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.	)	

DEFNDANT'S REPLY BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

This reply brief is submitted in support of the motion to dismiss submitted by Independent School District No. 3 of Tulsa County, Oklahoma (the "Broken Arrow School District" or "School District") [Docket No. 8].

As preliminary matters, the plaintiff, Jim Sisney ("Sisney"), has not contested that the Broken Arrow School Board has no independent legal existence and is not capable of being sued separately from the School District. Furthermore, Sisney has not contested any of the facts which the School District asserts are subject to judicial notice, nor has he cited any authority challenging the propriety of the court taking judicial notice of these facts. Thus, the following facts have been conceded for the purposes of the School District's motion to dismiss: (1) Sisney was notified in writing that the Board of Education intended to consider his possible termination, (2) Sisney was advised in that notification of the reasons for which the Board of Education was considering this action,

(3) Sisney was offered the opportunity for a due process hearing, and (4) Sisney did not at any time request a due process hearing.

I.
SISNEY HAS WAIVED ANY "BIAS" CLAIM BY WAIVING HIS RIGHT TO A DUE PROCESS HEARING

Sisney's proffered excuse for not requesting a due process hearing is that the Broken Arrow Board of Education ("Board") was a "tribunal incapable of meeting the demands of due process for a hearing and with the fairness and appearance of fairness[.]" Response, at p. 6. In support of his "bias" claim, Sisney cites to *Staton v. Mayes*, 552 F.2d 908 (10th Cir. 1997). However, *Staton* is factually and legally distinguishable from the facts at issue. Furthermore, *Staton* is silent as to the issue of an employee, such as Sisney, who voluntarily waives his right to a due process hearing – a waiver that is fatal to any "bias" claim.

A. *Staton* is factually and legally distinguishable.

In *Staton*, the plaintiff, a school superintendent, was given notice of his possible dismissal and the date on which a hearing had been scheduled before the local board of education. *Id*. at 910. This notice complied with Oklahoma law then in effect, which (1) defined a school superintendent as a "teacher" for the purposes of termination proceedings, (2) limited termination to certain enumerated grounds of cause, and (3) required a board of education to set a hearing date in the notice letter. *Id*. at 913 n. 10; *see* OKLA. STAT. tit. 70, § 6-103 (1971) (repealed 1990). Staton attended his due process hearing with counsel, and prior to introduction of any testimony, Staton's counsel objected to the lack of impartiality of the board of education. *Id*. at 910, 913.

The facts and law applicable to the case at bar, however, are materially different from those found in *Staton*. While Sisney, like Staton, received notice of the grounds for his possible termination, the Board was not required by Oklahoma law set a due process hearing date. Rather, the Board was only required to offer a due process hearing to Sisney, and it was Sisney's legal obligation - if he sought due process - to request such a hearing in writing. OKLA. STAT. tit. 70, § 6-101.13 (2001). *Staton* is further distinguishable because the reasons an administrator (such as a superintendent) may be dismissed are no longer limited to certain enumerated causes. Rather, a board of education can terminate an administrator for any just cause. *Id.* Additionally, the statutory procedure for an administrator's dismissal is different from that for a teacher. *Compare* OKLA. STAT. tit. 70, § 6-101.13 (2001) (setting forth administrator dismissal proceedings) *with* OKLA. STAT. tit. 70, §§ 6-101.20 – 6.101.29 (setting forth teacher dismissal proceedings); *Hoerman v. Western Heights Bd. of Educ.*, 913 P.2d 684, 690-91 (Okla. Ct. App. 1995) (recognizing that administrators are not teachers, "the Legislature has not preemptively specified the grounds for dismissal of an administrator as it has with tenured teachers[,]" and "the Legislature intended that *cause* for dismissal of an administrator be determined upon the facts of each case." (emphasis original)).

B. Sisney waived any claim of Board bias by failing to request a due process hearing and by failing to present his "bias" claim to the Board.

The Broken Arrow Board of Education enjoys a presumption of impartiality. *See Hoerman*, 913 P.2d at 688 (recognizing that a presumption of impartiality exists in favor of those serving in quasi-judicial capacities and that the burden of establishing a

disqualifying interest rests on the party making the assertion); *Mangels v. Pena*, 789 F.2d 836, 838 (10th Cir. 1986) (citing *Withrop v. Larkin*, 421 U.S. 35, 47 (1975) for the proposition that honesty and integrity are presumed on part of a tribunal).

Despite having received written notice that the Board would be considering his possible dismissal as superintendent, Sisney did not, at any time, request a hearing before the Board. Maybe Sisney did not want to public and press to learn, at a public hearing, all of the evidence warranting his immediate dismissal. Maybe it was for another reason. Whatever the reasons, they are immaterial and irrelevant because by not requesting a hearing, Sisney voluntarily - and by operation of law - waived his right to a due process hearing.[1] OKLA. STAT. tit. 70, § 6-101.13 (2001). ("Failure of the administrator to request a hearing before the local board of education within ten (10) days after receiving the written statement shall constitute a waiver of the right to a hearing."); *see also Faulkenberry v. Kansas City Southern Ry. Co.*, 602 P.2d 203, 206-207 (Okla. 1979) ("A waiver is defined as the voluntary or intentional relinquishment of a known right.").

