not filed by a teacher as specified by the grievance process. *See Mandan Educ. Ass'n v. Mandan Pub. Sch. Dist. No. 1*, 2000 ND 92, ¶ 8, 610 N.W.2d 64 ("A decision on the merits without raising time limit violations can waive the right to later assert time limit violations as a failure to exhaust administrative remedies."). Because the grievance was not filed within the time period specified in the grievance procedure, the district court should have been precluded from exercising jurisdiction over the teachers' claim for breach of contract. *See Hitchcock v. Bd. of Trustees Cypress-Fairbanks Indep. Sch. Dist.*, 232 S.W.3d 208, 213 (Tex. App. 2007) (finding that teacher failed to exhaust all available administrative remedies because she did not meet the deadline for filing her grievance); *Woodford v. Ngo*, 548 U.S. 81, 90–91 (2006) ("Proper exhaustion demands compliance with an agency's deadlines and other critical procedural rules because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings.").

[¶28] Because the teachers failed to exhaust the administrative remedies available to them, they are precluded from seeking a judicial remedy. As stated above, under the

negotiated grievance procedure, each teacher was provided a vehicle to remedy any grievance regarding "an alleged violation, interpretation or application of any specific provision of the negotiated agreement or conditions of employment." App. 31. Because the internal administrative remedies provided to the teachers were capable of providing adequate relief for any grievance regarding the interpretation or application of the negotiated agreement, the teachers should be precluded from seeking a judicial remedy for their failure to comply with the negotiated grievance procedure and exhaust the available administrative remedies. *Long v. Samson*, 1997 ND 174, ¶ 13, 568 N.W.2d 602 ("A remedy is not inadequate simply because it may not result in the exact relief requested."). It is clear from the record that the teachers failed to abide by the express terms of the grievance procedure, and as a result, the district court lacked jurisdiction to hear the teachers' claims. *Schuck*, 2001 ND 93, ¶ 10, 626 N.W.2d 698.

[¶29] This Court has repeatedly recommended that teacher associations and school districts attempt to negotiate their contract disputes before bringing suit. *See Mandan Educ. Ass'n v. Mandan Pub. Sch. Dist. No. 1*, 2000 ND 92, ¶ 13, 610 N.W.2d 64 (VandeWalle, C.J., concurring specially) (applauding the efforts of the school district and the education association for attempting to negotiate their differences in the contract); *Williston Educ. Ass'n*, 483 N.W.2d 567, 572-73 (N.D. 1992) (VandeWalle, J., concurring specially) (expressing dismay over failure of school district and education association to use negotiation act to resolve their differences). By allowing teachers to circumvent the negotiated grievance procedure, the district court is circumventing the established exhaustion doctrine and the negotiation process in North Dakota. In order to avoid the potentially disruptive effects of the district court's decision, the District requests that the

decision of the district court be reversed and summary judgment be granted in favor of the District. By doing so, this Court can ensure that parties involved in collective bargaining are encouraged to implement similar procedures "to establish a uniform and exclusive method for orderly settlement of employee grievances." *Nieman v. Yale Univ.*, 851 A.2d 1165, 1171 (Conn. 2004) ("[T]he purpose of the exhaustion requirement is to encourage the use of grievance procedures, rather than the courts, for settling disputes . . . . If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation would inevitably exert a disruptive influence upon both the negotiation and administration of collective [bargaining] agreements.") (second alteration in original).

III. The Middle School Teachers Did Not Teach More Than Six Class Periods

[¶30] The district court erred in granting summary judgment in favor of the WEA in deciding as a matter of law that the middle school teachers taught more than six class periods in the 2012-2013 school year.

