20210248
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
OCTOBER 6, 2021
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Joseph S. Motisi,

Plaintiff/Appellant,

v.

Hebron Public School District

Defendant and Appellee.

Supreme Court No. 20210248
Morton Cty. No. 30-2021-CV-00687

Appeal from District Court, Morton County, North Dakota
South Central Judicial District
Honorable Douglas Bahr

Appeal from Judgment of Dismissal Dated July 26, 2021

BRIEF OF APPELLANT JOSEPH S. MOTISI

REQUEST FOR ORAL ARGUMENT

Submitted by,

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2. Whether the District Court erred in interpreting N.D.C.C. § 15.1-15-02.

3. Whether the District Court erred in concluding the Petitioner did not have a clear legal right to an offer of continuing contract for the 2021-22 school year.

STATEMENT OF THE CASE

[¶1] Joseph S. Motisi, Petitioner/Appellant, (Motisi) served a petition for Writ of Mandamus, an affidavit, with exhibits, application for temporary restraining order and preliminary injunction and a proposed alternative Writ of Mandamus upon the Hebron Public School District (District) on July 8, 2021. (App P. 5-17). On July 12, 2021, instead of filing an answer, the District filed a response in opposition to the application for temporary restraining order and preliminary injunction with an affidavit and exhibits. The District Court considered the response to be the answer of the District. (App P. 22). On July 19, 2021 the District Court signed a temporary restraining order. (App P. 21).

[¶2] On July 26, 2021, the District Court issued an order denying Motisi's Petition for Writ of Mandamus and vacating the temporary restraining order. (App P. 22). Judgment was entered on July 26, 2021. (App P. 30). Notice of Entry of Judgment was filed on July 28, 2021. (App P. 31). Notice of Appeal was timely filed on September 14, 2021. (App P. 32).

STATEMENT OF THE FACTS

[¶3] Joseph S. Motisi ("Motisi") was a resident of the City of Hebron, State of North Dakota. (App P. 5).

[¶4] For the 2019-20 and 2020-21 school term, Motisi was employed by Hebron Public School District ("District") as a Middle School and a High School Science Teacher. (App P. 5).

[¶5] The District is a political subdivision of the State of North Dakota, organized under the laws of the State of North Dakota and operating an elementary and secondary school district in and around Hebron, North Dakota. (App P. 5).

[¶6] Prior to being employed at the Hebron School District during the 2019-20 and 2020-21 school year, Motisi was employed as a science teacher at the South Heart School District located in Stark County, North Dakota. In total, he had six years of teaching experience in the State of North Dakota. (App P. 5).

[¶7] On April 16, 2021, Motisi received a Probationary Teacher Notice of Contemplated Nonrenewal ("Notice") notifying him the Districts School Board ("Board") has voted to contemplate nonrenewing his teaching contract for the upcoming school year, 2021-22, for the following reasons: (1) Inability to maintain professional boundaries and language with staff including in the presence of students; (2) Inability to adequately manage his classroom including inability to adequately prepare for class and timely attend school events, which negatively impacts effective learning; and (3) Inability to gain respect and trust of staff, students, and parents, in order for effective learning to occur. (App P. 6).

[¶8] The Notice also provided that an executive session meeting for the purpose of discussing the reasons for his contemplated nonrenewal would be held on April 22, 2021 at 7:00 p.m. at the Hebron Public School. This executive session meeting would be held pursuant to the provisions of N.D.C.C § 15-1-15-02. The statute provides nonrenewal procedures for probationary teachers. (App. P. 6).

[¶9] An executive session meeting was held on April 22, 2021 for the District to contemplate not renewing the teacher's contract for the upcoming school year of the Petitioner. Motisi did not attend the executive session meeting.

[¶10] On or about April 23, 2021, Motisi received from the District a "Probationary Teacher Notice of Nonrenewal" notifying him that on April 22, 2021, at a special

board meeting, a determination was made by the Hebron School Board to nonrenew his teaching contract pursuant to N.D.C.C. § 15.1-15-02. (App P. 6).

[¶11] On April 26, 2021, Motisi delivered a letter to the Superintendent of Schools, Myron Schaff, notifying the Hebron School District of his claim of a continuing contract for the 2021-22 school year pursuant to N.D.C.C. § 15.1-15-04. (App P. 6).

