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DISTRICT IV

April 7, 2022

To:

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Circuit Court Judge
Electronic Notice

Mark Hazelbaker
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Carlo Esqueda
Clerk of Circuit Court
Dane County Courthouse
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Lori M. Lubinsky
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You are hereby notified that the Court has entered the following opinion and order:

2021AP860

Leonard Wilkosz v. School District of Lodi (L.C. # 2020CV1536)

Before Blanchard, P.J., Fitzpatrick, and Graham, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Leonard Wilkosz appeals the circuit court's judgment dismissing his complaint against the School District of Lodi ("the District"). The court granted the District's motion to dismiss the complaint for failure to state a claim. Wilkosz seeks to challenge the District's decision to non-renew his teaching contract. Based on our review of the briefs and the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT.

RULE 809.21(1) (2019-20).¹ We affirm based on Wilkosz’s failure to exhaust his administrative remedies.

“Whether a complaint states a claim upon which relief can be granted is a question of law that we review *de novo*.” *Milwaukee Deputy Sheriffs’ Ass’n v. Milwaukee Cnty.*, 2016 WI App 56, ¶5, 370 Wis. 2d 644, 883 N.W.2d 154. “[W]e accept as true all well-pleaded facts in a complaint, as well as the reasonable inferences therefrom.” *Id.* “[L]egal conclusions stated in the complaint are not accepted as true, and they are insufficient to enable a complaint to withstand a motion to dismiss.” *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶19, 356 Wis. 2d 665, 849 N.W.2d 693.

Wilkosz’s complaint against the District includes the following factual allegations that we accept as true for purposes of our review. The non-renewal of teacher contracts is governed by the procedures set forth in WIS. STAT. § 118.22 and provisions in the District’s staff handbook, which includes a grievance policy.² Early in 2020, the school superintendent informed Wilkosz that he intended to recommend that the school board non-renew Wilkosz’s contract. In response, Wilkosz requested a private conference with the board pursuant to § 118.22. During the conference, the superintendent did not provide the board with specific names, dates, or other facts relating to the superintendent’s allegations against Wilkosz. The board did not have any testimony, affidavits, or witness statements before it. Instead, the board had only the superintendent’s “hearsay assertions.” After the private conference, the board

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

² Although this allegation arguably contains a legal conclusion as to what authority governs non-renewal of teacher contracts, we accept the entire allegation as true because the District does not dispute that non-renewals are governed by WIS. STAT. § 118.22 and the staff handbook.

president informed Wilkosz by letter that the board had voted to non-renew his contract. Wilkosz then filed a grievance pursuant to the staff handbook grievance policy. An independent hearing officer heard the grievance and sustained the board's non-renewal vote.

In his complaint filed in the circuit court, Wilkosz further alleged that the superintendent conducted a "sham" investigation that was "structured to reinforce a pre-determined conclusion," and that the school board's vote to non-renew his contract was a "rubber stamp" on the superintendent's recommendation. Wilkosz claimed that the board's decision was based on nothing more than hearsay from the superintendent and, as such, it was arbitrary and capricious. He also claimed that the board violated WIS. STAT. § 118.22 by delegating the non-renewal decision to the superintendent.

The District moved to dismiss Wilkosz's complaint for failure to state a claim. Among other arguments, the District contended that Wilkosz had waived and settled his grievance by failing to complete the grievance process as set forth in the staff handbook grievance policy.

In granting the motion, the circuit court concluded that the school board had complied with the procedures in WIS. STAT. § 118.22 and with the staff handbook's grievance policy. The court also concluded that Wilkosz had failed to avail himself of the final step in the grievance process—an appeal to the board with an evidentiary hearing—and that, under the grievance policy, this failure was deemed a waiver of the appeal and a settlement of the grievance.

