IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JIM SISNEY, an individual,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 09-CV-253-TCK-PJC**
	)	
INDEPENDENT SCHOOL DISTRICT NO. 3 OF TULSA COUNTY, a Political Subdivision; and the BROKEN ARROW SCHOOL BOARD,	)	
	)	
Defendants.	)	

OPENING BRIEF IN SUPPORT OF
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Respectfully submitted,

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The Defendant, Independent School District No. 3 of Tulsa County (the "Broken Arrow School District") and the Broken Arrow School Board, respectfully submits this brief in support of its motion for summary judgment.[1]

The Plaintiff, Jim Sisney, is the former Superintendent of the Broken Arrow School District. The Board of Education voted to dismiss Sisney from his employment with the Broken Arrow School District on October 23, 2008. Sisney then brought this action alleging that he was terminated without due process. He asserts claims under 42 U.S.C. § 1983 for deprivation of property and liberty without due process of law. Sisney also asserts a state law claim for breach of contract resulting from his termination.

[1] The Board of Education of the Broken Arrow School District (the "School Board") is the governing body of the Broken Arrow School District. OKLA. STAT. tit. 70, § 5-106 (2009 Supp.). It has no independent legal existence apart from the Broken Arrow School District and is not an entity capable of being sued separately from the School District. OKLA. STAT. tit. 70, § 5-105 (2001).

The Broken Arrow School District now moves for summary judgment pursuant to Rule 56, FED. R. CIV. P., on all of Sisney's claims.

The Tenth Circuit has explained that "[p]rocedural due process ensures that a state will not deprive a person of life, liberty or property unless fair procedures are used in making that decision." *Kirkland v. St. Vrain Valley School District No. RE-1J*, 464 F.3d 1182, 1189 (10th Cir. 2006). The court explained that to determine whether a plaintiff was denied procedural due process, a two-step inquiry is necessary: "(1) Did the individual possess a protected interest to which due process protection was applicable? (2) Was the individual afforded an appropriate level of process?" *Id.*

In this case, the Broken Arrow School District acknowledges that Sisney had a protected property interest in continued employment by virtue of his employment contract. This case therefore turns on the second inquiry set forth above – was Sisney "afforded an appropriate level of process?"

The Supreme Court has observed that due process is a flexible concept that calls for such procedural protections as the particular situation demands. *Morrissey v. Brewer*, 408 U.S. 471, 478 (1972). The Tenth Circuit has emphasized that the essential elements of procedural due process are notice and an opportunity for a hearing. *Darr v. Town of Telluride*, 495 F.3d 1243, 1251 (10th Cir. 2007), and *Jones v. Nuclear Pharmacy, Inc.*, 741 F.2d 322, 325 (10th Cir. 1984).

Oklahoma law specifies the procedure to be followed in terminating the employment of a full-time certified administrator. OKLA. STAT. tit. 70, § 6-101.13 (2001). This statute provides that the administrator must be notified, in writing, of the

proposed action and provided a list of the reasons for such action. The administrator then has ten (10) days after his receipt of the written notice to request a due process hearing before the local board of education. If the administrator timely requests a hearing, the board is required to conduct a due process hearing before voting on the possible termination. If the administrator does not timely request a hearing, § 6-101.13 specifically provides that he has waived his right to a hearing. The procedure mandated by § 6-101.13 provides for notice and an opportunity for a hearing consistent with the requirements of the Due Process Clause of the Fourteenth Amendment. *Hoerman v. Western Heights Bd. of Educ.*, 1995 OK CIV APP 130, ¶¶ 8-9, 913 P.2d 684, 687-88.

It is undisputed that Sisney was provided written notice that the Board of Education was going to consider his possible dismissal, the reasons for such action, and his right to a due process hearing. Sisney admits that he did not request a due process hearing. Because the undisputed facts establish that Sisney waived his right to a due process hearing, he cannot now claim that he was deprived of due process. *Pitts v. Board of Education of U.S.D. 305, Salina, Kansas*, 869 F.2d 555, 557 (10th Cir. 1989) (holding that teacher who "was fully informed of his considerable procedural rights" and failed to take advantage of those procedures "waived his right to challenge them in federal court").

