

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

App. No. 30602

WILLIAM J. SWEENEY

Plaintiff and Appellant

vs.

THE SOUTH DAKOTA BOARD OF REGENTS and the UNIVERSITY OF SOUTH
DAKOTA,

Defendants and Appellees

APPEAL FROM THE CIRCUIT COURT, FIRST JUDICIAL CIRCUIT
CLAY COUNTY, SOUTH DAKOTA

THE HONORABLE TAMI A. BERN
CIRCUIT COURT JUDGE

Appeal Filed January 19, 2024

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STATEMENT OF JURISDICTION

The Order of Dismissal of Dr. Sweeney's Appeal to Circuit Court was signed and filed on January 13, 2024. R _____. The Notice of Appeal and Appellant's Docketing Statement were filed and served on opposing counsel on January 19, 2024, within the time specified by SDCL 15-26A-6. R _____.

REQUEST FOR ORAL ARGUMENT

Dr. Sweeney requests an oral argument regarding the issues in this appeal, pursuant to SDCL 15-26A-82.

PRELIMINARY STATEMENT

This appeal comprises three separate administrative appeals to Circuit Court. These cases were consolidated upon the motion by Appellant. Documents from 13CIV21-118 will be cited R1 _____. Documents from 13CIV22-060 will be cited R2 _____. Documents from 13CIV22-120 will be cited R3 _____. In each case, the documents in the administrative record were sequentially numbered by the BOR; those documents will also be cited by respective page numbers, BR _____. The various transcripts will be cited by TR _____. Documents in the Appendix will be cited APP. _____.

STATEMENT OF ISSUES

1. Whether the determinative Findings of Fact at pages 6-9 of the Memorandum Decision are clearly erroneous, or mixed questions of law and fact which are fully reviewable, and errors of law?
2. Whether the Circuit Court's decision regarding subject matter jurisdiction at pages 3-4 of the Memorandum Decision is an error of law?
3. Whether the determinative Findings of Fact at pages 10-13 of the Memorandum Decision are clearly erroneous, or mixed questions of law and fact which are fully reviewable, and errors of law?

4. Whether the determinative Findings of Fact at pages 13-14 of the Memorandum Decision are clearly erroneous or are mixed questions of law and fact which are fully reviewable, and errors of law?
5. Whether the Circuit Court's affirmance of the BOR decision regarding Grievances 1, 2 and 3 was the result of errors of law?

STATEMENT OF THE CASE

This is an appeal of the Circuit Court's denial of Dr. Sweeney's administrative appeals of three Board of Regents ("BOR") decisions on three separate grievances. BOR Policy 4:7 defines a grievance available to faculty at the South Dakota universities:

Grievance: An alleged misinterpretation, misapplication, or violation of a specific term or provision of Board policy, or other agreements, contracts, policies, rules, regulations, or statutes that directly affect terms and conditions of employment for the individual employee.

BOR Policy 4:7.LC(3), APP. 54. Dr. Sweeney based each grievance on a misinterpretation, misapplication, or violation of a specific term of a BOR policy, and/or of other policies. Each grievance denied by the BOR was separately appealed to Circuit Court under SDCL ch. 1-26. Dr. Sweeney moved to consolidate the appeals, which was granted. R3, 216.

An oral argument was held on July 12, 2023. The Court entered its Memorandum Opinion on November 8, 2023. R3 220, APP. 3. This was not a final order, SDCL 15-6-54(b), because the case was remanded for the further proceedings on the first grievance regarding three issues not addressed by the agency findings of fact and conclusions of law. R3 220, p. 9, APP. 11. The parties then entered into a stipulation to obviate the need for further proceedings on these issues not addressed. R3 236. An Order and Final Judgement was entered on January 13, 2024. R3 238, APP. 1. The Notice of Appeal was filed January 19, 2024. R3 240.

STATEMENT OF FACTS

Dr. Sweeney has been a professor at the University of South Dakota ("USD") for almost 29 years. A summary of his resume is included in R1, Ex. 1, BR 165.¹ Dr. Sweeney has gone through the promotional tenure process and is a tenured full professor in the Division of Curriculum and Instruction (C&I) in the Special Education (SPED) program, R1, TR 14, BR 21. He has done extensive academic advising, having advised between 100-200 graduate advisees, over the course of the 29 years at USD. R1, TR 15, BR 22. Dr. Sweeney advises significantly more students than the average faculty member in the division. R1, Ex. 1, p. 15, BR 179. He has also been active in the recruitment of students to the Graduate Program. R1, TR 16-17, BR 23-24. Among the programs of study mandated for USD by SDCL 13-57-1 are undergraduate and graduate programs for education, i.e., the education of educators. The School of Education administers and provides undergraduate degrees in education. The Graduate School administers and provides for the various Master's Degrees in Education, as well as the Doctorate Degrees in Education.

A. **The First Grievance.** The first grievance arose from the January 29, 2021, letter of warning to Dr. Sweeney from Interim Dean Amy Schweinle. This letter alleges:

1. That Dr. Sweeney had informed a certain student that she did not need to take the PRAXIS Core test;
2. That Dr. Sweeney had advised students they could waive course requirements or practicum due to work experience;

¹ Ex. 1 is a combination of Dr. Sweeney's curriculum vitae and 2019-2020 evaluation. Dr. Zahud completed his part of the evaluation in October 2020. Dr. Schweinle completed her part of the evaluation after she had issued the letter of warning. Ex. 1, pp. 26-27, BR 190-191.

3. That Dr. Sweeney was misadvising students; and
4. That Dr. Sweeney was advising students not assigned to him.

R1, Ex. 2, p. 65; APP. 41, TR 34, BR 41. All four of these allegations relate to advising.

The letter summarizes Dr. Schweinle's understanding of the role of faculty advisers:

You must immediately cease advising students who are not formally assigned to you as advisees. Any advising must strictly adhere to BOR, University and School of Education policies, procedures and the university catalogs, which is why we moved to the single advisor concept.

BR. 259, APP. 41. The "single advisor concept" was an error, as applied to Dr. Sweeney, but was at the heart of the discipline.

At the time this matter arose, Dr. Gary Zalud was the Chair of the Division of Curriculum and Instruction (i.e., C&I) and subordinate to Dr. Schweinle. Dr. Curt Hackemer was the Provost and Vice President for Academic Affairs. "C&I is the graduate division for Teacher Education – all graduate programs are in C&I." R1, Ex. 6, p. 1, BR 277. The C&I department includes graduate students, but its faculty also teach undergraduate classes and students.

Ex. 6 from this grievance is the C&I Minutes for the August 20, 2020 C&I meeting. These minutes include the statement that "This year, as a transitional year to several program changes, Susan GAPP. will be assigned as advisor to all *newly accepted* candidates pursuing a Master's Degrees." R1, Ex. 6, p. 8, BR 286 (emphasis added). A Master's Degree takes more than one year to complete, so existing student-advisor relationships, for degree candidates in their second or third years, were unaltered by this policy change. R1, TR 117, BR 124. This was a major source of dispute throughout the grievance process, with Dr. Schweinle insisting that the department had gone to a single

advisor system, or “centralized advising”. During the grievance process, Dr. Hackemer and President Sheila Gestring repeated this error, which was critical. In his February 26, 2021 denial of the Step 1 Grievance, Dr. Hackemer stated:

As Dean Schweinle’s letter makes clear, all master’s students within the Division of Curriculum and Instruction have been moved [to] a single advisor, with her specific concern being “that you have continued to informally advise students and have also used an outdated advising form as part of that process.”

R1, Ex. 2, p. 1, BR 218. This was wrong, as finally admitted by Dr. Hackemer at the June 8, 2021, evidentiary hearing. R1, TR 138, BR 145. Faculty advisors are recognized as valuable resources for Master’s Degree candidates, both in practice and BOR Policy 4:38, APP. 59. Dr. Sweeney only gave academic advice to students who had been assigned to him. R1, TR 34, BR 41; see also, Rebuttal Letter, R1, Ex. 2, p. 56, BR 250.

Dr. Gary Zalud gave Dr. Sweeney a glowing evaluation in the 2019-2020 Annual Faculty Review. R1, Ex. 1, pp. 26-28, BR 190-2. Dr. Zalud gave Dr. Sweeney a “2” in every category, which is the highest score he could give. R1, TR 74, R 81. Under “Teaching,” Dr. Zalud commented on advising:

During the evaluation period, Dr. Sweeney was guiding the progress of twelve doctoral students who were in different phases of completing their program (taking courses, writing dissertation proposals, collecting data, and preparing to defend dissertations). In addition, Dr. Sweeney advised numerous Master’s-Degree level students. Evidence suggests students were progressing in towards completing degree requirements.