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). Sisney was provided the opportunity for a hearing. However, he voluntarily waived his right. Having done so, Sisney cannot now be heard to complain that the Board was "biased." *Cf. Koch v. Koch Industries, Inc.*, 203 F.3d 1202, 1238-1239 (10th Cir. 2000) (holding

[1] It is undisputed that the legal consequence associated with not timely requesting a due process hearing was contained in the Notice letter received by Sisney. That is, the Board could act on his employment without further notice or an opportunity to be heard – which is what occurred.

that plaintiffs waived their argument that the trial court was biased "because they failed to timely move for disqualification"); *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."); *Tigrett v. The Rector and Visitors of the Univ. of Virginia*, 97 F.Supp.2d 752, 762 (W.D. Va. 2000) (rejecting student's claim that it was not his duty to allege bias in a hearing proceeding and finding that student could not, 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)).

II.
SISNEY'S "BIAS" CLAIM FURTHER FAILS AS A MATTER OF LAW BECAUSE THE RULE OF NECESSITY PREVENTS THE DISQUALIFICATION OF THE THREE BOARD MEMBERS SISNEY CLAIMS WERE BIASED.

A school district's board of education is an elective body under Oklahoma law. OKLA. STAT. tit. 70, § 5-107A (2001). 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) (2008 Supp.), *amended on other*

grounds by 2009 Okla. Sess. Laws Ch. 250, § 1 (H.B. 1592 effective May 14, 2009). 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).

There are five members of the School District's board of education. It is to three of these board members, coincidently the three board members who voted to terminate Sisney's employment, against whom Sisney now asserts a claim of "bias."[2] Complaint, ¶¶ 12, 15, 17.

In his Response, Sisney asserts that this court is the proper forum for considering his bias claim because no disqualification or alternative tribunals were available at the time of his hearing. Response, at p.7. It is true that under current Oklahoma law, no statutory or administrative procedure exists for addressing board bias claims or for the seating of an alternative tribunal in lieu of a board of education.[3] Sisney is incorrect, however, assuming that this somehow transforms this court into the appropriate forum for addressing his "bias" claim.

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[2] At the time Sisney's termination was considered and voted upon by the Board, three of its members were named defendants in an action filed by Sisney - CJ-2008-6173, District Court of Tulsa County. In his Response, Sisney alludes to the fact that these three board members' status as defendants implicates per se bias on their parts. Response, at p.7. This is not the case under Oklahoma law. The fact that these three board members were defendants in a lawsuit brought by Sisney is simply "a factor which might reflect on the appearance of bias by the [tribunal]." *Johnson v. Board of Governors of Registered Dentists of the State of Okla.*, 913 P.2d 1339, 1348 (Okla. 1996).

[3] In *Staton*, the court of appeals references Oklahoma statutory provisions that had been enacted to give a superintendent an appeal remedy after an adverse board decision. *Staton*, 552 F.2d at 915. These provisions, however, are no longer in effect. *See Hoerman*, 913 P.2d at 689-90.

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,* 873 P.2d 1001, 1009 (Okla. 1994); 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 School District*, 426 U.S. 482, 494-96 (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 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 (emphasis added).

Southwestern Bell, 873 P.2d at 1009.

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 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 Sisney's dismissal – thereby effectively preventing its lawful consideration. *See* OKLA. STAT. tit. 25, § 304(2) (2008 Supp.) (requiring a majority of members of a public body to be present for a meeting); OKLA. STAT. tit. 25, § 305 (2001) (mandating that "[I]n 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 disqualification of a majority of a board of education or the seating of 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).

There can be no doubt that Sisney's "bias" claim is asserted for no other reason than "to destroy the only tribunal with power" to consider his dismissal. Sisney should not be allowed, through this action, to accomplish that goal.

III.
SISNEY SHOULD NOT BE GRANTED LEAVE TO AMEND

For the reasons previously set forth, Sisney's complaint fails to state a claim upon which relief can be granted. Furthermore, the undisputed facts conclusively establish that Sisney waived his opportunity for a due process hearing by failing to request a hearing, and this waiver is fatal to his "bias" claim. Accordingly, leave should not be granted for

Sisney to amend his Complaint as any such amendment would be futile. *See Duncan v. Manager, Dep't of Safety, City & County of Denver*, 397 F.3d 1300, 1315 (10th Cir. 2005) (recognizing that a court may refuse leave to amend due to futility of amendment); *Watson ex rel. Watson v. Beckel*, 242 F.3d 1237, 1239-40 (10th Cir. 2001) (explaining that a "proposed amendment is futile if the complaint, as amended, would be subject to dismissal.").

Conclusion

As the court of appeals noted in *Staton*, federal courts "must be mindful of the commitment in our Nation of public education to the control of state and local authorities." *Staton*, 552 F.2d at 912 (citing *Goss v. Lopez*, 419 U.S. 565, 578 (1975)).

Sisney was provided the *opportunity* for a hearing before the Broken Arrow Board of Education before it voted whether or not to dismiss him from his employment. However, he voluntarily waived his *opportunity* for a due process hearing before the Board - the only tribunal authorized at law that could provide it. As such, Sisney was afforded all of the due process required by law. Accordingly, Sisney's due process claims against the School District fail to state a claim upon which relief can be granted, and leave to amend should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

☒ I hereby certify that on the 24th day of July, 2009, 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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