[¶12] The next day, on April 27, 2021, Superintendent Myron Schaff acknowledged receipt of the claim of continuing contract. (App P. 6).

LAW AND ARGUMENT

I. STANDARD OF REVIEW

[¶13] The standard for the issuance of a Writ of Mandamus is set forth in N.D.C.C. § 32-34-01, and states:

> The Writ of Mandamus may be issued by the Supreme and District Courts to any inferior tribunal, corporation, board, or person to compel the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right for office to which the party is entitled and from which the party is precluded unlawfully by such inferior tribunal, corporation, board, or person.

[¶14] The party seeking the Writ of Mandamus bears the burden of demonstrating a clear legal right to the performance of the particular acts sought to be compelled by the Writ. He must also demonstrate there is no plain, speedy and adequate remedy in the ordinary course of law. Issuance of the Writ is left to the sound discretion of the trial Court. This Court will not reverse a trial Court's denial of a Writ of a Mandamus absent an abuse of discretion. Wutzke v. Hoberg 2004 ND 42 ¶ 3, 675 N.W. 2d 179 (citations omitted). "The fact that the Court will be forced

to construe or interpret a statute or examine facts to which a statute applies, does not necessarily preclude the remedy of Mandamus". Fargo Education Association v. Paulsen 739 N.W. 2d 842, 845, (N.D. 1976). A Court abuses its discretion if it acts in an arbitrary, unreasonable, or capricious manner, or if it misapplies or misinterprets the law. Kenmare Education Association v. Kenmare Public School District #28 2006 ND 136, ¶ 9, 717 N.W. 2d 603.

[¶15] Mandamus actions have been used in numerous situations involving teachers who allege their continuing contract rights or nonrenewal rights have been improperly infringed upon by a School District. Several of those cases have reached this Court. *See* Henley v. Fingal Public School District No. 54, 219 N.W.2d 106 (N.D. 1974); Coles v. Glenburn Public School District No. 26, 436 N.W.2d 262 (N.D. 1989); and Opdahl v. Zeeland Public School District No. 4, 512 N.W.2d 444 (N.D. 1994). Teachers and principals have a clear and legal right to compliance with the statutory procedures for nonrenewal, and Mandamus is proper if those procedures have not been followed. Opdahl, Id. at 445.

II. THE DISTRICT COURT ERRED IN APPLYING THE RULES OF STATUTORY CONSTRUCTION

[¶16] The issue before this Court is whether the District Court erred in denying Motisi's Petition for Writ of Mandamus. In North Dakota, there are two separate and distinct nonrenewal procedures for teachers employed in public schools. One is for "probationary teachers" found in N.D.C.C. § 15.1-15-02. The other nonrenewal procedure for all other teachers is found in N.D.C.C. §§ 15.1-15-05 and 15.1-15-06. That procedure is for teachers who are not probationary. A review of those statutes will reveal the nonrenewal hearing protections given to

probationary teachers are minimal. For probationary teachers, it is a meeting in front of the school board where the board simply tells the teacher their employment will not be renewed for the upcoming school year. It is a walk-through procedure. In contrast, the nonrenewal protections given to teachers who are not considered probationary are substantial from the perspective that the District must substantiate the reasons for the nonrenewal, present witnesses, exhibits, testimony and evidence. The teacher receives notice, an explanation of the reasons for the nonrenewal and receives an evidentiary hearing. The teacher is also given the ability to call witnesses, present evidence and ask questions of the school board witnesses or administration witnesses for purposes of clarification. The two hearing procedures are substantively different. Both procedures were created by the Legislature. The District chose to use the nonrenewal procedure for probationary teachers pursuant to N.D.C.C. § 15.1-15-02.

