

C28



IN THE DISTRICT COURT OF TULSA COUNTY  
STATE OF OKLAHOMA

JIM SISNEY,  
Plaintiff,

vs.

MARYANNE FLIPPO, et al.,  
Defendants.

2011 FEB - 7 DISTRICT COURT  
FILED

FEB 7 2011

Case No. CJ-2008-6173  
Judge Daman Cantrell

SALLY HOWE, CLERK  
STATE OF OKLA. TULSA COUNTY

**REPLY IN SUPPORT OF DEFENDANT BROKEN ARROW SCHOOL DISTRICT'S  
MOTION FOR SUMMARY JUDGMENT**

Defendant, Independent School District No. 3 of Tulsa County, Oklahoma, commonly known as the Broken Arrow School District ("District"), respectfully submits this reply brief in further support of Defendant's Motion for Summary Judgment (the "Motion").

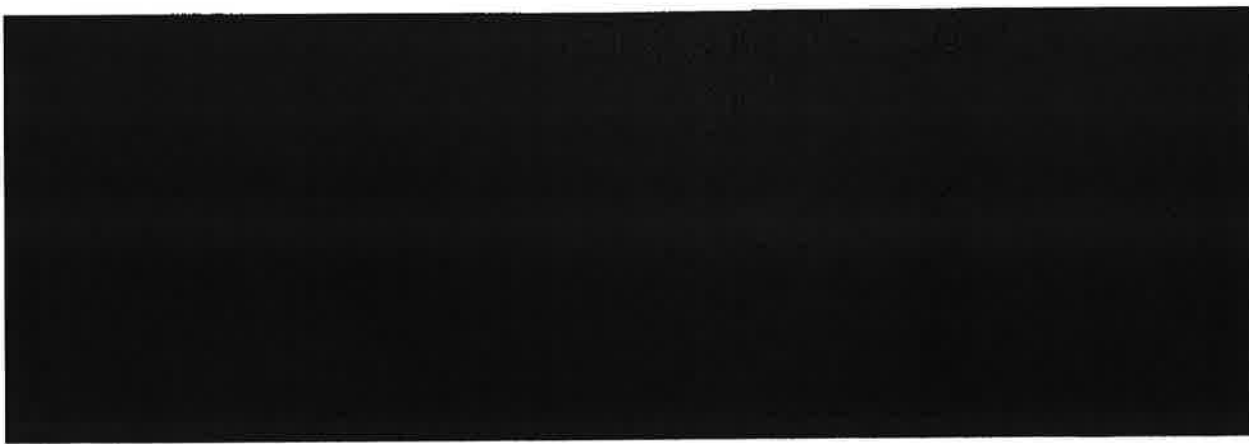
**I. There Are No Material Facts in Dispute**

Plaintiff admits all of the District's Undisputed Facts as set forth in the School District's Motion except numbers 15 and 17. However, Plaintiff qualifies each of the undisputed facts with additional statements in an attempt to controvert the undisputed facts as set forth by the District [Plaintiff's Response, pp. 2-6]. The additional statements, however, are not relevant or material to Plaintiff's breach of contract claim.<sup>1</sup>

Additionally, the evidence relied upon by Plaintiff in an effort to controvert undisputed facts number 15 and 17 do not support the contention for which it is cited. Plaintiff relies on the affidavits of Terry Stover ("Stover") and Stephanie Updike ("Updike") in an attempt to controvert the undisputed fact that evidence was presented in executive session by which the board members made their decision to terminate Plaintiff's employment with the District. Plaintiff's Response pp. 5-6. Response Exhibits 4, 5. The District also submitted an affidavit of

<sup>1</sup> See the accompanying Motion to Strike filed contemporaneously herewith for a full discussion on the inadmissibility of Plaintiff's proffered exhibits and arguments related to those exhibits.

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Stover with its Motion. Motion Exhibit No. 6. The affidavit submitted by Stover with Plaintiff's Response does not controvert any facts in his original affidavit nor does Stover assert that his prior affidavit was false. In support of the District's Motion, Stover testified that on October 23, 2008, the Board received information supporting each of the five reasons for Dr. Sisney's possible dismissal. Motion Exhibit No. 6, ¶6. Stover does not contradict or withdraw this contention in the newly submitted affidavit. Instead, he simply states, "there were no witnesses presented to the Board, no sworn statements or verification of any of the allegations." [Response Exhibit 4, ¶16]. There is no requirement that witnesses testify in order for the Board to make a decision. All that is required is that information be presented from which the Board could have reached the decision it did. *Scherich v. Indep. Sch. Dist. No. 42 of Garfield County*, 1979 OK CIV APP 7, ¶8, 591 P. 2d 1270. 1273. Stover's statement does not controvert his previous testimony, or the District's undisputed facts, that there was evidence presented to the Board in executive session on each of the five grounds of cause for Plaintiff's termination.

Updike contradicts herself in her testimony and actually supports the fact that information was presented to the Board supporting the reasons for Sisney's dismissal [Response Exhibit 5]. Updike states in paragraph 17, "there was not any debate, discussion or presentation of any evidence against Dr. Sisney." However, the very next sentence states that there was "a reading of the allegations and **some other documents**" presented. Further, in paragraph 20, Updike again admits that **information was presented** at the meeting for the Board to consider in voting on Sisney's dismissal. As reflected in the above discussion, Plaintiff has failed to controvert any of the District's uncontroverted facts.

