20150256
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
DECEMBER 8, 2015
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Williston Education Association, Plaintiff/Appellee, vs. Williston Public School District No. 1 Defendant/Appellant.	)	Supreme Court File No. 20150256 Williams County District Court File No. 53-2013-CV-00431

Appeal from District Court, Williams County, North Dakota
Judgment entered August 28, 2015
Northwest Judicial District
Honorable Joshua B. Rustad

BRIEF OF APPELLEE WILLISTON EDUCATION ASSOCIATION

Submitted by,

Michael J. Geiermann
GEIERMANN BERGESON
& GULER LAW OFFICES, P.C.
Attorney for Appellee
P.O. Box 2196
Bismarck, ND 58502-2196
Telephone: (701) 223-1986
Email: gmann@gbg-lawoffice.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Citations

TABLE OF AUTHORITIES cont.

Citations

Statutes

STATEMENT OF THE ISSUES

1. Whether the District Court correctly granted summary judgment in favor of the Williston Education Association in deciding as a matter of law the grievance procedure in the 2011-13 Negotiated Agreement did not need to be exhausted.

2. Whether the District Court correctly granted summary judgment in favor of the Williston Education Association in ordering the School District to pay to the teachers at the Williston Middle School one seventh of their contracted amount for teaching an additional class for the 2012-13 school year.

STATEMENT OF CASE

[¶ 1] On April 10, 2013, Williston Education Association ("WEA") served a Summons and Complaint upon the Williston School District ("District") by Admission of Service. (App. P. 7)[1]. The parties then conducted discovery. A trial in the matter was originally scheduled for September 25-26, 2014. That trial was subsequently postponed and rescheduled for August 18, 2015.

[¶ 2] Both parties moved for summary judgment. On August 6, 2015, the Court issued an Order Granting Summary Judgment in favor of the WEA. (App. P. 14). On August 26, 2015, the Court signed an Order for Judgment. (App. P. 23). Judgment was entered in the matter on August 28, 2015. (App. P. 26).

STATEMENT OF THE FACTS

[¶ 3] WEA, pursuant to N.D.C.C. Ch. 15.1-16 is the exclusive authorized representative organization for the teachers employed by the District for the 2011-12 and 2012-13 school years and for years prior to that year. (App. P. 14).

[¶ 4] The District operates a public school in and around Williston, North Dakota, which is located in Williams County. (App. P. 14).

[¶ 5] In the spring of 2011, the WEA and the District entered into negotiations pursuant to N.D.C.C. Ch. 15.1-16. On or about June 3, 2011, the parties came to an agreement covering school years 2011-12 and 2012-13. (App. P. 30). The Negotiated Agreement covered two consecutive school years. (App. P. 14).

[¶ 6] Teachers who were assigned to Williston Middle School ("WMS") for

[1] All references to "App." refer to the District's appendix. The WEA submitted a four page appendix and it is cited only once in paragraph 45.

2011-12 had a schedule which included five content class periods, a prep period, a team time period, and a prime time period. These teachers had six periods of student contact each day. The 40 minute prime time period was the first class period in the morning. This period was a student contact period, had a curriculum and required teachers to prepare. (App. P. 15).

[¶ 7] There is a clause in the Negotiated Agreement under the heading Seventh Class Period Compensation which states: "A 7-8 grade teacher who consents to be assigned more than six (6) class periods shall receive $1/7^{th}$ of his/her schedule salary for the seventh class period." Id. at P. 16.

[¶ 8] Prior to the beginning of the 2011-12 school year, three teachers at WMS agreed to teach an additional class period instead of having a prep/planning period. These teachers were Chad Askim, Wade Stueve and Jeff Winslow. These three teachers' schedules consisted of six content class periods, a team period, and a prime time period. (App. Pp. 15, 28, 29, 34, 35).

[¶ 9] The extra class status of these teachers was noted on the WMS class schedule by the designation of "Ext" next to their names. These three teachers had seven student contact class periods per day. (App. P. 28).

[¶ 10] The school administration acknowledged that the supplemental contract paying Askim, Stueve and Winslow the additional compensation was based upon a specific provision in the Negotiated Agreement, as well as the fact that these teachers taught an additional class period. (App. P. 74).

[¶ 11] Because of the increased enrollment in WMS and the inability of the District to hire more teachers, for the first semester of the 2012-13 school year, the team

period was taken away and all teachers were required to teach an extra content period, so that most had six content periods, a prep period, and a prime time period. The prime time period was shortened to fifteen minutes a day. One teacher gave up her prep period and taught a seventh content class and earned an extra 1/7th of her salary. (App. Pp. 16, 36).

