

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

BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES

[¶1] This appeal raises two issues. (1) Did the district court err when it determined that the doctrine of exhaustion of remedies applied to this case, even though there is no precedent for applying this doctrine, exhaustion does not apply to due process claims, and any attempt at exhaustion would be futile? (2) Did the district court err when it determined that the due process claim failed as a matter of law when the district court acknowledged the allegations of bias of a decisionmaker in the process and when the district court improperly applied a dismissal standard to this claim?

STATEMENT OF THE CASE

[¶2] This case involves a professor's challenge to the unilateral revocation of his doctoral degree by the Dean of the College from which the professor earned the degree. On a motion to dismiss, or alternatively, for summary judgment, the district court ruled against the professor using dismissal standards and entered its Memorandum Decision and Order Granting Defendant's Motion to Dismiss on September 29, 2005. The Judgment was filed on October 4, 2005. The professor filed a Notice of Appeal on October 18, 2005.

STATEMENT OF THE FACTS

[¶3] The appellant, Dr. Brown, received his Ph.D. degree from UND in 2003. Dr. Brown was also employed by UND. (App. 3.) At all relevant times, particularly July 1, 2004 through December 31, 2005, Dr. Brown was employed pursuant to an employment contract with UND as an Assistant Professor in the Nursing Department and the Director of the Nurse Anesthesia Program. (Id.)

[¶4] Dr Brown's employment contract indicates that his appointment of employment with UND is "subject to State Board of Higher Education and Institution Policies." (Id.) One such policy stems from UND's Office of Research and Program

Development (ORPD) and is titled “Ethical Conduct in Research, Scholarship and Creative Activity.” (App. 4.)

[¶5] UND’s Ethical Conduct Policy provides in its Introduction:

[I]t is particularly important to distinguish misconduct in research, scholarship, and creative activity from the honest error and the ambiguities of interpretation that are inherent in the research/creative process and that are normally corrected by further research and study.

(Id.) In order to fulfill this mission, to distinguish misconduct from the honest error, UND has formulated a procedure to follow; specifically, Section IV(B)(3) of UND’s Ethical Conduct Policy provides:

Due process will be provided to all parties in keeping with the applicable state and federal law and University of North Dakota and State Board of Higher Education policies. All parties will be treated fairly and their reputations guarded by providing confidentiality to the extent possible under applicable state and federal records and/or the North Dakota Open Records Act.

(Id.) Further, Section IV(B)(6) of UND’s Ethical Conduct Policy provides: “The University will document the pertinent facts and actions at each stage of the process.”

(Id.)

[¶6] The procedure in UND’s Ethical Conduct Policy sets forth many steps for UND to follow when there are allegations of misconduct. (Id.) First, as set forth in Section V of the policy, the Vice President of Academic Affairs must conduct a “pre-inquiry-review.” (Id.) Then, in accordance with Section V, within 15 days of receipt of the allegation, the Vice President of Academic Affairs is to appoint a “Committee of Inquiry.” (App. 5.) If a Committee of Inquiry determines that the allegations have merit, then pursuant to Section VI of UND’s Ethical Conduct Policy, the process proceeds to a formal investigative phase. (Id.) Finally, if misconduct is found by the Committee of Investigation, then the University must impose sanctions that are appropriate to the

seriousness of the conduct pursuant to Section VIII of UND's Ethical Conduct Policy. (Id.)

[¶7] UND's Ethical Conduct Policy in Section VIII recommends certain sanctions for ethical misconduct. (Id.) None of the listed sanctions include revocation of a degree. (Id.)

[¶8] On October 7, 2004, Dr. Brown received e-mail correspondence from Lisa Allison-Jones, RN, Ph.D., in which she indicated that portions of Dr. Brown's dissertation were identical to her dissertation, and she asked Dr. Brown for an explanation. (Id.) After investigation, Dr. Brown discovered that a portion of Dr. Allison-Jones' dissertation, through the electronic movement and transfer of text, was inadvertently included in his dissertation without proper citation. (Id.)

