No. 121A23 TWENTY-FIRST JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA
****

ALVIN MITCHELL,

Petitioner-Appellant,

v.

THE UNIVERSITY OF NORTH CAROLINA BOARD OF GOVERNORS,

Respondent-Appellee.

From Forsyth County

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RESPONSE TO MOTION TO DISMISS APPEAL

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RESPONSE TO MOTION TO DISMISS APPEAL

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Sometimes the loudest sound is silence.

In its motion to dismiss the constitutional appeal (and in its response to the petition, for that matter), the University doesn't dispute that the deference issue in this appeal is substantial. The University doesn't dispute that our state's case law is in disarray. It doesn't dispute that the Court of Appeals applied a federal standard that federal courts have since repudiated. It doesn't dispute that deference violates the North Carolina Constitution or that deference encourages agencies to misbehave.

Rather than dispute the substantiality of the constitutional questions presented—the governing standard under N.C. Gen. Stat. § 7A-30(1)—the University conjures vehicle problems for this appeal. None of those concerns stick.

I. The Deference Issue Is Properly Before This Court.

The University argues that the deference issue is not properly preserved for review in this Court. The University, however, has apparently misunderstood how errors committed by the Court of Appeals are preserved for review in this Court.

Had the deference issue arisen at trial, Appellate Rule 10 would have required Professor Mitchell to present "to the trial court a timely request, objection, or motion" opposing deference. N.C. R. App. P. 10(a). But since the deference issue did not arise at trial, there was nothing for Professor Mitchell to object to in that court. By its own terms, Appellate Rule 10 applies only to the preservation of errors made in "trial proceedings." The University's citations were expressly decided under Rule 10, based on errors in trial tribunals, and are therefore irrelevant. *See, e.g.*, *State v. Ray*, 364 N.C. 272, 277-78, 697 S.E.2d 319, 322 (2010); *State v. Jaynes*, 342 N.C. 249, 263, 464 S.E.2d 448, 457 (1995). The University's other case involved an appellant who presented a new issue to the Court of Appeals, which it had never raised as a basis to dismiss the lawsuit in the trial court. *Higgins v. Simmons*, 324 N.C. 100, 103, 376 S.E.2d 449, 452 (1989).

None of the University's cases address what should happen when the error first occurs at the Court of Appeals. That answer lies in Appellate Rule 16(a), and a different line of authority. Under Rule 16(a), this Court reviews determinations of the Court of Appeals for "error[s] of law." N.C. R. App. P. 16(a); *accord Irving v. Charlotte-Mecklenburg Bd. of Educ.*, 368 N.C. 609, 611, 781 S.E.2d 282, 284 (2016). That is true whether this Court accepts the appeal under its mandatory jurisdiction or in its discretion. N.C. R. App. P. 16(a).

To preserve an error of law committed by the Court of Appeals for review in this Court, an appellant need do only two things: (1) seek review of the issue in the Supreme Court, and (2) argue the error in its new briefing. *See, e.g.*, *State v. Stanley*, 288 N.C. 19, 26, 215 S.E.2d 589, 594 (1975); *State v. Miller*, 282 N.C. 633, 643, 194 S.E.2d 353, 359 (1973); *State v. Williams*, 274 N.C. 328, 333, 163 S.E.2d 353, 356-57 (1968). That is what Professor Mitchell is now doing—filing a notice of appeal based on the substantial constitutional questions presented in this case, with the intent to brief those issues in this Court.

Not only does the University's motion misunderstand these principles, but the University's waiver argument also makes no sense on this record. The first time an error related to deference occurred was in the Court of Appeals, not the trial court. In the trial court, Professor Mitchell sought de novo review of the University's termination decision and of the University's interpretation of its rules. (R pp 113-14.) The University never sought deference for its

interpretation. (R pp 32-55.) The trial court conducted a de novo review and did not defer. (R pp 123-35.)

On appeal, Professor Mitchell again asked the Court of Appeals to conduct a de novo review. Br. for Pet'r-Appellant at 15, *Mitchell v. UNC Bd. of Governors*, No. COA21-639 (N.C. Ct. App. Apr. 4, 2023), 2022 WL 159613, at *14-15. But, for the first time on appeal, the University swapped horses and sought deference. Br. for Resp't-Appellee at 13-14, *Mitchell*, No. COA21-639, 2022 WL 845818, at *13-14.

