

**OPINION  
79-116**

July 27, 1979 (OPINION)

Mr. Howard J. Snortland

Superintendent

Department of Public Instruction

State Capitol

Bismarck North Dakota 58505

Dear Mr. Snortland:

This is in response to your letter of July 11, 1979, wherein you requested an opinion concerning the application of sections 15-47-27 and 15-47-38, and chapter 15-38.1 of the North Dakota Century Code to teachers employed by the Division of Independent Study. In your letter you set forth the following facts and questions:

The Division of Independent Study has been placed under the supervision of the State Board of Public School Education. At the last State Board meeting in June there was presented to the State Board from J. Herman O'Keeffe, the State Director, a letter requesting an Attorney General's opinion.

The teachers employed in the Division of Independent Study had petitioned the State Board, through its chairman, the opportunity to negotiate for the 1979-80 school year. On the basis of this petition, Mr. O'Keeffe requested an Attorney General's opinion.

We respectfully request your opinion whether the teachers employed in the Division of Independent Study are included under the provisions of section 15-47-27 and 15-47-38 and chapter 15-38.1 of the North Dakota Century Code.

Sections 15-47-27 and 15-47-38 provide as follows:

15-47-27. TIME FOR RENEWAL OF TEACHERS' CONTRACTS. - Any teacher who has been employed by any school district or the director of institutions in this state during any school year, shall be notified in writing by the school board or the director of institutions, as the case may be, not earlier than the fifteenth day of February and not later than the fifteenth day of April in the school year in which he or she has been employed to teach, of the determination not to renew the teacher's contract for the ensuing school year, if such determination has been made; and failure to give such written notice on or before said date shall constitute an offer to renew the contract for the ensuing school year under the same terms and conditions as the contract for the then current year. On or before April fifteenth in any year and not earlier than February fifteenth, all teachers shall be notified of a date,

which shall not be less than thirty days after the date of such notice, upon which they will be required to accept or reject preferred reemployment, and failure on the part of the teacher to accept said offer within such time shall be deemed to be a rejection of the offer. Any teacher who shall have accepted the offer of reemployment, either by the action or nonaction of the school board or the director of institutions, on or before April fifteenth, as herein provided, shall be entitled to the usual written contract for the ensuing school year, as provided by law and shall notify the school board or the director of institutions in writing of his or her acceptance or rejection on or before the date specified or before May fifteenth, whichever is earlier. Failure on the part of the teacher to provide such notification shall relieve the school board or the director of institutions of the continuing contract provision of sections 15-47-26 through 15-47-28. Nothing in this section shall be construed as in any manner repealing or limiting the operation of any existing law with reference to the dismissal of teachers for cause (Emphasis supplied).

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15-47-38. LEGISLATIVE INTENT IN EMPLOYMENT OF TEACHERS - NOTIFICATION OF DISCHARGE OR FAILURE TO RENEW - HEARING.

1. The legislative assembly, in recognition of the value of good employer-employee relationships between school boards of this state and the teachers employed in the school systems, the need to recruit and retain qualified teachers in this state, and further in recognition of the many intangibles in evaluating the performance of individual members of the teaching profession, urges that each school board of this state ensure through formally adopted policies, that channels of communication exist between the board, supervisory personnel, and teachers employed within its school system. In the very sensitive area of discharge of teachers for cause prior to the expiration of the term of the teachers' contracts, or in decisions not to renew the contracts of teachers, school boards shall give serious consideration to the damage that can result to the professional stature and reputation of such teachers, which stature and reputation were required only after the expenditure of substantial time and money in obtaining the necessary qualifications for such profession and in years of practicing the profession of teaching; and that in all decisions of school boards relating to discharge or refusal to renew contracts, all actions of the board be taken with consideration and dignity, giving the maximum consideration to basic fairness and decency.
2. The school board of any school district contemplating discharging a teacher for cause prior to the expiration of the term of the teacher's contract shall notify such teacher in writing of such fact at least ten days prior to the date of contemplated discharge. Such teacher shall be informed in writing of the time and place for a special meeting of the school board to be held for such purpose

