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United States Court of Appeals, Tenth Circuit.

Dr. Gavin CLARKSON, an individual, Plaintiff - Appellant,
v.
BOARD OF REGENTS OF NEW MEXICO STATE UNIVERSITY; Enrico Pontelli, in his individual capacity and official capacity as hearing officer, Defendants - Appellees.

No. 21-2059

FILED March 31, 2022

(D.C. No. 2:18-CV-00870-KRS-GBW), (D. New Mexico)

Attorneys and Law Firms

Dr. Gavin Clarkson, an Individual, Alexandria, VA, Pro Se.

Kathy Black, Christa M. Hazlett, Conklin, Woodcock & Ziegler, Albuquerque, NM, for Defendants - Appellees Board of Regents of New Mexico State University, Enrico Pontelli.

Before MORITZ, KELLY, and CARSON, Circuit Judges.

ORDER AND JUDGMENT*

Paul J. Kelly, Jr., Circuit Judge

Gavin Clarkson, proceeding pro se,[1] appeals the district court's entry of final judgment on claims he brought after New Mexico State University (NMSU) terminated his employment. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. Background

NMSU employed Clarkson as a tenure-track professor. In 2017, Clarkson accepted an appointment to serve as the Deputy Assistant Secretary for Policy and Economic Development (DASPED) at the U.S. Department of the Interior. But he wanted to continue his academic career, so he sought an unpaid leave of absence from NMSU. In his request, he discussed the work he would perform as the DASPED and how it would benefit NMSU. Because the initiatives he would be "responsible for developing and implementing" as the DASPED would not "happen overnight," he "request[ed] an extended leave of absence beginning Monday, August 14[, 2017,] and concluding when faculty report back to campus in ... January of 2020," along with "the option, at [Clarkson's] election, to extend that leave until the faculty report in ... January of 2021." R. at 212. In making this request, Clarkson acknowledged that his requested leave would be "substantially longer than normal," but stated that his "appointment as DASPED is an extraordinary opportunity that ... justif[ies] an extended leave." Id. He also asked that his tenure review be postponed until the fall semester following his return.

Daniel Howard, the university's executive vice president and provost, "approve[d] [Clarkson's] first request, a leave of absence without pay until January of

2020." Id. at 214. Howard also wrote: "I am ... willing to consider an extension until January of 2021, but I am going to require that you make a formal request for this extension by August 30 of 2019, at which time I, or whoever is Provost at the time, will decide whether to grant the extension." Id. And he agreed to pause Clarkson's "tenure clock." Id.

Clarkson resigned from the DASPED post in December 2017 to run for Congress. Howard then informed Clarkson that the "agreement for leave without pay is ... revoked" and demanded that Clarkson "return for duty on Tuesday, January 16, 2018." Id. at 215. The parties dispute whether Clarkson returned as required, but do not dispute that Howard sent Clarkson a notice of proposed termination on January 24 due to Clarkson's alleged "job abandonment and insubordination." Id. at 216.

The university scheduled a hearing on Clarkson's proposed termination. In advance of the hearing, the university provided Clarkson with documents relevant to its proposed action as well as the option to have his case heard by either a committee of three members of the faculty senate or a university dean. Clarkson elected to have a dean hear his case, and the university selected Enrico Pontelli, the Dean of the College of Arts and Sciences, to conduct the hearing.

Clarkson had counsel at the hearing, at which Clarkson testified and questioned university officials. Pontelli issued a written decision about a week after the hearing upholding the proposed termination.

Clarkson then brought this suit against the NMSU Board of Regents, alleging wrongful termination, race- and age-based discrimination, that the school's termination procedures violated his due process rights, and that the school's revocation of his leave of absence breached a contract he had formed with the school regarding leave. In response to the Board's motion to dismiss, Clarkson agreed to dismiss the wrongful termination and discrimination claims and filed an amended complaint that pressed his remaining claims and added four individual defendants, including Pontelli. Clarkson later voluntarily dismissed his claims against one of the individual defendants, and the court dismissed the claims against two others because Clarkson did not serve them, leaving only the Board and Pontelli as defendants.

The district court later granted summary judgment to the remaining defendants. It concluded that neither the NMSU Board of Regents nor Pontelli, in his official capacity, were "persons" amenable to suits for damages under 42 U.S.C. § 1983. It further determined that to the extent Clarkson sought injunctive relief against Pontelli in his official capacity, the claim could not succeed because Pontelli lacked authority to grant the relief Clarkson sought. It also found that the § 1983 claim against Pontelli in his individual capacity failed because the evidence did not show Pontelli had violated Clarkson's constitutional rights. And it found Clarkson's breach-of-contract claim deficient because he defaulted on his obligation to serve as the DASPED and therefore could not "demonstrate due performance under the leave of absence agreement." R. at 524.

II. Discussion

A. The District Court's Dismissal of Claims

Clarkson argues the district court erred in dismissing his wrongful termination and discrimination claims. But he agreed to dismissal of these claims and sought permission to file an amended complaint asserting only claims for "breach of contract" and "a violation of 42 U.S.C. § 1983 based on the denial of Dr. Clarkson's due process rights." R. at 74. He therefore waived appellate review of the district court's dismissal. See Richison v. Ernest Grp., Inc., 634 F.3d 1123, 1127 (10th Cir. 2011) (noting that when a "theory was intentionally relinquished or abandoned in the district court, we usually deem it waived and refuse to consider it").

B. The District Court's Grant of Summary Judgment

"We review de novo the district court's grant of summary judgment...." Ezell v. BNSF Ry. Co., 949 F.3d 1274, 1278 (10th Cir. 2020). Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In conducting our review, "we view the evidence in the light most favorable to the non-moving party." Ezell, 949 F.3d at 1278 (internal quotation marks omitted). "After the moving party has identified a lack of a genuine issue of material fact, the nonmoving party has the burden to cite to specific facts showing that there is a genuine issue for trial." Id. (internal quotation marks omitted). "The nonmoving party must be specific to satisfy its burden, either by citing to particular parts of materials in the record or by showing that the

moving party has relied on insufficient or inadmissible evidence." Id. (internal quotation marks omitted).

To the extent Clarkson re-asserts arguments he presented to the district court, we affirm for substantially the reasons cited by the district court. We do not consider the arguments Clarkson raises for the first time on appeal because he does not argue that they support reversal under plain-error review. See Richison, 634 F.3d at 1131 ("[T]he failure to argue for plain error and its application on appeal ... surely marks the end of the road for an argument for reversal not first presented to the district court.").

C. Clarkson's Request for Further Relief

Clarkson asks us to direct the district court to authorize him to amend his complaint and compel document production. He does not provide a record citation showing he asked for this relief in the district court, and we therefore decline his invitation. See 10th Cir. R. 28.1(A) (requiring parties to "cite the precise references in the record where the issue was raised and ruled on"); United States v. Henson, 9 F.4th 1258, 1274 (10th Cir. 2021) ("[A]s a general rule, we do not consider an issue not presented, considered, and decided by the district court." (emphasis and internal quotation marks omitted)), petition for cert. filed (U.S. Dec. 20, 2021) (No. 21-6736); United States v. Suggs, 998 F.3d 1125, 1141 (10th Cir. 2021) (noting that "we are a court of review, not of first view" (internal quotation marks omitted)).

D. Clarkson's Motion to Supplement the Record

Clarkson attached 31 exhibits to his opening brief. He then filed a motion seeking to supplement the record to include 30 of these exhibits.

Under Federal Rule of Appellate Procedure 10(e), a party may modify the record on appeal "only to the extent it is necessary to 'truly disclose what occurred in the district court.' " United States v. Kennedy, 225 F.3d 1187, 1191 (10th Cir. 2000) (brackets omitted) (quoting Fed. R. App. P. 10(e)(1)). "This court will not consider material outside the record before the district court." Id. Indeed, while "Rule 10(e) allows a party to supplement the record on appeal," it "does not grant a license to build a new record." Id. (internal quotation marks omitted).

The exhibits Clarkson seeks to add to the record fall into three general categories: (1) documents not presented to the district court in any form; (2) documents presented to the district court in a different form, such as with different portions highlighted; and (3) copies of publicly available documents, such as NMSU regulations. Our precedent forecloses supplementing the record with documents from the first two categories because we "will not consider material outside the record before the district court." Id. And we need not supplement the record to include the documents in the third category because the documents falling in this category cited to or by the district court are already in the record. See R. at 208–11, 219–24. We therefore deny Clarkson's motion to supplement the record.

III. Conclusion

We affirm the district court's entry of final judgment.

Footnotes

*After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

1Because Clarkson proceeds pro se, we construe his filings liberally but do not serve as his advocate. See United States v. Pinson, 584 F.3d 972, 975 (10th Cir. 2009).

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United States District Court, D. New Mexico.

Dr. Gavin CLARKSON, an individual, Plaintiff,

v.

BOARD OF REGENTS OF NEW MEXICO STATE UNIVERSITY, et al., Defendants.

Civ. No. 18-870 KRS/GBW
Filed 05/03/2021

Attorneys and Law Firms

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MEMORANDUM OPINION AND ORDER

KEVIN R. SWEAZEA, UNITED STATES MAGISTRATE JUDGE

THIS MATTER is before the Court on Defendants' Motion for Summary Judgment, (Doc. 74), and Plaintiff's Motion for Partial Summary Judgment, (Doc. 75), both filed on January 11, 2021. The parties have filed responses, (Docs. 80, 81), and replies, (Docs. 83, 85), to the summary judgment motions, and have consented to the undersigned to conduct dispositive proceedings in this case pursuant to 28 U.S.C. § 636(c), (Doc. 10). Having considered the parties' briefing on the Motions for Summary Judgment, the record of the case, and

relevant law, the Court **GRANTS** Defendants' Motion for Summary Judgment, **DENIES** Plaintiff's Motion for Partial Summary Judgment, **DISMISSES** Plaintiff's claims, and **VACATES** the trial and associated deadlines in this case.