R1, Ex. 1, p. 26, BR 190. Regarding “Service,” Dr. Zalud was very complimentary of Dr. Sweeney’s recruitment efforts:

The workload expectation assigned to Dr. Sweeney for this evaluation period was 10% service. An institutional priority

is to increase the number of students through recruitment and retention of students. *Dr. Sweeney demonstrated strength recruiting students into graduate programs in Special Education. He clearly understands the need to grow enrollment – especially during these difficult times!*

R1, Ex. 1, p. 27, BR 191. (emphasis added).

At the January 29, 2021 meeting, Dr. Schweinle briefly mentioned that the letter of warning was related to not following policies and procedures related to advising, which surprised Dr. Sweeney. R1, TR 32, BR 39. She gave “examples of misadvising and do not necessarily reflect the whole.” R1, Ex. 2, p. 65, BR 259, APP. 1. Dr. Sweeney asked Dr. Schweinle what evidence she possessed. She mentioned emails and “in-person meetings with a specific student, R.A., who was a student who was in several of my classes who had requested a change of advisor,” as described by Dr. Sweeney. R1, TR 35, BR 42. The “R.A. issue” was not mentioned in the letter.

Dr. Sweeney wrote an extensive rebuttal letter, dated February 8, 2021. R1, Ex. 2, p. 60, BR 254. Dr. Schweinle did not immediately respond, but she later responded, in a March 15, 2021 letter, that she would not reconsider or remove the letter of warning. Her letter was sent after the filing of the February 18, 2021, Step 1 Grievance to Dr. Hackemer, which was required by BOR Policy 4:7.E(2), APP. 57.²

Dr. Hackemer denied the grievance, for the reasons stated in his February 26, 2021 letter, R1, Ex. 2, p. 24, BR 218, including the mistaken belief about the “single advisor system”. Dr. Sweeney submitted the Step 2 Grievance to USD President Gestring. In her April 6, 2021 denial of the Step 2 grievance, President Gestring’s decision was simply based upon the premise that “no new evidence brought to my

² Step 1 was skipped because Vice President Hackemer was the first level which could reverse Dr. Schweinle.

attention.” R1, Ex. 2, p. 11, BR 205. The record shows that evidence was submitted to USD President Gestring, as well as being explained in detail in Dr. Sweeney’s rebuttal letter, R1, Ex. 2, p. 63; Statement of Grievance, R1, Ex. 2, p. 57; and the attachment to the Step 2 Grievance, R1, Ex. 2, pp. 18-22, BR 212-216. Dr. Sweeney submitted the grievance to the BOR by way of an April 14, 2021 letter to Dr. Brian Maher, Executive Director of the BOR. R1, Ex. 2, p. 1, BR 195.

The BOR appointed veteran attorney, Roger Tellinghuisen, as the hearing examiner, R1, BR 305. The hearing was held in Vermilion, South Dakota on June 8, 2021. R1, BR 8. Mr. Tellinghuisen issued his proposed decision, findings of fact and conclusions of law on July 21, 2021. R1, BR 2, APP. 18. Under the BOR Grievance Policy, this proposed decision was forwarded to the BOR, which could adopt, reverse, or modify the hearing examiner’s decision, findings, and conclusions. BOR Policy 4:7.J.E(4)(c), APP. 58. On August 13, 2021, the BOR adopted, without modification, Mr. Tellinghuisen’s proposals. R1, APP. 17. The appeal to Circuit Court followed. R1, R1.

B. The Second Grievance. On October 21, 2021, Dr. Sweeney received an email from his Department Chair, Dr. Zalud, informing him that he had been assigned an additional class to teach for the Spring 2022 semester, SPED 260, Introduction to Behavior Management. R2, TR 9, BR 19. Dr. Zalud told him to contact the Undergraduate Chair of the Division of Teacher Residency and Education, Dr. Dan Mourlam, for more information. R2, TR 12, BR 22. Dr. Sweeney did so, and Dr. Mourlam told him that he was not allowed to discuss this matter with Dr. Sweeney

without the USD lawyer present, a condition which never had been imposed in all of Dr. Sweeney's previous 27 teaching years at USD. R2, TR 13, BR 23.

Dr. Sweeney had never taught SPED 260 in his 27 years at USD. R2, TR 10, BR 20. He had taught a graduate-level course on Behavior Management, but the new course assigned to him was an undergraduate course. He described in detail how different it is to teach an undergraduate course compared to a graduate course. The graduate students usually have employment experience in the field of special education, so they have a knowledge and experience base which is totally absent for the undergraduate students, most of whom are college sophomores not yet admitted to the School of Education. R2, TR 11-12, BR 21-22. Teaching a new course required considerable preparation. Dr. Sweeney estimated that from October 21, 2021, and the beginning of the Spring 2022, he spent 80-120 hours just preparing to teach this course. R2, TR 57, BR 67.

Dr. Sweeney questioned this late addition to his workload because he already had more than the 30 credit units prescribed by BOR Policy 4:38.C.2, APP. 61. See R2, Ex. 1, p. 37, BR 129; TR 15, BR 25.

Dr. Sweeney had immediately raised his concerns with Dr. Zalud:

My workload is already projected well above workload limits for the current school year. Therefore, I strongly suggest you re-evaluate your plans for SP 21. You will not have addressed the mandatory discussion on workload and yearly expectation that was supposed to occur at the beginning of the school year. Also, you never responded to my inquiry on whether you were providing additional prep time, release time, or overload compensation when you re-assigned me online SPED 730 in the late summer for FA 2021. You do realize that in the 27 years at USD, I never taught SPED 730 or a related categorical class on learning disabilities? Therefore, this class is a new prep for me.

R2, Ex. 1, p. 36, BR 128. Dr. Zalud ignored this by referring him to Dr. Mourlam, who said he could not talk to him. His only redress was a grievance.

The Step 1 grievance was submitted to Dr. Schweinle, now Dean of the School of Education, on November 1, 2021. R2, BR 126-137. Dr. Sweeney described several ways in which the October 21, 2021, late assignment was a “misinterpretation, misapplication or violation of a specific term or provision of a Board policy or other . . . policies, rules, regulations”. BOR Policy 4:7.I.C(3) (definition of a grievance). R2, BR 358, APP. 54.

Dean Schweinle responded on November 7, 2021. There was no discussion, just a table. R2, Ex. 1, p. 32, BR 124. Dr. Sweeney observed several mistakes and omissions in Dr. Schweinle’s response. R2, TR 21, BR 31. He received no workload credits for the Fall 2021 semester for student teaching, or internship, even though he had always received workload credit in these areas in the past. R2, TR 22, BR 32. He also received no allocation for advising for the Fall semester. R2, TR 23, BR 33, even though required. For the Spring 2022 semester, Dr. Schweinle listed SPED 715 as a two-credit course, when, in fact, it is a three-credit course and was taught as a three-credit course.³ She also gave no workload credits for advising, co-sponsoring a School of Education sanctioned student group, or supervising doctoral students in their preparation of dissertations for the Spring 2022 semester. R2, TR 22, BR 32. In the Spring 2022 semester, Dr. Sweeney had seven doctoral students who were in the process of preparing their dissertations. Typically, professors would only be responsible for overseeing the dissertations of one or

³ In the catalogue, it is listed as two or three credits, but at the hearing, Dr. Sweeney explained how he was teaching it as a three-credit course at the present time and it always has been taught as a three-credit course. R2, TR 28, BR 38.

two doctoral students at one time during a school year. In the Spring semester of 2022, Dr. Sweeney was also advising approximately 20 graduate students. R2, TR 29, BR. 39.

In addition, Dean Schweinle omitted any workload calculations related to graduate practicums and internships in her response to Dr. Sweeney's Step 1 Grievance. R2, Ex. 1, p. 32, BR 124. Dr. Sweeney supervised 4 graduate students in internship experiences during the Fall Semester of 2021. R2, TR 24-25, BR 34-35. The School of Education's Appendix A to the USD 2021 Workload Policy states the following:

Supervision of internships and field experiences is expected from program faculty where applicable and will be assigned equitably across program faculty where possible. In situations where supervision of internships and field experiences is disproportionate, a faculty member's workload may be assigned additional workload credit with the approval of the dean.

R 2, Ex. 8, p. 7, BR 349, APP. 50.

On November 8, 2021, Dr. Sweeney submitted the Step 2 Grievance to Dr. Hackemer. R2, Ex. 1, pp. 23-27, BR 115-119, including the details about Dr. Sweeney's encounter with Dr. Mourlam. "Dr. Mourlam did apologize for the demand of USD counsel being present at any meeting with him, and stated he hoped Dr. Sweeney understood." R2, Ex. 1, p. 25. BR 117. Attachment A to the Step 2 Grievance also described in detail the flaws observed by Dr. Sweeney in the Step 1 response by Dr. Schweinle. R2, Ex. 1, pp. 26-27, BR 118-119.