On appeal, Wilkosz argues that the circuit court should not have dismissed his complaint. He contends that his complaint allegations are sufficient to state a claim that the school board's decision to non-renew his contract, without any evidence, was arbitrary and capricious. Wilkosz concedes, however, that he did not avail himself of the final step in the grievance process,

namely, an appeal to the board, and he does not dispute that an appeal to the board would have included an evidentiary hearing.³

We agree with the circuit court and the District that the court properly dismissed Wilkosz's complaint based on Wilkosz's abandonment of the grievance process as set forth in the staff handbook grievance policy. According to the policy, failure to timely complete any step in the process is deemed a waiver and settlement of a grievance. The relevant provision of the policy states as follows: "The time limits set forth in this Section shall be considered as substantive, and failure of the grievant to file and process the grievance within the time limits set forth in this Section shall be deemed a waiver and a settlement of the grievance."⁴

Wilkosz contends that he should not be held to this waiver provision or required to exhaust his administrative remedies because an appeal to the school board—the same body that had already ruled against him—would have been futile. He argues that the doctrine of exhaustion of remedies does not require a litigant to pursue a futile administrative remedy. Relying on *Coachella Valley Mosquito & Vector Control District v. California Public*

³ Wilkosz appears to have abandoned his claim that the board violated WIS. STAT. § 118.22 by delegating the non-renewal decision to the superintendent. Regardless, our decision and analysis would be the same.

⁴ Wilkosz does not dispute that the staff handbook and grievance policy are part of our review in deciding whether his complaint states a claim. Although Wilkosz did not attach the handbook or policy to his complaint, the District filed copies of these documents in support of its motion to dismiss. Under *Soderlund v. Zibolski*, 2016 WI App 6, ¶37, 366 Wis. 2d 579, 874 N.W.2d 561, courts "may consider a document attached to a motion to dismiss or judgment on the pleadings without converting the motion into one for summary judgment, if the document was referred to in the plaintiff's complaint, is central to his or her claim, and its authenticity has not been disputed." Here, Wilkosz's complaint refers to the staff handbook and grievance policy; the handbook and policy are, we conclude, central to his claim; and Wilkosz does not dispute the authenticity of the copies the District filed. For these reasons, we consider the staff handbook and grievance policy in addressing whether Wilkosz's complaint states a claim.

Employment Relations Board, 112 P.3d 623 (Cal. 2005), Wilkosz argues that the futility exception may be satisfied by a showing that the agency has prejudged an appeal. Wilkosz appears to be relying on the court’s statement in *Coachella* that “[t]he futility exception requires that the party invoking the exception ‘can positively state that the [agency] has declared what its ruling will be on a particular case.’” *Coachella*, 112 P.3d at 628 (quoted source omitted).

Coachella is not binding on this court. Regardless, we are not persuaded by Wilkosz’s reliance on *Coachella*. The factual allegations in Wilkosz’s complaint, even if accepted as true, do not establish that the school board would have prejudged his appeal had he brought one.⁵ As noted above, Wilkosz alleged that the board voted to non-renew his contract based on the superintendent’s “hearsay assertions”; that the superintendent conducted a “sham” investigation that was “structured to reinforce a pre-determined conclusion”; and that the board’s decision was a “rubber stamp” of the superintendent’s recommendation to non-renew his contract. These allegations, if accepted as true, might support a reasonable inference that the *superintendent* was biased against Wilkosz, but they do not support a reasonable inference that the *board* would have prejudged an appeal that would have included an evidentiary hearing.

Wilkosz also relies on *Benson v. Gates*, 188 Wis. 2d 389, 525 N.W.2d 278 (Ct. App. 1994), but *Benson* likewise does not support Wilkosz’s futility argument. In *Benson*, the court concluded that exhausting agency remedies was futile when the only issue in dispute was a question of law that the court would review without deference to the agency. See *Benson*, 188

⁵ Wilkosz’s complaint includes an allegation that “[a]ll administrative remedies available to Wilkosz have been exhausted or are futile.” We do not accept this allegation as true because nothing in Wilkosz’s briefing convinces us that this allegation is a factual allegation rather than a legal conclusion.

Wis. 2d at 400-02. Here, in contrast, Wilkosz's complaint allegations do not support a reasonable inference that the only issues in dispute are questions of law.

Therefore,

IT IS ORDERED that the circuit court's judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals