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DECEMBER 22, 2015
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

REPLY BRIEF OF APPELLANT WILLISTON PUBLIC SCHOOL DISTRICT NO. 1

Submitted by:

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LEGAL ARGUMENT

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

[¶1] The WEA claims neither it nor the middle school teachers were required to exhaust the grievance procedure laid out in the Negotiated Agreement before the WEA brought suit on behalf of the middle school teachers. *See* Appellee Brief, ¶ 19. The grievance procedure is included in the Negotiated Agreement, meaning both the WEA and the District agreed to its inclusion. The Negotiated Agreement 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.

[¶2] The WEA fixates on case law indicating that education associations have the power to enforce negotiated agreements on behalf of its members. The District agrees that an education association does have the power to enforce the negotiated agreement between it and a school district. However, that does not circumvent the teachers' requirement to exhaust their administrative remedies through the grievance procedure. To hold otherwise would result in no need to ever 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. Neither the district court nor the WEA cite to any authority allowing this type of circumvention of the exhaustion doctrine. Instead, the WEA and the district court cite to *Williston Educ. Ass'n v. Williston Pub. Sch. Dist. No. 1*, 483 N.W.2d 567 (N.D. 1992), but

never address the fact that teachers in that 1992 case did file a grievance before the WEA brought suit. *Id.* at 569.

[¶3] The WEA asks in paragraph 28 of its Brief if it makes "more sense to file 33 individual grievances, or one?" for its position that the District should have recognized the WEA's untimely grievance. There is no requirement in the grievance procedure that each individual teacher needed to submit a separate grievance. The middle school teachers could have submitted individual grievances or one grievance with the names of each grievant listed. Furthermore, not all middle school teachers were aware of the grievance, and testimony provided to the district court shows that teachers themselves did not believe they would be getting extended or supplemental contracts for the 2012-13 school year. App. 63, 69, 90, 93, 95.

[¶4] In its brief, the WEA states that it brought the grievance to alert the District to the concern and that the District was not harmed or prejudiced in any way by the teachers' failure to exhaust their administrative remedies. This is incorrect. 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. Regardless, there is no requirement under the exhaustion of administrative remedies doctrine for the employer to show it was harmed or prejudiced by the employee's failure to exhaust their administrative remedies. To the contrary, the teachers have the burden to show they would be irreparably harmed by enforcement of the exhaustion doctrine, which has not been argued by the WEA. *See Barret v. Dep't of Health & Human Serv.*, 14 F.3d 26, 27 (8th Cir. 1994) (finding that claimant has the burden to show he or she would be "irreparably harmed by enforcement of the exhaustion doctrine").

[¶5] In addition, the WEA tries to speculate as to what the outcome could have been had the teachers exhausted the available administrative remedies. Appellee Brief, ¶ 28. This Court has rejected arguments and refused to speculate as to the outcome had a plaintiff utilized the available administrative remedies. *See Long v. Samson*, 1997 ND 174, ¶ 13, 568 N.W.2d 602; *Thompson v. Peterson*, 546 N.W.2d 856, 863 (N.D. 1996); *Southeast Human Serv. Center v. Eiseman*, 525 N.W.2d 664 (N.D. 1994).

[¶6] The WEA also claims in paragraph 30 of its Brief the cases cited by the District are distinguishable because there is no collective bargaining agreement which provided for the grievance procedure. The WEA fails to cite to any case law holding that an entity can sue on behalf of its members even though the members did not exhaust administrative remedies available to them. No such case law exists. Instead, case law supports the District's position that the teachers were required to exhaust their administrative remedies before the WEA brought suit on their behalf. *See Mandan Educ. Ass'n v. Mandan Pub. Sch. Dist. No. 1*, 2000 ND 92, 610 N.W.2d 64 (teacher filed grievance before MEA brought suit where parties disputed meaning of the term "unavailability" in negotiated agreements); *Williston Educ. Ass'n*, 483 N.W.2d at 569 (teachers filed grievance before the WEA brought suit where parties disputed meaning of term "extra class"); *Nieman v. Yale Univ.*, 851 A.2d 1165, 1171-72 (Conn. 2004) ("Where employment rights are contractual, and the contract establishes an internal grievance procedure for resolving disputes, the procedure ought to be followed.").