Dr. Hackemer responded with a letter dated November 29, 2021. Ex. 1, pp. 19-21, R 111-113: "This grievance is supported by a misreading of current policy, a misunderstanding of my remarks at a School of Education meeting, and the attempted application of a policy and a collective bargaining agreement that are no longer in effect."

R2, Ex. 1, p. 19, BR 111. This related to Dr. Sweeney's initial presentation which questioned whether or not the 2021 Workload Policy adopted by USD had been authorized by the BOR. For the purposes of this grievance hearing, however, Dr. Sweeney proceeded with the understanding that the 2021 Workload Policy at USD was the operative policy. At the hearing, Dr. Sweeney described the ambiguities in this recently adopted policy.⁴ R2, TR 25-26 BR 35-36. Dr. Hackemer denied Dr. Sweeney's grievance at Step 2. This denial did not include any calculation of the workload credits which, in Dr. Hackemer's view, Dr. Sweeney earned in 2021-22. R2, Ex. 1, pp. 19-21, BR 111-113.

Dr. Sweeney submitted the Step 3 Grievance to President Gestring, on December 3, 2021. R2, Ex. 1, pp. 14-17, BR 106-109. President Gestring rejected the Step 3 Grievance, by a letter dated December 17, 2021. R2, Ex. 1, pp. 8-9, BR 100-101. Dr. Sweeney had stated "Dr. Hackemer admits that the 2021 USD Workload Policy requires a discussion between the faculty member and the chair as 'an integral part of the annual performance evaluation.'" R2, Ex. 1, p. 13, BR 105. Dr. Sweeney then pointed out that no such discussion by Dr. Zalud, the evaluator,⁵ occurred. *Id.* Although she acknowledged that Dr. Sweeney had asserted that Dr. Schweinle's calculations of the workload were incorrect, President Gestring:

⁴ There was no attempt, in the grievance or at the hearing, to apply the COHE collective bargaining agreement no longer in effect.

⁵ See, Ex. 2 (all in R2), Sweeney Annual Faculty Review, 2020-2021, pp. 30-34, BR 167-171; Ex. 3, Sweeney Annual Faculty Evaluation, 2019-2020, pp. 26-29, R 197-200; Ex. 4, Sweeney Annual Faculty Evaluation, 2018-2019, pp. 23-28, BR 224-229, including: "No where in the supervisor's comments on Dr. Sweeney's 2018-2019 Annual Evaluation did Dr. Zalud discuss Dr. Sweeney's workload based upon the criteria set forth by the School of Education's workload criteria ..." Ex. 4, p. 26, BR 227.

1. Did not include any information demonstrating the correct calculation;
2. Criticized him for relying on the previous Workload Policy, R2, Ex. 1, p. 8, BR 100, but ignored that Dr. Sweeney had cited the operative 2021 Faculty Workload Policy, R2, Ex. 8, BR 343.
3. Rejected the argument that Dr. Sweeney should be given .33 of a unit for overseeing a student teacher and cited no authority for not pro-rating the units;
4. Ignored the error of counting SPED 715 as a 2-credit course, instead of 3-credit, by saying the total would still fall within policy; and
5. Because of policy stated discussion "should occur", which did not happen, she concluded the language did not "make such discussion mandatory." R2, Ex. 1, p. 9, BR 101.

Therefore, Dr. Sweeney filed his Step 4 Grievance with Dr. Maher, R2, Ex. 1, p. 1, BR 93, which led to the February 1, 2022, evidentiary hearing. R2, BR 11-92. The BOR appointed experienced attorney, Melanie Carpenter, to be the hearing examiner. R2, BR 356.

Ms. Carpenter issued her proposed decision, findings of fact, and conclusions of law on April 14, 2022. R2, BR 2-10, APP. 24. This proposed decision was after the April 8, 2022 meeting between Dr. Schweinle and Dr. Sweeney, when Dr. Schweinle directed totally new assignments for Dr. Sweeney, without discussion, which resulted in the third grievance. The BOR adopted Ms. Carpenter's proposal without comment or modification on May 12, 2022. R2, BR1, APP. 24, which Dr. Sweeney timely appealed to Circuit Court.

C. **The Third Grievance.** Dr. Sweeney described several ways in which the April 8, 2022, new assignments were a "misinterpretation, misapplication or violation of a specific term or provision of a Board policy or other policies, rules, regulations ..." BOR Policy 4:7.LC(3), APP. 54. The new workload assignments removed Dr.

Sweeney from his didactic teaching responsibilities and reduced his allocated research workload, and replaced these didactic teaching and research responsibilities with new administrative obligations which were a dramatic deviation from Dr. Sweeney's past role and responsibilities and a totally new direction in his career path. R3, Ex. 1, p. 25, BR 83. He was assigned to find and evaluate professional licensing requirements for Continuing and Distance Education for the 50 states.

Dr. Sweeney filed his Step 1 grievance with Dr. Hackemer on April 21, 2022. R3, Ex. 1, p. 22, BR 80. The grievance also alleged that "This new workload assignment is in direct retaliation for Dr. Sweeney bringing the workload grievance, for which the hearing was held on February 1, 2022." R3, Ex. 1, p. 25, BR 83. Dr. Hackemer responded to the Step 2 grievance by a letter dated April 26, 2022. R3, Ex. 1, p. 20, BR 78. He wrote:

The current faculty workload policy makes clear that "workload may include teaching, research, and service, with the exact allocation *based on faculty rank and responsibilities as approved by the dean or the dean's designee*. As such, Dean Schweinle has the authority to make appropriate workload assignments. Ultimately, workload assignments are an administrative decision.

Id. (emphasis added). There was no mention of "faculty rank" in Dean Schweinle's assignment. R3, Ex. 1, p. 29, BR 87, APP. 43.

Dr. Sweeney had quoted the policy: "Each institution shall establish workload policies *in consultation with their faculty* and then concludes that he was not appropriately consulted as an individual." (emphasis in grievance). Dr. Hackemer replied:

This is an unfortunate misreading of this policy on your part. This policy language requires institutions to consult with *the*

faculty at large in the development of institutional workload policies, including school/college addendums. That required consultation that is the basis for this portion of your grievance occurred during the adoption process for the 2021 USD Workload Policy, with consultation not obligating administration to any adjustment of the policy.

R3, Ex. 1, pp. 20-21, BR 78-79 (emphasis added).

Dr. Hackemer further stated, in response to the allegation that the new assignment was in direct retaliation for Dr. Sweeney bringing the workload grievance, that “Absent any direct evidence in the grievance that the workload assignment was in fact retaliatory, I have no basis for determining whether or not this was indeed the case.” R3, Ex. 1, p. 21, BR 79. Dr. Hackemer denied the grievance. Dr. Sweeney submitted Step 3 of his grievance to President Gestring on May 3, 2022. R3, Ex. 1, p. 12, BR 70. Dr. Sweeney challenged the interpretation of the policies by Dr. Hackemer:

There appears to be a controversy on whether the USD 2021 Workload Policy is really a policy, or a set of guidelines, meant to assist faculty and the administration in guiding discussions, making assignments, and in the allocation of quantitative workload units.” Dr. Hackemer exaggerates the meaning of ‘guidelines’. He treats the word as though guidelines can be simply ignored. That is contrary to one of the most common rules of construction: a rule cannot be construed to render part of it mere surplusage.

R3, Ex. 1, p. 15, BR. 73.

Dr. Sweeney stated, in his submission to President Gestring, that Dr. Hackemer forgot to:

mention that the USD 2021 Workload Policy, that he helped to draft, specifically states that a faculty member’s Department Head is supposed to consult with a faculty member during their annual review about workload considerations. This discussion of workload considerations for the current academic year and future academic years was not done.

R3, Ex. 1, p. 16, BR 74.

Dr. Sweeney also noted that Dr. Hackemer quotes SD BOR 4:38.C.1 by stating that the Dean of the School of Education possesses the “latitude” to assign a “variety of activities” found in the Expectations of the Faculty document; Dr. Sweeney felt this phrase suggests that the faculty member should possess the background knowledge, training, and experience to engage in some of the listed activities. APP. 60-61. Dr. Sweeney pointed out that the Expectations of the Faculty document provides a list of different activities, but not all faculty members are required to engage in all these activities, and common sense would direct a department head or Dean to select faculty activities and expectations that are consistent with their training, background, and experience. To select activities that are not part of a faculty member’s current repertoire of skills and experience is a recipe for uncertain outcomes for all parties. R3, Ex. 1, p. 15, BR 73.

President Gestring responded with a letter dated May 16, 2022. She agreed with Dr. Hackemer’s conclusion that SD BOR Policy 4:38 gives Dean Schweinle complete latitude in making a workload assignment.