prior to the final decision on the matter. Such teacher shall also be informed in writing of his right to demand a specification of the reasons for such discharge, which must on demand of the teacher be furnished not less than five days prior to said meeting to be held on the question of contemplated discharge. Such reasons shall be sufficient to justify the contemplated action of the board and shall not be frivolous or arbitrary. At the meeting with the board, if the teacher has informed the board in writing at least two days prior thereto that he will contest the charges brought against him, the board must sustain the charges with evidence produced at such hearing with witnesses who shall be subject to cross-examination by the teacher or his representative. The teacher may then produce such witnesses as may be necessary to refute the charges, which witnesses shall be subject to cross-examination. The proceedings may, at the request of either party, be transcribed by a court reporter at the expense of the person requesting such transcript and the witnesses may on demand of either party be placed under oath by a person authorized by law to administer oaths. Any person testifying falsely under oath shall be guilty of perjury and punished according to law. The meeting shall be an executive session of the board unless both the school board and the teacher requesting such meeting shall agree that it shall be open to other persons or the public. The teacher may be represented at the meeting by two representatives of his own choosing. In addition to board members, the school district clerk, and the superintendent, the school board may be represented by two other representatives of its own choosing at such executive session. If the teacher so requests he shall be granted a continuance of not to exceed seven days by the board unless for good cause otherwise shown. No cause of action for libel or slander shall lie for any statement expressed either orally or in writing at any executive session of the school board held for the purposes provided for in this section.

3. A school board may dismiss a teacher, effective immediately, for any of the following causes:
  - a. Immoral conduct, insubordination, or conviction of a felony;
  - b. Conduct unbecoming a teacher which requires the immediate removal of a teacher from his classroom duties;
  - c. Failure without justifiable cause to perform contracted duties;
  - d. Gross inefficiency which the teacher has failed to correct after reasonable written notice; or
  - e. Continuing physical or mental disability which renders him unfit or unable to perform his duties as a teacher.

4. The school board by unanimous vote may suspend the teacher from regular duty if such action is deemed desirable during the process of determining if cause for dismissal exists. If, upon final decision, the teacher is dismissed, the board may in its discretion determine the teacher's salary or compensation as of the date of suspension. If the final decision is favorable to the teacher, there shall be no abatement of salary or compensation.
  
5. The school board of any school district contemplating not renewing a teacher's contract, as provided in section 15-47-27, shall notify such teacher in writing of such contemplated nonrenewal no later than April first. Such teacher shall be informed in writing of the time, which shall not be later than April seventh, and place of a special school board meeting for the purpose of discussing and acting upon such contemplated nonrenewal. Such teacher shall also be informed in writing of the reasons for such nonrenewal. Such reasons shall be sufficient to justify the contemplated action of the board and shall not be frivolous or arbitrary but shall be related to the ability, competence, or qualifications of the teacher as a teacher, or the necessities of the district such as lack of funds calling for a reduction in the teaching staff. At the meeting with the board the teacher may then produce such evidence as may be necessary to evaluate the reasons for nonrenewal, and either party may produce witnesses to confirm or refute the reasons. The school board shall give an explanation and shall discuss and confirm at such meeting its reasons for the contemplated nonrenewal of the contract. The meeting shall be an executive session of the board unless both the school board and the teacher shall agree that it shall be open to other persons or the public. The teacher may be represented at such meeting by any two representatives of his own choosing. In addition to board members, the school district clerk, and the superintendent, the school board may be represented by two other representatives of its own choosing at such executive session. Upon such hearing, if the teacher so requests, he shall be granted a continuance of not to exceed seven days. No cause of action for libel or slander shall lie for any statement expressed either orally or in writing at any executive session of the school board held for the purposes provided for in this section. The determination not to renew a contract if made in good faith shall be final and binding on all parties. Final notice of the determination not to renew a contract shall be given in writing by April fifteenth as provided in section 15-47-27 (Emphasis supplied).