A. The Negotiated Agreement is No Longer Ambiguous since the 1992 Case

[¶31] Teacher contracts are subject to the same statutory rules of interpretation as other contracts of employment. *Williston Educ. Ass'n*, 483 N.W.2d at 570 (citing N.D.C.C. § 9–07–01 and *Campbell v. Wishek Pub. Sch. Dist.*, 150 N.W.2d 840 (N.D. 1967)). "The plain language of a contract governs if it is clear. N.D.C.C. § 9–07–02. We also construe contracts as a whole to give effect to every part if reasonably practicable. N.D.C.C. § 9–07–06." *Kalvoda v. Bismarck Pub. Sch. Dist. # 1*, 2011 ND 32, ¶ 24, 794 N.W.2d 454. While "[t]he purpose of contract interpretation is to find the 'mutual intention of the parties as it existed at the time of contracting,' [i]f those

intentions may be determined from the writing alone, the contract is not ambiguous." *Williston Educ. Ass'n*, 483 N.W.2d at 570 (quoting N.D.C.C. § 9-07-03 and citing N.D.C.C. § 9-07-04). "According to N.D.C.C. § 9-07-02, if the contract is unambiguous, the language of the contract governs any dispute." *Id.*

[¶32] In *Williston Educ. Ass'n*, the WEA sought to have all high school teachers in the District who taught six classes during the 1990-1991 school year to receive additional compensation. *Williston Educ. Ass'n*, 483 N.W.2d at 568. The language in the applicable negotiated agreement at that time did not expressly list the number of classes to be taught per day by teacher, but instead included language stating, "Extra Class" with an additional amount of compensation listed. *Id.* The Supreme Court concluded that "extra class" was ambiguous and the number of daily classes was not specifically negotiated for the 1990-1991 negotiated agreement. *Id.* at 570-71. Therefore, the Court looked to the parties' prior course of dealing and usage, concluded the District breached the negotiated agreement, and ordered the District to pay the additional compensation to each high school teacher who taught six classes in 1990-1991.

[¶33] Since the Supreme Court's decision in 1992, the WEA and the District have specifically negotiated the number of daily classes and included that language in the negotiated agreement. The 2011-2013 Negotiated Agreement clearly provides that "[a] 9-12 grade teacher who consents to be assigned more than five (5) class periods shall receive 1/7th of his/her schedule salary for the sixth class period," and "[a] 7-8 grade teacher who consents to be assigned more than six (6) class periods shall receive 1/7th of his/her schedule salary for the seventh class period." App. 32. The parties agree this language is clear and unambiguous. Document #45 (WEA's Brief in Support of Motion

for Summary Judgment), ¶ 35 ("A plain reading of the language will reveal the parties' intentions.").

[¶34] Unlike the language at issue in the 1992 case, the Negotiated Agreement for school years 2011-2013 specifically states how many class periods a middle school teacher can be assigned before receiving extra compensation. This was a clear change from the negotiated agreement at issue in the 1992 case. Since the language is unambiguous, the language of the contract governs. In the present case, it is clear from the record that a class period did not include prime time.

B. Prime Time Was Not a Class Period in 2012-2013

[¶35] Even the Complaint specifically acknowledges that for the 2011-2012 school year, middle school teachers were assigned five class periods, and for the 2012-2013 school year, teachers were assigned six class periods. App. 8-9, ¶¶ 6, 11. The Complaint never alleges middle school teachers were teaching more than six class periods and never alleges that prime time should be considered a class period. As discussed above, the WEA's grievance also failed to allege middle school teachers were teaching more than six class periods. App. 38. For the first time, in its summary judgment brief, WEA changed its claim and argued that prime time should be considered a class period, so that all middle school teachers were actually teaching at least seven class periods for the 2012-2013 school year. It did not seek to amend its complaint, nor was this argument included in WEA's grievance.

[¶36] The district court found, as a matter of law, that prime time was a class period in 2012-2013. In doing so, the Court completely disregarded the record. The record reflects that prime time was not considered a class period by the administration or

the teachers in 2012-2013, and that teachers were assigned only six class periods in 2012-2013 with the exception of Karen Toavs. App. 61-63, 67-69, 78-79, 86-88, 90, 93-95, 97, 99, 101-02. Even WEA itself did not consider prime time a class period, as evidenced by its failure to allege that in its grievance or in the Complaint.