Your assertion that the workload violates policy because the assignments bear ‘no relationship to specific past and present role assignments’ takes that phrase out of context. The ‘quantitative expectations’ of the workload depend on the variety of factors listed, from which you quote. To limit future workload assignment to those activities assigned in the past would lock the University into the past, preventing necessary change to meet current and future needs.

R3, Ex. 1, p. 10, BR. 68. Dr. Sweeney had not, in his grievance, claimed that he could only be assigned duties assigned in the past. Regarding retaliation, she concluded that the

assignment of duties was not a “materially adverse action”, and the assignments are within those contemplated for a faculty member because there is no impact on title, salary, or benefits. R3, Ex. 1, p. 11, BR 69. Dr. Sweeney submitted his Step 4 grievance to Dr. Maher on May 23, 2022. R3, Ex. 1, p. 2, BR 59, a detailed “Rationale for Step 4 Grievance”. R3, Ex. 1, pp. 4-8, BR 62-68.

The BOR once again appointed Roger Tellinghuisen as the hearing examiner. The hearing was held in Vermillion, South Dakota on July 15, 2022. Mr. Tellinghuisen served his proposed decision, findings of fact, and conclusions of law on August 29, 2022, recommending the denial of this grievance. R3, BR 2-7, APP. 35. On October 12, 2022, the BOR adopted Mr. Tellinghuisen’s proposals without comment or modification. R3, BR 1., APP. 34. The appeal to the First Circuit was filed in Clay County on October 14, 2022. R 3, R1.

STANDARD OF REVIEW

The review of an administrative appeal is governed by SDCL 1-26-36. *Puetz Corp. v. South Dakota Dept. of Revenue*, 2015 SD 82, ¶ 13, 871 N.W.2d 632, 636. “Upon review of agency’s decision, circuit court and Supreme Court must ascertain whether administrative agency’s findings of fact were clearly erroneous, whereas administrative agencies and circuit court’s conclusions of law are fully reviewable.” *Sharp v. Sharp*, 422 N.W.2d 443, 447 (S.D. 1988); SDCL 1-26-36. Under SDCL 1-26-36, “we examine agency findings in the same manner as the circuit court to decide whether they were clearly erroneous in light of all the evidence.” *Pirmantgen v. Roberts Cnty.*, 2021 SD 5, ¶ 20, 954 N.W.2d 718, 724 (citation omitted) (quoting *Reidburn v. South Dakota Dep’t of Labor and Reg., Reemployment Assistance Div.*, 2024 SD 19, ¶

21). When the issue is a question of law, the decisions of the administrative agency and the circuit court are fully reviewable” under the de novo standard of review. *Id.* (citation omitted). Although a court “may not displace an administrative agency’s choice between conflicting inferences or conclusions, both of which have support in evidence, a court may reverse findings that are not fairly supported by evidence in record, when record is considered as a whole.” *City of Brookings v. Dep’t of Envtl. Prot.*, 274 N.W.2d 887, 890 (S.D. 1979); SDCL 1-26-36.

A finding of fact is “clearly erroneous” when after reviewing all the evidence, “we are left with a definite and firm conviction that a mistake was made.” *State v. Wilkins*, 536 N.W.2d 97, 99 (S.D. 1995). Mixed questions of law and fact are fully reviewable. *Permann v. Dep’t of Labor*, 411 N.W.2d 411, 413 (S.D. 1987). Whether an agency correctly applied the facts to the law is a mixed question of law and fact and so is fully reviewable. *Erdahl v. Groff*, 1988 SD 28, ¶ 25, 576 N.W.2d 15, 20.

Questions of statutory interpretation are reviewed de novo. *Nodak Mut. Ins. Co. v. McDowell*, 2010 SD 54, ¶ 7, 784 N.W.2d 483, 485. This case involves the interpretation of the language of administrative rules. “Administrative regulations are subject to the same rules of construction as are statutes.” *Citibank, N.A. v. S.D. Dep’t of Revenue*, 2015 SD 67, ¶ 12, 868 N.W.2d 381, 387 (quoting *In re Black Hills Power, Inc.*, 2016 SD 92, ¶ 8, 889 N.W.2d 631). The agency’s interpretations of its regulations are reviewed de novo. *Nelson v. S.D. State Bd. of Dentistry*, 464 N.W.2d 621, 624 (S.D. 1991).

ARGUMENT

Regarding the Letter of Warning, in the first grievance, the Circuit Court affirmed without analysis the hearing examiner regarding the advisement of students not assigned to Dr. Sweeney and the incorrect advisement regarding a Praxis Core examination. APP. 3, 8-11. With respect to the second grievance, the workload grievance, the Circuit Court determined that Dr. Sweeney did not meet his burden to prove that the workload calculation was incorrect and exceeded acceptable established percentages. APP. 12-14. The Court held it did not have jurisdiction to determine the grievance regarding the workload discussion, or in the alternative, that the policy was violated in regard to the workload discussion. APP. 14. With respect to the third grievance, the assignments given on April 8, 2022, the Circuit Court determined that Dr. Sweeney did not prove that BOR Policy 4:38:C.4 required his agreement for the assignments and did not prove that the assignments were retaliatory. APP. 15-16. The Circuit Court did not enter its own findings of fact and conclusions of law, but apparently affirmed the findings and conclusions entered by the hearing examiners in all three hearings, which the Circuit Court has the discretion to do under SDCL 1-26-36.

In each of the three grievances, the denials were based upon a misinterpretation, misapplication, or violation of specific provisions of BOR policies, or other policies adopted by USD. A common route to achieve this goal, in all three cases, was the derogation of a common rule of statutory construction.

This common rule of statutory construction prohibits adding words or phrases to a statutory, regulatory, or policy provision which is not in the original adopted by the party with the authority to adopt. BOR Policy 4:38.6.1 prescribes the minimum standards of

performance for teaching. Included in this section, is to “be regularly available for out of class consultation with students”. R1, Ex. 4, p. 5, BR 270, APP. 64. This does not have added at the end of that sentence “... regarding course content” or language to that effect. Adding words or phrases to a rule, where they have not been originally placed, is prohibited. *In re Black Hills Power*, 2016 SD 92, ¶ 11, 889 N.W.2d 631, 635. In the first grievance, USD/BOR effectively added the “regarding course content,” and the hearing examiner and Circuit Court accepted this.

In the second grievance, the School of Education Workload Policy states “For non-residency instructors, the Supervision of 3 teacher candidates equates to 1 workload unit.” R2, Ex. 8, BR 349, APP 50. The Administration added “minimum” to “3 teacher candidates” or “only” to “supervision”. It also added “at large” to the requirement of consultation with faculty. See pp. 13-14, *infra*.

In the third grievance, the Administration added to the policy “Each institution shall establish workload in consultation with their faculty” the phrase “at large”. This totally changed the meaning from individualized discussion to forming a committee whose conclusions would bind all. See *In re Black Hills Power*, *supra*.

I. THE FIRST GRIEVANCE

A. Academic Advising and Academic Freedom. Most of the June 8, 2021 hearing dealt with different facets of “advising.” BOR Conclusion of Law No. 4 states:

Grievant’s position that being prohibited from making statements to students in regard to University policies and procedures when such students are not his advisees violates his rights under his ‘academic freedom’ is misplaced. Academic freedom does not permit a faculty member to give incorrect or false information to students.

R6, APP 22. Nobody disputed that “Academic freedom does not permit a faculty member to give incorrect or false information to students.” Dr. Sweeney never claimed that it did, either in his testimony or detailed submissions in the grievance process. R1, Ex. 2, BR 195-259. The same analysis applies to BOR Conclusion of Law No. 5:

Further, ‘faculty member discretion’ as an advisor does not permit a faculty member to give incorrect or misleading information to students whether they are assigned to the faculty member as advisees or not.

R1, BR 6, APP 22.

BOR Conclusions of Law 4-7 are entirely wrong, if they, in fact, are addressing the “R.A. issue”, which is unclear. After R.A. had exhausted the internal, published procedures for an advisor change, R.A. asked Dr. Sweeney, after class, if there was anything else that could be done. What Dr. Sweeney told her was clearly not academic advising:

That specific student asked what recourse does she have. And I said, Well, you know, you’ve gone through all of the internal policies. Now you would need to potentially go outside of the university and I e-mailed her a link to a specific attorney here in town who might be able to help her address that matter.

R1, TR 36, BR 43. Dr. Sweeney did not even know “where she was in the progression of her overall program.” R1, TR 37, BR 44. Disciplining Dr. Sweeney for these out-of-class consultations is a violation of BOR Policies 2:29.2.A and 4:38.C.1. Disciplining Dr. Sweeney for telling R.A. to talk to a lawyer is also a misapplication of the School of Education Graduate Programs and Procedures, p. 3. See R1, Ex. 2, p. 56, BR 250, and p. 42, BR 236.