Then, unlike the trial court, the Court of Appeals based its holding on deference. When determining whether the University followed its own rules to terminate Professor Mitchell, the Court of Appeals quoted the "plainly erroneous" deference standard three times. (Slip Op. at 9, 11, 12.) It applied that standard to rule against Professor Mitchell. (*Id.* at 12 (deferring to the University's interpretation of its rules because it "[wa]s not plainly erroneous")). By doing so, the Court of Appeals rejected the de novo standard sought by Professor Mitchell and accepted the deference standard promoted by the University on appeal.

The Constitution was violated when the Court of Appeals issued its deference-giving opinion. That means the appeal to this Court is the first opportunity that Professor Mitchell has had to both preserve and seek appellate review of this error.

II. The University's Violation of Its Own Rules Presents Substantial Constitutional Questions that Should Not Be Dismissed.

The constitutional questions presented in this appeal are substantial.

First, despite the University's confessed confusion, (Mot. to Dismiss at 27), these questions are indeed substantial. Professor Mitchell was a tenured professor, having a contract that limited the University's right to terminate him. (R p 124 ¶¶ 1-2; Doc. Ex. 1171 ¶ 4.) When the University terminated Professor Mitchell without following the limitations on its termination authority, it violated multiple provisions of the federal and state constitutions. It violated the fruits-of-their-labor clause, which this Court recently clarified. *See Tully v. City of Wilmington*, 370 N.C. 527, 535-36, 810 S.E.2d 208, 215 (2018) (explaining that the clause "applies when a governmental entity acts in an arbitrary and capricious manner toward one of its employees by failing to abide by promotional procedures that the employer itself put in place"); *accord id.* at 536, 810 S.E.2d at 215-16 ("[W]e conclude that the City's actions here implicate Tully's right under Article I, Section 1 to pursue his chosen profession free from actions by his governmental employer that, by their very nature, are unreasonable because they contravene policies specifically promulgated by that employer for the purpose of having a fair promotional process.").

The University's same misconduct also violated the law of the land clause in the state constitution and the due process clause in the federal

constitution. Professor Mitchell had a protectable property interest in his employment because he was tenured. *Crump v. Bd. of Educ. of Hickory Admin. Sch. Unit*, 326 N.C. 603, 613-14, 392 S.E.2d 579, 584 (1990); *see also Bd. of Regents v. Roth*, 408 U.S. 564, 576-77 (1972) ("[I]n the area of public employment, the Court has held that a public college professor dismissed from an office held under tenure provisions, and college professors and staff members dismissed during the terms of their contracts, have interests in continued employment that are safeguarded by due process." (citations omitted)). Even the court below recognized that basic point. (Slip Op. at 9-10 ("Petitioner was a tenured professor who held a protected property interest in his employment.").)

These underlying constitutional violations matter on appeal because the deference issue is a roadblock to vindicating these rights. Deference is not decided in a vacuum; deference fights happen in the context of a disputed claim. Because the Court of Appeals deferred to the University's interpretation of its own rules, it held that the University followed its own procedures. Based on that deference-induced misinterpretation, the court held that no constitutional violations occurred. That analysis was erroneous from beginning to end. This Court should accept review of the underlying constitutional questions because they straightforwardly follow from the deference issue (which is a substantial constitutional question in its own right).

Second, the University's waiver arguments misunderstand how preservation works when agency actions are challenged as unconstitutional. The preservation requirement of Appellate Rule 10 lets trial courts consider and resolve issues "on the front end," which may resolve the issue entirely and thereby avoid "needless after-the-fact appeals." *State v. Corbett*, 376 N.C. 799, 833, 855 S.E.2d 228, 253 (2021) (Berger, J., dissenting).

The purpose of the preservation requirement is not served here because agencies cannot rule on constitutional challenges. Constitutional issues need not be raised with administrative agencies for consideration in the first instance because "[t]he law does not contemplate that administrative boards shall pass upon constitutional questions." *Gulf Oil Corp. v. Clayton*, 267 N.C. 15, 20, 147 S.E.2d 522, 526 (1966). If Professor Mitchell had raised a constitutional challenge during the administrative proceedings, the government's only option would have been to abstain from addressing the question. *State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, Inc.*, 336 N.C. 657, 674, 446 S.E.2d 332, 342 (1994) (holding that the agency "did not have the authority" to hear constitutional challenges, so it "properly declined to do so").

This incompetence of administrative agencies is a feature, not a bug, of North Carolina administrative law. Under our constitution, administrative agencies are "limited" when they exercise "judicial power." *In re Redmond*, 369 N.C. 490, 493, 797 S.E.2d 275, 277 (2017); *see also* N.C. Const. art. IV, § 3.

They can exercise only "such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purposes for which the agencies were created." N.C. Const. art. IV, § 3. And it is not reasonably necessary for agencies to pass on constitutional questions. An agency's "judicial power clearly does not extend to consideration of constitutional questions," since it is a "well-settled rule" that constitutional questions "shall be determined by the judiciary, not an administrative board." *Redmond*, 369 N.C. at 493, 797 S.E.2d at 277 (quoting *Meads v. N.C. Dep't of Agric.*, 349 N.C. 656, 670, 509 S.E.2d 165, 174 (1998)).

Finally, the University's waiver argument has missed key parts of the record in the trial court and Court of Appeals. For example, the preservation question for the fruits-of-their-labor clause is whether that constitutional claim was presented to the trial tribunal. *See* N.C. R. App. P. 10(a). Contrary to the University's motion, it was plainly presented to the trial court. The trial proceeding began with a petition for judicial review—the equivalent of a complaint. Professor's Mitchell's pleading expressly pleaded this constitutional claim:

> 88. The Final Decision is in violation of Article I, Section 1 of the North Carolina Constitution. By upholding WSSU and the BOT's disregard of the procedural due process requirements set forth in Section 603 of the Code, the Final Decision arbitrarily and irrationally deprives Petitioner of his "right to the enjoyment of the fruits of [his] own labor."

(R p 9 ¶ 88; *see also* R p 9 ¶¶ 87, 89-90 (likewise challenging the agency's actions for violating his constitutional rights to due process and free speech).) So when the University says, "Mitchell did not even mention the fruits of labor clause" to the superior court, the University is mistaken. (Mot. to Dismiss at 28.)

The University has also misperceived the briefing at the Court of Appeals. Professor Mitchell briefed the fruits-of-their-labor issue in that court, both seeking relief on that constitutional clause and citing a very recent decision from the Court of Appeals on the clause. Br. for Pet'r-Appellant at 15-16, *Mitchell*, No. COA21-639 (citing the clause and *Mole' v. City of Durham*, 279 N.C. App. 583, 866 S.E.2d 773 (2021), *aff'd & ordered not precedential,* 884 S.E.2d 711 (N.C. 2023)). Professor Mitchell then concluded his argument by expressly seeking relief under this clause: "[The University's] departure from its written termination procedures violated Mitchell's constitutional rights to due process and to enjoy the fruits of his labors. Therefore, the termination must be overturned." *Id.* at 21.

The constitutional issues presented for this Court's review are, therefore, well preserved.

III. This Case Is an Excellent Vehicle for Reviewing These Substantial Constitutional Questions.

The substantiality of the questions presented here is not seriously disputed. The recent and pending decisions from the U.S. Supreme Court about deference, and this Court's recent decisions about agencies violating their own rules, would make that kind of argument impossible. The University never tries to muster such an argument. Instead, the University offers only vehicular roadblocks to this Court's review. But, as already shown, the roadblocks are illusory.

Indeed, on the deference issue especially, this case is an excellent vehicle. Deference issues do not always arise in a lawsuit between a private party and an agency; sometimes they arise when only private parties are mired in litigation, and the agency is not present to advocate for its deference position. That kind of case is a poor vehicle to decide such a major question. The party with the most at stake is absent.

Fortunately, this is not such a case. Not only has the University been represented by the Department of Justice at every stage of this litigation, but now that the case has arrived at this Court, the Solicitor General has arrived to articulate and defend the State's position on deference.

Not every litigant has the tenacity to present an issue like deference to this Court, but Professor Mitchell does. If not now, no one can say when this

Court will again have an opportunity to thoughtfully consider the deference issue. The Court should accept review of the issues presented and deny the University's motion to dismiss.

Respectfully submitted this the 31st day of May, 2023.

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This the 31st day of May, 2023.

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