[¶ 12] As a result of the unilateral schedule change, teachers at WMS during the first semester of the 2012-13 school year had seven student contact class periods. (App. P. 37).

[¶ 13] In the second semester of the 2012-13 school year at WMS, the team period was reintroduced and all classes were shortened, so that all teachers had six content classes, a prep period, a team period, and a prime time period. One exception was the teacher who taught seven content classes by giving up her prep period. (App. Pp. 16, 37). Teachers still had seven student contact class periods per day.

[¶ 14] The three teachers at WMS, Askim, Stueve and Winslow, who received additional compensation for teaching seven student contact class periods during the 2011-12 school year, did not receive additional compensation for teaching seven student contact class periods during the 2012-13, and lost money. (App. Pp. 74, 80).

[¶ 15] None of the teachers at WMS received additional contracts for compensation, except for Karen Toavs, who received one supplemental contract and actually taught students for eight class periods. (App. P. 97).

LAW AND ARGUMENT

1. Standard of Review.

[¶ 16] Summary judgment is a procedural device for the prompt resolution of a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law. A party moving for summary judgment has the burden of showing there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. In determining whether summary judgment was appropriately granted, we must view the evidence in the light most favorable to the party opposing the motion, and that party will be given the benefit of all favorable inferences which can reasonably be drawn from the record. On appeal, this Court decides whether the information available to the district court precluded the existence of a genuine issue of material fact and entitled the moving party to judgment as a matter of law. Whether the district court properly granted summary judgment is a question of law which we review de novo on the entire record. Hamilton v. Woll, 2012 ND 238 ¶ 9, 823 N.W.2d 754.

[¶ 17] At the District Court, the parties agreed this case was appropriate for summary judgment. The District Court also agreed. (App. Pp. 17-18). The District Court relied upon undisputed material facts contained in documents such as the Negotiated Agreement, class schedules and contracts to make its ruling. It also appears the District Court did not rely upon the "spin" put on various documents by witnesses who provided depositions. In its Statement of Facts, the

District provided this Court with deposition testimony from various witnesses who offered their interpretation of the Negotiated Agreement, the class schedules, and contracts. This testimony is immaterial. Simply put, the documents speak for themselves. By providing to this Court various references to facts which were not relied upon by the District Court, it appears the District is implying there were somehow disputed material facts in this case. Such an implication would not be proper since the District indicated to the District Court summary judgment was appropriate. In contrast to the District's Statement of Facts, the WEA's Statement of Facts for the most part comes from the District Court Order or a reference to undisputed documents. (App. Pp. 14-16).

2. <u>The District Court correctly granted summary judgment in favor of WEA holding the grievance procedure in the Negotiated Agreement did not need to be exhausted</u>.

[¶ 18] At Summary Judgment, the District argued that in order to claim a breach of contract, the middle school teachers needed to exhaust their administrative remedies with the District pursuant to the Negotiated Agreement. The grievance procedure specifically provides the "teacher" should bring up the grievance, not the WEA. (App. P. 31). No individual teacher filed a grievance. Rather, the WEA did file a grievance but it was dismissed by the District because the WEA was not a teacher, and the grievance was untimely. (App. P. 18).

[¶ 19] In contrast, the WEA argued it is given the right to enforce the terms and conditions contained in the Negotiated Agreement on behalf of itself and on behalf of its members and was not required to exhaust the grievance procedure. (App. P. 18-19). The District Court found education associations do have the power to

enforce their negotiated agreements and as the law supported the WEA position, it was not required to exhaust the grievance procedure. The District Court cited to Williston Education Association v. Williston Public School District, 483 N.W.2d 567 (N.D. 1992) ("WEA I") in support of its ruling.

[¶ 20] In its appeal, the District now argues that the District Court erred as a matter of law in finding that the grievance procedure did not need to be exhausted. The District argues the language of the Negotiated Agreement requires teachers to file grievances and since the teachers did not file a grievance, they are barred from bringing this action. The District cites to a number of cases from this Court which hold that the exhaustion of administrative remedies is required prior to instituting court action. Those cases are easily distinguishable and do not apply to the enforcement of a collectively bargained negotiated agreement. This Court must take into consideration rights given to public school teachers by the legislature, the nature of collective bargaining and several holdings of this Court regarding the scope of negotiated agreements as well as the power and authority of an education association.

[¶ 21] The dispute which has arisen between the WEA and the District concerns the proper application of the Negotiated Agreement to middle school teachers who taught at WMS for the 2011-2013 school years.