Conclusion of Law No. 7 is an error of law, contrary to BOR Policies. There is no finding of fact that Dr. Sweeney gave incorrect information to students. Conclusions of law must be supported by findings of fact. *Jasper v. Jasper*, 351 N.W.2d 114, 117 (S.D. 1984) (conclusion of law unsupported by a finding of fact must be reversed).

During the hearing, there was a substantial amount of disagreement about the definition of academic advising. This arose from inconsistent definitions. Dr. Schweinle was asked about the document, at R1, Ex. 2, p. 40, BR 234, "Graduate Program Policies and Procedures", adopted August 11, 2020. R1, TR 114, BR 121. She agreed that this stated a definition of academic advising, "as pertains to thesis and dissertation committees." *Id.* Dr. Schweinle stated that she used the definition from the School of Education Graduate Policies and Procedures to help define "advising," as well as others, but failed to state where the other definitions of "advising" came from. *Id.* It was pointed out to her that same document also included the definition of program advisor, which applies to the type of academic advising Dr. Sweeney has been doing. She agreed with that. *Id.* She also agreed that the Graduate Application Action form is an initial stage where the school outlines the information about the student, but that does not yet include a prescribed program of study, and the program of study form is completed when the advisor has already been assigned. R1, TR 116, BR 123.

The program advisor will work closely with the student to select an advisory committee. The program advisor will work on behalf of the advisory committee to advise students in course selection and registration aligned with the program of study and to administer written and oral exams.

R1, TR 116, quoting Ex. 2, p. 42, BR 236, citing the USD Graduate Program Policies and Procedures.

Dr. Sweeney's discussions with potential recruits to the Graduate Special Education program took place before there was any graduate application submitted by the graduate students. In the course of recruiting students, he testified he would work with them to lay out an informal program of study so the potential students would have an idea about what sort of program they could take at USD and what the requirements would be. R1, TR 68, BR 75. Preparing the informal program of study was not academic advising, it was recruitment. That was the stage at which Dr. Sweeney recruited the two women who were the subject of Julie Large's email exchange with Dr. Schweinle. R1, Ex. 3, BR 261. The actual Program of Study is determined "within the first semester of graduate work, preferably within the first month. "Graduate Program Policies and Procedures", R1, p. 4, Ex. 2, p. 43, BR 237. Dean Schweinle agreed that the "program of study form is completed when the advisor has already been assigned." R1, TR 116, BR 123. Dr. Schweinle's letter of warning was motivated, largely by Dr. Sweeney's recruitment efforts shown in Ex. 3, BR 261, which by every definition could not have been "advising", because the two women involved were not yet USD students. Dr. Schweinle misapplied USD policies regarding advising, and the Hearing Examiner apparently accepted Dr. Sweeney's position, but relied upon the R.A. communication. Conclusion #5, BR 7, APP. 23.

Advising is not defined by BOR Policies. The USD Faculty Workload Policy, for the School of Education (and others), at page 4, defines Academic Advising:

Per BOR Policy 4:38, academic advising of both undergraduate and graduate students is part of teaching. Advising may be assigned to any faculty member, regardless of home location, but not every faculty member is expected to have advisees. All active students will be assigned an advisor, either a professional advisor or a faculty member,

so faculty may find themselves advising students at both their home location and remotely.

R1, Ex. 2, p. 30, BR 224 (emphasis added). Therefore, as part of teaching, advising is subject to the principles of academic freedom. Academic freedom provides faculty the right and responsibility to apply their knowledge, expertise and discretion to convey to students the expectations of a certain discipline. R1, TR 64, BR 71. The letter of warning regarding advising is a violation of BOR Policies 4:38.C.3.1 and 1.11.1.A, and the USD Faculty Workload Policy. APP. 61-2, and 47.

Dr. Hackemer testified that out-of-class consultation with students was advising, in the sense of academic advising. R1, TR 131, BR 128.⁶ Dr. Schweinle did not. R1, TR 111, BR 118. Her complaint about informal advising primarily arose from the emails with Julie Large and the subsequent request for an advisor change. R1, TR 105, BR 112.

The general requirement of being available for out of class consultations with students is markedly different than academic advising. All faculty are required to be regularly available for out-of-class consultations, but not all faculty are assigned advisees. R1, Ex. 2, p. 30, BR 224. Students might ask a variety of questions after class. Dr. Sweeney was very clear in his testimony, that if an after class or out-of-class question raised an issue of academic advising, and the student is not one of his advisees, that he specifically tells that student he or she must ask that question of his or her academic advisor. He is explicit in making sure that they are supposed to contact their own advisor about such matters. R1, TR 34, BR 41. Nobody refuted this point.

⁶ This was contrary to his February 18, 2021 denial of the Step 1 Grievance: "The out-of-class consultations described in BOR Policy 4:38.6.1 are an important component of teaching expectations, but they are not necessarily linked to advising." BR 219.

Answering students' questions outside of class is not only permitted, it is required. This out-of-class consultation is also consistent with BOR Policy 2:29.2.A, which states:

Purpose

Recognizes that graduate education is an in-depth study of the major field that relies upon interactions both in and out of the classroom and is not just a collection of courses.

Ensures that the student develops a mentoring relationship with the faculty, benefits from the collective experiences of the students in the program and is immersed in the intellectual atmosphere of the program derived from the special expertise of the faculty.

(emphasis added). Ex. 8, BR 290. The record shows that Dr. Sweeney took this mentoring relationship very seriously.

President Gestring's March 29, 2021 letter discusses teaching and advising as though they are separate, distinct activities. Ex. 2, p. 13, R 207. However, Dr. Hackemer correctly testified that "advising is one activity that may constitute teaching". TR 130, R 137. In fact, BOR policy 4:38.6.1 includes the provision that:

Teaching includes the following or similar activities, the recognition and importance of which will vary depending upon the mission of the university, the role of the discipline within the university's functions, and the individual faculty member's assignment:

...

- Advising graduate students.

Ex. 4, p. 5, R 270, APP. 64. President Gestring also stated that Dr. Sweeney's "connection between teaching, academic freedom and advising is wholly misplaced." R1, Ex. 2, p. 13, BR 207. Policy 4:38.C.1 states "All faculty members will be significantly active in the broad areas of teaching, scholarship and service as assigned by

their institution.” R1, Ex. 4, p. 1, BR 265. These 3 categories are recognized again in 4:38.C.3.1. R1, Ex 4, BR 267, APP. 61. All other faculty activities are included within these 3 categories. “It is fundamental that the words of a [rule] must be read in their context and with a view to their place in the overall [regulatory] scheme.” *In re Certification of a Question of Law from U.S. District Court, Dist. Of S.D. S. Div.*, 2014 SD 57 ¶ 8, 851 N.W.2d 924, 927. Included in 4:38.C.3.1 is that selecting the relative importance of each category may vary among institutions, but “[t]he university’s selections shall be consistent with the guarantee of academic freedom as provided to faculty members in Board Policy 1:11.” R1, Ex. 4, p. 3, BR 268, APP. 62. Policy 1:11.1.A includes the admonition that “Academic freedom applies to both teaching and research.... It includes the freedom to perform one’s professional duties and present differing and sometimes controversial points of view, free from reprisal.” Ex. 5, p. 1, R. 275, APP. 52. Advising was included in Dr. Sweeney’s workload. R1, Ex. 2, p. 20, BR 214.

B. Substitution Versus Waiver. In the January 29, 2021 letter of warning, Dr. Sweeney was accused of advising students that they could waive required courses. The evidence demonstrates that this is incorrect. Dr. Sweeney made it very clear that he would only substitute a course, in the best interests of the student, if the prescribed course was not scheduled to be given during a timeframe which allowed the student to timely complete their Master’s degree, or, if the student had had another course which satisfied the requirement. R1, TR 98, BR 105. He explained that an advisor has the discretion to substitute one course and that substituting more than one course requires the Graduate Dean’s approval. R1, TR 99, BR 106. He has, in the past, successfully obtained the

Graduate Dean's approval for substituting more than one course. *Id.* This is required by BOR Policy 1:11.1.A: "Academic freedom applies to both teaching and research. . . . Academic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of students to freedom in learning." R1, Ex. 5, BR 275, APP. 52. The distinction between waiver as used by Dr. Sweeney and substitution is completely semantic. This point was explained in detail in Dr. Sweeney's rebuttal letter, R1, Ex. 2, p. 63, BR 257, and Statement of Grievance, R1, Ex. 2, p. 57, BR 251.

