

February 5, 2021

Melanie Carpenter
Woods, Fuller, Shultz & Smith, PC
300 S Phillips Ave., Ste. 300
Sioux Falls, SD 57117-5027

LETTER DECISION AND ORDER

N. Bob Pesall Law Firm
PO Box 23
Flandreau, SD 57028

RE: HF No. 3G, 2020/21 – Dr. Houssain Kettani v. Dakota State University and South Dakota Board of Regents

This letter addresses Respondent's Answer and Motion to Dismiss submitted December 17, 2020; Petitioner's Brief in Resistance to Motion to Dismiss submitted January 20, 2021; and Respondent's Reply in Support of Motion to Dismiss submitted February 1, 2021.

On December 13, 2019, an investigative panel held an evidentiary hearing regarding accusations against Dr. Houssain Kettani (Kettani) regarding the alleged improper publication of a student's research paper. The panel examined two issues: (1) whether Kettani's publication of the paper without the knowledge of the student who wrote it constituted academic misconduct and (2) whether Kettani's placement of himself as co-author of the student's paper constituted academic misconduct. The panel found that Kettani violated International journal of Computer and Communication Engineering publishing ethics standards by not having the student's consent on the final version of the paper and submitting it against the student's will. The panel found that Kettani committed fraud and academic misconduct per South Dakota Board of Regents (SDBOR) policy. The panel, however, could not find by a preponderance of the evidence that Kettani committed academic misconduct by unilaterally placing himself as co-author of the student's paper. The panel concluded that termination was appropriate.

The conclusions of the panel were provided to Kettani, and he responded. On February 7, 2020, after reviewing the response, Dakota State University's President Griffiths upheld the findings of the panel and gave Kettani notice of intent to terminate his employment for violation of academic misconduct.

Kettani filed a grievance regarding his termination in approximately January 2020. He went through the steps of the grievance procedure set forth in the Council of Higher Education (COHE) agreement. Step 3 involved a COHE Panel Hearing, held on June 9, 2020, which reviewed any newly discovered evidence regarding the publication of the paper. The decision to terminate was affirmed following the grievance procedure. The grievance process concluded in October 2020. Kettani submitted his Petition for Hearing on Grievance on November 13, 2020.

Dakota State University and South Dakota Board of Regents (jointly, Respondent) has brought this motion to dismiss on the grounds that the Department of Labor & Regulation (Department) does not have subject matter jurisdiction over Kettani's appeal. Prior to July 1, 2020, SDBOR employees were entitled to appeal grievances to the Department under SDCL 3-18-15.2. On July 1, 2020, the COHE agreement expired, and the South Dakota State Legislature directed that SDBOR employees were no longer subject to collective bargaining agreements set forth in SDCL 3-18.

Kettani submitted his appeal to the Department on November 2020, after the Legislature had redefined public employee under SDCL 3-18-1(8) to exclude "any person employed by the SDBOR or employed by an institution under the authority of the Board of regents except a person employed at the South Dakota School for the Deaf or the South Dakota School for the Blind and the Visually Impaired." Respondent informed Kettani that because his grievance process was initiated while the COHE agreement was in effect, the SDBOR would allow him to complete all the steps even though it continued past July 1, 2020. Additionally, Respondent advised Kettani he could appeal the SDBOR's decision to the Department pursuant to SDCL 3-18-5.2. Respondent argues that this advisement was erroneous and does not confer subject matter jurisdiction to the Department.

Kettani asserts that his right to appeal is preserved by SDCL 3-18-15.4 and by the general savings statute, SDCL 2-14-18. SDCL 3-18-15.4 states:

Nothing in this chapter prevents a governmental agency from legally changing any ordinance, policy, or rule that is currently the subject matter of a grievance procedure. However, any prior contractual rights may not be affected by a subsequent change of any ordinance, policy, or rule.

Kettani argues that in this matter the legislature is the government agency making the rules change when it removed university employees from the list of persons covered by SDCL 3-18. Despite the changes made to SDCL 3-18, SDCL 3-18-5.4 was not altered. He further argues that he has a contractual right to appeal. Kettani also argues that actions already in process are preserved by South Dakota's general savings statute, SDCL 2-14-18 which provides:

The repeal of any statute by the Legislature shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

He further asserts that Respondent's liability to Kettani under the contract is preserved, and that the statutes revised by the legislature must be treated as still in force and effect for purposes of sustaining his grievance action.

Respondent counters that Kettani has no contractual right to appeal, because the COHE agreement established that appeals would be governed by SDCL 3-18-15.2 and other relevant laws. The COHE agreement did not establish its own contractual right to appeal, and SDCL 3-18-15.2 no longer applies to Kettani. Respondent further asserts that no further grievance or appeal rights are due under contract, and, therefore, Respondent has no contractual liability to Kettani. Respondent adds that the subject of the grievance were specific sections of the COHE agreement and SDBOR policies, and none of these policies have been changed by Respondent. Therefore, Respondent asserts that SDCL 3-18-15.4 does not preserve appeal rights. Respondent argues that SDCL 2-14-18 does not apply because no statute has been repealed. The change to the statute involved a change in definition of the term "public employee" in SDCL 3-18-1(8). The legislature additionally enacted SDCL 13-49-39 which provides that SDBOR employees are no longer subject to collective bargaining provisions set forth in SDCL 3-

18. Respondent further argues that had the statute been appealed, no penalty, forfeiture, or liability would be extinguished by it.

The Department finds that Kettani's right to appeal is not preserved under SDCL 3-18-15.4. The definition of "agency" is provided by SDCL 1-26-1 which states in pertinent part:

The term does not include the Legislature, the Unified Judicial System, any unit of local government, or any agency under the jurisdiction of such exempt departments and units unless the department, unit, or agency is specifically made subject to this chapter by statute

Therefore, the Legislature is not an agency for purposes of SDCL 3-18-15.4, and Kettani's contractual rights are not preserved thereby. However, the Department finds that SDCL 2-14-18 preserves the contractual liability to Kettani. The South Dakota Supreme Court has held that the right to proceed under a statute is preserved if the statute had been in effect at the time the matter commenced.

...a majority of the jurisdictions have enacted general savings statutes with the express purpose of achieving the continuation of repealed statutes in respect to past activity and pending legal actions...Where a statute is repealed, a general saving statute operates to save any substantive right of a private nature, liability, right of action, penalty, forfeiture, or offense which has accrued under the repealed statute. *Consequently, any action predicated upon the repealed statute may be commenced and prosecuted to a conclusion under the provisions of the repealed act.*

In Re Tinklenberg, 2006 SD 52, 716 N.W.2d 798, 804 quoting 1A Norman J. Singer, *Sutherland Statutory Construction* §23:38 (6th Ed.)

In *Tinklenberg*, Tinklenberg was accused of mishandling insurance proceeds in violation of SDCL 58-30-106. The State Division of Insurance (Division) sought to revoke Tinklenberg's insurance producer's license. The legislature repealed the relevant statute before the Division commenced its proceedings. The Court upheld the Division's right to proceed under the statute because it had been in effect at the time the violation occurred. The Court applied SDCL 2-4-18 and found that revocation of a license was a penalty for purposes of the statute.

In the present matter, the COHE contract was in place at the time Kettani's procedure commenced. The COHE contract provides contractual liability for the

purposes of SDCL 2-4-18. Respondent has argued that only a definition has changed and that no repeal has occurred. However, the court in *Tinklenberg* specified that the purpose of carrying a matter past a repeal date was “[t]o alleviate the hardship and to rectify the injustice of the common-law rules of construction and interpretation as they prescribe the effect of the repeal of a statute” *Id.* at ¶ 18. *Tinklenberg* guides the Department to allow matters to proceed in order to “alleviate hardship and to rectify injustice.” Allowing Kettani to proceed with his grievance appeal would alleviate hardship and rectify injustice by preserving the due process he was entitled to when the grievance matter commenced. The Department is persuaded that because the matter commenced before July 1, 2020, the Department maintains jurisdiction over this grievance appeal.

Respondent has also requested dismissal on the merits alleging that Kettani has not responded to the Answer and Motion to Dismiss. Kettani is not obligated to respond to the Answer, and he did respond to the Motion to Dismiss. The request for dismissal on the merits is denied.

ORDER:

For the above reasons, Respondent’s Motion to Dismiss is DENIED.

This letter shall constitute the order in this matter.

Sincerely,

A handwritten signature in blue ink that reads "Michelle Faw". The signature is written in a cursive, flowing style.

Michelle M. Faw
Administrative Law Judge