[¶ 22] Prior to 1969, teachers employed in public schools in the state of North Dakota did not have the right to negotiate with their employer, the school district. School boards could unilaterally set terms and conditions they wanted concerning the employment of teachers in their school districts. In 1969, more than 100

teachers employed by the Minot School District went out on strike in April, 1969, to protest poor working conditions. Many of them were arrested and dismissed. See State v. Heath, 177 N.W.2d 751 (N.D. 1970). In direct response to the Minot teachers' strike, the North Dakota Legislature, in the spring of 1969, enacted a Teacher Representation and Negotiation Act as originally codified at N.D.C.C. Ch. 15-38.1. This Act gave teachers employed in the public schools the right to collectively bargain with their employer, the school district. Pursuant to the Act, the WEA and the District have entered into a series of Negotiated Agreements including a two-year Negotiated Agreement for the 2011-13 school term. This Court has recognized the Legislature's intent that it is better to allow teachers to have one voice than to present issues individually. In Barnes County Education Association v. Barnes County Special Education Board, 276 N.W.2d 247, 251 (N.D. 1979). This Court stated:

> "We believe that a reading of the entire chapter on teachers' representation and negotiation discloses an intent by the legislature to promote the growth and development of education in North Dakota by promoting a uniform basis of teacher representation and negotiation."

This Court has recognized that the bargaining law for certificated teachers applies not only to teachers who teach in public school districts, but also in special education units and in a school district in which one teacher makes up the entire teaching staff. Barnes County Education Association v. Barnes County Special Education Board, 276 N.W.2d 247 (N.D. 1979). Loney v. Grass Lake Public School District No. 3, 322 N.W.2d 470 (N.D. 1982). Clearly, the legislature intended to give public school teachers the right to speak with one unified,

collective voice.

[¶ 23] The parties are mandated to negotiate the terms and conditions of employment, employer/employee relations, the formation of the contract and the interpretation of the existing contract. In Fargo Education Association v. Fargo Public School District, 291 N.W.2d 267 (N.D. 1980), this Court indicated that courts could mandate negotiations between education associations and school districts on salary, hours, formation of an agreement, binding arbitration and the interpretation of an existing agreement. Id. at 271. However, this Court then indicated that it was important to allow the parties to determine for themselves the subjects of negotiation, stating:

> "That is not to say that negotiations may not include any item that relates directly or indirectly to terms and conditions of employment and employer-employee relations as may be agreed upon. It is up to the parties to negotiate what the "subjects of negotiation" will be." Id. at 271. (Emphasis supplied).

[¶ 24] The parties can negotiate terms and conditions of employment and employer-employee relations including salary and working hours. See N.D.C.C. § 15.1-16-09 and N.D.C.C. § 15.1-16-13(1). Rights and obligations which are not placed into the Negotiated Agreement do not exist, cannot be enforced and remain under the control of the school board. The 2011-13 Negotiated Agreement contains the following management rights clause stating, "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. P. 30). Management rights clauses are common in teacher-school board negotiated agreements.

[¶ 25] An example of the application of a managements rights clause is found in Mandan Education Association v. Mandan Public School District, 425 N.W.2d 917 (N.D. 1988) ("MEA"). In MEA, the District unilaterally changed the standard teaching day at the high school from five class periods to six class periods. MEA brought an action against the District. The Negotiated Agreement contained a management rights clause which is virtually identical to the management rights clause in this case. Id. at 918. In MEA, the Negotiated Agreement did not spell out the number of classes in a standard teaching day, nor did it schedule additional compensation for teaching an extra class (emphasis supplied). This Court held that since the Negotiated Agreement between the District and the MEA did not cover the subject, the number of class periods was subject to the District's exclusive direction and control. The MEA attempted to enforce a right through the court system which did not exist for it under the Negotiated Agreement.

[¶ 26] In contrast, in WEA I, the WEA sought to enforce a provision of a Negotiated Agreement on behalf of all high school teachers who were assigned to teach an additional sixth period . In WEA I, this Court enforced the "extra class" provision on behalf of the teachers since that contractual obligation was included in the Negotiated Agreement.

[¶ 27] The rights, duties and obligations not contained in the Negotiated Agreement are subject to the exclusive control of the District. Of course, an education association is given the right to enforce the terms and conditions contained in a negotiated agreement on behalf of itself and on behalf of its members. There is a long line of cases in North Dakota allowing education

associations to enforce negotiated agreements on behalf of members. See also Hilton v. NDEA, et al., 2002 ND 209, ¶ 28, 655 N.W.2d 60 (Center Education Association was justified, as a matter of law, in requiring compliance with the Negotiated Agreement to achieve a lawful object which it had the right to assert); Mandan Education Association v. Mandan Public School District, 425 N.W.2d 917 (N.D. 1988) (Education association attempted to enforce change in number of class periods taught at high school); Williston Education Association v. Williston Public School District No. 1, 483 N.W.2d 467 (N.D. 1992) (Education Association enforced Negotiated Agreement requiring additional compensation for high school teachers teaching extra class over five class periods per day).