Dr. Sweeney was accused of advising students that they did not have to take the PRAXIS Core exam, for graduate students who want to pursue teacher certification.⁷ This issue is subject to a great deal of confusion about what is allowed, and what has been allowed, according to past practice. In the past, there had been other tests allowed "in lieu of the core PRAXIS and that would be either the Miller Analogies test and/or the GRE, Graduate Record Exam, as well as maintaining at least a 3.0 grade point average." R1, TR 33, R 40. Dr. Zalud had previously initiated the discussion about eliminating the GRE and MAT, but Dr. Sweeney had pointed out to him that that may work to the disadvantage of some of their students. Dr. Zalud indicated that they would have to have a meeting to resolve this issue, but such a meeting was never conducted, so the issue had never been addressed. R1, TR 101, BR 108. The Administration produced no evidence at the June 8, 2021 hearing showing this issue had been resolved. Dr. Sweeney described the practice adopted by a previous Chair of the C&I Division, Dr. Nick Shudak, in his

⁷ Teacher certification and receiving a Master's Degree in education are different. Teacher certification is a State requirement to teach K-12. The Master's program requirements are different, but the two pursuits may have overlapping requirements. R1, TR 55, BR62. The School of Education is responsible for the teacher education requirements. BOR Policy 2:16.C.2. The Graduate School is responsible for the Master's Degree. R1, TR 254, BRT 161.

February 8, 2021 rebuttal letter, at R1, Ex. 2, p. 61, BR 255, which quotes from the USD Graduate Catalogue, "Students pursuing initial teacher certification will need to pass the Praxis II Special Education Core Knowledge and the Principles of Learning and Teaching PLT) exam" This was not contradicted at the June 8, 2021 hearing.

The Administration's case rested upon Ex. B, an email from Dr. Sweeney to a student who had been seeking a change of advisor from Dr. Zalud. This exhibit was not admitted into evidence.⁸ R1, BR 294. Finding of Fact No. 21, based upon this email, is clearly erroneous, if a finding of fact. It is a mixed question of law and fact, because "whether the Division correctly applied the facts to a law is a mixed question of law and fact, and as such is fully reviewable". *Erdahl v. Groff*, 576 N.W.2d at 20. Dr. Sweeney stated in that email "This requirement is a requirement of the undergraduate teacher education program not the graduate multicategorical special education program." This is a correct statement. A graduate student can obtain a Master's degree in SPED without receiving teacher certification from the State. When the past practice comes into play is when the graduate student wants to use the multicategorical graduate SPED degree to teach K-12. Therefore, Dr. Sweeney was correct when he stated there was a policy. Then he discussed equivalency of undergraduate coursework. He finished this discussion with "whether the undergraduate courses you took meet this requirement is an issue for your advisor." This was an entirely appropriate response. The rest of the email was about appealing the requested advisor's change based on the denial of the Dean of the School of Education (Dr. Schweinle) and/or the Dean of the Graduate School (Dr. Freeburg). This statement was also accurate. Disciplining Dr. Sweeney for this

⁸ See index to SD BOR Record of Sweeney Matter, #11.

communication is also a violation of BOR Policies 4:38.C.6.1 and 1:11.1.A. APP. 63 and APP. 52. The letter will be in Dr. Sweeney's personnel file permanently unless it is removed. The Dean's comments on the 2019-2020 Annual Performance Evaluation should also be removed.

II. THE SECOND GRIEVANCE

The purpose of a grievance procedure is described in the BOR Policy Manual.

A. Purpose

All problems should be resolved, whenever possible, before the filing of a grievance. Open communication is encouraged between administrators and faculty members so that resorting to the formal grievance procedure will not be necessary. The purpose of this policy is to promote prompt and efficient procedures for investigating and resolving grievances.

BOR Policy 4:7.LA, APP.54. Dr. Sweeney tried to resolve the issue informally, but was rebuffed by Dr. Moulam, who was apparently under orders to do so. See p. 10, *infra*.

The fundamental basis for the grievance was that the administration miscalculated his workload credits, by misapplying BOR Policy 4:38C.2 and the USD Workload Policy, and by the failure to engage in any discussion about workload. R2, Ex. 1, p. 35, BR 127; Ex. 8, p. 2, BR 344. In addition to the testimony of Dr. Sweeney, the record consists of Ex. 1, the documents which were all part of the grievance process and Dr. Sweeney's evaluations, Exs. 2-7. Dr. Sweeney was the only witness who testified at the February 1, 2022 hearing. The BOR and USD chose not to put on any testimony, so their evidence is limited to their statements in the exhibits, primarily R2, Ex. 1. This Court reviews this evidence as did the Circuit Court "unaided by any presumption that the Circuit Court's decision was correct". *Peterson v. Evangelical Lutheran Good Samaritan*

Society, 2012 SD 52, ¶ 13, 816 N.W.2d 843, 847. Exs. 1-7, offered by Dr. Sweeney, were admitted without objection at the hearing. R2, TR 6-7, R 16-17.⁹

BOR Policy 4:38 has a number of provisions which make it clear that communication between the administration of the academic institutions and the faculty of those institutions is an integral feature of the administration of the institution. This communication includes the workload of the faculty. In this case, however, the Administration's position, as shown by its submissions in Ex. 1, has been that it possesses the unfettered discretion to isolate certain words or phrases and put its entire emphasis on those words and phrases.

Included in BOR Policy 4:38, is Section 5, "Civility and Working with Colleagues, Staff Members, Students and Others." R2, Ex. 13, p. 4, BR 366, APP. 63. Prominent in this section of the BOR policy is:

Students must be taught, and they must be shown through the example given by institutional employees, that members of stable, effective, and prosperous social organizations observe norms of conduct under which all participants treat one another civilly and carry out their respective tasks in a constructive and informed manner. Complex social organizations derive their strength from the cooperation of those who participate in them.

Id.

Included in the record is "Expectations of Faculty with Professorial Rank at the University of South Dakota", August, 2012. R2, BR 372. The purpose of this is "to provide guidance to faculty members holding professorial rank and those who evaluate them." R2, BR 372. (emphasis added). This provision goes on to state "in that regard, the information

⁹ Ex. 1 is comprised of all documents submitted at the various steps of the BOR grievance process. BR 93-134. The pages in this exhibit are in reverse chronological order, because the grievance process requires that each step's submission be accompanied by all previous submissions.

below clarifies the standards and expectations that the University of South Dakota uses to evaluate its faculty....and during the annual evaluation process, and it defines the relationship between annual evaluation process and the promotion and tenure process.” *Id.*¹⁰ This annual evaluation process includes, specifically, interaction between a faculty member and his evaluator, in this case Dr. Sweeney and Dr. Gary Zalud, regarding the workload policy applied to Dr. Sweeney.¹¹ That lack of communication is one of the underlying problems which produced this grievance, as mentioned by Dr. Sweeney several times in documents which he submitted during the grievance process.

First, the Circuit Court held that “As to jurisdiction for Dr. Sweeney’s second grievance asserting, in part, violation of BOR policy for lack of workload discussion during his annual evaluation, this does not meet the definition of grievance . . .”. APP. 6. Therefore, the Court held it lacked subject matter jurisdiction. APP. 14. This evidence was relevant as evidence, however, to show the lack of communication which permeates the Department. It was not prejudicial until Dr. Sweeney was ordered to teach SPED 260.

Furthermore, BOR Policy 4:38 states “the quantitative expectations for activity in each area depend broadly on the mission of the University, the faculty member’s discipline and its role within the University, and on specific past and present role assignments of individual faculty responsibility”. (emphasis added). R2, Ex. 13, p. 1, BR 363. Dr. Sweeney’s past role assignments were ignored. At the same point, this BOR regulation states “the assessment of faculty performance cannot be reduced to a mere inventory of activities by kind and quantity.” *Id.* The grievance process reveals that, at least with respect

¹⁰ This appeal and the underlying grievances have no connection to the promotion and tenure process.

¹¹ As shown by the undisputed testimony in this record, this communication did not take place for several years. See Exs. 2-7. Dr. Sweeney objected to this lack of communication on several occasions, but to no avail. Ex. 2, p. 34, BR 171; Ex. 4, pp. 27-28, BR 228-9.

to Dr. Sweeney, the Administration dictated his assignments, without communication, and by reducing the assignments to a mere inventory of activities by kind and quantity.

That the overall thrust of BOR Policy 4:38 is one of communication between Administration and faculty, is further demonstrated by ¶ 2, specifically cited in the workload policy, namely,

The Board recognizes the value of policies that communicate workload expectations for faculty. Each institution shall establish workload policies in consultation with their faculty. Workload policy shall acknowledge workload expectations relating to the overall number of expected workload units, credit hours, contact hours, preparation, clinical work, instructional methods, research, service and other factors deemed appropriate.

....

Faculty members will be expected to undertake an effort equivalent to that needed to deliver thirty (30) workload units.