Nowhere in either of these sections is there any specific reference to the Division of Independent Study. In fact, the emphasized portion of each section makes specific reference to institutions or agencies other than the Division of Independent Study; i.e., school districts, public school districts, school boards, and the Director of Institutions.

The term "teacher" has also been defined, for the purposes of sections 15-47-27 and 15-47-38, in section 15-47-26 to read as follows:

15-47-26. DEFINITIONS. - The term "teacher", as used in sections 15-47-27 and 15-47-28, shall be construed to include all teachers, principals, and superintendents in all public school districts within this state, and all persons employed in teaching in any state institution, except institutions of higher education. The term "teacher", as used in section 15-47-38, shall be construed to include all teachers and principals in all public school districts within this state, and all persons employed in teaching in any state institution, except institutions of higher learning (Emphasis added).

Like sections 15-47-27 and 15-47-38 themselves, this section does not list the Division of Independent Study as one of those agencies or institutions to whom the sections in question apply, nor do we believe that the correspondence courses offered by the Division under chapter 15-19 are taught by "persons employed in teaching in any state institution", as those words are used in section 15-47-26. We would therefore conclude that without more, these sections apply only to teachers employed by the Director of Institutions or by boards of public school districts.

We are, of course, aware of the decision of the Supreme Court in Barnes County Education Association v. Barnes County Special Education Board, 276 N.W.2d. 247 (1979), in which the Court held the entirety of chapter 15-38.1 applicable to county special education boards. In that case the Court found in spite of the references throughout chapter 15-38.1 to "public school districts", that the language of the other sections, insofar as they specify the educational institutions or agencies to which the chapter applied, did not state that the chapter was applicable only to public school districts. The Court therefore found that the statute was ambiguous in its application and other indicia of the Legislature's intention in approving chapter 15-38.1 needed to be reviewed. The Court said:

We also note that a number of other provisions in chapter 15-38.1 refer to teachers, negotiating units, representative organizations, and school boards without any mention of "public school districts".

We believe that a reading of the entire chapter discloses that an ambiguity exists that requires judicial interpretation. Thus, we decline the Special School Board's invitation to apply the rule of literal interpretation.

In Dickinson Public School District No. 1 v. Scott, 252 N.W.2d. 216 (N.D. 1977), we were presented with an analogous situation in which we also declined a literal approach.

In Dickinson, the legislature amended a statute regarding state aid for transportation to include the following statement:  
"Those school districts qualifying for payments for buses having a capacity of seventeen or more pupils shall be entitled

to an amount equal to fifteen cents per day for each pupil who is transported in such buses . . ." The school districts argued that the language in question was "plain and mandatory" and that they were entitled to be paid fifteen cents per day for each pupil transported including nonpublic students that were authorized to be transported on public schoolbuses by an earlier statute.

We determined that the statute required interpretation and applied the rule of construction that all statutes relating to the same subject matter are to be construed together so as to harmonize them and give full force and effect to true legislative intent. *Dickinson Public School District v. Scott*, supra at 219. See also *Eriksen v. Boyer*, 225 N.W.2d. 66 (N.D. 1974); *Brink v. Curless*, 209 N.W.2d. 758 (N.D. 1973); *First American Bank and Trust Co. v. Ellwein*, 198 N.W.2d. 84 (N.D. 1972). We believe that the same rule is applicable in this case.

After a statute is determined to be ambiguous and requires construction, we must search for legislative intent to ascertain the meaning of the statute.

>5! 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 providing a uniform basis for teachers' representation and negotiation. We do not believe that this is to be limited to school boards of "public school districts." In reaching this conclusion, we note that section 15-38.1-14, N.D.C.C., section (1), provides that ">n!o teacher, administrator or representative organization shall engage in a strike." We do not believe that this refers to only teachers employed by a school board of a public school district.