I. Background

Plaintiff is a former faculty member of New Mexico State University's College of Business whose employment was terminated on April 27, 2018. Plaintiff's claims have been dismissed as to Dr. Dan Howard, Provost; Dr. James Hoffman, Dean of the College of Business; and Dr. Nancy Oretskin, Professor in the College of Business. (Docs. 40, 51). Plaintiff's remaining claims are: (1) that the Board of Regents of New Mexico State University ("NMSU") and Dr. Enrico Pontelli, Dean of the College of Arts and Sciences, violated his right to due process under 42 U.S.C. § 1983; and (2) that NMSU breached its contract with him. (Doc. 27) at 13-15. Defendants NMSU and Pontelli move for summary judgment on both causes of action; Plaintiff seeks summary judgment on his due process claim. (Docs. 74, 75).

II. Legal Standard

Summary judgment is appropriate when there are no genuinely disputed issues of material fact and, viewing the record in the light most favorable to the non-moving party, the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Sinclair Wyo. Refin. Co. v. A&B Builders Ltd.*, 989 F.3d 747, 765 (10th Cir. 2021); *Bruner v. Baker*, 506 F.3d 1021, 1025 (10th Cir. 2007). Once the party moving for summary

judgment properly supports its motion, the non-moving party must respond with some showing of an issue of genuine material fact. *Allen v. Denver Pub. Sch. Bd.*, 928 F.2d 978 (10th Cir. 1991), overruled on other grounds by *Kendrick v. Penske Transp. Svcs.*, 220 F.3d 1220, 1228 (10th Cir. 2000). The non-moving party may not rest on averments in its pleadings, but instead must establish specific, triable issues. *Gonzales v. Millers Cas. Ins. Co. of Texas*, 923 F.2d 1417 (10th Cir. 1991). The mere existence of an alleged, immaterial factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Moreover, "[t]he mere existence of a scintilla of evidence in support of the nonmovant's position is insufficient to create a genuine issue or dispute a material fact. To create a genuine issue, the nonmovant must present facts upon which a reasonable jury could find in favor of the nonmovant." *Sinclair Wyo. Refin. Co.*, 989 F.3d at 765 (citation and quotations omitted).

III. Undisputed Facts[1]

Plaintiff joined the faculty of NMSU in the Fall of 2012 as an Associate Professor of Business Law in the College of Business' Department of Finance. (Doc. 74-1) at 7. He was a tenure-track faculty member subject to a six-year probationary period and a tenure review date originally scheduled for the Fall of 2017. *Id.* Each academic year, NMSU offered Plaintiff a "Tenure Track Annual Contract for Employment." These contracts are "temporary" and "may or may not be renewed annually, in accordance with applicable NMSU policy." (Doc. 74) at 5, ¶8 (quoting Doc. 74-1 at 12, Plaintiff's 2017-2018

contract; and Doc. 74-1 at 13, NMSU Administrative Rules and Procedures ("ARP") 9.40).

In June 2017, Plaintiff accepted a full-time position as Deputy Assistant Secretary for Policy and Economic Development ("DASPED") in the office of Indian Affairs at the U.S. Department of the Interior. Pursuant to ARP 8.53, after three years of service, a faculty member may apply for professional leave, "normally not to exceed 1 year, for the purpose of undertaking some project that will directly benefit the university and person's professional development." (Doc. 74-1) at 14. On June 19, 2017, Plaintiff submitted a request for an extended leave of absence, stating he had recently accepted an appointment to serve as the DASPED. (Doc. 74-1) at 17. Plaintiff asked for unpaid professional leave from August 14, 2017 to January 2020, with the option of extending that leave until January 2021, and for his tenure review to be reset from Fall 2017 to the Fall semester immediately following his return to campus. *Id.* at 17-18.[2] As the basis for his request, Plaintiff stated: his "appointment as DASPED is an extraordinary opportunity that [ ] I trust will justify an extended leave;" his "service as DASPED provides a direct reputational benefit to NMSU and the College of Business;" he "will also work to bring NMSU students, (particularly, but not limited to, tribal members) to Washington, DC for internships as well as internships at other federal offices throughout the country;" and "serving as DASPED will significantly benefit [his] professional development." (Doc. 74-1) at 17.

On June 28, 2017, Provost Howard responded to Plaintiff's leave request, congratulating him on his

appointment as DASPED and stating it "is a singular honor for you and for New Mexico State University." (Doc. 74-1) at 19. Provost Howard granted Plaintiff's request for a leave of absence without pay from August 14, 2017, until January 2020. He stated he was "willing to consider an extension until January of 2021," but he required Plaintiff to "make a formal request for this extension by August 30 of 2019, at which time I, or whoever is Provost at the time, will decide whether to grant the extension." Provost Howard further agreed to reset Plaintiff's tenure review from Fall 2017 to the Fall semester immediately following his return to NMSU. *Id.* Additionally, on June 26, 2017 and September 27, 2017, NMSU's chancellor and Plaintiff, respectively, signed Plaintiff's Tenure Track Annual Contract of Employment for the 2017-2018 academic year. (Doc. 74-1) at 12.

On December 29, 2017, Plaintiff resigned as DASPED. (Doc. 27) at 5, ¶24; (Doc. 75-1) at 5, ¶24. According to Plaintiff, in November 2017 a "false news story appeared in the Washington Post alleging that [Plaintiff] had resigned because of a report about problems with the Indian Loan Guarantee Program during the Obama Administration." (Doc. 75-1) at 4, ¶20; (Doc. 75-4) at 25-28. Provost Howard later stated he was aware of this article and "assumed that Dr. Clarkson would resume his regular duties" in January 2018. (Doc. 74-1) at 37; (Doc. 75-1) at 4, ¶21; (Doc. 80) at 29. Plaintiff states that on December 14, 2017, he "received email correspondence confirming that he was still on [a] professional leave of absence." (Doc. 75-1) at 5, ¶23.[3] Plaintiff also states that on January 4, 2018, Dr. Harikumar Sankaran, NMSU's Finance Department Head, emailed Plaintiff about returning for the Fall

Semester, and in response Plaintiff informed Dr. Sankaran that he had decided to run for Congress. (Doc. 75-1) at 5, ¶¶28-29.[4] On January 8, 2018, Plaintiff formally announced his candidacy for New Mexico's Second Congressional District, which was covered by the Las Cruces Sun News on January 9, 2018. (Doc. 75-1) at 5-6, ¶¶32-33.

According to Plaintiff, on January 10, 2018, Dr. Sankaran told him to schedule a meeting with the Dean and Associate Dean of the College of Business to discuss the status of Plaintiff's leave. (Doc. 75-1) at 6, ¶35. On January 11, 2018, however, Plaintiff states that Dr. Sankaran told him that the Provost and NMSU General Counsel Liz Ellis cancelled the meeting. (Doc. 75-1) at 6, ¶¶36, 38. Plaintiff claims he attended a Finance Department faculty meeting on January 12, 2018, where he "reminded everyone that he is on leave while he is running for office." (Doc. 75-1) at 6, ¶39. The parties agree that Plaintiff was not on the schedule to teach in the Spring of 2018. *Id.*; (Doc. 80) at 9.

On January 12, 2018, Provost Howard sent Plaintiff a Memorandum titled "Notification to Return to Work," stating "NMSU has become aware that your appointment has ended and you are no longer serving as Deputy Assistant Secretary for Policy and Economic Affairs" so "the original agreement for leave without pay is now revoked." (Doc. 74-1) at 20. Provost Howard further stated "[t]he original approval for leave was specific to supporting your appointment, with no agreement for leave for any other purpose." *Id.* Plaintiff was informed that "[f]aculty are required to return for duty on Tuesday, January 16, 2018, a requirement that now holds for you." *Id.* Plaintiff was given two options:

"Presuming that you do not intend to resign, please check in with your department head on that date. If you do not intend to report as required, you are expected to notify your college administrator of your decision to voluntarily resign your position. This notification must occur no later than Tuesday, January 16, 2018 by 5:00 PM." *Id.*

Plaintiff states he attempted to call Provost Howard on January 12, 2018 but was not able to reach him. (Doc. 75-1) at 6-7, ¶41. Plaintiff did not receive a paycheck from NMSU on January 12, 2018. (Doc. 75-1) at 7, ¶42. Plaintiff states that on January 16, 2018, he attended the College of Business convocation and checked in with Dr. Sankaran. (Doc. 75-1) at 7, ¶44. Also on January 16, 2018, Plaintiff emailed the Provost, Dean Hoffman, and Dr. Sankaran, and stated he was not resigning and that he challenged the Provost's authority to revoke his leave. (Doc. 75-4) at 29. Plaintiff stated that even though he checked in with his department head, "such action is not, and should not be construed in any way as, an acceptance or either of the two options that you propose or even agreeing that you have the authority to unilaterally revoke a leave.[ ] Therefore, I reject your attempt to revoke my leave." *Id.*

Plaintiff states that he received a call from Provost Howard on January 17, 2018, the Provost said he needed Plaintiff to teach classes that semester, and Plaintiff agreed to teach classes while on leave. (Doc. 81) at 10, ¶50. Plaintiff received an email on January 19, 2018 informing him that he was going to be scheduled for three "mini-mester" courses. (Doc. 75-4) at 30. On January 23, 2018, a meeting was held with Plaintiff,

Provost Howard, and Dr. Ellis, but Plaintiff "declined to continue the hearing" because he was not afforded the opportunity to have his own attorney present. (Doc. 81) at 11, ¶53. In an email to Dean Hoffman, Dr. Sankaran, Dr. Ellis, and the Provost on January 23, 2018, Plaintiff states "there is no authority for the provost to cancel my leave unilaterally," and he cautions them "to act appropriately and preserve all documentation that would be discoverable in subsequent litigation." (Doc. 75-4) at 32.