Sisney contends that he is entitled to pursue a due process claim in federal court because he believes he would not have received a fair hearing if he had exercised his right to due process. But by waiving his due process hearing, Sisney also waived any argument that the Board was biased. The Tenth Circuit has ruled that a party who makes no attempt to disqualify a trial judge on the ground of bias has waived that issue and may

not allege bias on appeal. *Koch v. Koch Industries, Inc.*, 203 F.3d 1202, 1238-39 (10th Cir. 2000). This situation is no different. By choosing not to go forward with a due process hearing, Sisney deprived the Broken Arrow School District "of the opportunity to provide him with due process." *Pitts*, 869 F.2d at 557. This includes the opportunity to provide him an unbiased hearing.

In addition, the undisputed facts establish that Sisney cannot carry his burden of showing bias on the part of any member of the Board of Education. The law presumes that board members act with honesty and integrity when discharging their official duties. *Hortonville Joint School District No. 1 v. Hortonville Education Association*, 426 U.S. 482, 497 (1976). Because of this presumption, the Tenth Circuit has explained that there must be "some substantial countervailing reason to conclude that a decisionmaker is actually biased." *Mangels v. Pena*, 789 F.2d 836, 838 (10th Cir. 1986).

Moreover, the Board of Education of the Broken Arrow School District is the only body authorized by Oklahoma law to determine whether Sisney's employment should be terminated. Sisney's contention that three (3) members of the Board should be disqualified from voting on his dismissal would prevent the Board from ever addressing that issue. Under the well-settled legal doctrine known as the "rule of necessity," the only body capable of making a decision cannot be deprived of its authority to act. *Southwestern Bell v. Oklahoma Corporation Commission*, 1994 OK 38, 873 P.2d 1001.

Finally, the undisputed facts establish that the Broken Arrow School District is entitled to judgment as a matter of law on Sisney's breach of contract claim. Under Oklahoma law, a school employee who alleges that a termination decision breached his

employment contract must show that the school district either violated his procedural due process rights or acted arbitrarily and capriciously in terminating him. *Childers v. Independent School District No. 1 of Lincoln County,* 1992 OK CIV APP 50, ¶ 6, 842 P.2d 355, 357. The authorities cited in this brief demonstrate that Sisney's due process rights were not violated, and the undisputed facts establish that the Board's decision was supported by evidence and therefore was not arbitrary or capricious.

Because the undisputed facts establish that the Broken Arrow School District is entitled to judgment as a matter of law on all of Sisney's claims, its motion for summary judgment should be granted.

The Undisputed Facts

Pursuant to LCvR 56.1(b), the Broken Arrow School District submits the following statement of undisputed material facts.

1. Sisney became superintendent of the Broken Arrow School District in 2003. Deposition of James David Sisney, p. 32, line 4 through p. 33, line 24. The cited excerpts from Sisney's deposition are attached to this brief as Exhibit 1.

2. At a meeting of the Board of Education of the Broken Arrow School District on October 6, 2008, the Board voted 3-2 to notify Sisney of his possible dismissal from employment, the reasons that may exist for his possible dismissal, and his right to a hearing prior to any dismissal action. The Board directed the School District's attorney to send written notice of the foregoing to Sisney. Minutes of October 6, 2008, Special Meeting of the Board of Education of the Broken Arrow School District, attached to this brief as Exhibit 2.

3. By letter dated October 7, 2008, addressed to Dr. Jim Sisney at his home address,[2] J. Douglas Mann, the attorney for the Broken Arrow School District, advised Sisney "that the Board of Education has directed me to notify you, in writing, that the Board of Education has determined that it will consider and vote on your possible dismissal as a full-time certified administrator." Sisney, p. 45, line 13 through p. 48, line 20. Defendant's Exhibit 5 to Sisney Deposition, attached to this brief as Exhibit 3.

4. The October 7 notice letter to Sisney identified the following five (5) reasons for the possible action:

> 1. Significant evidence from several witnesses shows that you frequently treat staff, patrons and others in a demeaning and humiliating manner which imperils working relationships.
>
> 2. Witnesses have indicated that during duty time and while acting as superintendent of schools, you have made unprofessional, demeaning and derogatory statements to a District employee about other District employees, current and former board members and superintendents of other Tulsa area school districts.
>
> 3. Witnesses and a document show that you entered into an agreement, on behalf of the District, with an administrator in which the administrator is requires to be paid for sick leave when he is not sick, requires the administrator to keep the agreement confidential when all such agreements are public records and which agreement you did not disclose to the school board.
>
> 4. Witnesses have indicated that you have made false public allegations against a District vendor as to that vendor's billing practices to the District.
>
> 5. Significant evidence from several witnesses shows that you are not a good leader nor do you work in a collaborative or collegial manner with staff or the community.