[¶9] Dr. Brown immediately notified his dissertation committee chair, Dr. Myrna Olson, concerning the error in this dissertation. (Id.) Dr. Brown also immediately contacted Proquest, the online dissertation publishing service, and he halted the sale and distribution of his dissertation pending a re-submission of an amended thesis. (Id.) Dr. Brown also responded to Dr. Allison-Jones, apologized to her, and suggested a telephone conference with her to discuss a satisfactory resolution with her. (Id.) Then, on or about November 26, 2004, Dr. Brown sent a letter to Cynthia Shabb, Assistant Dean of the Graduate School, requesting permission to amend his dissertation and detailing his efforts at attempting to resolve the error in his dissertation. (App. 6.)

[¶10] On or about December 7, 2004, Dean Benoit issued a memorandum to UND's Registrar, taking the extraordinary action of ordering the revocation of Dr. Brown's Ph.D. Degree (hereinafter "revocation order"). (Id.) Dean Benoit issued this revocation order without providing Dr. Brown with a hearing. (Id.) Dean Benoit failed to state the evidence on which he based this revocation order, and he failed to state specific factual grounds for the order. (Id.; App. 29)

[¶11] In his revocation order, dated **December 7, 2004**, Dean Benoit indicates: “The Ph.D. Degree of Richard J. Brown (NAID #318810) is to be revoked effective **December 6, 2004** at 4:30 p.m.” (App. 29.) The revocation further indicates that his decision to revoke Dr. Brown’s degree should be held in abeyance pending the appeal of his decision. (App. 29.) However, the memorandum does not indicate that the revocation order could be deemed null and void at the conclusion of the appeal hearing. (App. 6, 29.) Thus, the revocation order indicates that no matter what the result of the appeal hearing, Dr. Brown’s degree was revoked. (App. 6, 29.) The revocation order fails to provide any authority upon which Dean Benoit had to revoke Dr. Brown’s degree. (App. 29.)

[¶12] In issuing the revocation order, UND failed to follow any of the procedures that Dr. Brown was contractually entitled to as a faculty member. (App. 7, 9.) Specifically, it failed to follow the procedures set forth in UND’s Ethical Conduct Policy. (App. 4-6.) (UND’s Ethical Conduct Policy, unlike the issuance of the revocation order, recognizes the importance of providing the opportunity to remedy errors in research, treating all parties fairly, and guarding their reputations. (App. 4.) By ignoring the process set forth in the Ethical Conduct Policy, to which Dr. Brown was contractually entitled to, UND has damaged Dr. Brown’s present and future employment and earning potential as well as Dr. Brown’s standing in the academic and professional community. (App. 7.)

[¶13] Dr. Brown brought a Complaint against UND by and through the State Board of Higher Education, alleging that Dean Benoit was without authority to revoke Dr. Brown’s degree; the revocation was without due process, and the revocation amounted to a breach of contract. (App. 3-29.) UND brought a motion to dismiss, or alternatively for summary judgment, claiming that (1) Dr. Brown did not exhaust his

administrative remedies and (2) with respect to the claim for denial of due process, Dr. Brown fails to state a claim as a matter of law. (App. 1.) At the time that UND brought its motion, in June of 2005, more than six months remained until the completion of discovery. (App. 37.) No depositions had been taken. Nonetheless, the district court granted UND's motion, relying on matters outside of the pleadings to do so. (App. 39-50.)

LAW AND ARGUMENT

I. Standard of Review

[¶14] The district court viewed the fact concerning jurisdiction as not in dispute. Assuming that is true, “[w]hen the jurisdictional facts are not in dispute, the question of subject-matter jurisdiction is a question of law, and [the Court] review[s] the jurisdiction decision de novo.” Rolette County Social Service Bd. v. B.E., 2005 ND 101, ¶ 6, 697 N.W.2d 333, 335. The dismissal of the due process claim for failure to state a claim is also subject to de novo review. Wells v. First American Bank West, 1999 ND 170, ¶ 7, 598 N.W.2d 834, 837.

II. The District Court Erred When it Determined that the Doctrine of Exhaustion of Remedies Applies to this Case.

[¶15] As the district court has explained, “[t]he purpose of requiring exhaustion of remedies has its basis in the separation of powers doctrine and the proper role of the judiciary in reviewing actions of a coordinate equal branch of government.”

(Memorandum Opinion at 5.) Thus, a court gives deference to the executive branch's adjudication of a matter within its area of particular expertise; for example a court defers to the executive branch's expertise of its Education Standards and Practices Board.