[¶17] In denying the petition, the District Court utilized the rules of statutory construction to supposedly determine the Legislature's intent in enacting N.D.C.C. § 15-1-15-02. The District Court after reviewing the arguments of Motisi and the District concluded that if Motisi was a probationary teacher, the District followed the correct procedures in nonrenewing his contract. However, Motisi argued if he was not a probationary teacher, the District did not properly extinguish Motisi's continuing contract rights and he is entitled to his remedy. In order to determine if the District Court erred in denying the Petition for Writ of Mandamus, this Court must determine if the District Court properly applied the Rules of Statutory Construction. The statute at issue is N.D.C.C. § 15-1-15-02 (8) which states: "For purposes of this section, "probationary teacher" means an individual teaching for

less than two years" (Subsection 8). The interpretation of the statute is a question of law, fully reviewable on appeal. Hilton v. North Dakota Education Association 2002 ND 209 ¶ 10, 655 N.W. 2d 60. Both parties set forth for the Court the well-known rules regarding statutory construction. Motisi cited to County of Stutsman v. State Historical Society 371 N.W. 2d 321 (N.D. 1985)

> "Our duty is to ascertain the intent of the Legislature. A statute must be considered as a whole to determine the intent of the Legislature. The Legislature's intent must be sought initially from the statutory language. If the language of a statute is clear and unambiguous, the letter of the statute cannot be disregarded under the pretext of pursuing its spirit because the legislative intent is presumed clear from the face of the statute. Statutes must be construed to avoid absurd and ludicrous results. All sections of a statute must be construed to have meaning because the law neither does nor requires idle acts. In short, we are guided by the common sense principle that the statute is to be read to give effect to each of its provisions, whenever fairly possible." Id. at 325.

[¶18] The Stutsman County standard has been cited numerous times by this Court.

[¶19] In its order, the District Court cited to the standard found in the State by and through Workforce Safety and Insurance v. Avila 2020 N.D. 90, ¶ 7 942 N.W. 2d 811. This is also the standard argued by the District. The standard set forth in Stutsman County and Avila are practically identical. In Stutsman County, this Court indicated the Court Legislature's intent "must be sought initially" from the statutory language. If the language of the statute is clear and unambiguous, the letter of the statute cannot be disregarded under the pretext of pursuing its spirit because legislative intent is presumed clear from the face of the statute Id at 375. The District Court in citing to Avila stated: In ascertaining the Legislature's intent, we first look to the plain language of the statute and give each word of the statute

its ordinary meaning (App P. 25 ¶ 10). Whether the language states "must be sought initially" or "we first look", it is fundamentally the same. The first task the District Court must accomplish is to review the language of the statute in question to determine whether it is clear and unambiguous. If there is not an ambiguity, the review is concluded.

[¶20] The District Court has taken significantly inconsistent positions in applying the rules of statutory construction. The first rule of statutory construction is to look at the clear language of the statute itself. The District Court error is that it construed the term "statute" to mean the entire statute and not a particular subsection. It is totally permissible for a District Court to look at a subsection of the statute without looking at the entire statute or the chapter as a whole. As an example, that is exactly what this Court did in Avila. This Court concentrated on one single subsection provision of the clause governing disability awards at WSI. This Court in Avila did not stray from reviewing the specific language of a particular subsection. Therefore, Motisi's argument the District Court only needed to concentrate solely on the definition of a "probationary teacher" under Subsection 8 was appropriate under the rules of statutory construction.

[¶21] In its order, the District Court reviewed subsection 8 and then, contrary to its earlier conclusion the statute was not ambiguous, finds an ambiguity. The District Court after reviewing subsection 8 states "That subsection, alone, does not specify whether that means two years in the District, two years at the school, two years in the State etc." (App. P. 25 ¶12). By engaging in this analysis, the District Court disregards the clear language of the statute. Subsection 8 says exactly what it says. There is no ambiguity in that statute.

[¶22] The difficulty for the District and the District Court is the application of the statutory language to a particular set of facts. The District's argument has nothing to do with any ambiguity in the statute. It is simply an application problem. In this case, Motisi after teaching in Hebron for two years had a total of six years of teaching experience. Clearly under the language of subsection 8, the statute did not apply to him. He was not an "individual teaching for less than two years". Rather than following the explicit direction of this Court in the application of the rules of statutory construction, the District Court disregards not only those rules, but also its prior pronouncement that the statute was not ambiguous. The District Court then errs in going beyond the statutory rule construction parameters and concludes the statute is now ambiguous because of the waiver language set forth in N.D.C.C. § 15.1-15-02 (6). The District Court's inconsistency is clear. It indicates that the statute is unambiguous and then indicates that it is ambiguous. The District Court then criticizes Motisi for his argument that the Court must focus solely on the language of N.D.C.C. § 15.1-15-02 (8) separate and apart from other sections of the statute. The District Court indicates that Motisi's focusing on subsection 8 is "not the standard the Court follows when interpreting the statute". The District Court then tries to justify its position that it must "construe the statute as a whole and give effect to each of its provisions". (App. P. 25)