[¶ 28] The parties chose to establish a grievance procedure. The teachers chose not to exercise their individual right to file a grievance. Since the WEA has the right to enforce the Negotiated Agreement, the decision was made to have the WEA file a grievance on behalf of all the WMS teachers. The District chose not to recognize the grievance brought by the WEA. The District has that right. The District has characterized WEA's position on the grievance procedure as illogical. Does it make more sense to file 33 individual grievances, or one? The WEA brought a single grievance on behalf of 33 members who all expressed the very same concern. The WEA brought the grievance to alert the District to the concern about the nonpayment of all of the middle school teachers for the 2012-13 school year. The District's reaction to the grievance put form over substance. The District has not argued it was harmed or prejudiced in any way by the actions of the teachers or the WEA. Based upon the fact this case has reached this level, it is

safe to assume a substantive review of any grievance on this issue, whether it had been filed by the teachers or the WEA, would have been denied.

[¶ 29] Lastly, the purpose of exhausting an administrative remedy is to give an organization an opportunity to quickly determine through the operation of its internal procedures that it has committed an error, it may be able to minimize and sometimes eliminate any monetary injury to the plaintiff by immediately reversing its initial decision. See Soentgen v. Quain & Ramstad Clinic P.C., 467 N.W.2d 73, 82 (N.D. 1991). In this case, the WEA satisfied the purpose of a grievance procedure by alerting the District to the issue. The District had every opportunity to address the issue prior to the institution of litigation.

[¶ 30] In paragraphs 16-22 of its Brief, the District argues case law supports its argument that the District Court erred in finding the administrative remedies were not required to be exhausted. The cases cited by the District are easily distinguishable. In each and every case cited by the District, there is no collective bargaining agreement which provided for the grievance procedure. Secondly, the rights given to the individuals in the cases cited by the District are all individual rights which are granted to them by either policy or by statute and are not rights that are given to a collective body. For example, in Brown v. State, 2006 ND 60, 711 N.W.2d 194, a student tried to enforce his individual right after his doctoral degree had been revoked. In Peterson v. North Dakota State University System, 2004 ND 82, 678 N.W.2d 163, a faculty member attempted to appeal her dismissal from Bismarck State College. In Tracy v. Central Cass Public School District, 1998 ND 12, 574 N.W.2d 781, an individual teacher who could not obtain

recommendations from any school board members failed to take advantage of an ESPB procedure. In Long v. Sampson, 1997 ND 174, 568 N.W.2d 602, a dismissed professor failed to exhaust his administrative remedies. In Schuck v. Montefiore Public School District No. 1, 2001 ND 93, 626 N.W.2d 698, a teacher resigned in the face of a contemplated discharge by a school district. Five months after his resignation, the teacher sued the district for breach of contract and wrongful discharge. The district court dismissed the complaint as he failed to exhaust his administrative remedies under the discharge statute. See N.D.C.C. § 15-47-38, now codified at N.D.C.C. § 15.1-15-08. And lastly, in Soentgen v. Quain & Ramstad Clinic, PC, 467 N.W.2d 73 (N.D. 1981), a hospital was granted summary judgment on numerous claims brought by a physician who failed to exhaust administrative remedies. This Court noted that exhaustion of remedies was required as a hospital board would have the "expertise" in acting as a quasi-judicial tribunal to adjudicate a doctor's claim in the first instance. Id. at 82. [¶ 31] The other major factor that differentiates the cases cited by the District from the present case is the standard of review used by the courts in reviewing cases where administrative remedies have been exhausted. In all of the cases cited by the District, had the individual exhausted their administrative remedies and allowed the governmental entity such as the Board of Higher Education, state government, or the school district to hold a due process hearing and make a decision, the courts undoubtedly would have implemented the deferential standard in reviewing those decisions. This Court would not have reviewed those decisions *de novo* as a matter of law but rather deferred to the institution's