Tracy v. Central Cass Public School District, 1998 ND 12, ¶ 14, 574 N.W.2d 781.

[¶16] Outside of the executive branch, the Court has extended the exhaustion of remedies to wrongful termination claims, when those claims could be resolved by

internal grievance procedures. See, e.g., Soentgen v. Quain & Ramstad Clinic, P.C., 467 N.W.2d 73, 83-84 (N.D. 1991). Thus, although the Court has applied the exhaustion of remedies doctrine to administrative agency decisions (which are within the executive branch) and wrongful termination claims (which are outside of the executive branch), this Court has never extended the exhaustion of remedies doctrine to non-wrongful termination claims that are not administrative agency decisions. Accordingly, the district court's decision to do so is not warranted by existing law.

[¶17] Even if this Court should find it proper to extend the exhaustion of remedies doctrine to UND's non-executive branch, non-wrongful termination decision, the district court's application of the exhaustion of remedies doctrine is erroneous for two additional and independent reasons: (1) the purported administrative remedy is inadequate; and (2) the purported administrative remedy is futile. Unnamed Physician v. Saint Agnes Med. Center, 93 Cal. App.4th 607, 620 (2001) (explaining that the exhaustion doctrine is inapplicable where the administrative remedy is either inadequate or futile); see also Canady v. UAW Local 31, 368 F. Supp. 2d 1143 (D. Kan. 2004).

A. The Purported Administrative Remedy is Inadequate.

[¶18] "A remedy is not adequate if it does not square with the requirements of due process." Saint Agnes Med. Center, 93 Cal. App. 4th 607, 620 (2001). Thus, due process claims based on the propriety of the hearing process, do not require exhaustion. Carrillo v. Anthony Independent School Dist., 921 S.W.2d 800, 804 (Tex. Ct. App. 1996) (citing Patsy v. Board of Regents, 457 U.S. 496, 500-01 (1982)); cf Steffel v. Thompson, 415 U.S. 452, 472-73 (1974) (recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights).

[¶19] In the present case, Dr. Brown's claim is one for a denial of due process; accordingly, only if his due process claim fails as a matter of law, is he required to exhaust administrative remedies. Saint Agnes Med. Center, 93 Cal. App. 4th at 620.

B. The Purported Administrative Remedy is Futile.

[¶20] With regard to Dr. Brown's assertion of futility, the district court noted the following: "The mere that an alleged biased initial decision-maker may also be a final decision maker or participate in the process after the opportunity for a hearing, does not render the process futile or implicate the process." (App. 44.) The district court's reference is to Dean Benoit, who made the initial, unilateral decision to revoke Dr. Brown's degree, and then, later, participated in the administrative hearing, in which the Graduate Committee affirmed Dean Benoit's decision.

[¶21] The district court's assertion that Dean Benoit's alleged bias does not "render the process futile or implicate the process," is contrary to law. "[I]t is well established that a biased decisionmaker is constitutionally unacceptable and our system of law has always endeavored to prevent even the probability of unfairness." Hart County Bd. of Ed. v. Broady, 577 S.W.2d 423, 426 (Ky. Ct. App. 1979) (citing and quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975)) (citations and quotations omitted). Not only does Dean Benoit's bias affect due process, but at the same time it implicates futility. See Artis v. Greenspan, 223 F. Supp. 2d 149, 154-55 (D.D.C. 2002) (citing cases) (explaining that a plaintiff may be excused from exhausting administrative remedies if she presents evidence of bias that would render the pursuit of administrative exhaustion futile).

[¶22] Because futility and the due process claim are inextricably intertwined by the bias inquiry, the district court's consideration of matters outside the pleadings, without converting the motion to one for summary judgment, was erroneous. In failing

to convert the motion to one for summary judgment, even though it viewed matters outside the pleadings, the district court relied on Thompson v. Peterson, 546 N.W.2d 856, 861 (N.D. 1996), which in turned relied upon the decision in Osborn v. United States, 918 F.2d 724 (8th Cir.1990). Osborn noted the general rule, that when a party challenges a district court's subject matter jurisdiction by bringing a motion to dismiss, the court's reference to matters outside the pleadings does not convert the motion to a Rule 56 motion for summary judgment. 918 F.2d at 729. However, Osborn also held that the general rule does not apply when the jurisdictional issue is intertwined with the merits of the action. Id. at 730.