[¶23] Then, the District Court basically asks itself a rhetorical question to satisfy its position on subsection 8. The District Court states "That subsection, alone, does not specify whether that means two years in the District, two years at the school, or two years in the state, etc." (App. P. 25). In answering the District Courts questions, a teacher transferring to another North Dakota school district from a

school district where that teacher taught more than two years would not be a probationary teacher under subsection 8. A teacher coming into the state of North Dakota with teaching experience in another state with more than two years would not be a probationary teacher in North Dakota under the language of subsection 8. The language of subsection 8 says what it says.

[¶24] The District Court bought into the argument made by the District that somehow Motisi's four years of experience outside of Hebron did not make any difference, notwithstanding the clear language of subsection 8. As indicated earlier, the District is not concerned with an ambiguous statute. Rather, it is more concerned with the application of that statute to the facts facing it with Mr. Motisi who has six years of experience total in the state of North Dakota.

[¶25] The District made a choice regarding which procedure it should implement to nonrenew Mr. Motisi's contract. The District decided on the probationary teacher procedure as opposed to the hearing procedure given to teachers who are not considered probationary. Their arguments regarding ambiguity, are simply an effort to avoid liability for the wrongful termination of Mr. Motisi's continuing contract rights. See; Henley v. Fingal Public School District #54, 219 N.W. 2d 106 (N.D. 1974).

[¶26] In interpreting N.D.C.C § 15.1-15-02 the District Court holds that Motisi's reading of subsection 8 in isolation renders that statute to be meaningless. The District Court also indicates that Motisi's argument would lead to an absurd result. (App. P. 26 ¶ 14). Neither statement is true. Teachers with one year of experience regardless of whether it is in the school district the state or out of state who came to North Dakota would be considered as a probationary teacher. Teachers who

are completing their second year of teaching regardless of whether it is in the district, the State or a combination thereof, would be considered probationary teachers. The District Court, in trying to fit its legal argument into the facts of this case indicates that Motisi's six years of experience does not matter and therefore he would be considered as a probationary teacher. In essence, the District Court disregards fundamental rules of statutory construction and became a Legislature by adding to subsection 8 the requirement that the teaching experience must be in the state. The logic of the District Court cannot be upheld.

[¶27] The clear language of N.D.C.C. § 15.1-15-02 (8) is not modified because a School District has an option to waive the probationary status of a teacher. N.D.C.C. § 15.1-15-02(6) has no application here. This District never had the opportunity to waive Motisi's probationary status since he had been a teacher in North Dakota for 6 years. Moreover, one of the other rules of statutory construction is the Legislature is capable of saying exactly what it means. In Little v. Tracy, 497 N.W.2d 70 (N.D. 1993), when the parties urged this Court to review the legislative history of a statute, this Court stated:

> "It is presumed that the Legislature intended that all it said, and that it said all that it intended to say. The Legislature must be presumed to have meant what it has plainly expressed. It must be presumed, also, that it made no mistake in expressing its purpose and intent. Where the language of a statute is plain and unambiguous, the Court cannot indulge in speculation as to the probable or possible qualifications which might have been in the mind of the Legislature, but the statute must be given effect according to its plain and obvious meaning and cannot be extended beyond it." Usually when the plain meaning of a statute is apparent, it is unwise or unnecessary to delve further. Id. at 705. Little v. Tracy, 497 N.W.2d at 705 citing City of Dickinson v. Thress, 69 N.D. 748, 290 N.W.2d 653, 657 (1940).