[2] The "header" on the second page of the October 7 notice letter mistakenly contains the name "Mr. Charles Brown" rather than Sisney's name.

Defendant's Exhibit 5 to Sisney Deposition.

5. The October 7 notice letter notified Sisney of his right to request a due process hearing as follows:

> This is to notify you that you have the right to a hearing before the Board of Education prior to the Board taking any action with regard to your possible dismissal. If you wish to exercise your right to this hearing, you must, **WITHIN TEN (10) CALENDAR DAYS OF YOUR RECEIPT OF THIS NOTICE, NOTIFY THE CLERK OF THE BOARD OF EDUCATION IN WRITING.** If you fail to notify the Board Clerk in writing within the ten (10) calendar day period of your desire to have a hearing on your possible dismissal, you will be deemed to have waived your right to a hearing and the Board can proceed to make a decision concerning your possible dismissal without affording you any further notice or any further opportunities to present your side of the matter to the Board. The decision of the Board of Education concerning your possible dismissal is final and nonappealable.

Defendant's Exhibit 5 to Sisney Deposition (emphasis original).

6. The October 7 notice letter advised Sisney of the address of the Clerk of the Board for the purpose of notifying the Clerk of a request for a hearing. The notice letter stated that if Sisney requested a hearing, the hearing would be scheduled as soon as possible and Sisney would be notified in writing of the date, time and place of the hearing. Defendant's Exhibit 5 to Sisney Deposition.

7. Sisney received the October 7 notice letter on October 8, 2009. Sisney, p. 48, lines 5-20.

8. Sisney understood the contents of the October 7 notice letter. Sisney, p. 49, line 8 through p. 51, line 4.

9. Sisney had an attorney at the time he received the October 7 notice letter. He consulted with his attorney about the October 7 notice letter. Sisney, p. 48, lines 21-25; p. 51, lines 5-7.

10. During his employment as superintendent of the Broken Arrow School District, Sisney recommended the dismissal of a full-time certified administrator. In connection with that recommendation, Sisney read the statute that sets forth the due process rights to which full-time certified administrators are entitled under Oklahoma law. Sisney, p. 40, line 14 through p. 45, line 12; Defendant's Exhibit 4 to Sisney Deposition, attached to this brief as Exhibit 4.

11. Sisney understood that he had the right to a due process hearing before the Board of Education of the Broken Arrow School District. Sisney understood that in order to have a hearing, he had to request a hearing. Sisney understood that if he did not request a hearing, he would not have an opportunity to respond to the five (5) reasons for his possible dismissal set forth in the October 7 notice letter. Sisney, p. 42, line 16 through p. 45, line 5; p. 55, line 23 through p. 56, line 23.

12. Sisney understood that if he did not ask for a due process hearing, he was waiving his right to a hearing. Sisney, p. 45, lines 6-12; p. 58, line 1 through p. 59, line 9.

13. Sisney did not request a due process hearing. Sisney, p. 51, lines 14-16; p. 56, line 24 through p. 57, line 13.

14. The Board of Education of the Broken Arrow School District scheduled a special meeting for October 23, 2008, to consider Sisney's possible dismissal. Agenda

for October 23, 2008, Special Meeting of the Board of Education for the Broken Arrow School District, attached to this brief as Exhibit 5.

15. Neither Sisney nor his attorneys attended the October 23, 2008, meeting. Neither Sisney nor his attorneys sought to voir dire any of the members of the Board regarding possible bias. Neither Sisney nor his attorneys presented any evidence or argument that any member of the Board was biased. Neither Sisney nor his attorneys asked any member of the Board to recuse himself or herself from participating in the hearing. Sisney, p. 61, line 5 through p. 62, line 21.

16. At the October 23, 2008, meeting of the of the Board of Education of the Broken Arrow School District, information was presented to the Board in executive session in support of each of the five (5) reasons for the possible termination of Sisney set forth in the October 7 notice letter. Affidavit of Terry Stover, attached to this brief as Exhibit 6; Affidavit of Sharon Whelpley, attached to this brief as Exhibit 7; Affidavit of Shari Wilkins, attached to this brief as Exhibit 8; Affidavit of Marianne Flippo, attached to this brief as Exhibit 9.