[¶7] Here, the parties apparently dispute the term "class periods" in the negotiated agreement. This dispute clearly falls within the negotiated agreement grievance procedure's definition of grievance. App. 31. Therefore, the WEA's argument in

paragraph 31 of its Brief that no grievance procedure existed is clearly incorrect. A grievance procedure did exist and the WEA cannot be allowed to bring an action on behalf of the teachers without the teachers first exhausting their administrative remedies in the grievance procedure.

[¶8] The WEA fails to recognize this Court's repeated recommendations 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); *Williston Educ. Ass'n*, 483 N.W.2d 567, 572-73 (N.D. 1992) (VandeWalle, J., concurring specially). 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.

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

[¶9] In paragraph 17 of its Brief, the WEA claims that testimony is immaterial in this case and that the documents speak for themselves. However, throughout its entire Brief, the WEA then makes claims relating to the testimony and states in paragraph 33, "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." (emphasis added). The district court determined that the WEA and the District "have different interpretations of the understanding between the WEA and the District." App. 18.

[¶10] The negotiated agreement is not ambiguous since the parties have specifically negotiated the number of daily class periods and included that language in the negotiated agreement. App. 32. The WEA claims that because three middle school teachers received supplemental contracts in 2011-12, all middle school teachers should have received supplemental contracts in 2012-13. The record does not support the WEA's position. 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. The WEA's grievance also failed to allege middle school teachers were teaching more than six class periods. App. 38.

[¶11] 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.

[¶12] Prime time was forty minutes long in 2011-2012 and included SSL (supporting student literacy), while it was only fifteen minutes in 2012-2013 and did not contain an SSL component. App. 57. The SSL program was formalized in 2012-2013 where it became an elective content course and no longer part of prime time. App. 57-58. Several teachers themselves testified during the depositions that while they may have considered prime time a class period for the 2011-2012 school year, they did not consider prime time a class period in 2012-2013. App. 61-62, 99. Reo Boston, a teacher, testified that prime time was a class period in 2011-2012 but not in 2012-2013 because "prime time

changed, in my opinion, to a class where we taught a curriculum to a holding period" for students where they took attendance and listened to announcements for fifteen minutes. App. 62.

[¶13] 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. Karen Toavs, a middle school teacher who received a supplemental contract for the 2012-2013 school year, testified that she received the supplemental contract because she did not have a plan/prep period. App. 97, 99. The WEA asserts in paragraph 36 of its Brief that the superintendent acknowledged Askim, Winslow, and Stueve were paid additional compensation in 2011-2012 because they were in front of students for an additional class period. This is incorrect. She testified that they received extra compensation "because they taught during their prep time" and discussed how they needed to prepare for their classes outside of school hours for the 2011-2012 school year. App. 74.

[¶14] The practice established by the District for the 2011-2012 school year is simple – teachers received extra compensation for giving up their prep period in order to teach a class. Even if prime time was considered a class period for the 2011-2012 school year, which some teachers testified they thought it should be, it certainly was not a class period in 2012-2013. The WEA claims there is nothing in the negotiated agreement that would require the District to pay teachers for giving up their prep time in 2011-2012. If this is true, then the District overpaid those teachers, but such an overpayment does not affect the teachers from fulfilling their contractual obligation which is to teach six class periods without receiving extra compensation. App. 32; *See Kalvoda v. Bismarck Pub. Sch. Dist. #1*, 2011 ND 32, ¶ 26, 794 N.W.2d 454.

[¶15] 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

[¶16] 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 22nd day of December, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2015, the following documents:

Appellant's Reply Brief

was 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 22nd day of December, 2015.

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