[¶28] This Court has also warned District Courts not to violate the separation of powers doctrine in attempting to construe language or laws passed by the

Legislature. "The separation of government functions and powers prohibit us (courts) from grading the legislative choice as good, better or best. Rather, our judicial review is limited to determining the law's meaning to according to the rules of construction." Sorenson v. Felton, 2011 ND 33, ¶ 14, 793 N.W.2d 799. The District basically asked the District Court to become the Legislature and it complied. In Estate of Christeson v. Gilstad, 2013 ND 50, ¶ 14, 829 N.W.2d 453 the Supreme Court stated:

> "We must further presume that the Legislature made no mistake in expressing its purpose and intent. Consequently, we will not correct an alleged legislative "oversite" by rewriting unambiguous statutes to cover the situation at hand. When the wording of a statute is clear and free of all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit. This Court is not free to 'amend' or 'clarify' the clear language of a statute and "if changes are to be made in the statute, we leave that matter to the Legislature as it is for the Legislature to determine policy, not for the Courts." Id. at ¶ 14. (citations omitted).

[¶29] In Fetzer v. Minot Park District, 138 N.W.2d 601, 604, (N.D. 1965) this Court stated:

[¶30] "The Courts cannot legislate, regardless of how much we might desire to do so. Therefore, regardless of how worthy a claim against a municipal corporation might be, we cannot assume the functions of the legislative assembly. Our power is limited to passing on laws that are enacted by the Legislature, and if the Legislature fails to act, we cannot change the law by judicial decision."

[¶31] When this Court reviews the rules of statutory construction, as set forth in all of the cases cited by Motisi, it can only come to one conclusion: The language of N.D.C.C. § 15.1-15-02(8) is clear on its face, the legislative history does not

need to be considered and Motisi is not a probationary teacher because he has taught in North Dakota for six years.

[¶32] The District asked the District Court to hold N.D.C.C. § 15.1-15-02(8) can be construed to mean "employed in the District for two years." All this Court needs to do is review the language found in N.D.C.C. § 15.1-15-15.1 dealing with the nonrenewal rights of public school principals to determine the legislative intent. Actually, the Legislature knows how to limit probationary status to 2 years in a school district. It has done it before. In 2015, in an effort to clarify nonrenewal and continuing contract protections of principals, the Legislature enacted a statute which allowed School Districts to use minimal due process in nonrenewing principals who were recently employed. However, the language enacted by the Legislature in 2015 to lessen nonrenewal and continuing contract protections for principals is much different than the language used in 2019 for the amendment to the probationary teacher statute. N.D.C.C. § 15.1-15-05.1 states as follows:

[¶33] "If the Board of a school district elects not to renew the contract of a principal, an assistant superintendent, or an associate superintendent, who has been employed by the board in that position for less than two years, the board shall provide written notice of the nonrenewal to the individual before May first. At the request of the individual, the board shall meet with the individual, in executive session, to convey the reasons for the nonrenewal." (emphasis supplied).

[¶34] In reviewing N.D.C.C. § 15.1-15-05.1 the Legislature specifically indicated that principals, and assistant and associate superintendents who have been employed by the Board for less than two years are subject to minimal nonrenewal

protection. The Legislature used the phrase: "employed by the board in that position for less than two years, for a specific limiting reason." This argument made by Motisi is not even addressed by the District Court. Unfortunately, for the District, similar limiting language does not appear in subsection 8. That language says: "An individual teaching for less than two years." As much as they would like to, the District does not get to add or qualify the language passed by the Legislature. Neither does the District Court.

CONCLUSION

[¶35] For all of the reasons stated herein, Joseph S. Motisi respectfully requests this Court to reverse the judgment of the District Court and remand for a determination of damages.

Dated this 6th day of October, 2021.

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REQUEST FOR ORAL ARGUMENT

Joseph S. Motisi respectfully requests this Court grant oral argument in this matter. The case presents, for the first time, issues relating to the interpretation of the probationary teacher statute in N.D.; N.D.C.C. § 15.1-15-02.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief of Appellee complies with the type volume limitations set forth in N.D.R.App.P. 32. Based on the information provided by Microsoft Word, this Brief contains 4,440 words, excluding the table of contents, table of authorities, statement of the issues, any addendum materials, and any certificates of counsel. This Brief is typeset in Arial (12 point) and was prepared using Microsoft Word.

Dated this 6th day October, 2021.

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Appeal from District Court, Morton County, North Dakota
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Honorable Douglas Bahr

Appeal from Judgment of Dismissal dated July 26, 2021

CERTIFICATE OF SERVICE

[¶ 1] I hereby certify that on October 6, 2021, the following documents:

Brief of Appellant
Appendix of Appellant

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:

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