On January 24, 2018, Provost Howard sent Plaintiff a Notice of Proposed Termination stating Plaintiff's refusal to return to work following revocation of the leave of absence "constitutes job abandonment and insubordination." (Doc. 74-1) at 21. This Notice explained that, pursuant to ARP 10.50, Plaintiff is entitled to a pre-determination hearing before an impartial hearing officer and the opportunity to present a defense. The Notice further explained that Plaintiff may choose to have the hearing conducted by a dean serving as a hearing officer or before a Dean's Advisory Committee comprised of three members of the Faculty Senate. *Id.* at 22; (Doc. 74-1) at 27 (ARP 10.50). Since the Dean of the College of Business was involved in this matter and may be a witness, Plaintiff was informed that another dean will be appointed if Plaintiff choses to have the hearing conducted by a dean. (Doc. 74-1) at 22.

On January 31, 2018, Plaintiff notified NMSU he planned to contest his termination through the pre-determination hearing pursuant to ARP 10.50, and he declined the option to use a Dean's Advisory Committee. (Doc. 74-1) at 23. In this notification, Plaintiff requested "all notes, phone records, emails,

and any other records related to the decision to cancel my leave, as well as any university email or written correspondence of any form that mentions and/or references me since me [sic] November 1, 2017." *Id.* NMSU's Human Resource Services office, in consultation with the Faculty Senate Chair and NMSU General Counsel, assigned College of Arts and Sciences Dean Dr. Pontelli to serve as the hearing officer. (Doc. 74) at 9-10, ¶7.

NMSU states that it provided Plaintiff with all documents relevant to his proposed termination. *See* (Doc. 74) at 8, ¶23; (Doc. 74-1) at 30. On February 22, 2018, Plaintiff requested additional documents related to "the supposed self-plagiarism allegations" brought against him in the Spring of 2017. (Doc. 74-1) at 34. NMSU provided Plaintiff twenty-two additional documents and stated it had no more responsive documents. *Id.* at 32-34. Plaintiff disputes this and argues he was not provided with five affidavits, correspondence between the Provost and Dean Hoffman, an article regarding Plaintiff's departure from DASPED, and other "numerous communications regarding Dr. Clarkson's termination under false assertions of attorney-client privilege." (Doc. 81) at 7, ¶19(d). Defendants state they provided one of the requested affidavits to Plaintiff, but the remaining four affidavits were not provided because they were prepared for use in a non-university proceeding and were not maintained by NMSU. (Doc. 80) at 15, ¶43. Defendants further state that the article and all relevant, non-privileged emails were provided to Plaintiff during the hearing. *Id.* at 13.

In addition, Plaintiff requested the appearances of four witnesses, all of whom appeared at the hearing and Plaintiff was given the opportunity to question. (Doc. 74-1) at 2, ¶¶13, 16. Plaintiff requested to have an investigator interview the witnesses before the pre-determination hearing, but Defendant Pontelli rejected this request, explaining that "was not within the scope of the informal fact finding pre-determination hearing process," and that the witnesses would be available for questioning during the hearing. (Doc. 75-4) at 50.

At the hearing on April 13, 2018, Plaintiff appeared with an attorney whom he was permitted to consult during the hearing. (Doc. 74-1) at 2, ¶18. Plaintiff questioned three witnesses: Dr. Ellis; Dean Hoffman; and Dr. Oretskin. (Doc. 74-1) at 35. Defendant Pontelli states that Plaintiff "repeatedly attempted to question witnesses regarding an allegation of plagiarism made against him in the spring of 2017," but Defendant Pontelli "limited questioning regarding the plagiarism allegation because I did not believe it was relevant to the Notice of Proposed Termination." *Id.* He further stated the "Notice was confined to Dr. Clarkson's failure to return to work as ordered; there were no allegations concerning academic performance or relationships with other faculty members." (Doc. 74-1) at 2, ¶19.

On April 20, 2018, Defendant Pontelli issued a Final Determination. (Doc. 74-1) at 35-37. Defendant Pontelli documented the evidence presented at the hearing and found that Plaintiff's June 19, 2017 request for a leave of absence articulated that the project Plaintiff sought to undertake was to serve as the DASPED, so when Plaintiff left the DASPED appointment, the leave was

terminated. If Plaintiff wanted to undertake a different project, such as pursuing a run for Congress, he should have made a new leave request. However Defendant Pontelli noted that the ability to pursue Plaintiff's proposed goals would be possible only once he gained a congressional seat, so the process of seeking the seat would not meet the university's requirement that the leave must benefit the institution. *Id.* at 36. Defendant Pontelli rejected Plaintiff's claim that NMSU engaged in retaliation based on Plaintiff's political affiliation and found that Plaintiff's claim of retaliation based on alleged plagiarism was irrelevant to the proposed notice of termination. Defendant Pontelli further found that Provost Howard failed to timely communicate with Plaintiff that he expected Plaintiff would return to NMSU, and that communication with Plaintiff had been "antagonistic, especially at the Department and College levels, with limited attempts to seek mutual understanding and establish a positive protocol of communication and interaction." *Id.* at 37.

Defendant Pontelli concluded that the proposed Notice of Termination should be upheld because "the motivation supporting the leave is currently not in place and there has been a failure on the part of Dr. Clarkson to inform the institution of the change of scope and to request, at the appropriate time, a novel accommodation." *Id.* Defendant Pontelli recommended adding to the Notice of Termination two additional actions: (1) that Plaintiff be allowed a final chance to request the opportunity to immediately resume his regular duties at NMSU in lieu of termination; and (2) if Plaintiff requests reinstatement and it is approved, Plaintiff be given the opportunity to submit a new leave request once he obtains a congressional seat, which

should be impartially considered. *Id.* Plaintiff was informed that he could appeal the determination pursuant to ARP 10.50, Section M. *Id.* (ARP 10.50, Section M provides that a faculty member may file a post-determination appeal to a panel of senior faculty senators and may then seek final review by the Chancellor of the university).

On April 24, 2018, NMSU provided Plaintiff with a Notice of Termination and Option to Request Immediate Return. (Doc. 74-1) at 38. NMSU stated that as a result of the outcome of the pre-determination hearing, Plaintiff's employment will be terminated as of April 27, 2018 unless Plaintiff requests to immediately resume his regular duties as a faculty member at NMSU. On April 25, 2018, Plaintiff requested a post-determination appeal. (Doc. 74) at 10, ¶35; (Doc. 75-4) at 17. Throughout May, June, and July 2018, staff from the office of NMSU's Human Resources, Employee and Labor Relations, communicated multiple times with Plaintiff to coordinate mediation and to set the post-determination appeal hearing. (Doc. 74-1) at 39-45. Plaintiff was offered an opportunity for mediation, but the parties were unable to schedule a mediation session. *Id.* at 39-42. Thereafter, Plaintiff was contacted by NMSU Employee Relations staff on June 8, June 21, and July 2, 2018 about scheduling the post-determination hearing. *Id.* at 42-43. Plaintiff was given proposed dates, which he rejected, and was then asked to provide alternate dates. *Id.* On July 27, 2018, Plaintiff was again contacted by an Employee Relations staff member noting that Plaintiff had not yet provided alternate dates for the hearing and asking if Plaintiff was still interested in pursuing the post-action hearing. *Id.* at 44. Plaintiff responded on August 2, 2018, stating

he had a new attorney who will provide proposed dates for the post-action appeal hearing. *Id.* at 45. No dates were provided and NMSU Human Resource Services staff concluded Plaintiff had decided to abandon his post-determination appeal. (Doc. 74-1) at 10, ¶14. Plaintiff filed his lawsuit on July 28, 2018 in the Third Judicial District Court of the State of New Mexico, and it was removed to this Court on September 14, 2018. (Doc. 1).

IV. Analysis

A. Due Process Claim

Plaintiff claims Defendants violated his right to due process by revoking his leave of absence and terminating him for an illegitimate and/or discriminatory purpose and without meaningful notice or a fair hearing. (Doc. 27) at 14-15. Defendants move for summary judgment on Plaintiff's due process claim for the following reasons: (1) NMSU is not a proper party under 42 U.S.C. § 1983; (2) Defendant Pontelli is entitled to qualified immunity; (3) Plaintiff does not have a right to constitutional due process as an untenured annual contract employee; and (4) Plaintiff was afforded adequate due process under the Constitution. (Doc. 74) at 11. Plaintiff contends he is entitled to summary judgment on his due process claim because NMSU's policies and procedures created a constitutionally protected right to continued employment, and he was deprived of that right without proper due process because NMSU did not provide him with all relevant documents, his investigator was not permitted to interview witnesses before the hearing, Defendant Pontelli excluded relevant testimony, and

Defendant Pontelli was biased against Plaintiff. (Doc. 75) at 17-28.

1. NMSU Board of Regents is Not a Proper Defendant Under Section 1983

Defendants first move for summary judgment on Plaintiff's due process claim against NMSU and Defendant Pontelli in his official capacity because they are not proper parties under Section 1983. (Doc. 74) at 11-12. Plaintiff responds that he "is not bringing his suit against NMSU as an entity," but instead he is suing the Board of Regents. (Doc. 81) at 11.

