

IN THE SUPREME COURT OF IOWA

YEMPABOU PALO,

Petitioner-Appellee,

vs.

IOWA BOARD OF REGENTS,

Respondent-Appellant.

SUPREME COURT NO. 14-0085

APPELLEE'S RESISTANCE TO
APPELLANT'S MOTION FOR
IMMEDIATE STAY OF DISTRICT
COURT RULING PENDING
CONSIDERATION OF
APPLICATION FOR
INTERLOCUTORY REVIEW

COMES NOW, the Petitioner-Appellee, Yempabou Palo, by and through his undersigned counsel, and for his Resistance to Appellant's Motion for Immediate Stay of District Court Ruling Pending Consideration of Application for Interlocutory Review, states as follows:

1. The Appellant is correct in stating this matter involves student disciplinary proceedings. These proceedings are governed by Iowa Code Chapter 17A, the stated purpose of which is:

To provide legislative oversight of powers and duties delegated to administrative agencies; *to increase public accountability of administrative agencies*; to simplify government by assuring a uniform minimum procedure to which all agencies will be held in the conduct of their most important functions; to increase public access to governmental information; to increase public participation in the formulation of administrative rules; *to increase the fairness of agencies in their conduct of contested case proceedings*; and to simplify the process of *judicial review of agency action* as well as increase its ease and availability.

Iowa Code §17A.1(3) (emphasis added).

2. Iowa Code Chapter 17A applies to Appellant as it is a “. . . board, commission, department, officer or other administrative office or unit of the state.” Iowa Code §17A.2(1). *See* Appellant’s Motion to Waive Filing Fee (“The Board of Regents is a state entity”)

3. As a student at a university governed by Appellant, *see* Iowa Code §262.7(2), Appellee has the right to challenge Appellant’s decision and seek a stay through the district court. *See* Iowa Code §17A.19(1) (“A person or party who has exhausted all adequate administrative remedies and who is aggrieved or adversely affected by any final agency action is entitled to judicial review thereof under this chapter.”); Iowa Code §17A.19(5)(d) (“If the court determines that relief should be granted from the agency’s action on an application for stay . . . the court may issue an order . . . granting a stay on appropriate terms, or granting other temporary remedies.”)

4. Any claim by Appellant’s to the right to unilaterally determine misconduct and punishment immediately collides with the Due Process rights set forth in the United States and Iowa Constitutions. *See Goss v. Lopez*, 419 U.S. 565, 575 (1975) (“The Due Process Clause also forbids arbitrary deprivations of liberty. ‘Where a person’s good name, reputation,

honor, or integrity is at stake because of what the government is doing to him,' the minimal requirements of the Clause must be satisfied.”)

5. Respect for the sound judgment of the district courts leads the appellate courts to rarely reverse discretionary decisions. *First Midwest Corp. v. Corporate Fin. Assocs.*, 663 N.W.2d 888, 890 (Iowa 2003).

6. Pursuant to Iowa Code §17A.19:

In proceedings for judicial review of agency action in a contested case, however, *a court shall not itself hear any further evidence* with respect to those issues of fact whose determination was entrusted by Constitution or statute to the agency in that contested case proceeding. . . . If it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the contested case proceeding before the agency, the court may order that *the additional evidence be taken before the agency* upon conditions determined by the court.

Iowa Code §17A.19(7) (emphasis added).

7. The district court had access to the administrative record from the hearing before the Administrative Law Judge, and relied on by President Leath and the Board of Regents in issuing their decisions. The application for stay was addressed by the agency, with all parties provided the opportunity to submit evidence and argument. No argument regarding the sufficiency of evidence was raised before the agency. Where the district court has some evidence, be it an affidavit, sworn testimony, *or their equivalent*, on which it may ascertain the circumstances confronting the

parties and balance the harm that may be prevented against the harm that may result, it properly exercises its discretion. *See Kleman v. Charles City Police Dep't*, 373 N.W.2d 90, 96 (Iowa 1985) (emphasis added).

8. It is an axiomatic principle of appellate law that in order to preserve error, the issue must be raised and adjudicated by the district court before the appellate court will decide the issue. *Staff Mgmt. v. Jimenez*, 839 N.W.2d 640, 647 (Iowa 2013) (citing *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002)).

9. This axiom and the statutory prohibition set out above contradict Appellant's assertion that as Appellee did not supply the district court with testimony or an affidavit, the district court abused its discretion in ordering a stay. Appellant failed to make any argument to the district court asserting a lack of testimony, either oral or affidavit, deprived the court of any factual basis on which a stay could be granted.

10. Appellant failed to raise the issue of the district court's authority before the district court. Appellant failed to request the district court rule on the issue. Appellant failed to file any motion for reconsideration, asking the district court address the authority issue. Based upon the Appellant's failures, this Court should determine Appellant failed

to properly preserve error and hence, any contention related to the district court's authority should be deemed waived.