decision. This Court will not substitute its judgment for the judgment of those entities. See Peterson v. North Dakota University System, 2004 ND 82, 678 N.W.2d 163, Opdahl v. Zeeland Public School District, 512 N.W.2d 444 (N.D. 1994). In contrast, the construction of a written contract to determine its legal effect is a question of law for the courts to decide, and on appeal, this Court will independently examine and construe the contract to determine if the trial court erred in its interpretation of it. See also Williston Education Association v. Williston Public School District, 483 N.W.2d 567 (N.D. 1992), and Mandan Education Association v. Mandan Public School District, 2000 ND 92 ¶ 9, 610 N.W.2d 64. School boards do not have any expertise to determine the legal effect of contract language. That expertise can only be exercised by courts. In the fall of 2012, the District was faced with a contract interpretation issue. It was not a scenario where the District was given the opportunity to be the fact finder and the final arbiter. This is not a situation where a school board made a determination to non-renew or discharge a teacher or reviewed a conflict between an administrator and a teacher. Any record or fact finding made in a grievance procedure by the District in this case would not be binding on a court. Rather, this is an issue of contract interpretation for courts. Under these facts, WEA had the right to proceed with a breach of contract action. This Court has recognized that in the absence of a grievance procedure, the aggrieved party may resort to appropriate legal action. See Grand Forks Education Association v. Grand Forks Public School District No. 1, 285 N.W.2d 578, 582 (N.D. 1979). WEA was an aggrieved party.

[¶ 32] The District Court understood education associations, in a collective bargaining agreement, have the right to enforce their negotiated agreements. With knowledge of the WEA position, the District chose to simply ignore it. It may have been far better for the District to deal with the issue and try to resolve it at the local level. While the WEA did not have any grievance rights and could have proceeded into court immediately, the WEA tried to do the right thing and tried to work it out at the lowest possible level. The District simply refused and found itself in court. The District recognizes its indefensible position on the breach of contract issue so it is forced to argue the technical argument of exhaustion of administrative remedies as its primary argument. This situation presented a breach of contract question which must be resolved by the courts, not school boards. The District Court did not err in finding the grievance procedure did not need to be exhausted.

3. The District Court correctly interpreted the 2011-13 Negotiated Agreement requiring the District to pay WMS teachers for the extra class for 2012-13.

[¶ 33] The District argues that the District Court made several errors of law in reaching its decision granting summary judgment to the WEA. It argues the District Court misinterpreted the language in the Negotiated Agreement regarding sixth class period compensation, it erred in finding that "prime time" was a class period and the Negotiated Agreement provided only for payment for teachers who give up their prep periods and not their prime time periods. Clearly the District Court did not accept any of the arguments raised by the District. Rather, the District Court accepted the arguments of the WEA as it argued the language concerning the extra compensation for teaching a sixth class was clear, the

District had established a past practice by issuing three supplemental contracts for the 2011-12 school year, the District improperly interpreted the Negotiated Agreement for the 2012-13 school year by failing to provide supplemental contracts to all of the WMS teachers who taught an extra class for the 2012-13 school year and the District breached the contract. The starting point is to review the language from the Negotiated Agreement and the practice established by the District in issuing supplemental contracts for the 2011-12 school year.

[¶ 34] The Negotiated Agreement provides as follows:

> "Seventh class period compensation.
> A 7-8 grade teacher who consents to be assigned more than six (6) class periods shall receive 1/7 of his/her schedule salary for the seventh class period." (App. P. 32).

[¶ 35] For the relevant time period, the District operated, one middle school for students in grades 7 and 8. In WMS, there were four teams designated by color. Each team consisted of four content teachers of science, math, social studies and language arts. Students on these teams also received instruction in Phy Ed and other elective classes. For the 2011-12 school year, the Prime Time period was the first period of the day and was 40 minutes. Teachers were required to prepare for those classes and teach a particular curriculum to students in that class during Prime Time. The teaching of Prime Time required all teachers to be in front of students for six periods a day.

[¶ 36] Prior to the beginning of the 2011-12 school year, concerns were raised regarding the number of classes which could be offered and the potential for a large increase in the number of students during the school year. No new teachers

were hired. Instead, three teachers received supplemental contracts. (App. P. 15, 29, 34, 35). These contracts were issued pursuant to the provision on page 16 of the Negotiated Agreement allowing for seventh period class compensation. More importantly, the reason these teachers were paid additional compensation is that they were in front of students for an additional class period. This fact was acknowledged by the school superintendent. (App. P. 74). The supplemental contract provided payment of 1/7th of their teaching salary for the 2011-12 school year. These teachers' status as having extended contracts was also acknowledged on the teaching schedule for the 2011-12 school year by placing the designation "(Ext)" next to their names. (App. P. 28). These teachers were not acting as substitute teachers (App. P. 20, ¶ 24).