We also believe that the title of the bill which became Chapter 172, 1969 Session Laws (chapter 15-38.1, N.D.C.C.) is indicative of legislative intent. The title states that it is "An Act to provide procedures for representative organizations of public schoolteachers to negotiate with school boards with reference to employer-employee relations; to establish procedures to be used in the event of disagreement; and to establish an education factfinding commission."

Following the same method of analysis, we do not believe that sections 15-47-27 and 15-47-38 are so ambiguous in their terms of application as to require any further search for the intentions of the Legislative Assembly.

In the Barnes County case the Court was faced with the construction of the meaning of entire chapter of state law when only some sections in that entire chapter were clear in their meaning. In the case of sections 15-47-27 and 15-47-38, we deal only with two separate sections of the state law, each of which is clearly by its own language limited to school boards or another agency. We believe that this situation is clearly distinguishable from that in Barnes County. Here, each of only two sections is clear in its terms of application.

If a statute is clear and unambiguous the letter of the statutory language cannot be ignored under the guise of determining legislative intent. Barnes County Education Association v. Barnes County Special Education Board, supra, at 249, and cases cited therein. For this reason we are of the opinion that sections 15-47-27 and 15-47-38 do not fit the analysis of the Barnes County case and that there is therefore no basis upon which to say that these two sections apply to teachers employed by the Division of Independent Study.

The application of chapter 15-38.1 to teachers of the Division of Independent Study presents a more difficult question, as the Supreme Court has already held in the Barnes County case that the application of this chapter is not limited to public school districts, but also applies to County Special Education Boards.

In arguing that chapter 15-38.1 should apply to special education boards, the Barnes County Education Association pointed to several instances in chapter 15-38.1 in which the language of the statutes purports to apply to "school boards" without limitation to the boards of "public school districts". The Association referred to section 15-38.1-02 concerning definitions and sections 15-38.1-07 and 15-38.1-08 regarding the rights to organize and negotiate. Thus, the Court in Barnes County, supra, at page 250 said:

We also note that a number of other provisions in chapter 15-38.1 refer to teachers, negotiating units, representative organizations, and school boards without any mention of "public school districts".

The Court's opinion then states that a reading of the chapter as a whole led the Court to conclude ">we do not believe that this is to be limited to school boards of 'public school districts'". The Court also relied on the title of the bill which enacted chapter 15-38.1 in 1969, which bill title referred to the teachers' right to negotiate with "school boards", without limitation of that word to "school boards of public school districts". It is apparent to us that in Barnes County the Supreme Court relied heavily on the frequent references throughout chapter 15-38.1 to "school boards", and to the same language in the applicable bill title. In this light, the application of chapter 15-38.1 to special education boards makes sense, and while this language was thus held to apply to county boards, we do not believe that the Division of Independent Study can in any way be called a "school board", and even if such language could be read as referring to the State Board of Public School Education, under whose ultimate supervision the Division has been created (N.D.C.C. section 15-19-02), it would be impossible for an education association representing teachers of the Division to negotiate with the State Board of Public School Education, as there is no employer-employee relationship between such teachers and the State Board; the teachers employed by the Division of Independent Study are employed by the Division and not the State Board. The State Board has been given no authority to contract directly with teachers of the Division but only the authority to appoint the director of the Division of Independent Study. N.D.C.C. section 15-19-02. For this reason we do not believe the analysis conducted by the Supreme Court in the Barnes County case could be applied to chapter 15-38.1 to make that chapter applicable to teachers of the

Division of Independent Study.

For the foregoing reasons we conclude that sections 15-47-27 and 15-47-38, and chapter 15-38.1 do not apply to teachers employed by the Division of Independent Study.

Sincerely,

ALLEN I. OLSON

Attorney General