11. Appellant further contends the court abused its discretion by interjecting itself into the decisions of academic officials. In doing so, Appellant relies on *North v. State*, 400 N.W.2d 566 (Iowa 1987) to argue against judicial review of academic decisions. The case relied on is inapposite to the present matter. In *North*, the decision challenged was the university's refusal to readmit a student following an authorized leave of absence. *Id.* at 567. In addressing a reluctance to interfere with the decision, the Iowa Supreme Court noted it was appropriate for the court to show reluctance to: “. . . to involve itself in the discretionary function of officials of academic institutions who must daily decide *who should be admitted, who should be readmitted, who should be graduated, and how the performance of students should be measured.*” *Id.* (emphasis added.) The Iowa Supreme Court further notes that this reluctance should be applied to review of the substance of a *genuinely academic decision.* *Id.* (quoting *Regents of University of Michigan v. Ewing*, 474 U.S. 214 (1985)) (emphasis added).

12. Appellee's academic performance or whether he should be enrolled as a student at Iowa State University is not a question at issue. President Leath's decision, approved in full by Appellant, specifically states

that Appellee “. . . has excelled academically at Iowa State University”
(Final Decision at 4.)

13. What is in question is whether the sanction prohibiting Appellee from participating in intercollegiate athletics, coming out of disciplinary proceedings effectuated by Iowa State University, is arbitrary and capricious and an abuse of discretion. *See Henson v. Honor Committee of U. Va.*, 719 F.2d 69, 74 (4th Cir. 1983) (“. . . disciplinary proceedings require more stringent procedural protection than academic evaluations, even though the effects of an adverse decision on the student may be the same.”)

14. The district court properly considered the factors for stay as set out in Iowa Code §17A.19(5)(c), to which the district court refers in its Ruling. (Ruling at 7.) These factors are:

- (1) The extent to which the applicant is likely to prevail when the court finally disposes of the matter.
- (2) The extent to which the applicant will suffer irreparable injury if relief is not granted.
- (3) The extent to which the grant of relief to the applicant will substantially harm other parties to the proceedings.
- (4) The extent to which the public interest relied on by the agency is sufficient to justify the agency's action in the circumstances.

Iowa Code §17A.19(5)(c).

15. Appellant faults the district court for its supposed failure to consider the likelihood of success on the merits. This argument disregards that likelihood of success is only one factor, balanced along with the three other factors, in deciding whether a stay should be granted. The Iowa Supreme Court has explicitly stated:

This factor does not describe the degree of likelihood of prevailing, but only requires the court to consider and balance the extent or range of the likelihood of success. See generally John W. Gotanda, Emerging Standards for Issuing Appellate Stays, 45 Baylor L. Rev. 809 (1993). Thus, the degree of likelihood of success required to be shown to obtain a stay will necessarily vary with the assessment of the other three factors. Mohammed v. Reno, 309 F.3d 195, 101 (3rd Cir. 2002). A stay can be granted "where the likelihood of success is not high but the balance of hardships favors the applicant." Id.

Grinnell College v. Osborn, 751 N.W.2d 396, 402 (Iowa 2008) (emphasis added). Even if Appellee has a minimal likelihood of success on the merits, if the remaining three factors weigh in his favor, a stay is warranted.

16. The district court correctly found that Appellee would be irreparably harmed should a stay not have been granted. An irreparable injury exists where the absence of a stay *would deprive a party of the ability to obtain relief if successful at the conclusion of judicial review. Grinnell College, 751 N.W.2d 396, 402 (Iowa 2008).*

17. It is uncontested that Appellee is a fifth year senior who has used his "red-shirt" year, whose eligibility to participate in intercollegiate

athletics expires at the end of the current season. It is uncontested that Appellant renewed Appellee's scholarship at the university, during the pendency of administrative proceedings. It is uncontested that President Leath issued his decision after the start of the academic calendar year, the deadline for Appellee to transfer to another university and maintain his eligibility.

18. Should the district court's grant of stay be overturned, Appellee will lose his final opportunity to participate in intercollegiate athletics. *This is an undisputed fact.* This loss cannot be compensated for should the district court ultimately reverse Appellant's decision.

19. Appellee acknowledged before the district court that participation on the basketball program is a privilege and not a right. But this does not mean that Iowa State University or the Board of Regents can arbitrarily and unilaterally decide that a student, in otherwise good standing, is forbidden to participate in this aspect of the collegiate experience. This also does not mean, as Appellee again acknowledged before the district court, that the athletic staff cannot decide, based on an individualized assessment of a player and the needs of the team, which players play. *See Heike v. Guevara*, 519 Fed. Appx. 911, 922 (6th Cir. March 18, 2013) (. . . "a coach's decisions about who plays, how much playing-time each player gets,

and whether a player remains part of the team at the end of a season are, by their nature, ‘based on a vast array of subjective, individualized assessments.’”) (Citation omitted).