[¶ 37] During the 2011-12 school year, concern was raised among administrators in regard to a potential influx of students into the District for the 2012-13 school year. The terms and conditions for the 2012-13 school year would be covered by the same Negotiated Agreement as the year before. Based upon the concern, the administration at WMS changed the teaching schedule for the 2012-13 school from the 2011-12 school year by eliminating the Team Time period and assigning all teachers an additional curricular class. (App. P. 20). Therefore, the standard teaching day for teachers at WMS for the 2012-13 school year included six periods of content time, a planning period and a Prime Time period. While the Prime Time period's length was changed from 40 minutes to 15 minutes, teachers still had to prepare for that class and there was a particular curriculum which needed to be taught. (App. P. 21). Therefore, for the 2012-13 school year, all teachers at

WMS, with several exceptions, taught seven periods and had a planning period. No teachers in WMS were provided with supplemental contracts for 2012-13, except Karen Toavs who actually taught eight classes per day. While she received a supplemental contract, she is entitled to a second supplemental contract: one for teaching a 7th period and one for teaching an 8th period. (App. P. 16). The teachers who had taught seven periods in 2011-12, Chad Askim, Wade Stueve and Jeff Winslow, did not receive supplemental contracts for basically teaching the same schedule in 2012-13 they had taught in 2011-12. While a second change in the schedule was made at semester time for the 2012-13 school year, which added the Team Time period back into the schedule, teachers were still teaching seven classes, which included six content classes and a Prime Time period. The practice established by the District the year before is very simple: seven student contact periods requires a supplemental contract paying the teacher an additional 1/7th of their salary.

[¶ 38] In its Complaint, the WEA alleged that the District breached the Negotiated Agreement by failing to issue supplemental contracts to all WMS teachers for the 2012-13 school year. The elements of a prima facia case for breach of contract are: 1) the existence of a contract; 2) breach of the contract; and 3) damages which flow from the breach. The breach of contract is the nonperformance of a contractual duty when it is due. The burden of providing the elements of a breach of contract is on the WEA. WFND, LLC v. Fargo Marc, LLC, 2007 ND 67 ¶ 13, 730 N.W.2d 841 (citations omitted). Issues of fact may become issues of law if reasonable persons could reach only one conclusion from the facts.

Mandan Education Association v. Mandan Public School District No. 1, 2000 ND 92 ¶ 6, 610 N.W.2d 64.

(A) Existence of a contract.

[¶ 39] There is a Negotiated Agreement between WEA and the District which was applicable to two school years, 2011-12 and 2012-13. The first element is satisfied.

(B) Breach of contract.

[¶ 40] The second element is whether the Negotiated Agreement was breached. In 1992, in a case involving the WEA and the District which involved the failure of the District to pay additional compensation for teaching an extra class period, this Court set forth the rules concerning the interpretation of a negotiated agreement. In Williston Education Association v. Williston Public School District, 483 N.W.2d 567, 570, 571 (ND 1992), this Court stated as follows:

> "Teacher contracts are subject to the same statutory rules of interpretation as other contracts of employment. NDCC 9-07-01; Campbell v. Wishek Public School District, 150 N.W.2d 840 (N.D. 1967). C.F. NDCC 9-07-17 (Contract with public party interpreted against the private party if an uncertainty is not resolved by the other rules of interpretation); see generally Walle Mutual Insurance Company v. Sweeney, 419 N.W.2d 176 (N.D. 1988). (NDCC 9-07-19 is a rule of last resort; it cannot apply to frustrate the intentions of the parties ascertained by other rules of contract interpretation).
>
> The purpose of contract interpretation is to find the "mutual intention of the parties as it existed at the time of contracting." NDCC 9-07-03. If those intentions may be determined from the writing alone, the contract is not ambiguous. NDCC 9-07-04; National Bank of Harvey v. International Harvester Company, 421 N.W.2d 799 (N.D. 1988). According to NDCC 9-07-02, if the contract is unambiguous, the language of the contract governs any dispute.

> A contract is ambiguous when rational arguments can be made for different positions about its meaning. National Bank of Harvey, 421 N.W.2d at 801. Whether or not a contract is ambiguous is a question of law that we independently review on appeal. Vanderhoof v. Gravel Products, Inc., 404 N.W.2d 485, 491 (N.D. 1987). If a contract is ambiguous, extrinsic evidence may be considered to determine its meaning. A course of dealing and usage should be given effect in interpreting a contract ambiguity"

[¶ 41] The WEA showed the breach of the Negotiated Agreement by the District. A plain reading of the language will reveal the parties' intentions. At WMS, a teacher who is assigned more than six classes must be compensated. At the beginning of the 2011-12 school year, the standard teaching load for a teacher was five content periods, a Prime Time period, a Planning period and a Team Time period. Of those eight periods, teachers were assigned to six class periods with students. There is no material distinction between the Prime Time period and the content class periods taught by every teacher. The District Court held Prime Time was an extra student contact class. (App. P. 21). There is no doubt teachers at WMS who taught the standard teaching load (six classes with students) for the 2011-12 school year did not receive additional compensation under the Negotiated Agreement. However, three teachers did teach the additional class period during that school year and as a result received the supplemental contracts paying them and additional 1/7th of their teaching contract. For teaching the additional class, Askim received the sum of $8,480.03, Stueve received the sum of $7,105.81, and Winslow received the sum of $5779.97. By its actions in issuing these supplemental contracts, the District has acknowledged that Prime Time was a class period pursuant to the Negotiated Agreement.

[¶ 42] The District argued the three teachers who received supplemental contracts were to be paid as substitute teachers under the paragraph entitled "Sixth Class Period Compensation" contained in the Negotiated Agreement. (App. P. 19, ¶ 21). The District Court disagreed. The District apparently has realized the lack of merit in that argument as it has dropped it from its Brief to this Court since the superintendent testified in her deposition the supplemental contracts were issued pursuant to the "Seventh Class Period Compensation" paragraph. (WEA App. Pp. 3-4). Because these teachers were each paid a different amount of money, they could not have been substitute teachers. Substitute teachers are paid the same amount based upon the daily base salary rate as set forth in the Negotiated Agreement. (App. P. 32).

[¶ 43] For the 2012-13 school year, the District, unilaterally decided to change the schedule at WMS by adding an extra class period to each teacher's schedule. The schedule eliminated the Team Time period. While the teaching schedule changed at WMS from 2011-12 to 2012-13, the Negotiated Agreement did not. This was a two-year Agreement and was not subject to renegotiation between school years. The WEA did not contest the District's ability to change the schedule. WEA asserts there are consequences to a change in the schedule which contractually obligate the District to issue supplemental contracts.

[¶ 44] The change which took place at the beginning of the 2012-13 school year obligated the District to issue supplemental contracts to each and every WMS teacher. All teachers, with the exception of Karen Toavs, were assigned more than six class periods with students. (App. Pp. 36-37). This Court must review

and compare the schedules of Askim, Stueve and Winslow for both school years. These individuals were assigned a similar schedule in 2012-13 to the schedule they were assigned in 2011-12. (App. Pp. 30-32). The only difference is they did not receive a supplemental contract for school year 2012-13, and in essence, lost the opportunity to earn the money for teaching an extra class that they had earned in 2011-12. Even though the District changed the schedule for the second semester of the 2012-13 school year, and added the Team Time back in, a simple review of the schedule will reveal the teachers were still assigned more than six student contact class periods during that semester as well. Breach of contract is defined as the nonperformance of a contractual duty when due. WFND, LLC v. Fargo Marc, LLC, 2007 ND 67 ¶ 13, 730 N.W.2d 841. The contractual duty owed by the District to all of the teachers at WMS for the 2012-13 school year was to issue supplemental contracts. Its failure to do so amounts to a breach. The District Court so held. The last element is damages which flow from the breach. The failure to pay teachers 1/7th of their salary constitutes damages.

[¶ 45] The removal of Team Time or Planning Time to assign an additional class is irrelevant. There is no provision in the Negotiated Agreement to pay additional compensation for removing either a plan period or a teaming period. Rather, the mutual intention of the parties requires extra pay for teaching an extra class. The legal obligation of the District was to pay teachers who were assigned more than six class periods during the two school years, 2011-12 and 2012-13. The District fulfilled that obligation in 2011-12; it did not in 2012-13. The District has clearly established a past practice of its understanding of its obligation under the

Negotiated Agreement in 2011-12 by issuing extra duty contracts to Askim, Stueve and Winslow. Past practice is helpful in contract interpretation. WEA I, 483 N.W.2d 567, 571-72; Mandan Education Association v. Mandan Public School District, 2000 ND 92, ¶ 9, 610 N.W.2d 64. See also Kalvoda v. Bismarck Public School District No. 1, 2011 ND 32 ¶ 27, 794 N.W.2d 454. A course of dealing is a strong indicator of what the parties intended. It is virtually impossible for the District to argue any other interpretation of that provision. When additional classes were assigned, teachers are entitled to additional compensation. The District assigned teachers additional classes for the 2012-13 school year and failed to pay them. In the Negotiated Agreement, the parties recognized the extra work involved in teaching extra classes as opposed to a team time or a prep time. A clear breach of contract occurred.

