

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Dr. Richard J. Brown,)
)
 Plaintiff-Appellant,) Supreme Court No. 20050365
)
 vs.)
)
 State of North Dakota, by and through)
 the State Board of Higher Education,)
)
 Defendant-Appellee.)
 _____)

APPEAL FROM JUDGMENT DATED OCTOBER 4, 2005, OF THE DISTRICT
COURT OF GRAND FORKS COUNTY, STATE OF NORTH DAKOTA,
THE HONORABLE SONJA CLAPP, PRESIDING

REPLY BRIEF OF APPELLANT

Thomas D. Fiebiger
ND ID #04190
Attorney for Appellant,
Richard J. Brown

OHNSTAD TWICHELL, P.C.
15 Broadway, STE 500
P.O. Box 2765
Fargo, ND 58108-2765
TEL (701) 280-5801
FAX (701) 280-5803

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INTRODUCTION

[¶1] Admitting that the district court looked at matters outside of the pleadings in granting its motion to dismiss, UND seeks to defend that determination by arguing: (1) that there is no evidence of futility (even though Richard Brown was not allowed to gather additional evidence of futility), and (2) the “process” offered to Richard Brown was satisfactory (even though Richard Brown was not allowed to gather additional evidence of insufficiency).

[¶2] UND goes on to argue that although it presented evidence outside of the pleadings, although the district court considered evidence outside of the pleadings in reaching its dismissal decision, and although Richard Brown specifically requested more time to conduct discovery if the court should consider matters outside of the pleadings, that Richard Brown was required to submit an affidavit requesting more time to submit discovery.

LAW AND ARGUMENT

I. The Trial Court Improperly Viewed Matters Outside the Pleadings in Granting the Motion to Dismiss.

[¶3] As explained in the Appellant’s brief, although a court may consider matters outside of the pleadings in considering a motion to dismiss for lack of jurisdiction, it may not do so when the jurisdictional issue is intertwined with the merits of the action. Osborn v. United States, 918 F.2d 724, 730 (8th Cir.1990). In the present case, the resolution of the jurisdictional issue, whether bias rendered exhaustion futile, also answers the merits, whether bias effectively lead to the denial of due process. Thus, the district court was erroneous in considering matters outside the pleadings without converting the motion to one for summary judgment. Id.

[¶4] Richard Brown specifically requested that the Court grant him additional time to conduct discovery if the court planned to look outside of the pleadings to resolve

the issue. See (Response to Motion to Dismiss, Docket # 19, at page 5.) Richard Brown did so pursuant to Rule 12(b) of the North Dakota Rules of Civil Procedure because UND brought a motion to dismiss not simply a motion for summary judgment. Rule 12(b) provides:

If, on a motion asserting defense numbered (vi), to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion must be treated as one for summary judgment and disposed of as provided in N.D.R.Civ.P. 56, and all parties must be given reasonable opportunity to present all material made pertinent to the motion by N.D.R.Civ.P. 56.

Yet, UND asserts that Richard Brown should have instead submitted an affidavit, pursuant to Rule 56, indicating that he needed more time for discovery. The district court, however, did not consider the matter under Rule 56. (App. 49) (“[T]he Court need not consider the Rule 56 motion for summary judgment.”) Accordingly, Rule 56 does not apply.

[¶5] In addition, a judicial maxim indicates, “The law neither does nor requires idle acts.” N.D.C.C. § 31-11-05(23). Richard Brown’s affidavit would have merely recited what was already part of the record, that the discovery period was far from over, and that he needed additional time for discovery. He should not, however, be required to submit to this idle act. N.D.C.C. § 31-11-05(23).

II. Richard Brown Was Not Required to Exhaust Administrative Remedies

[¶6] In its Response Brief, UND has still not provided a basis for extending the exhaustion of remedies doctrine to a non-executive, non-employment law matter. Assuming the exhaustion doctrine is extended, UND argues that the process could not be futile because Richard Brown presented no evidence of futility. Again, however, Richard Brown was given no opportunity to present further evidence of futility.

[¶7] Administrative exhaustion of remedies presumes that an adequate remedy is present for the aggrieved wrong. North River Ins. Co. v. Iowa Div. of Ins., 501 N.W.2d

542, 545 (Iowa 1993). UND has presented no evidence, and Richard Brown has found none, that allows: (1) a Dean to unilaterally revoke a degree conferred by the State Board of Higher Education; or (2) a committee on student academic standards to re-confer a degree that has been previously revoked. Thus, the administrative remedy proposed by UND is futile for this reason as well.

III. The District Court Erred When It Determined that Dr. Brown's Claim for a Violation of Due Process Fails as a Matter of Law.

[¶8] It is well-settled that, "When evaluating a motion for judgment on the pleadings, a court must accept as true all factual allegations set out in the complaint, and must construe the complaint in the light most favorable to the plaintiff, drawing all inferences in his favor." Wishnatsky v. Rovner, —F.3d —, 2006 WL 20580, at *2 (8th Cir. 2006); accord Gosbee v. Martinson, 2005 ND APP 10, ¶ 12, 701 N.W.2d 411, 415 ("[B]ecause determinations on the merits are generally preferred to dismissal on the pleadings under N.D.R.Civ.P. 12(b)(6), the court's scrutiny of the complaint must be highly deferential to the pleader and the complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no facts which would entitle him to relief.")

[¶9] Here, the district court acknowledges that there were allegations of bias by the decisionmaker in this case. (App. 44.) This is sufficient to state a claim for a denial of due process. "Due process guarantees . . . the right to a hearing before a neutral and detached hearing body." Bigby v. Dretke, 402 F.3d 551, 558 (5th Cir. 2005) (citing Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973)).

[¶10] Despite repeated invitation, UND still has not cited to any case, statute, or other authority that would either allow Dean Benoit to revoke Dr. Brown's degree or that would allow any graduate committee to rescind that revocation. Due process requires that any process, to be due, must allow for some relief. See Stutsman County v.

Westereng, 628 N.W.2d 305, 308 (N.D. 2001) (“A person is denied due process or a fair hearing when the defects in the hearing process might lead to a denial of justice.”) . Dr. Brown’s due process claim is satisfied for this second, independent reason.

CONCLUSION

[¶11] For the reasons stated above, Appellant, Richard J. Brown, respectfully requests that the trial court’s Judgment be reversed.

Dated: January 10, 2006.

Thomas D. Fiebiger
ND ID #04190
Attorney for Appellant,
Richard J. Brown

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I hereby certify that on January 10, 2006, I caused the following document:

Reply Brief of Appellant

to be filed electronically with the Clerk of the Supreme Court by e-mailing a true and correct copy to supclerkofcourt@ndcourts.com and to be served upon the attorney for Appellee, Tag Anderson, by e-mailing a true and correct copy to tanderso@state.nd.us.

The originals of the foregoing are being held in my office.

Dated this 10th day of January, 2006.

Thomas D. Fiebiger
ND ID #04190