17. After returning to open session, the Board voted 3-2 to dismiss Sisney. Board members Whelpley, Wilkins, and Flippo voted "yes." Board members Stover and Updike voted "no." Sisney, p. 65, lines 10-15; Affidavit of Terry Stover; Affidavit of Sharon Whelpley; Affidavit of Shari Wilkins; Affidavit of Marianne Flippo; Defendant's Exhibit 6 to Sisney Deposition, attached to this brief as Exhibit 10.

18. Board members Whelpley, Wilkins, and Flippo each based her decision to vote to dismiss Sisney solely on the evidence in support of the five (5) reasons set forth in

the October 7 notice letter that was presented at the October 23 Board meeting. Affidavit of Sharon Whelpley; Affidavit of Shari Wilkins; Affidavit of Marianne Flippo.

19. Neither Whelpley, Wilkins, or Flippo ever told Sisney that her mind was made up before the October 23 Board meeting or that she could not be fair and impartial in considering whether Sisney should be dismissed. Sisney, p. 76, line 18 through p. 78, line 24; p. 80, line 24 through p. 82, line 12.

20. Sisney admitted in his deposition that his only evidence of bias by Whelpley, Wilkins, or Flippo is his subjective belief that they were biased. Sisney, p. 109, lines 12-23.

21. Pursuant to the terms of his contract with the Broken Arrow School District, Sisney was paid his full salary through June 30 of 2009, notwithstanding that he was dismissed on October 23, 2008. Sisney, p. 142, line 25 through p. 143, line 12.

22. Sisney was hired as interim superintendent of the Sperry School District in April of 2009. Thereafter, he was hired as superintendent of the Sperry School District for the 2009-2010 school year. After being dismissed at Broken Arrow, Sisney did not apply for any superintendent positions until he was contacted by the Sperry School District. Sisney, p. 143, lines 13-23; p. 145, line 1 through p. 146, line 22.

Argument and Authority

Introduction

Pursuant to Rule 56, FED. R. CIV. P., a motion for summary judgment should be granted if the record demonstrates that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The United States

Supreme Court has defined the standards by which a motion for summary judgment is to be judged. In *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), the Court stated:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Id. at 322. The Court observed:

> One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupportable claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose.

Id. at 323-24.

On the same day that *Celotex* was decided the Court also decided *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242 (1986), in which the Court held that the standard for motions for summary judgment is the same as the standard for directed verdicts. *Id*. at 250. As the Court previously stressed in *Matsushita Electric Industries, Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts …. Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Id.*, at 586-87 (citations omitted). Thus, a properly supported motion for summary judgment should be granted unless there is sufficient evidence in the record to justify a jury verdict for the non-moving party.

The Tenth Circuit has discussed the analysis called for by Rule 56 as follows:

> Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law" …. Factual disputes about immaterial matters are irrelevant to a summary judgment determination …. We view the evidence in a light most

> favorable to the nonmovant; however, it is not enough that the nonmovant's evidence be "merely colorable" or anything short of "significantly probative."
>
> * * *
>
> A movant is not required to provide evidence negating an opponent's claim …. Rather, the burden is on the nonmovant who "must present affirmative evidence in order to defeat a properly supported motion for summary judgment …. After the nonmovant has had a full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in the possession of the movant (citations omitted).

Committee for the First Amendment v Campbell, 962 F.2d 1517, 1521 (10th Cir. 1992).

Thus, in order to defeat the present motion for summary judgment, Sisney must now come forward with "affirmative evidence" that is "significantly probative" of his claims. Sisney cannot rely on evidence that is "merely colorable" to defeat a motion for summary judgment. Likewise, "[f]actual disputes about immaterial matters are irrelevant to a summary judgment determination." *Frank v. U.S. West, Inc*., 3 F.3d 1357, 1361 (10th Cir. 1993). A fact is "material" only if it "might affect the outcome of the suit under the governing law." *Occusafe, Inc. v. EG&G Rocky Flats, Inc*., 54 F.3d 618, 621 (10th Cir. 1995).

Proposition I

Sisney May Not Claim That He Was Denied Due Process After Waiving His Right to a Hearing

Sisney was notified of his right to a due process hearing and expressly waived such a hearing. For that reason, he cannot now claim that he was denied due process.