[¶ 46] The key consideration for the Court is the mutual intention of the parties. WEA I at 570; N.D.C.C. § 9-07-03. Clearly, education associations negotiate contracts which provide extra compensation for extra duties whether it be curricular or extra-curricular. This is clear from the WEA's Negotiated Agreement. Pursuant to the 2011-13 Negotiated Agreement, every group of teachers, whether they be elementary, middle school or secondary teachers, may be paid additional compensation for teaching over and above the standard teaching assignment. (App. P. 32). The standard teaching assignment in WMS for the 2011-12 school year consisted of teaching six periods, a planning period and a team period. Teachers who taught above that schedule were paid. There are similar provisions for high school teachers and elementary teachers. Extra work means

extra pay.

4. **History repeats itself.**

[¶ 47] At the District Court, the WEA argued the dispute between the WEA and District was a case of history repeating itself. In 1992, this Court issued a decision in a case involving the unilateral change in a schedule at the Williston High School ("WHS") without paying teachers additional compensation as provided in the Negotiated Agreement. In the last paragraph of its Opinion, the District Court stated WEA I had "eerily similar circumstances to this case". (App. P. 21). Most importantly, after reviewing the holding of WEA I, the District Court applied WEA I to this case and stated:

> "If we come to the conclusion that prime time period was considered a class period during the 2011-12 year in the case at bar, it should be considered a class period in the 2012-13 year. Just as each class in 1990-91 year in the above-mentioned case was shorter than the classes in the previous years, does not change the fact that it was an extra class. Similarly, even though prime time period was shortened, it is the fact that it is a class, rather than its length, that is important." (App. P. 22).

[¶ 48] In WEA I, the District sought to change the class schedule at WHS from a standard five period teaching schedule to a six period teaching schedule. Id. at 568. It was shown that over a number of years, the teachers who taught an additional sixth class period at WHS were compensated. The negotiated agreement which was in place for a number of years provided for "extra compensation" for teaching an additional class period at WHS. Due to the fact that the District assigned an additional teaching period to the high school teachers for the 1990-91 school year, the District was obligated to pay those teachers for

that extra class. This Court found the term "extra class" was ambiguous and looked at the past practice of the parties to determine the obligation of the District. This Court concluded that the obligation of the District was to pay the teachers additional compensation for additional work. Id. at 571-72.

[¶ 49] The WEA argued the facts and holding of WEA I are factually and legally indistinguishable from the present case. In WEA I, the Court found the unilateral change in the contractual relationship requires the District to pay additional compensation. In this case, there is clear and unambiguous language that requires additional compensation for teaching more than six periods. In 2011-12, three teachers taught over and above the six class periods and were paid accordingly. This is a past practice. The issuance of supplemental contracts in that school year is evidence that the District properly interpreted the Negotiated Agreement as it applied to the class schedule at WMS. For the 2012-13 school year, the District discontinued its proper interpretation of the Negotiated Agreement. Instead of assigning three teachers an additional class, the District assigned all of the teachers at WMS an additional class period which required them to teach seven class periods. The District failed to compensate those teachers pursuant to the Negotiated Agreement. The District Court clearly found, based on undisputed evidence, that Prime Time was a class period based upon the fact that teachers were with students, they needed to prepare, and a curriculum was taught. The fact the period was shortened the next school year, as indicated by the District Court, is irrelevant. For the second time in 22 years, this District assigned additional classes to teachers and did not pay them

according to a specific provision in the Negotiated Agreement. In both instances, the WEA sought to enforce the Negotiated Agreement. The result here should be the same as WEA I. The District Court correctly found that "history did repeat itself".

CONCLUSION

[¶ 50] For all of the reasons stated herein, the WEA respectfully requests this Court affirm the judgment of the District Court.

Dated this 8th day of December, 2015.

GEIERMANN BERGESON
& GULER LAW OFFICES, P.C.
Attorneys for Appellee
P.O. Box 2196
Bismarck ND 58501-2196
Telephone: (701) 223-1986
Email: gmann@gbg-lawoffice.com

By: /s/ Michael J. Geiermann
Michael J. Geiermann (ID #04174)

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Williston Education Association,	)	
	)	
Plaintiff/Appellee,	)	Supreme Court File No. 20150256
	)	
vs.	)	Williams County District Court
	)	File No. 53-2013-CV-00431
Williston Public School District No. 1	)	
	)	
Defendant/Appellant.	)	
	)	

Appeal from District Court, Williams County, North Dakota
Judgment entered August 28, 2015
Northwest Judicial District
Honorable Joshua B. Rustad

CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2015, the following document:

Brief of Appellee Williston 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:

Rachel Bruner-Kaufman
Pearce & Durick
PO Box 400
Bismarck ND 58502-0400
Email: rbk@pearcedurick.com

Dated this 8th day of December, 2015.

/s/ Michael J. Geiermann
Michael J. Geiermann