A cause of action under 42 U.S.C. § 1983 requires the deprivation of a civil right by a "person" acting under color of state law. However, in *Will v. Mich. Dept. of State Police*, the United States Supreme Court held that "neither a State nor its officials acting in their official capacities are 'persons' under § 1983." 491 U.S. 58,71 (1989). In addition, the Tenth Circuit has explained that "a governmental entity that is an arm of the state for Eleventh Amendment purposes is not a 'person' for section 1983 purposes." *McLaughlin v. Bd. of Trs. of State Colleges of Colo.*, 215 F.3d 1168, 1170 (10th Cir. 2000) (citation omitted). An "arm of the state" includes "entities created by state governments that operate as alter egos or instrumentalities of the states," and the Tenth Circuit has consistently held that universities and their boards of regents are arms of the state and, thus, not "persons" under Section 1983. *Sturdevant v. Paulsen*, 218 F.3d 1160, 1164 (10th Cir. 2000); *Barrett v. Univ. of N.M.*, 562 Fed. Appx. 692, 694 (10th Cir. 2014) ("The Board is an arm of the State of New Mexico ...."); *Ross v. Bd. of Regents of the Univ. of*

N.M., 599 F.3d 1114, 1117 (10th Cir. 2010) (district court was correct in holding that plaintiffs failed to state a claim under Section 1983 because the suit named only agencies of the State of New Mexico and state employees in their official capacities); *Watson v. Univ. of Utah Med. Ctr.*, 75 F.3d 569, 575-77 (10th Cir. 1996) (holding the University of Utah and the University of Utah Medical Center are arms of the state); N.M. Const. Art. XII, §§ 3, 11; NMSA 1978 § 21-8-3 (providing NMSU is an educational institution under control of the state, managed by a Board of Regents).

Here, Plaintiff states he is suing the Board of Regents and does not name individual members. Accordingly, Plaintiff's due process claim against the Board of Regents will be dismissed with prejudice because the Board of Regents is not a "person" and therefore not a proper defendant in a Section 1983 claim. *See Will*, 491 U.S. at 71. Plaintiff also argues the Board of Regents is liable "for allowing his due process rights to be withheld by the university through the actions of Defendant Pontelli, Dean Hoffman, Nancy Oretskin, etc.," and because the Board "authorized and/or permitted the individual Defendants in this matter to 'try' [Plaintiff] in a bias (sic) proceeding ...." (Doc. 81) at 11. Nevertheless, Section 1983 requires an assertion that an *individual* deprived the plaintiff of a civil right—not an entity. *See Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009) ("Because vicarious liability is inapplicable to ... § 1983 suits, a plaintiff must plead that each government official defendant, through the official's own individual actions, has violated the Constitution."); *McLaughlin*, 215 F.3d at 1172 ("Having sued only the Board rather than the individual trustees, Mr.

McLaughlin has failed to state a claim against a person covered by section 1983.").

2. Defendant Pontelli in his Official Capacity

Plaintiff's due process claim for monetary damages against Defendant Pontelli in his official capacity will also be dismissed with prejudice for the same reasons stated above. *See Porro v. Barnes*, 624 F.3d 1322, 1328 (10th Cir. 2010) ("[S]uing individuals in their official capacity under § 1983 ... is essentially another way of pleading an action against the [governmental entity] they represent.").

In addition to seeking monetary damages, Plaintiff also seeks: (1) an order enjoining NMSU from processing his termination until after his administrative appeal rights have been exhausted; and (2) all actions undertaken against him since April 26, 2018 regarding his employment and leave status to be undone. (Doc. 27) at 15, ¶94. A plaintiff may maintain an action against an individual defendant in his official capacity to the extent he seeks prospective relief for ongoing violations of the plaintiff's rights under federal law. *See Buchwald v. Univ. of N.M. Sch. of Med.*, 159 F.3d 487, 495-96 (10th Cir. 1998). However, such claims can only be asserted against a defendant who has "some connection with the enforcement of the act, or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party." *Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 760 (10th Cir. 2010) (holding that a plaintiff seeking prospective injunctive relief against a public official in his official capacity must show the official has authority to perform the act).

Defendants state that Plaintiff's termination became effective prior to the filing of this lawsuit so that request for relief is now moot. (Doc. 74) at 12. Moreover, Defendants assert that Defendant Pontelli does not have the authority to grant the relief Plaintiff seeks. *Id.* Plaintiff does not dispute these assertions. The Court, therefore, holds that Plaintiff's due process claim for injunctive relief against Defendant Pontelli in his official capacity also fails as a matter of law and shall be dismissed with prejudice. *See Barrett*, 562 Fed. Appx. at 695 (explaining that in order to obtain prospective equitable relief the plaintiff must "adequately allege the individual official's duty to enforce the statute in question and a demonstrated willingness to do so"); *Barrett v. Univ. of N.M. Bd. of Regents*, 2013 WL 12085687, at *4 (D.N.M.) (dismissing the plaintiff's claim for injunctive relief because she "failed to allege how the Individual Defendants are able to address the harms she alleges if she succeeds in obtaining an injunction from this Court"); *Klein v. Univ. of Kan.*, 975 F. Supp. 1408, 1417 (D. Kan. 1997) (explaining that the state official must have the power to perform the act required to overcome bar of immunity under the Eleventh Amendment).

3. Qualified Immunity

Next, Defendants move for summary judgment on Plaintiff's due process claim against Defendant Pontelli in his individual capacity on the basis of qualified immunity. (Doc. 74) at 13-20. Qualified immunity provides "immunity from suit rather than a mere defense to liability." *Saucier v. Katz*, 533 U.S. 194, 200 (2001). "When a defendant raises the defense of qualified immunity, the plaintiff bears the burden to

demonstrate that the defendant violated his constitutional rights and that the right was clearly established." *Singh v. Cordle*, 936 F.3d 1022, 1033 (10th Cir. 2019) (citation omitted). The law was "clearly established" only if it "was sufficiently clear that every reasonable official would understand that what he [was] doing [was] unlawful." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (quotation marks omitted). To make such a showing, the plaintiff "must point to a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Callahan v. Unified Gov't of Wyandotte Cty.*, 806 F.3d 1022, 1027 (10th Cir. 2015) (quotation marks omitted).

"To assess whether an individual was denied procedural due process, courts must engage in a two-step inquiry: (1) did the individual possess a protected interest such that the due process protections were applicable; and, if so, then (2) was the individual afforded an appropriate level of process." *Montgomery v. City of Ardmore*, 365 F.3d 926, 935 (10th Cir. 2004). A substantive due process claim, however, "bars certain government actions regardless of the fairness of the procedures used to implement them." *Brown v. Montoya*, 662 F.3d 1152, 1172 (10th Cir. 2011). A substantive due process claim arises when a plaintiff alleges the government deprived him of a fundamental right and protects against the exercise of government authority that "shocks the conscience." *Seegmiller v. LaVerkin City*, 528 F.3d 762, 767 (10th Cir. 2008).

a. Protected Property Interest

Plaintiff claims he has a constitutionally protected property interest in continued employment at NMSU and in a fair tenure review. (Doc. 27) at 14, ¶85. Defendants, however, assert that as a non-tenured professor, Plaintiff did not have a protected property interest in his continued employment or tenure review. (Doc. 74) at 18-19. Defendants argue that neither the "probationary nature" of Plaintiff's employment, nor the Provost's grant of a leave of absence, created a legitimate claim of entitlement to continued employment with NMSU. *Id.* at 18.

Defendants are correct that if Plaintiff had been a tenured professor, he would have possessed a protected property interest in his continued employment. *See Tonkovich v. Kan. Bd. of Regents*, 159 F.3d 504, 517 (10th Cir. 1998). Nevertheless, the Tenth Circuit has explained that property interests can be created by "state-law rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Darr v. Town of Telluride, Colo.*, 495 F.3d 1243, 1251 (10th Cir. 2007) (quoting *Bd. of Reg. v. Roth*, 408 U.S. 564, 577 (1974)). To create a property interest, the state-law rule or understanding must give the recipient "a legitimate claim of entitlement to the benefit." *Roth*, 408 U.S. at 577. For example, "an employee may possess a property interest in public employment if she has tenure, a contract for a fixed term, an implied promise of continued employment, or if state law allows dismissal only for cause or its equivalent." *Darr*, 495 F.3d at 1251 (citations omitted).

Defendants do not argue that Plaintiff was an at-will employee. *See Bishop v. Wood*, 426 U.S. 341, 345 n.8 (1976) ("At-will employees lack a property interest in continued employment."). Instead, Defendants assert that Provost Howard's "discretionary grant of Plaintiff's request for a leave of absence neither creates a contract nor changes the probationary nature of Plaintiff's employment." (Doc. 74) at 18. Defendants' argument fails to take into account that the leave of absence was tied to Plaintiff's contract for the 2017-2018 academic year that set forth the terms of Plaintiff's employment and stated the contract "may be terminated by the university for cause, for reasons of financial exigency, or in the case of program or position elimination." (Doc. 74-1) at 12. In addition, ARP 10.50 Sections J and K provide that an employee can only be dismissed upon a showing of just cause (such as dishonest behavior, neglect of professional responsibilities, or other misconduct), and the employee is entitled to due process including "fair and timely hearing processes, before an impartial hearing official or body." (Doc. 74-1) at 26-27. The Court, therefore, finds that Plaintiff possessed a property right in his continued employment for the 2017-2018 academic year as set forth in the "Tenure Track Annual Contract of Employment 2017-2018" and NMSU's ARP 10.50. *See, e.g., Inskeep v. City of Farmington*, 2014 WL 12789006, at *7 (D.N.M.) ("[B]ecause Plaintiff is not an at-will employee, and could only be fired for cause, Plaintiff possesses a state-created property right under Tenth Circuit precedent").

b. Fairness of Termination Process

Having found Plaintiff possessed a protected interest in his continued employment during the 2017-2018 academic year, the Court must next determine whether Plaintiff was afforded an appropriate level of process prior to his termination. *See Montgomery*, 365 F.3d at 935. Plaintiff claims he did not receive adequate due process because Defendants failed to provide him with documents supporting his termination, his investigator was not allowed to interview witnesses prior to the hearing, and records were presented at the hearing that he did not know about ahead of time. (Doc. 75) at 21-22. Plaintiff also claims Defendant Pontelli improperly limited testimony at the hearing by disallowing questions regarding plagiarism accusations from Spring 2017, and Defendant Pontelli was biased against him because he was selected by and directly answers to Provost Howard. *Id.* at 22-23, 27-28.

In analyzing a due process claim and whether appropriate processes were in place to protect the individual, courts must "ask what process the State provided, and whether it was constitutionally adequate. This inquiry would examine the procedural safeguards built into the statutory or administrative procedure ... and any remedies for erroneous deprivations provided by statute or tort law." *Zinermon v. Burch*, 494 U.S. 113, 126 (1990). The central tenets of procedural due process are: (i) notice, (ii) the right to be heard, and (iii) a hearing. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985); *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970). In addition, courts consider the private interest affected; the risk of deprivation through existing procedures and the value of additional

measures; and the burden placed on the government to adopt such safeguards. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

The Tenth Circuit further explains that before public employees can be terminated, they are entitled to "notice and opportunity for a hearing appropriate to the nature of the case." *Valencia v. Bd. of Reg. of the Univ. of N.M.*, 2021 WL 1529748, at *6 (10th Cir.) (quoting *Loudermill*, 470 U.S. at 542). The hearing requires: "(1) oral or written notice to the employee of the charges against him; (2) an explanation of the employer's evidence; and (3) an opportunity for the employee to present his side of the story." *Id.* (quoting *Merrifield v. Bd. of Cnty. Cmmr's for Cnty. of Santa Fe*, 654 F.3d 1073, 1077-78 (10th Cir. 2011)). However, "a full evidentiary hearing is not required prior to an adverse employment action; it suffices that the employee is given notice and an opportunity to be respond." *Id.* The Tenth Circuit has "upheld as sufficient to meet these requirements informal proceedings such as pretermination warnings and an opportunity for a face-to-face meeting with supervisors, and even a limited conversation between an employee and his supervisor immediately prior to the employee's termination." *Id.* ("We have called such procedures 'not very stringent.' ") (citation omitted).

In a similar suit challenging the due process afforded in a pretermination hearing involving NMSU, the court explained: "Where comprehensive post-termination procedures are available, as they were to [the plaintiff] per § 4.05.11 of the NMSU Policy Manual (but which he rejected as a sham), a public employee dischargeable solely for cause is entitled only to a very limited

hearing prior to his termination." *Law v. N.M. State Univ.*, 2010 WL 11590707, at *6 (D.N.M.) (citations omitted). Moreover, the pretermination hearing "need not definitively resolve the propriety of the discharge," but "should be an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." *Loudermill*, 470 U.S. at 545-46. In sum, the pretermination hearing "is merely the employee's chance to clarify the most basic misunderstandings or to convince the employer that termination is unwarranted." *Powell v. Mikulecky*, 891 F.2d 1454, 1458 (10th Cir. 1989).

Here, Plaintiff was notified of his proposed termination and informed it was because he refused to return to work following revocation of his leave of absence. (Doc. 74-1) at 21. Plaintiff was informed of his right to a hearing pursuant to ARP 10.50 and the opportunity to present a defense, and was provided the option of having the hearing conducted by a dean serving as a hearing officer or before a Dean's Advisory Committee comprised of three members of the Faculty Senate. *Id.* at 22. The Court finds these procedures were sufficient to provide Plaintiff notice of the charges against him and the process to present his side at a hearing.

Plaintiff argues he did not receive all the documents he requested and was not able to interview witnesses prior to the hearing, which deprived him of his ability to present a defense. Defendants counter that they provided all relevant, non-privileged documents to Plaintiff that were relied on by Defendant Pontelli and the witnesses at the hearing. *See* (Doc. 74) at 8, ¶23;

(Doc. 74-1) at 30. The only documents Plaintiff specifically describes that he was not permitted to obtain were the four affidavits pertaining to a plagiarism complaint from the Spring of 2017. Plaintiff's termination was based his refusal to return to NMSU as a paid faculty member after his leave of absence was revoked. Accordingly, the affidavits were not relevant because the plagiarism issue was not the basis for Plaintiff's termination. Similarly, Defendant Pontelli did not deprive Plaintiff of due process by limiting questions at the hearing to the issues pertaining to his leave of absence and failure to return to NMSU. Plaintiff points to no cases requiring anything further than an explanation of the evidence the employer relied on for the termination decision, which was provided to Plaintiff here. *See Merrifield*, 654 F.3d at 1078 (finding adequate due process where the plaintiff was given "an explanation of the employer's evidence").

Plaintiff also asserts that Defendants' failure to provide him with all the documents he requested violated ARP 10.50(H)(6), which provides: "If corrective action is going to be pursued, the faculty member will be provided a copy of the investigative report and access to the supporting documents at the time the corrective action is formally proposed." (Doc. 75) at 21. The Tenth Circuit has made clear, however, that a violation of procedures guaranteed by a university's rules does not constitute a cognizable federal constitutional claim for violation of due process. In *Hulen v. Yates*, the Tenth Circuit stated that "[t]hroughout this litigation there have been repeated references to, and apparent reliance on, the Faculty Manual's procedural rules. But in deciding whether a state has violated a person's constitutional right to procedural due process, we

should pay no attention to whether the state has complied with procedures mandated by state law." 322 F.3d 1229, 1246-47 (10th Cir. 2003). Instead, "it is purely a matter of federal constitutional law whether the procedure afforded was adequate." *Id.* Therefore, a violation of NMSU's ARP cannot constitute a denial of Plaintiff's federal constitutional due process rights. *See also Hennigh v. City of Shawnee*, 155 F.3d 1249, 1256 (10th Cir. 1998) (police officer alleged procedural due process violation when demotion in rank did not comply with the procedures guaranteed by his collective bargaining agreement; court held "the Constitution does not require that each individual receive the procedural guarantees provided for by the instrument which bestows a property interest."); *Levitt v. Univ. of Texas*, 759 F.2d 1224, 1229 (5th Cir. 1985) ("Even if the University failed to follow its own rules, it nevertheless gave [the professor] all the process to which he was entitled under the Constitution.") (cert. denied, 474 U.S. 1034 (1985)).

Additionally, Plaintiff claims he was deprived of due process because he was denied the right to have an investigator interview witnesses before the pre-determination hearing. Defendant Pontelli rejected this request because it "was not within the scope of the informal fact finding pre-determination hearing process," and explained that the witnesses would be available for questioning during the hearing. (Doc. 75-4) at 50. While due process requires an opportunity for the employee to present his side of the story, a formal evidentiary hearing is not required prior to an adverse employment decision. *Loudermill*, 470 U.S. at 545. Plaintiff does not explain how the lack of pre-hearing interviews affected his ability to present his side of the

story; indeed, all of Plaintiff's requested witnesses appeared at the hearing and Plaintiff was able to question them with the assistance of his counsel. Therefore, the denial of Plaintiff's request to interview witnesses prior to the hearing does not constitute a violation of his due process rights. *See Tonkovich*, 159 F.3d at 519-21 (holding due process does not require a professor be allowed to interview adverse witnesses prior to a hearing, to have access to every piece of evidence requested, and to compel witnesses to testify).

Plaintiff also asserts Defendant Pontelli was biased against him because he reports to the Provost. First, Plaintiff had the opportunity to choose the option of a Dean's Advisory Council instead of a dean to serve as the hearing officer but declined that option. Second, Plaintiff makes only conclusory allegations that Defendant Pontelli was biased because he was employed by the university and the subordinate of the Provost. The Tenth Circuit has explained there is no clearly established right to a professional hearing officer or a hearing officer not employed by the university proposing the adverse action. *Tonkovich*, 159 F.3d at 519. Instead, "a substantial showing of personal bias is required to disqualify a hearing officer or tribunal in order to obtain a ruling that a hearing is unfair." *Corstvet v. Boger*, 757 F.2d 223, 229 (10th Cir. 1985). Plaintiff makes no such showing here. Moreover, Defendant Pontelli's impartiality is reflected in his decision that was not fully favorable to NMSU, found fault with NMSU's communications with Plaintiff, and recommended allowing Plaintiff a chance to request the opportunity to resume his regular duties at NMSU and to submit a new leave request. (Doc. 74-1) at 37. Therefore, the Court finds no disputed issues of

material fact regarding Defendant Pontelli's impartiality. *See Pioneer Ctrs. Holding Co. Emp. Stock Ownership Plan & Tr. v. Alerus Fin., N.A.*, 858 F.3d 1324, 1334 (10th Cir. 2017) ("To defeat a motion for summary judgment, evidence, including testimony, must be based on more than mere speculation, conjecture, or surmise.").