The Tenth Circuit addressed this specific issue in *Pitts v. Board of Education of U.S.D. 305, Salina, Kansas*, 869 F.2d 555 (10th Cir. 1989). There, the local board of education notified a tenured teacher that it did not intend to renew his contract for the

following school year. The court explained that this action was "the first step in the lengthy process required by Kansas law for the dismissal of a tenured public school teacher." *Id.* at 556. Upon receiving notice of the board's decision and an outline of his due process rights, the teacher indicated that he wanted to exercise his right to a due process hearing before a committee selected for such purpose. Before the committee's first meeting, the teacher filed a lawsuit in federal court, and neither the teacher nor his attorney attended the committee's prehearing conference. The teacher then submitted a letter stating that he was waiving his right to a pretermination hearing. The district court subsequently entered summary judgment for the school district, and the teacher appealed.

The Tenth Circuit concluded that the teacher had waived his right to challenge the due process procedures available to him:

> Pitts was fully informed of his considerable procedural rights. Indeed, he initially asserted them. The procedures mandated by Kansas law clearly meet the requirements of the due process clause. By knowingly failing to take advantage of those procedures, Pitts has waived his right to challenge them in federal court.

Id. at 557 (emphasis added; footnote omitted).

The Tenth Circuit reached the same result in *Kirkland v. St. Vrain Valley School District No. RE-1J*, 464 F.3d 1182 (10th Cir. 2006), a case in which an administrator and school district entered into a written termination agreement. The agreement provided that the administrator would not request a due process hearing in connection with his termination and the board would terminate his employment without public comment. The Tenth Circuit held that by entering into the termination agreement, the administrator

"waived any right to a pre-termination hearing" and could not thereafter assert a claim for denial of due process. *Id.* at 1195-96.

Other circuits that have addressed this situation have also concluded that the plaintiff waived his or her right to assert a due process claim. In *Cliff v. Board of School Com'rs of City of Indianapolis*, 42 F.3d 403 (7th Cir. 1995), the Seventh Circuit held that a teacher waived her right to a due process hearing by submitting a letter to the board withdrawing her request for a hearing and asking the board to defer any decision on her nonrenewal until an arbitrator ruled on her latest grievance. The board responded by acknowledging the teacher's withdrawal of her request for a hearing but declining to defer its decision until the pending grievance had been resolved. The teacher made no attempt to reinstate her request for a hearing, and the board ultimately voted not to renew her contract. The Seventh Circuit held that the teacher had waived her right to a due process hearing. "[T]he right to such a hearing is generally waived when an employer offers a pre-termination hearing and the employee fails to accept." *Id.* at 414. The court observed that an employee "'cannot sue in federal court to secure a right which he declined when it was voluntarily offered to him.'" *Id.*, *quoting Suckle v. Madison Gen. Hosp.*, 499 F.2d 1364, 1367 (7th Cir. 1974).

In *Correa v. Nampa School Dist. No. 131*, 645 F.2d 814 (9th Cir. 1981), a school employee sued the school district after her contract was not renewed. The district court held that the plaintiff "had waived her right to claim a due process violation because she knowingly and voluntarily chose to forego the District's administrative procedures and instead pursued a claim through the Office of Civil Rights." *Id.* at 816-17. The Ninth

Circuit affirmed, noting that "where adequate administrative procedures exist, a person cannot state a claim for denial of procedural rights when he has elected to forego a complete hearing." *Id.* at 817.

In *Birdwell v. Hazelwood School District*, 491 F.2d 490 (8th Cir. 1974), the Eighth Circuit held that a teacher could not pursue a due process claim after waiving his right to a due process hearing. The teacher was recommended for dismissal after he made disruptive comments about military recruiters visiting campus. The teacher chose not to attend the board meeting where his dismissal was considered, and the board then voted to dismiss him. In rejecting the teacher's claim that he was denied due process, the court noted that the teacher had no right to complain of the alleged deficiencies in the due process procedure he was offered:

> He was aware of the time and place of the Board meeting, that his continued employment was at stake, and that his dismissal was being recommended because of his statements in class and his actions toward the servicemen in the building. Nevertheless, with this knowledge, and after conferring with legal counsel, it was his decision not to attend the meeting.

Id. at 494-95. Based on the foregoing facts, the court found the teacher had waived his right to challenge his due process hearing:

> The opportunity thus demanded was here afforded but appellant deliberately chose not to avail himself of it and not to present to the Board the arguments made to us. He cannot now scour the record of the hearing he thus ignored for flaws in its conduct. We find a voluntary and knowing waiver.

Id. at 495.