## II. Plaintiffs' Additional Statements

The School District responds to Plaintiff's additional Statements as follows:

Plaintiff's Statement No. 1, is immaterial. The court should not consider Plaintiff's Statement Nos. 2-6, 8-9 for summary judgment purposes.<sup>2</sup> The Statements are not relevant to Plaintiff's breach of contract claims. The affidavits and other evidentiary materials cited as support for Plaintiff's Statements are based on hearsay, irrelevant and inadmissible. Further, statements made related to the draft Special Audit Report of the Broken Arrow School District are factually wrong and misleading. *See Motion to Strike* filed contemporaneously herewith.

### ARGUMENTS AND AUTHORITIES

#### **I. The Undisputed Facts demonstrate that the School District did not breach Plaintiff's contract.**

The substance of Plaintiff's Response contends that the Broken Arrow Board of Education, or certain members of the Board, was biased toward Plaintiff. As the authority Plaintiff relies on indicates, whether a board is biased is a factor considered in a **procedural due process claim** and Plaintiff has not asserted a claim for denial of due process in his Third Amended Petition. *Hoerman v. Western Heights Bd. of Educ.*, 1995 OK CIV APP 130, ¶¶7-11, 913 P.2d 684, 687-688; Plaintiff's Third Amended Petition attached as Exhibit 12 to Plaintiff's Response.

Further, even if Plaintiff arguably did assert a bias claim, the "rule of necessity" would still require the Board to make a determination as to Plaintiff's employment. A school district's board of education is an elective body under Oklahoma law. OKLA. STAT. tit. 70, § 5-107A. It is charged under Oklahoma law with, among other things, (i) maintaining and operating a complete public school system of such character as it deems best suited to the needs of the school district, and (ii) contracting and fixing the duties and compensation of superintendents, teachers, and other employees. OKLA. STAT. tit. 70, § 5-117(A)(3) & (14). Further, it is the **sole body** granted

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<sup>2</sup> Plaintiff did not add an additional Statement to paragraph 7.

authority by the Oklahoma Legislature to consider the nonreemployment or dismissal of an administrator. OKLA. STAT. tit. 70, § 6-101.13 (emphasis supplied).

Courts, including the Oklahoma Supreme Court, have consistently noted that regardless of the potential for bias, a board and its elected members may have a statutory duty and obligation to hear a case and render a decision. This doctrine, referred to as the “rule of necessity,” has been recognized by the United States Supreme Court in *United States v. Will*, 449 U.S. 200, 217 (1980); the Oklahoma Supreme Court in *Southwestern Bell v. Oklahoma Corp. Comm’n*, 1994 OK 38, ¶29, 873 P.2d 1001, 1009; and the Tenth Circuit Court of Appeals in *Brinkley v. Hassig*, 83 F.2d 351, 357 (10th Cir. 1936).

Generally speaking, while **due process** requires an unbiased tribunal, a limitation or an exception applies when there is only one tribunal with the legal power to act. In those circumstances, what process is due requires a consideration of the individual’s interest in the outcome and the state’s interest in providing the procedure. *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass’n*, 426 U.S. 482, 494-96, 96 S.Ct. 2308, 2315-2316 (1976).

In the *Southwestern Bell* case, the Oklahoma Supreme Court ruled Corporation Commissioner Robert Anthony was required to consider an administrative rate increase request presented by Southwestern Bell even though he acted as an informant for the FBI while it was investigating the phone company’s activities with Corporation Commissioners. Because the Oklahoma Corporation Commission was the only body legally entitled to make the decision and there was no statutory mechanism in place to replace Commissioner Anthony, the three board members **were required** to sit and consider the case. In so holding, the Oklahoma Supreme Court stated that the rule of necessity operates “on the principle that ‘a biased judge is better than no judge at all’ and the disqualification of a judge cannot be allowed to ‘bar the doors to justice

or to destroy the only tribunal vested with the power' to hear the matter." *Southwestern Bell*, 1994 OK 38, ¶29, 873 P.2d at 1009, (citing *Barker v. Secretary of State's Office of Missouri*, 752 S.W.2d 437, 440 (Mo. App. 1988)). The Tenth Circuit Court of Appeals reached the same conclusion in *Brinkley v. Hassig*, 83 F.2d at 357.

Under Plaintiff's argument, three of the District's board members would have been required to disqualify themselves from considering Plaintiff's possible dismissal because of their alleged bias. This logic, however, is fatally flawed and absurd. First it would prevent a quorum of the Board (at least three members), as required by Oklahoma's Open Meetings Act, from ever being able to meet to consider the Plaintiff's dismissal – thereby effectively preventing its lawful consideration. See OKLA. STAT. tit. 25, § 304(2); OKLA. STAT. tit. 25, § 305; OKLA. STAT. tit. 25, § 306. Second, it would prevent the only body authorized by Oklahoma law to consider Plaintiff's possible dismissal from acting because there are no mechanisms in place for disqualification of a majority of a board or the seating of an alternative tribunal. Accordingly, even assuming "bias," the Board was the only legal and proper forum to hear and consider Plaintiff's dismissal.

Plaintiff has not presented any material fact as to which a genuine issue exists to support his breach of contract claim. Therefore, it is indisputably established that the Board's decision to dismiss him was **not** arbitrary and capricious, but rather based on evidence presented to the Board for the grounds of cause contained in the notice letter Plaintiff received.

#### **CONCLUSION**

The School District Defendant respectfully requests that their motion for summary judgment be granted.

ROSENSTEIN, FIST & RINGOLD

By:



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**District**

**CERTIFICATE OF MAILING**

I hereby certify that on the 7th day of February, 2011, I served the attached document by U.S. Mail, postage prepaid, on the following:

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