The Court also addresses whether Plaintiff was provided due process as to his post-termination appeal. Plaintiff does not specifically argue that his post-termination appeal relates to his claim for violation of due process, but he does state that he was prevented from exhausting his administrative remedies because NMSU did not proceed with the appeal hearing. (Doc. 81) at 22-23. The evidence in the record shows that Plaintiff requested a post-determination hearing, (Doc. 75-4 at 17), and for three months NMSU staff communicated with Plaintiff trying to set the appeal hearing, (Doc. 74-1 at 39-45). Specifically, Plaintiff was contacted by NMSU staff on June 8, June 21, and July 2, 2018, with proposed dates, which Plaintiff rejected, and then Plaintiff was asked to provide alternate dates. *Id.* at 42-43. On July 27, 2018, Plaintiff was again contacted by a staff member noting that Plaintiff had not yet provided alternate dates for the hearing and asking if Plaintiff was still interested in pursuing the post-action hearing. *Id.* at 44. Plaintiff responded on August 2, 2018, stating he had a new attorney who will provide proposed dates for the post-action appeal hearing. *Id.* at 45. Since no dates were provided, and Plaintiff filed this lawsuit on July 28, 2018, NMSU concluded Plaintiff had decided to abandon his post-determination appeal. (Doc. 74-1) at 10, ¶14.

The Tenth Circuit has explained that "[o]ne cannot be denied something one did not ask for," and that a party's "failure to take advantage of the procedural opportunities available to her for her appeal constitutes a waiver of any claims she has that she was denied a right to procedural due process." *See Kirkland v. St. Vrain Valley Sch. Dist. No. Re-1J*, 464 F.3d 1182, 1194-95 (10th Cir. 2006) (citation omitted). Therefore, the Court concludes that Plaintiff's multiple rejections of proposed dates for the appeal hearing, and failure to propose alternate dates or respond to NMSU's inquiries, constitutes failure to take advantage of the procedural opportunity afforded him and waiver of a claim for denial of procedural due process regarding the appeal.

In conclusion, the undisputed facts show that Plaintiff was notified of the reasons for his proposed termination, given an opportunity to be heard and present his side at a hearing, provided the documents Defendants relied on at the hearing, and presented with an opportunity to appeal his termination decision, which he abandoned. Therefore, "the totality of the procedures and opportunities which the University afforded plaintiff were sufficient to satisfy constitutional requirements." *Siebert v. Univ. of Okla. Health Sciences Ctr.*, 867 F.2d 591, 599 (10th Cir. 1989), abrogated on other grounds by *Fed. Lands Legal Consort. v. United States*, 195 F.3d 1190, 1195 (10th Cir. 1999). Plaintiff "was not fired out of the blue," "for reasons he did not know," or "without being given the opportunity to present his side of the story." *Id.* Despite Plaintiff's claims that he was denied relevant documents and was unable to question witnesses about plagiarism allegations, "[d]ue process does not mandate that all evidence on a charge or even

the documentary evidence be provided, only that such descriptive evidence be afforded as to permit [the employee] to identify the conduct giving rise to the dismissal and thereby enable him to make a response." *Law*, 2010 WL 11590707, at *8. The pretermination process NMSU offered Plaintiff "extended well beyond that brief face-to-face encounter with a supervisor that courts have so often held satisfies due process demands where post-termination procedures are available." *Id.* In addition, Plaintiff does not make a substantial showing of personal bias on the part of the hearing officer, nor does he present any facts indicating the hearing process was fundamentally unfair.

For the foregoing reasons, the Court finds no disputed issues of material fact as to Plaintiff's due process claim and concludes that no reasonable jury could find that Plaintiff was denied his constitutional right to due process. Moreover, Plaintiff has not shown that Defendants abused their authority "in a manner that shocks the conscience." *Seegmiller*, 528 F.3d at 767. Therefore, the Court finds that Defendant Pontelli is entitled to qualified immunity for Plaintiff's due process claim.

B. Breach of Contract Claim

Defendants also move for summary judgment on Plaintiff's breach of contract claim. Plaintiff claims the document granting him a leave of absence is a contract and that NMSU breached the contract "unilaterally and without any authority under law or regulation" when Provost Howard revoked Plaintiff's leave of absence. (Doc. 27) at 13. Plaintiff claims a "second breach occurred when the Provost ordered Defendant

Clarkson to go up for tenure in the Fall of 2018 rather than the Fall of 2020." *Id.*

To establish a claim for breach of contract, a plaintiff must demonstrate: (1) the existence of a contract; (2) due performance of the contract by the plaintiff; (3) breach of the contract by the defendant; and (4) damages resulting from the breach. *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1212 (10th Cir. 2009). The elements of a contract in New Mexico are offer, acceptance, consideration, and mutual assent. *Garcia v. Middle Rio Grande Conservancy Dist.*, 1996-NMSC-29, ¶ 9, 121 N.M. 728, 918 P.2d 7. Consideration is a bargained-for exchange between the parties where something "is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise." *Smith v. Village of Ruidoso*, 1999-NMCA-151, ¶33, 128 N.M. 470, 994 P.2d 50. New Mexico law provides for a "contextual approach" to contract interpretation. *Mark V, Inc. v. Mellekas*, 114 N.M. 778, 781, 845 P.2d 1232, 1235 (1993). Thus, courts are not restricted to the four corners of the document and, instead, may consider extrinsic evidence when evaluating whether there is ambiguity in a contract. *C.R. Anthony Co. v. Loretto Mall Partners*, 112 N.M. 504, 508-09, 817 P.2d 238, 242-43 (1991); *see also Aesc Ins. Grp. of New Mexico v. Aspen Ins. UK, Ltd.*, 2012 WL 12903077, at *3 (D.N.M.) (explaining that whether an agreement contains an ambiguity "is a matter of law to be decided by the trial court" which "may consider collateral evidence of the circumstances surrounding the execution of the agreement").

NMSU's ARP 8.53 allows faculty members to seek a leave of absence "for the purpose of undertaking some

project that will directly benefit the university and the person's professional development." (Doc. 74-1) at 14. Plaintiff submitted a request for an extended leave of absence pursuant to ARP 8.53 stating he had recently accepted an appointment to serve as the DASPED. (Doc. 74-1) at 17. He asked for unpaid professional leave from August 14, 2017 to January 2020, with the option of extending that leave until January 2021, and for his tenure review to be reset from Fall 2017 to the Fall semester immediately following his return to campus. *Id.* at 17-18. As the basis for his request, Plaintiff stated his "appointment as DASPED is an extraordinary opportunity that [ ] I trust will justify an extended leave," his "service as DASPED provides a direct reputational benefit to NMSU and the College of Business," he "will also work to bring NMSU students, (particularly, but not limited to, tribal members) to Washington, DC for internships as well as internships at other federal offices throughout the country," and "serving as DASPED will significantly benefit [his] professional development." *Id.* at 17. In response to Plaintiff's leave request, Provost Howard congratulated Plaintiff on his appointment as DASPED and stating it "is a singular honor for you and for New Mexico State University." (Doc. 74-1) at 19. Provost Howard granted Plaintiff's request for a leave of absence without pay from August 14, 2017, until January 2020. He did not grant Plaintiff's request for leave until January of 2021 and directed Plaintiff to "make a formal request for this extension by August 30 of 2019, at which time I, or whoever is Provost at the time, will decide whether to grant the extension." Provost Howard further agreed to reset Plaintiff's tenure review from Fall 2017 to the Fall semester immediately following his return to NMSU. *Id.*

Defendants contend the document granting Plaintiff's leave of absence request does not constitute a binding contract for three reasons. First, Defendants argue that NMSU policy provides that its ARPs shall not create any type of contract, implied or otherwise, between the Board of Regents and its employees. (Doc. 74) at 22. Defendants, therefore, argue that the Provost's letter "is merely evidence of how ARP 8.53 was implemented in this case." While NMSU's ARPs may not create a contract between NMSU and its employees, the agreement for Plaintiff to take a leave of absence is not based on ARP 8.53 alone. Instead, Plaintiff offered to take a leave of absence without pay to serve as DASPED, and the Provost accepted that offer. The parties engaged in a "bargained-for exchange" and came to a mutual agreement. While Plaintiff claims his leave of absence was not contingent on him serving as DASPED, Provost Howard clearly accepted Plaintiff's offer for a leave of absence for the purpose of serving as DASPED until January 2020. Indeed, Plaintiff's alternative request for a leave of absence until January 2021, without providing a reason for that additional time, was rejected by the Provost. Therefore, reading Plaintiff's leave request and Provost Howard's response together, and considering they were made pursuant to ARP 8.53, the Court finds the parties entered into a contract for Plaintiff to take a leave of absence to January 2020 for the purpose of serving as DASPED and to extend Plaintiff's tenure review to the Fall semester immediately following his return to NMSU. *See Galaxy CSI, LLC v. Los Alamos Natl. Bank*, 2006 WL 8444059, *3 (D.N.M.) ("When the contracting parties' expressions of mutual assent are clear and unambiguous, a court must give effect to those expressions.") (citing *C.R. Anthony v. Loretto*

Mall Partners, 1991-NMSC-070, ¶17, 112 N.M. 504, 817 P.2d 238 (1991)).

Second, Defendants argue that the leave of absence agreement was not a binding contract that allowed Plaintiff to remain on leave until January 2020 with no requirement to remain in the DASPED position. (Doc. 74) at 22. Read in this way, Defendants contend the contract lacks a bargained-for exchange and mutuality of obligation and is contrary to the clear intent of ARP 8.53 which states that leave must be for a project that will directly benefit the university and the employee's professional development. The Court agrees. For the reasons stated above, the Court concludes that the parties agreed for Plaintiff to take a leave of absence for the purpose of serving as DASPED; it was not an opened-ended leave of absence for any other reason.