Sisney's due process claims are governed by these authorities. The undisputed facts establish that Sisney was notified of his right to a due process hearing. Indeed,

Sisney was familiar with the due process procedures provided by Oklahoma law because he had previously recommended the dismissal of full-time certified administrator from her employment with the Broken Arrow School District. Sisney knew that he had to request a due process hearing in order to challenge the five (5) reasons for his possible dismissal identified in the October 7 notice letter. Yet Sisney chose not to ask for a hearing. Because Sisney elected to waive his right to a due process hearing, he cannot claim that he was deprived of property or liberty without due process of law. The Broken Arrow School District is entitled to judgment as a matter of law on Sisney's due process claims.

Proposition II

Sisney Waived His Opportunity to Challenge the Board for Bias

Sisney contends that he was deprived of a "meaningful" opportunity for a due process hearing because he believes the three (3) members of the Board who ultimately voted to dismiss him were biased. Sisney argues that he can therefore bypass the due process hearing and have his claims adjudicated in this court. But as the Tenth Circuit explained in *Pitts*, such an argument "misunderstands the nature of his federal claim, which is an assertion that he was denied due process." *Pitts*, 869 F.2d at 557. The court explained in *Pitts* that "[f]ederal courts do not sit to second guess state decisions on the merits of a discharge decision, but only to ensure that employees are provided with due process when the decision is made …. By waiving his hearing, Pitts deprived the school

board of the opportunity to provide him with due process, and he gave up his right to test the correctness of the board's decision." *Id.*

The same is true here. Sisney cannot waive his right to a due process hearing and at the same time contend that the hearing he was offered would not have been fair. Such a result would allow Sisney the best of both worlds: he can avoid the effort and expense of going through a due process hearing while preserving the right to challenge the fairness of that hearing. Not only would this allow Sisney to have his cake and eat it too, it would put the Broken Arrow School District in the impossible situation of having to prove the fairness of a hearing that never occurred. Reason and logic demand that in order for a party to assert that he was denied a fair hearing, he must actually have exercised his right to have a hearing. Because Sisney waived his right to a hearing, he also waived his right to assert a claim that the Board was biased.

Sisney's situation is no different than that of a litigant who believes that the judge is biased but does not raise the issue until after the trial is concluded. The Tenth Circuit has held that in such a situation, the litigant has waived his right to allege bias on appeal. In *Koch v. Koch Industries, Inc.*, 203 F.3d 1202 (10th Cir. 2000), the court observed that "at no point during the litigation did the Plaintiffs seek to have the district court judge disqualified on the basis of bias or any other grounds. The Plaintiffs thus waive their argument on appeal because they failed timely to move for disqualification." *Id.* at 1238-39. *See*, *also*, *United States v. Diaz-Albertini*, 772 F.2d 654, 657 (10th Cir. 1985) (recognizing that "[w]hen the basis for a challenge to a particular juror can be timely shown, the failure to object at the trial's inception constitutes a waiver of the right to

attack the composition of the jury" and noting that a "litigant cannot transform a tactical decision to withhold the information from the court's attention into a trump card to be played only if it becomes expedient. The duty is to disclose.").

The rationale behind this rule was best explained by the court in *Tigrett v. The Rector and Visitors of the Univ. of Virginia*, 97 F.Supp.2d 752 (W.D. Va. 2000). In that case, a university student who was disciplined by a student judicial body alleged that he was deprived of a fair hearing. The student claimed that the press coverage regarding the incident for which he was disciplined, as well as the "volatile campus atmosphere," precluded a fair hearing. The student conceded that he did not allege that the student hearing panel was biased at the time of his hearing, but he argued that it was not his duty to allege bias; "rather, it was the University's duty to provide an unbiased panel and accord Plaintiff a fair and impartial hearing." *Id.* at 762. The court rejected this argument:

> Plaintiff's view is akin to arguing that a litigant has a right to a fair trial, and therefore it is not the duty of his attorney ever to object during the course of that trial. Nevertheless, plaintiff's counsel had an opportunity to question the panel members prior to the … proceedings and, after doing so, declined to raise an objection of impermissible bias. Plaintiff has done nothing more than allege bias, but cannot, as a matter of law, show how he was denied due process when he was given an opportunity to question members of the panel concerning their alleged bias but declined to challenge their impartiality (emphasis original). The plaintiff has waived any argument with regard to bias (emphasis added).

Id.

Sisney waived his right to a due process hearing. By doing so, he waived his right to challenge the fairness of the hearing in any way, including his right to allege that the

Board members were biased. The Broken Arrow School District is therefore entitled to judgment as a matter of law on Sisney's due process claims.