[¶23] Thus, if the jurisdictional issue and the merits of the action both require resolution of the same question, then the motion must be converted to one for summary judgment. See, e.g., Morrison v. Amway Corp., 323 F.3d 920, 926 (11th Cir. 2003) (finding the proper standard of review to be pursuant to Rule 56 when the definition of “employer” provides both the basis of federal court subject matter jurisdiction and an element of the cause of action); Trainor v. Apollo Metal Specialties, Inc., 318 F.3d 976, 978 (10th Cir. 2002) (same). 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. Accordingly, the district court improperly failed to convert the motion to dismiss into one for summary judgment. Osborn, 918 F.2d at 729.

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.

[¶24] Procedural due process had two components: “Whether a constitutionally protected property or liberty interest is at stake and, if so, whether minimum procedural due process requirements were met.” Morrell v. North Dakota Dept. of Transp., 598 N.W.2d 111, 114 (N.D. 1999). Here, the district court agreed with the well-established principle that Dr. Brown had a protected interest in his degree. The district court,

however, held that minimum procedural due process requirements were met, by accepting UND's facts as true and not allowing Dr. Brown time to gather additional facts through discovery to rebut UND's assertion. When considering a motion to dismiss pursuant to Rule 12(b)(vi), if the district court looks at matters outside the pleadings, the court must treat the motion as one for summary judgment and then must allow the non-moving party a reasonable opportunity to present evidence to rebut the motion. See N.D. R. Civ. P. 12(b) ("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.") The district court did not do so; instead, it wholly relied on UND's version of the facts and granted the motion to dismiss. (App. 44-49.) When considering a motion to dismiss, however, a court can only look at matters contained in the pleadings. N.D. R. Civ. P. 12(b). The pleadings sufficiently allege a violation of due process, and the district court's decision should be reversed.

[¶25] The district court acknowledges that there were allegations of bias by the decisionmaker in this case. (App. 44.) "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)). Thus, due process requires a hearing before an impartial decisionmaker. Hart County Bd. of Ed. v. Broady, 577 S.W.2d at 426 {"[A] biased decisionmaker is constitutionally unacceptable[.]"} (citing and quoting Withrow, 421 U.S. at 47) .

[¶26] Whether a decisionmaker is biased such that the bias affects due process is an issue of fact. Clements v. Airport Authority of Washoe County, 69 F.3d 321, 334

(9th Cir. 1995) (reversing grant of summary judgment with respect to due process claim when genuine issues of material fact existed with regard to whether bias affected the plaintiff's due process claims). Part of the inquiry concerns whether the biased decisionmaker may have influenced the rest of the decisionmakers. See Pike v. Gallagher, 829 F. Supp. 1254, 1274 (D.N.M. 1993).

[¶27] Here, although Dr. Brown was not allowed to engage in further discovery to substantiate his allegations of bias to rebut the dismissal motion, the district court acknowledges the alleged bias of Dr. Benoit, and it also acknowledges his participation in the hearing process. These facts should be sufficient to defeat summary judgment, much less dismissal. Clements, 69 F.3d at 334 (reversing grant of summary judgment with respect to due process claim when genuine issues of material fact existed with regard to whether bias affected the plaintiff's due process claims). Dr. Brown should be given a reasonable opportunity to present materials relevant to the motion to dismiss. See N.D. R. Civ. P. 12(b) (stating that if, on reviewing a motion to dismiss for failure to state a claim, matters outside the pleading are presented and not excluded by the court, the motion must be treated as one for summary judgment and all parties must be given a reasonable opportunity to present all materials made pertinent to the motion.)

[¶28] Further, 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.”) Neither the district court nor UND has cited to any case, statute, or other authority, which would either allow Dean Benoit to revoke Dr. Brown's degree or that would allow any graduate committee to rescind that revocation. Dr. Brown's due process claim is satisfied for this second, independent reason.

CONCLUSION

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

Dated: November 23, 2005.

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I hereby certify that on November 23, 2005, I caused the following documents:

- 1. Brief of Appellant; and**
- 2. Appendix 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 23rd day of November, 2005.

Thomas D. Fiebiger
ND ID #04190