Third, Defendants argue that if the leave of absence was a contract, it was superseded by the contract for the 2017-2018 academic year, which was executed by Plaintiff on September 27, 2017, and states that it "supersedes all other agreements." (Doc. 74) at 23-24. Defendants state that because the 2017-2018 contract makes no mention of professional leave, Plaintiff was under contract to NMSU for 2017-2018. *Id.* at 24. Plaintiff's 2017-2018 Annual Contract of Employment states it is made "[i]n accordance with the ... official policies of the University as set forth in the most recent Regents Policy Manual and the Administrative Rules and Procedures." (Doc. 74-1) at 12. The contract, therefore, was subject to the leave of absence option available to Plaintiff in ARP 8.53, which he exercised. *See Snyder v. Bd. of Regents for Agric. & Mech. Colleges ex rel. Oklahoma State Univ. Ctr. for Health*

Scis., 2020 WL 827412, at *47 (W.D. Okla.) (explaining that a university's policies are incorporated into an agreement that refers to the policies). Accordingly, the 2017-2018 contract does not alter the Court's conclusion that the parties entered into a binding contract for Plaintiff to take a leave of absence to serve as DASPED.

Having found that a contract was created when Plaintiff was granted a leave of absence, the Court next considers whether that contract was breached. Since the leave of absence was based on Plaintiff serving as DASPED, when Plaintiff resigned that position, the leave of absence ceased to operate and Plaintiff was required to return to NMSU pursuant to the parties' 2017-2018 academic year contract. Plaintiff claims Defendants "unilaterally and without any authority under law or regulation" breached the contract by revoking Plaintiff's leave of absence." To the contrary, ARP 8.53 provides for a leave of absence only for a purpose that directly benefits the university, which "must be detailed in the application." (Doc. 74-1) at 14. Once that purpose ended, the parties were no longer bound by the leave of absence agreement and Plaintiff was required to perform under the 2017-2018 contract. Instead, Plaintiff refused to acknowledge his leave of absence had ended and did not return to his duties as a faculty member or request a second leave of absence. Therefore, Plaintiff cannot demonstrate due performance under the leave of absence agreement, so Defendant's revocation of the leave was not a breach. Accordingly, the Court finds as a matter of law there was no breach of contract and grants summary judgment for Defendants on this claim.

V. Conclusion

For the reasons stated above, the Court holds that NMSU and Defendant Pontelli in his official capacity are not proper defendants under Section 1983 for Plaintiff's due process claim, and Defendant Pontelli is entitled to qualified immunity for Plaintiff's individual capacity due process claim. The Court further holds that both Defendants are entitled to judgment as a matter of law on Plaintiff's breach of contract claim. Because the Court grants Defendants' Motion for Summary Judgment on Plaintiff's remaining claims, the Court finds it unnecessary to reach Defendants' additional claims that Plaintiff failed to exhaust his administrative remedies for his breach of contract claim or that Plaintiff's requested relief for reinstatement is moot.

IT IS THEREFORE ORDERED that:

1. Defendants' Motion for Summary Judgment, (Doc. 74), is GRANTED;
2. Plaintiff's Motion for Partial Summary Judgment, (Doc. 75), is DENIED;
3. Plaintiff's claims are DISMISSED with prejudice; and
4. The trial and all associated deadlines are VACATED.

Footnotes

1The following facts are undisputed and supported by exhibits referenced by the parties unless otherwise indicated.

2Plaintiff states that he asked for his leave to begin after the end of the summer semester because he was preparing to teach an online course at NMSU during the summer. (Doc. 75-1) at 3, ¶14.

3Plaintiff does not state who this email was from, nor does he attach a copy of the email to his Motion for Summary Judgment or response to Defendants' Motion for Summary Judgment.

4Plaintiff does not attach a copy of these emails to his Motion for Summary Judgment or response to Defendants' Motion for Summary Judgment.

NM STATE UNIVERSITY

Dr. Gavin Clarkson
Associate Professor

College of Business
Department of Finance
MSC 3FIN
New Mexico State University
P.O. Box 30001
Las Cruces, NM 88003-8001

To: Hari Sankaran, Finance Department Head
Re: Leave request
Date: June 19, 2017

As you know, I recently accepted a presidential appointment to serve as the Deputy Assistant Secretary for Policy and Economic Affairs (DASPED) in the Office of Indian Affairs at the US Department of the Interior. In that role, I will be responsible for developing and implementing economic initiatives throughout Indian Country, and I anticipate having a significant positive impact on tribes in New Mexico as well as the New Mexico economy as a whole. In fact, based on preliminary analysis, one of the first initiatives that I will work on will generate more than $1 billion of economic stimulus for New Mexico alone and perhaps $20 billion nationwide.

The priorities I have been given are 1) economic development, 2) capacity building among tribal governments to enable their economies to become self-sustaining, and 3) human capital development among tribal youth. All of these priorities are entirely

consistent with the goals of New Mexico State University, and I look forward to working with my NMSU colleagues as well as colleagues throughout New Mexico to advance those priorities.

None of these initiatives will happen overnight, however, and thus I need to request an extended leave of absence beginning Monday, August 14 and concluding when faculty report back to campus in the January of 2020. I am also requesting the option, at my election, to extend that leave until the faculty report in the January of 2021.

While I realize that this timeframe is substantially longer than normal, I believe it is allowed under the existing NMSU Administrative Rules and Procedures (ARP). Specifically, ARP §7.20.60.A allows for professional leaves without pay for longer than one year, although leaves of one year are the norm. I believe my appointment as DASPED is an extraordinary opportunity that that I trust will justify an extended leave.

As I read the university's regulation, professional leaves must directly benefit the university and my professional development. While I am fairly certain that a $1 billion economic stimulus for New Mexico, improving tribal economic infrastructure, and human capital development among the tribal nations of New Mexico clearly benefits the university, I also think my service as DASPED provides a direct reputational benefit to NMSU and the College of Business. I will also work to bring NMSU students, (particularly, but not limited to, tribal members) to Washington, DC for

internships as well as internships at other federal offices throughout the country.

I also believe that serving as DASPED will significantly benefit my professional development, as I will have access to data and resources that will advance my scholarly activities for years to come. My scholarly record is a primary reason I was appointed to this position, and I anticipate that impacting tribal economies in New Mexico and throughout Indian Country will further enhance my academic reputation.

Separately, I do recognize that NMSU is facing some budgetary difficulties, so although NMSU would normally make a contribution of the employer portion of my health insurance pursuant to ARP §7.20.60.E, I will waive that requirement so that no NMSU funds will need to be spent for my benefit during my leave, and I will elect federal health insurance. Thus, holding my academic line open should not cause any adverse budgetary impact for NMSU during my leave, and may actually result in budgetary savings.

Since my appointment as DASPED is a presidential appointment and not a contract, I will need some guidance as to whether ARP §7.20.60.F applies, since I do not believe I will have an annual evaluation. In the event that I do receive annual evaluations, I can certainly forward them to my department head.

ARP §7.20.60.G specifies that all "conditions of professional leave without pay, including the status of the individual upon return to the university and (if appropriate) the effect of this period on tenure and promotion eligibility, must be in writing prior to the

leave period." Since I was planning on going up for tenure this fall (I have attached the executive summary I developed in the workshop this summer), I propose that upon my return to the university as an Associate Professor in either January 2020 or 2021, I would go up for tenure the following fall semester.

Since ARP §7.20.60.G states that professional leaves "normally will not apply toward the probationary period for tenure," I would suggest that we treat my time on leave as a pause on my tenure clock, so the fall semester after my return will be within my sixth year of service.

When I return, I would also like to take over the management of the Indian Resource Development Program in the College of Business. We can leave until then discussions of teaching load and allocation of effort based on a shared vision of what IRD should be going forward.

Please let me know if I need to provide any additional information for your consideration.

TENURE REVIEW OF GAVIN CLARKSON
DRAFT EXECUTIVE SUMMARY

Introduction

My interest in tribal economies is both academic and personal. I have written and published extensively on tribal finance, economic development, and even Indian mascots. I have also seen first-hand the grinding poverty that pervades reservations in New Mexico and

throughout Indian Country, and I am only one generation removed from such poverty.

My pre-tenure research produced 37 peer-reviewed articles and book chapters. Since joining NMSU, I have had six articles either published or accepted and produced three peer-reviewed book chapters. The Financial Times named me the nation's "leading scholar in tribal finance,"and I am often cited as an expert on tribal finance, economic, and governmental issues by the Wall Street Journal, Bloomberg, and USA Today. I am currently an untenured associate professor in the Finance Department at NMSU, and based on my record, I am applying for tenure.

Academic Background

I earned both a bachelor's degree and an MBA from Rice University and a doctorate from the Harvard Business School in Technology and Operations Management. I am also a cum laude graduate of the Harvard Law School where I was president of the Native American Law Students Association. From 2003 until 2008 I was an assistant professor in the School of Information at the University of Michigan, with simultaneous Law School and Native American Studies appointments. For family reasons, I moved back home to Texas and accepted an untenured associate professor position at the University of Houston Law Center in 2008.

In 2011 NMSU initiated a nationwide search to recruit scholars from underrepresented communities, and I accepted the invitation to visit the campus and present my research. Because NMSU has the highest

percentage of enrolled tribal members of any Division I school and has strong ties to the tribes in New Mexico, I accepted the dean's invitation to "come and work on Indian stuff," starting in 2012 as an untenured associate professor. I had a strong desire to work with tribal students (most of whom are first-generation college attenders) as well as to have an impact on tribal economies in New Mexico and throughout Indian Country. When budgets tightened and the needs of the college changed, however, I shifted away from an emphasis on capacity building towards a more traditional research and teaching allocation and subsequently focused on research projects that could be completed with available resources. I also developed new research on tribal economies that should provide additional publications in the near future.