Proposition III

The Undisputed Facts Establish
That the Board Members Were Not Biased

In *Velharticky v. ISD No. 3 of Roger Mills County*, 846 F. Supp. 941 (W.D. Okla. 1993), the court considered a claim by a former superintendent who alleged that he was denied due process because the board members who voted to terminate him were biased against him. The court rejected the superintendent's claim and granted summary judgment to all defendants. In summarizing the law governing the superintendent's allegations of bias against the school board members, the court noted:

> After reviewing the case law regarding whether tribunals are biased, the Court makes the following two observations: 1) the board members are entitled to a presumption of honesty and integrity in their decision-making powers, and 2) the United States Supreme Court tends to leave these decisions in the hand of the bodies elected to make these decision, unless, in the totality of circumstances there is an unconstitutionally intolerable risk of bias.

Id. at 944.

The court in *Velharticky* relied on *Hortonville Joint School District No. 1 v. Hortonville Education Assn*, 426 U.S. 482 (1976), in which the United States Supreme Court considered whether board members that had participated in heated collective-bargaining negotiations with teachers were precluded from voting to terminate teachers who went on strike after the board failed to meet their demands. The Supreme Court held that the board members were not biased, concluding that decisionmakers are

unconstitutionally biased only if they have a personal or financial stake in the outcome that may create a conflict or if they have personal animosity toward the person affected. The undisputed facts establish that neither situation is present in this case.

Significantly, the Supreme Court in *Hortonville* emphasized that board members are not biased merely because they are familiar with the facts of the dispute: "Mere familiarity with the facts of a case gained by an agency in performance of its statutory role does not, however, disqualify a decisionmaker." *Id*. at 493. Indeed, even taking a public position regarding a policy issue in controversy does not disqualify a decisonmaker: "Nor is a decisionmaker disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that he is not 'capable of judging a particular controversy fairly on the basis of its own circumstances.'" *Id*.

The Court in *Hortonville* relied on its earlier decision in *Withrow v. Larkin*, 421 U.S. 35 (1975), in which the Supreme Court reversed a lower court's injunction prohibiting an administrative hearing from going forward. The Court in *Withrow* held that bias is not shown merely because the decisionmaker has previously investigated the alleged wrongdoing:

> The mere exposure to evidence presented in nonadversary investigative procedures is insufficient in itself to impugn the fairness of the Board members at a later adversary hearing. Without a showing to the contrary, state administrators "are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances."

Id. at 55 (citation omitted).

Courts faced with allegations of bias on the part of decisionmakers have consistently recognized that "prior knowledge and discussion of the facts relating to a given adjudicatory hearing are inevitable aspects of the multi-faceted roles which Board members play." *Evers v. Pender County Board of Education*, 407 S.E.2d 879 (N.C.App. 1991), *aff'd* 416 S.E.2d 3 (N.C. 1992). Because of the presumption that board members act with honesty and integrity, the Tenth Circuit has stressed that there must be "some substantial countervailing reason to conclude that a decisionmaker is actually biased." *Mangels v. Pena,* 789 F.2d 836, 838 (10th Cir. 1986). In other words, there must be a "a substantial showing of personal bias" in order to disqualify a board member. *Corstvet v. Boger*, 757 F.2d 223, 229 (10th Cir. 1985).

The undisputed facts establish that Sisney cannot make the necessary showing of bias in this case. Sisney's speculation that the Board members were unhappy about his assertions of impropriety involving a vendor, and his subjective belief that certain Board members were biased against him, fall far short of the showing require to overcome the presumption of honesty to which the Board members are entitled.

Proposition IV

The Rule of Necessity Prevents Sisney from Destroying the Board's Authority to Discontinue His Employment

A school district's board of education is an elective body under Oklahoma law. OKLA. STAT. tit. 70, § 5-107A (2001). It is charged 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) (2009 Supp.). Further, it is the sole body granted authority by the Oklahoma Legislature to consider the nonreemployment or dismissal of an administrator. OKLA. STAT. tit. 70, § 6-101.13 (2001).

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 Corporation Commission,* 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*, 426 U.S. at 494-96.