[¶37] The 2011-2013 Negotiated Agreement further states, "All terms and conditions of employment not covered by this agreement shall continue to be subject to the School Board's exclusive direction and control and shall not be subject to negotiations during the term of this agreement." App. 33. In addition, Board Policy DHBB-Instructional Staff Work Load (Supplementary) was adopted in April 2011 and states:

> All teachers other than part time are expected to work a full workday, which includes but is not limited to attendance at parent/teacher conferences, IEP meetings, or other relevant activities. This may include any combination of classes and study hall or other duty assignments. In addition, staff members may be required to attend other meetings for purposes which include, but are not limited to, IEP planning, curriculum development, or development meetings after school or in the evening.
>
> The Board will be the final authority regarding the equitable distribution of work among the staff. Salary will not be dependent on the workload.

App. 104 (emphasis added). Prime time and team time are other duty assignments, have never been treated as class periods, and have never been counted towards class periods in determining whether a teacher should receive extra compensation under the Negotiated Agreement. App. 102, ¶ 4.

C. Three Teachers in 2011-2012 Received Supplemental Contracts for Teaching during their Prep Time

[¶38] The record reflects that Chad Askim, Jeff Winslow, and Wade Stueve received supplemental contracts in school year 2011-2012 for teaching a class during

their prep period. App. 47-51, 53-55, 57, 71, 74, 76, 81, 84, 102. Bartok spoke with all three teachers about giving up their plan period in 2011-2012. App. 52. Bartok further testified that she told those three teachers that for the 2012-2013 school year they would not get supplemental contracts because they have their plan period back. App. 54. Bartok testified that the teachers in 2012-2013 did not teach more than six class periods, with the exception of Toavs who taught seven class periods and received a supplemental contract. App. 56, 58. Dr. LaFontaine testified that the WEA informed her they felt that teachers should be compensated for teaching during their team time. Dr. LaFontaine responded to the WEA that teachers were not teaching more than six classes so they would not receive additional compensation. App. 75.

[¶39] It is undisputed that teachers in Williston, including 7-8 grade teachers, receive extra compensation for agreeing to give up their prep/plan period but do not receive extra compensation for giving up their team time. App. 58-59, 62-63 (teacher stating he has not received compensation for subbing for another teacher during his team time, but has received compensation for subbing during his plan/prep period); App. 67 (teacher stating she has received compensation for subbing during plan time but not for subbing during team time); App. 83, 90-91, 94; App. 65 (teacher testifying that the practice in Williston is a teacher receives extra compensation for subbing during their prep period, but not for subbing during their team time). Todd Matthews, a middle school teacher for the District, testified:

> . . . It's – it's in your negotiated contract that if you lose your prep, it's an understanding – I don't know the exact words, but if you teach a prep – you lose your prep period and you're willing to teach an extra class, you get paid one-seventh of your salary. It's sort of a standard. I think in – if I go back to my days teaching at Trenton, it's the same case there. . . .

App. 82.

[¶40] The district court erred in finding, as a matter of law, that the middle school teachers taught more than six class periods in the 2012-2013 school year. It is clear from the record that teachers taught six class periods in the 2012-2013 school year and that the 15-minute prime time was not considered a class period. As such, the District requests the decision of the district court be reversed and summary judgment be granted in favor of the District.

CONCLUSION

[¶41] The WEA failed to meet its burden of proving that the District breached the Negotiated Agreement. The district court misapplied the law when it determined that neither the teachers nor the WEA needed to exhaust the administrative remedies, namely the negotiated grievance procedure found in the Negotiated Agreement. The district court further misapplied the law and the record when it determined that prime time was a class period for the 2012-2013 school year. Based upon the record and the applicable law, summary judgment should have been granted in the District's favor. The North Dakota Supreme Court should **REVERSE** the district court's order.

Dated this 4th day of November, 2015.

Respectfully submitted,

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Williston Education Association, Plaintiff/Appellee, vs. Williston Public School District No. 1, Defendant/Appellant.	)))))))))	Supreme Court No. 20150256 Williams Co. No. 53-2013-CV-431

CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2015, the following documents:

Appellant's Brief
Appellant's Appendix

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

Michael J. Geiermann: gmann@gbg-lawoffice.com

Dated this 4th day of November, 2015.

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