Should I be granted tenure, I would hope to work with the NMSU administration on capacity building to meet the needs of tribal students and communities throughout New Mexico as well as pursue an impactful research agenda focused on tribal economic development and prosperity.

Research and Impact

Given the Association to Advance Collegiate Schools of Business' emphasis on "impact," particularly research that "make[s] a difference in business and society," the following summarizes how my research has had such an impact, both in terms of articles produced while at NMSU as well as prior work[1] that has had an impact since I joined the Finance faculty:

• The Department of Interior issued an Advanced Notice of Proposed Rule Making regarding the Indian Trader Regulations, with particular emphasis on reducing or eliminating state overreach in tribal economies, particularly in the areas of regulation and taxation (in part based on a case involving the Jicarilla Apache Tribe in northern New Mexico). My recent article on tribal electronic commerce, Online Sovereignty, as well as new research on the Indian Trader Statutes, Tribes v. The Billion Dollar Tax Weevil, was cited by several tribal leaders and federal officials during the comment period and is now part of the federal record.

• Congress passed the Tribal Law and Order Act giving tribes criminal jurisdiction over non-Indian offenders in sexual assault, domestic violence, and child sexual abuse case. My scholarly voice was one of many providing examples of the need for legislative change.

• The NCAA adopted my published proposal for its mascot policy that was fully implemented the year I joined the NMSU faculty. My research was compelling, not only because it was the first empirical examination of nationwide mascot usage and demonstrated a correlation with underlying population demographics but also because it proposed a solution based on established principles of US trademark law. That research continues to influence the debate regarding the cancellation of the trademark for the Washington NFL franchise.

• Congress allocated $2 billion of tax-exempt Tribal Economic Development Bond capacity as part of American Recovery and Reinvestment Act. My

research demonstrating blatant discrimination by the IRS against tribal government bond issuances and my testimony before the Senate Finance Committee was instrumental in the passage of this provision.

• I developed a categorization scheme for information asymmetry that is externally generalizable beyond the tribal context and cited in publications unrelated to Indian Country.

• My own tribe has called a constitutional convention this summer, in part to restructure the tribal judiciary based on a model and rationale I put forth in an article more than a decade ago.

• The Patent Reexamination process revised statutorily by Congress in the America Invents Act and subsequently by USPTO regulation addresses the concerns I raised in several published articles, including a Strategic Management Journal article published the year before.

I am a lifetime member of the American Indian Science and Engineering Society (AISES) and have spent substantial time examining human capital development in Indian Country. To that end I was honored to be a co-PI on behalf of NMSU and the Southwest Indian Polytechnic Institute on a $750,000 NASA grant to increase STEM participation in Indian Country.

Perhaps my best example of applying my research in an impactful way while at NMSU involved helping the Cheyenne River Sioux Tribe in their negotiations with the federal government over a settlement for flooding their lands. By combining my legal and financial

research, I was able to persuade the federal government of the flawed nature of their financial compensation model and ultimately to convince the Department of the Treasury to pay the tribe an additional $33 million.

Service to the University and Mentoring of Native Students

When I arrived at NMSU, the Native American Business Students Association (NABSA) was nearly defunct, and general malaise existed throughout both of the two other American Indian student groups (AISES and United Native American Organization). I was brought in specifically to energize the American Indian students at the College of Business, but it was hoped that the addition of an enrolled tribal member to the faculty (albeit a Choctaw from Oklahoma) would also have a positive impact across campus.

I nurtured NABSA to the point where it is now one of the most active, most energized, and most excited student groups on campus. In addition to teaching American Indian Law and Policy, I developed a new Tribal Program Management course that served as a vehicle for the students to learn about creating, funding, operating, accounting for, and reporting on programs. Pedagogically, the students learned these skills when they put on the annual Native American Marketplace in partnership with the Friends of the Mesilla Valley Bosque Park. After my teaching load was altered, the Tribal Management Course was no longer offered. I continued to advise and mentor the students on program management, however, and The Marketplace

continued and recently completed its fourth successful year.

I also sponsored and coached the first ever NABSA business plan team as they participated in two different business plan competitions. At the National Reservation Economic Summit, the team placed second overall. I also helped move the Indian Resource Development Program into the College of Business and served as Interim Director during the transition.

Teaching Philosophy

I have successfully taught at both the undergraduate and graduate level for years with a consistent philosophy of "tough but fair." At the beginning of the semester, I make clear that I do not give grades ... the students earn grades. I also make clear what is expected throughout the course of the semester. For most undergraduate courses, I organize the semester into modules with multiple graded assignments and a comprehensive exam at the end of each module. This approach allows me to identify and potentially intervene if students are struggling before they fall too far behind. For graduate classes, my emphasis is on producing a written final product that is suitable for publication. I have helped many students secure their first published article over the years, including several who won the American Indian Law Review writing competition.

While my tribal heritage has probably prompted numerous American Indian students to seek me out for mentoring and guidance, Black and Hispanic students have also turned to me as a mentor, perhaps because of

my extensive involvement in various diversity initiatives such as the Ph.D. Project and my work with the Broadening Participation in Computing Initiatives at the National Science Foundation. Indigenous students from Central and South America, as well as Hispanic students generally, are also comfortable approaching me even if their English proficiency is limited, as I also speak Spanish.

Although my teaching evaluations have been consistently good, I want to point out at least one instance where things didn't go perfectly. I learned from the experience, and I made improvements. My first online teaching experience involved a series of live lectures that were recorded and subsequently streamed using MediaSite and Powerpoint slides. Use of Canvas LMS for that course was limited. Rather than repeat the recorded talking head lecture method, however, I subsequently chose to rely more on the publisher's video content and MindTap exercises. I also used ProctorU's remote exam proctoring for the first time, and I relied heavily on Canvas and its integration with MindTap, which use turned out less integrated than promised.

While it is fair to say that the initial offering of the course was not as successful as my face-to-face classes, many of the student evaluations pointed out that I was responsive, even at night and on weekends, particularly when technical issues interfered with course delivery. Ironically, one of my students was also my instructor for the Quality Matters online course. After acknowledging repeated technical issues with MindTap, she stated, "I want to thank Dr. Clarkson for being very responsive to emails and special requests. He

would answer me immediately and changed dates for me often . . . . When it comes to being available for student questions or issues, Dr. Clarkson was great!" I have completed my OCIP fellowship by incorporating many of her suggestions, and the course is now much better. Additionally, I have adapted elements from the online version of BLAW 316 back into the face-to-face offering, which also improved student performance.

Footnote

1 The Finance Department P&T guidelines specify a minimum of three articles over a five-year period, however, tenure review is not limited to that time period when evaluating "other indicators of research productivity" (§ 6.2)

FILED
United States Court of Appeals
Tenth Circuit
April 29, 2022
Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 21-2059 (D.C. No. 2:18-CV-00870-KRS-GBW) (D. N.M.)

DR. GAVIN CLARKSON, an individual, Plaintiff - Appellant,

v.

BOARD OF REGENTS OF NEW MEXICO STATE UNIVERSITY, et al., Defendants - Appellees.

ORDER

Before MORITZ, KELLY, and CARSON, Circuit Judges.

Appellant's petition for rehearing is denied.
Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

Text of NMSA §37-1-23(A)

Governmental entities are granted immunity from actions based on contract, except actions based on a valid written contract.

Text of ARP §8.53.1

After 3 years of service and with the approval of appropriate department head and administrators, any regular full-time exempt staff member or any faculty member of regular appointment with rank of instructor or above may submit an application for professional leave without pay, normally not to exceed 1 year, for the purpose of undertaking some project that will directly benefit the university and the person's professional development. These benefits must be detailed in the application.

Text of ARP §8.53.7

Periods of professional leave without pay normally will not apply toward the probationary period for tenure. All conditions of professional leave without pay, including the status of the individual upon return to the university and (if appropriate) the effect of this period on tenure and promotion eligibility, must be in writing prior to the leave period.

Text of ARP §10.50.9

Just Cause, capable of being proven by the standard of proof set forth at Part 11 subsection C, is required before suspension without pay, reduction in salary, or involuntary dismissal may be imposed. Just cause includes dishonest behavior; gross or habitual neglect of

professional responsibilities; willful violation of NMSU policy, rule or procedures; use of any improper influence to secure a promotion or privileges for individual advantage; or any other serious misconduct causing or creating the potential for harm to person, property or the institution. Just Cause may also be unrelated to any misconduct on the part of faculty, and could include a loss of licensure and/or clinical admitting privileges required for the performance of one's academic duties; or the medical inability to perform essential functions of the job.

Text of ARP §10.50.11

A recommendation to dismiss from employment or to reduce salary attributable to regular faculty employment are serious corrective actions implicating one's property rights, which is why just cause and due process are required before such action may be taken.

A. Due process requires fair and timely hearing processes, before an impartial hearing official or body. The faculty member charged with misconduct and facing serious disciplinary action is entitled to a predetermination hearing, at which the relevant facts are presented by the parties, and determined by a hearing officer to be accurate prior to proceeding with the proposed corrective action. This ensures that the faculty member has had an adequate opportunity to present a defense to the claims and the evidence; it also ensures that the decision makers have an accurate understanding of the facts underlying the recommendation.

B. The faculty member also has the right to a post-determination appeal to the provost and senior vice president for academic affairs, as well as the right to request a final review by the Chancellor.

C. At the pre-determination hearing and any subsequent appeal, the burden of proving just cause by the applicable standard of proof is on NMSU. The standard of proof shall be clear and convincing evidence for all infractions, except for disciplinary action proposed for discrimination proscribed by federal and state law, which matters are investigated by the university's Office of Institutional Equity; the burden of proof when discrimination constitutes the grounds for which the disciplinary action is being taken shall be preponderance of the evidence.