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 wrote:

> In an attempt to conserve judicial resources, as well as the resources of the rate payers, we observe in passing that while an attempt to disqualify Anthony in a proceeding involving a judicial function might arguably be cognizable, it would likely lead to the same result reached in this legislative function decision today: Commissioner Anthony would not be disqualified but would be allowed to continue to hear the matter despite assertions of bias and prejudice. **This is so because the "rule of necessity", which would undoubtedly be held applicable, would require that Anthony not be disqualified because the concurrence of a majority of the Commissioners is necessary for a decision, and there is no mechanism in the law for appointment of a replacement commissioner. The rule of necessity is a common law rule recognizing that a judge should not be disqualified where his jurisdiction is exclusive or there is no provision for appointing a replacement so that his disqualification would deny the constitutional right to a forum**. *United States v. Will*, 449 U.S. 200, 101 S.Ct. 471, 66 L.Ed.2d 392 (1980). The rule has been held applicable to state administrative proceedings where the administrative body was acting in an adjudicatory capacity. *Barker v. Secretary of State's Office of Missouri*, 752 S.W.2d 437 (Mo. App. 1988); *First American Bank & Trust Co. v. Ellwein*, 221 N.W.2d 509 (N.D. 1974), cert. denied, 419 U.S. 1026, 95 S.Ct. 505, 42 L.Ed.2d 301 (1974). **It 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.** *Barker, supra*, at 440.

Southwestern Bell, ¶ 29, 873 P.2d at 1009 (emphasis added).

Under Sisney's argument, three of the District's board members were required to disqualify themselves from considering his possible dismissal because of their alleged bias. This logic, however, is fatally flawed. 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 Sisney's dismissal – thereby effectively preventing its

lawful consideration. *See* OKLA. STAT. tit. 25, § 304(2) (2009 Supp.) (requiring a majority of members of a public body to be present for a meeting); OKLA. STAT. tit. 25, § 305 (2001) (mandating that "in all meetings of public bodies, the vote of each member must be publicly cast and recorded"); OKLA. STAT. tit. 25, § 306 (2001) (stating that no informal gatherings among a majority of the members of a public body shall be used to decide any action or to take any vote on any matter).

Second, it would prevent the only body authorized by Oklahoma law to consider Sisney's possible dismissal from acting, because there are no mechanisms in place for disqualifying a majority of a board of education or seating an alternative tribunal. Accordingly, the Board, even assuming "bias," was the only legal and proper forum to hear and consider Sisney's dismissal.

> From the very necessity of the case has grown the rule that disqualification will not be permitted to destroy the only tribunal with power in the premises. If the law provides for a substitution of personnel on a board or court, or if another tribunal exists to which resort may be had, a disqualified member may not act. **But where no such provision is made, the law cannot be nullified or the doors to justice barred because of prejudice or disqualification of a member of a court or an administrative tribunal**.

Brinkley, 83 F.2d at 357 (emphasis added).

Because the Rule of Necessity precludes Sisney from destroying the only body with authority to dismiss him from his former position as superintendent of the Broken Arrow School District, Sisney's due process claims fail as a matter of law.

Proposition V

The Broken Arrow School District Is Entitled to Judgment as a Matter of Law on Sisney's Breach of Contract Claim

Sisney also asserted a state law breach of contract claim. The Oklahoma Court of Civil Appeals has held that a school employee who alleges that a termination decision breached his employment contract must show either that the school district violated the employee's procedural due process rights or that it acted arbitrarily and capriciously in terminating him. *Childers*, ¶ 6, 842 P.2d at 357; *Hoerman*, ¶ 25, 913 P.2d at 90.

The statutory provisions for termination of a contract are part of the contract as if they were set forth therein. *Hoerman*, ¶ 22, 913 P.2d at 689-90. Thus, Sisney cannot argue that the Broken Arrow School District violated his due process rights.

A decision is arbitrary and capricious "if there is no support for it in the record and it is therefore a 'willful and unreasoning action, in disregard of facts and circumstances.'" *Patrick v. State ex. rel. Board of Education,* 1992 OK CIV APP 153, ¶ 14, 842 P.2d 767, 770. The attached affidavits of four Board members, including Terry Stover, one of the two Board members who did not vote for Sisney's dismissal, establish that during executive session on October 23, 2008, the Board heard evidence supporting each of the five (5) grounds identified in the October 7 notice letter. The undisputed facts therefore establish that the Board's decision to dismiss Sisney was not arbitrary and capricious.

Conclusion

For the reasons set forth in this brief, the Broken Arrow School District respectfully requests that its motion for summary judgment be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

☒ I hereby certify that on the 14th day of January, 2010, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants:

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