R2, BR 364, APP. 61. Contrary to the Administration's repeated efforts, throughout the grievance process, to isolate individual words and phrases, to dictate Dr. Sweeney's workload, the University's interpretation flies in the face of a variety of cases involving statutory construction. It is important to note that:

Statutes must be read together. It is inappropriate to select one statute on a topic and disregard another statute which may modify or limit the effective scope of the former statute. By focusing only on [one] and disregarding [the other], the Board ignores a limitation placed upon the definition of a [university].

In re Appeal of AT&T Information Systems, 405 N.W.2d 24 (S.D. 1987); *In re Expungement of Oliver*, 2012 SD 9, ¶ 9, 810 N.W.2d 350, 352.

Contrary to Finding of Fact No. 6, BR 2, Dr. Sweeney did not "accept" SPED 260; he was ordered to teach it and he did.

When after reviewing all of the evidence, there is a definite and firm conviction that a mistake was made by the hearing examiner regarding the following clearly erroneous findings of fact:

Findings of Fact 10. BOR 4:38, as well as the USD 2021 Workload Policy, specify that faculty members are responsible for 30 workload units across a full academic year. Dr. Schweinle quantified 15.5 didactic workload units in her responses. She made no comment about the remainder of the 14.5 quantifiable workload units. BOR 4:38.2 requires 30. R2, Ex. 13, p. 2, BR 364. She either ignored the balance of 14.5 credits or assumed Dr. Sweeney was given credits for supervision of internships, student teaching, or student advising, as he had in the past.

Findings of Fact 11-25 and 47-49 are mere statements about the record, or certain BOR policies. Finding of Fact 26 is really a Conclusion of Law, and it is an error of law. Findings of Fact 27-29 are, once again, statements about the record.

Findings of Fact 31-39. Once again, the Administration claimed that there was an expectation (i.e., USD Workload Policy) that faculty coordinate and supervise internships and practicum experiences with no working credit. These internships and practicum experiences are part of all students' programs within the School of Education. Since these course offerings are requirements for student completion, there is an expectation that faculty (i.e., generally their graduate advisors) will coordinate and supervise these field experiences. Since the expectation of coordination and supervision are an expectation of the student's program of study, compensation of a faculty member related to workload is required. The University cannot arbitrarily say faculty members are going to engage in this activity and provide no compensation and/or workload credit for this activity. This expectation of a

required activity by a faculty member related to their teaching responsibilities is listed in BOR 4:38. Second, because no specific criteria are in place related to the relative workload units allocated for supervision of internships and practicum experiences at the graduate level, and no policy excludes this, one needs to use past practice to calculate the relative workload units for these activities. See p. 37, *infra*.

Since supervision of internships and field experiences are specifically addressed under the teaching section of the BOR 4:38.C.6.1 (p. 5), APP. 63, and is implied as a prerequisite condition for the statement “...*faculty member's workload may be assigned additional workload credit*,” *Id.*, Dr. Sweeney asserted that Dr. Schweinle’s omission of any workload equivalent for internships and field experiences are a misapplication of the USD 2021 Workload policy.¹²

Findings of Fact 35-39. The School of Education Workload Addendum states that graduate faculty are expected to supervise 1 to 2 dissertation students a year. Dr. Sweeney supervised 5 and 7 students in each of the respective semesters of the school year. There are no specific criteria in the current USD or SOE Workload Policies related to how many workload units are awarded for supervising 1 to 2 dissertation students per year. Because there are no criteria present to determine the relative equivalency of supervising 1 to 2 dissertation students, one must prorate Dr. Sweeney’s supervision of 5 and 7 students in each of the respective semesters of the school year based upon past practice. “The amount of time an individual commits to various areas depends on assignments given by the Chair in the context of the University’s Workload Policy.” R2, Ex. 14, p. 10, BR 381. This hardly

¹² Unfortunately, the lack of criteria and the lack of discussion and consultation related to workload and faculty expectations appears to create a workload process that is ambiguous, confusing, inconsistent, and prone to arbitrary and capricious decisions. This is contrary to the overall scheme of BOR 4:38, APP. 59.

means “zero”. The allocation of only 1.5 workload units for supervision of dissertation students provided to Dr. Sweeney by School of Education Dean Schweinle is arbitrary and capricious. There was no factual basis for it.

The hearing examiner stated in Finding of Fact 37 that the “supervision of dissertation students is considered both teaching and research.”. R2, BR 5, APP. 28. True, however Dr. Sweeney was never made aware whether supervising dissertation students was going to be considered as teaching or research. Further, no specific workload credit (i.e., workload units) was ever allocated to either of these categories in the workload calculations. Whether the consideration of supervision of dissertation students is considered as teaching or research activities should have been clarified at some meeting to discuss workload considerations. This lack of discussion interjected ambiguity, and results in arbitrary and capricious decision-making and abuses of administrative discretion.

Findings of Fact 50-53. The hearing examiner’s comments on Finding of Fact 50 are incorrect. Didactic courses workload units are equivalent to the number of credits the course is worth. She further confused things by adding in statements on low-enrollment courses. Low enrollment courses are covered in BOR 2:38, § D. These low enrollment thresholds are commonly referred to as the 10, 7, 4 enrollment rules. In short, for a course to “make”, it needs 10 students at the undergraduate level, (i.e., 100-400 level courses), at least 7 students at an initial graduate level (i.e., 500-600 level courses), and at least 4 students at the advanced graduate level (i.e., 700-900 level courses). *Id.* Therefore, it is not clear why the hearing examiner included this item.

As Dr. Sweeney testified, R2, p. 40 of Ex. 1 (BR 132), is taken directly from the Digital Measures in the evaluation, at R2, pp. 9-10 of Ex. 2, TR 18, BR 28. If the workload

credits are added up, there were 20.66 for Fall, 2022, BR 147, and 19.17 for Spring, 2021. BR 146-7.

The hearing examiner concluded that “Sweeney has not presented any evidence that his is entitled to additional workload credits for supervision of dissertation students, nor does the Workload Policy require it.” Finding of Fact 39, APP. 29. Workload by its very nature is an allocation of TIME that a faculty member is expected to allocate for those activities listed in BOR 4:38. Since the baseline stated in the School of Education Workload Policy is the supervision of 1 to 2 dissertation students yearly, and Sweeney supervised 12 (i.e., 5 one semester and 7 the next semester), then logically he would need to allocate more time to engage in these supervision activities. Therefore, the hearing examiner’s conclusion does not take time into account when considering the number of dissertation students supervised during this period. For the hearing examiner to find that Dr. Sweeney did not provide evidence of the need for additional workload credit is clearly erroneous.

Dr. Sweeney provided a breakdown of workload units that addresses both didactic and nondidactic teaching responsibilities, the percentage of research and scholarship participation, and the percentage of service obligations. The figures presented by Dr. Sweeney were well above 33 workload units for the entire year and did not count the research and service obligations that are delineated on his annual evaluation (i.e., 60% teaching 30% research/scholarship, and 10% service). These percentages should equate into 18 workload units of teaching (i.e., didactic and nondidactic), 9 workload units of research/scholarship, and 3 workload units related to service obligations. When research and service obligations are taken into account, Dr. Sweeney’s workload units are well over

40 units for the 2021-2022 academic year, but the policy requires 30 workload units across the entire school year.

Findings of Fact 30, 46 and 53 are mixed questions of law and fact and are therefore fully reviewable. Finding of Fact 30 states “the policy does not provide a prorated share of the workload unit must be awarded when a faculty member has less than 3 teacher candidates.” APP. 28. This is a mixed question of law and fact because it is applying an administrative provision, the workload policy, to a set of facts. It is erroneous because it violates one of the most basic rules of statutory construction, i.e., in the interpretation of a provision, one must not add words or phrases which are not present in the written document. That is exactly what the hearing examiner did in this case. In Appendix A to the USD Workload Policy, applicable to the School of Education, states “For non-residency instructors, supervision of 3 teacher candidates equates to 1 workload unit”. R2, Ex. 8, BR 349. It does not say “supervision of a *minimum* of 3 teacher candidates”. Nor does it state “*only* supervision of 3 teacher candidates equates to 1 workload unit”. The absence of the language which the Administration, and the hearing examiner, added to the Workload Policy ignores the past practice where prorated numbers were given for supervision of student teachers. The ambiguity in the current policy can, and should be, resolved by resort to past practice. Dr. Sweeney pointed out why. R2, TR 22-23, BR 32-42.