20. By renewing Appellee’s scholarship in or about June 2013, an action taken by Iowa State University officials knowing the allegations against him, these officials made the determination that all requirements for eligibility and good standing had been met. To be eligible for this scholarship, Petitioner had to meet applicable NCAA, conference, and institutional regulations to be eligible for financial aid. *See NCAA Division I Manual*, Art. 15.3.1.1. Iowa State University’s Office of Judicial Affairs is authorized to, when a student is accused of violating the Code of Conduct, to place a hold on the accused student’s new awards of financial aid until the case is adjudicated when the alleged conduct is such that, if true, may pose a threat of harm to persons or property. ISU Student Disciplinary Regulation 5.5.1. Because no such action was taken, Iowa State University presented to Appellee the opportunity to participate in the basketball program, an opportunity on which he relied.

21. Appellant’s assertion that Iowa State University’s public perception would be harmed should Appellee be permitted to participate in the basketball program is unsupported by any evidence, and is entirely

speculative. Appellant relies on the testimony of Iowa State University Dean of Students, Pamela Anthony, who testified to playing no role in any previous proceedings of this case, to assert that the public interest will be harmed if the university is not permitted to Appellee force to take responsibility for his action and accept the consequences for his actions.

22. First and foremost, Appellee continues to challenge all allegations that he committed sexual misconduct. While President Leath determined such actions occurred, a determination that Appellant “rubber-stamped” in a five-line decision taking three months to issue, this finding was contrary to the decision of an experienced ALJ who presided over ten-hours of in-person testimony and upon whose record President Leath relied. This also flies against the decision by the Story County Attorneys’ Office to dismiss criminal sexual abuse charges upon determining the complaining witness lacked credibility and evidence had been fabricated.

23. Second, inherent in the Appellant’s argument is the concept that its reputation and authority will be damaged if it is required to adhere and comply with a legally issued decision by a court exercising its proper authority. Such an assertion is illogical, because he has already missed seventeen games this year already.

24. Furthermore, Appellee was fully reinstated to the men's basketball team last season while the administrative proceedings against him were ongoing. Any harm to the university's reputation which could occur would have happened at this time, but none did. This fact was explicitly recognized by the district court:

The Iowa Board of Regents also alleges that having Mr. Palo on the ISU basketball team tarnishes the University's reputation and image and presents a threat to other students. If this is true, then why renew Mr. Palo's scholarship, allow him to remain a student in "good standing," and have full and unrestricted privileges as an ISU student, other than participating in basketball? Further, if these claims are truly believed, then why was he reinstated to the basketball team during the 2012-13 season and allowed to participate in 17 games?

(Ruling at 6-7.) This speculative and ephemeral harm is clearly outweighed by the immediate and practical loss Appellee would suffer should the stay be overturned.

25. Appellant also cites to Ms. Anthony's testimony on the necessity of student disciplinary rules to ensure an environment where students can succeed academically and personally. What Appellant does not state is how Appellee's participation in basketball undermines this environment. If President Leath considered Appellee to be a threat to campus or the student body, either academically or personally, he had the options of expelling him from Iowa State University or deciding that his scholarship would not be renewed. Neither option was utilized. Instead, the

scholarship was renewed *and Appellee remains a full-time student at the university*. Additionally, when Ms. Anthony was asked how permitting Appellee to participate in the basketball program caused him to be a threat to any student, she could not provide any scenario where student safety would be jeopardized.

26. The district court's Ruling is well-reasoned and supported by the evidence in the record. In its Ruling, the district court properly balanced all relevant factors and correctly determined they weighed in Appellee's favor. For all the reasons set forth above, Appellant's Motion for Immediate Stay of District Court Ruling must be denied.

WHEREFORE, Petitioner-Appellee, Yempabou Palo, prays that this Court summarily deny Appellant's Motion for Immediate Stay of District Court Ruling Pending Consideration of Application for Interlocutory Review.

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**ATTORNEYS FOR
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PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause by:

- | | |
|---|---|
| <input type="checkbox"/> personal service | <input type="checkbox"/> first class mail |
| <input type="checkbox"/> certified mail, return receipt requested | <input checked="" type="checkbox"/> facsimile |
| <input type="checkbox"/> Airborne Express (overnight) | <input type="checkbox"/> electronic filing |
| | <input type="checkbox"/> e-mail |

on the 23 day of January, 2014.

I declare that the statements above are true to the best of my information, knowledge and belief.

Matthew M. Boles

Original filed.

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