In a case where the union wanted past practice to help interpret a contract, the South Dakota Supreme Court held, in *American Federation of State, County & Municipal Employees v. State*, 444 N.W.2d 10, 12 (S.D. 1989) “if the language is ambiguous and does not speak to a subject it normally would be expected to, then the court may go beyond the four corners of the contract”, quoting *MEA/AFSCME Local 519 v. City of Sioux Falls*, 423

N.W.2d 164 (S.D. 1988). “Other jurisdictions have recognized this rule. When a latent ambiguity in the terms or language of an agreement, extrinsic sources such as bargaining history and past practices may be considered.” *Id.*¹³

Finding of Fact 46 is also a mixed question of law and fact. It states:

The workload policy does not provide for an award of workload credit for new or online course preparation.”

R 6, APP. 29. This is also the application of a regulation to a set of facts, which ignores the fact that there was no discussion whatsoever between any Administrator, particularly Dr. Zalud, with Dr. Sweeney regarding the sudden addition of a new course, SPED 260. Shortly before that, Dr. Sweeney had been ordered to teach yet another new course. Dr. Sweeney was assigned two new courses on short notice that he had never taught in 27 years at USD. He was allowed no input into these decisions, contrary to the practice and to the overall purpose of the communicative scheme of BOR Policy 4:38. A “Statute should be applied without defeating the purpose of the overall statutory scheme”. *Arends v. Dacotah Cement*, 2002 SD 57, ¶ 19, 645 N.W.2d, 583, 589, citing *Grauel v. SD School of Mines and Technology*, 2000 SD 145, ¶ 14, 619 N.W.2d, 260, 264. The Administration provided no rationale for not providing additional workload credits. The only explanation that was provided to Dr. Sweeney was that the Administration possessed the unfettered discretion to assign whatever it felt was appropriate. Hackemer, November 29, 2021 letter, R2, Ex. 1, p. 21, BR 113; Gestring, December 17, 2021 letter, R2, Ex. 1, p. 9, BR 101.

Finding of Fact 53 is a mixed question of law and fact because it also applies an administrative provision to a set of facts: “Sweeney has not presented any evidence that he

¹³ One court recognized that, even without ambiguity, past practice may be considered. *MEA/AFSCME Local 519 v. City of Sioux Falls*, 423 N.W.2d 164, 168 (S.D. 1988).

is entitled to additional workload credits for teaching these classes nor does the policy require it.” R2, R 7, APP. 30. In fact, Dr. Sweeney provided substantial evidence regarding this issue, both in the grievance procedure submissions, R2, Ex. 1, pp. 3-7, BR 95-100; 10-18, BR 102-111; 22-45, BR 114-137, and in his unrefuted testimony at the February 1, 2022 evidentiary hearing. He testified about how he calculated his teaching workload at 33.51 credits, with the new course added. R2, TR 52, BR 62. USD did not present any testimony to contradict this, nor was there anything in the USD submissions in Ex. 1 which challenged this. Dr. Sweeney also provided Ex. 8, the USD Faculty Workload Policy, effective January, 2021:

Faculty members holding professional rank whose primary responsibilities involved delivery of instruction will be assigned workload units to support active research, scholarship or creative scholarship or creative scholarship or active discipline-related professional service. *Specific assignments are discussed during the annual performance evaluation.*

Ex. 8, p. 2, BR 344. (emphasis added). This is the language provided by USD. It does not state the “specific assignments may be discussed” or “should be discussed.” It says “are” discussed. This discussion at the time of assignment was mandatory but was not done.

Conclusions of Law 1-8 are uncontroversial. BR 7, APP. 30. Conclusions of Law 9-10 are common, and correct, statements of rules of construction. Conclusion of Law 14 is simply a statement of the case and is really a finding of fact. Conclusion of Law 11 is interesting because it cites Connecticut cases for the proposition that silence does not equate to ambiguity. APP. 31. The primary authority cited, *Hartford Windsor Health Care Properties, LLC v. City of Hartford*, 298 Conn. 191, 198, 3 A.3d 56 (2010), also cites the rule that: “If a statute or regulation does not sufficiently define a term, it is appropriate to

look to the common understanding of the term as expressed in a dictionary”. 298 Conn. 191 at 200-01. BOR 4:38.C2 states: “The Board recognizes the value of policies that communicate workload expectations for faculty”. App. 61. The dictionary definition of “communicate” as a “share or exchange information or ideas.” Compact Oxford English Dictionary, p. 195 (Oxford University Press, 3d. ed. 2008). “Share” and “exchange” are the opposite of “unilaterally impose.” Also cited in this case is the rule that:

“[W]e are [also] guided by the principle that the legislature is always presumed to have created a harmonious and consistent body of law.... [T]his tenet of statutory construction.... Requires us to read statutes together when they relate to the same subject matter.... Accordingly, [i]n determining the meaning of a statute ... we look not only at the provision at issue, but also to the broader statutory scheme to ensure the coherency of our construction.

298 Conn. at 198. It is the Administration which ignored this principle, by parsing “should” to mean “may”, in President Gestring’s response, R2, Ex. 1, p. 2, BR 101, and by totally ignoring R2, Ex. 8, p. 2, BR 344.

Conclusion of Law 12 can be read as favoring Dr. Sweeney’s positions. “A guideline is a recommended practice that allows discretion in its implementation...” *Hobbs v. Jones*, 412 S.W.3d 844, 861 (Ark. 2012) (dissent). In *Hobbs*, the Method of Execution Act (MEA) was found unconstitutional, which was affirmed on appeal, because the statute gave unfettered discretion on the method to the Arkansas Department of Corrections (ADC). The ADC argued that it still had guidance due to the prohibition against cruel and unusual punishment. The majority rejected this argument, which is why Conclusion of Law 12 quotes the dissent. But not all of it; the rest of the quote is “While the current MEA does not give mandatory directives to the Director as to the chemicals and procedure used in carrying

out lethal injection, it does provide guidance.” *Id.* In other words, the MEA did not give the ADC unfettered discretion.

The same rationale applies to Conclusion of Law 13. APP. 31. Dr. Sweeney is not arguing, and did not testify, that USD had no discretion, but only that it had to exercise its discretion within the overall purpose of the BOR and USD policies, i.e., within a framework of cooperation, discussion and recognition of Dr. Sweeney’s overall responsibilities and his experience.

Conclusion of Law 15, APP. 31, that “USD’s award of zero workload units for Sweeney’s supervision of the student teacher did not violate, misinterpret, or misapply applicable policies” is legally erroneous. It rests upon the imaginary insertion of additional language not included in the original provision, *In re Black Hills Power, supra*, and contrary to past practice, with no discussion with Dr. Sweeney.

Conclusion of Law 17, APP. 17, regarding USD’s award of 1.5 workload units for supervision of dissertation students violated the overall purpose of BOR 4:38 because there was no communication with Dr. Sweeney, and it ignores his overall burden. The Administration provided no criteria to differentiate the number of students supervised completing dissertation research above the stated baseline (i.e., 1 to 2 students supervised during an academic year). Conclusion of Law 18, APP. 32, the “award of zero workload teaching credits for co-advising the student group” violated the overall purpose of BOR 4:38 for the same reasons stated for Conclusion 17.

Regarding Conclusion of Law 19, advising is listed as a teaching responsibility in the teaching section of BOR 4:38. The hearing examiner stated that it is a service obligation, which is incorrect. Additionally, service in the USD and School of Education

workload documents suffers from the same ambiguity and arbitrariness as nondidactic teaching and research expectations related to the quantifiable breakdown on workload units required in BOR 4:38. Therefore, USD's "determination to make no award of workload units for service" or for academic advisement does violate, misinterpret, and misapply applicable policies under BOR 4:38.

Conclusions of Law 20-24, APP. 32: The hearing examiner states the following: "ultimately the Workload Policy itself is a guideline." This statement is contrary to her statements in Finding of Fact 26, where she specifically states that the "guidelines" are treated as policy statements. If these "guidelines" are truly policy statements, then they need to be considered under the principles of statutory construction, as discussed previously. Viewed under the lens of statutory construction, the University is violating, misapplying, and misinterpreting their own workload documents, primarily by avoiding any discussion.

III. THE THIRD GRIEVANCE: THE ASSIGNMENTS

Dr. Sweeney had brought it to the Dean's attention that he was not familiar with the policy expectations for the SOE SARA administrator and possessed no formal background in Head Start or program evaluation research.¹⁴ Dr. Schweinle had briefly explained that the SARA program was a U.S. Department of Commerce initiative dealing with distance education courses. The Dean did not discuss the lack of background or that these administrative duties were not consistent with Dr. Sweeney's discipline, previous faculty assignments, or the fact that Dr. Sweeney possessed no formal background, training, or experience with the "new" activities listed in the 2022-2023 workload assignment. *Id.*

¹⁴ The list of assignments is at R3, Ex. 1, p. 29, BR 87, APP. 43.

Curiously, President Gestring interjected, “Dean Schweinle expressed to me several non-retaliatory reasons for the change in workload assignments. . . . There are also ongoing concerns about your informal advising of students not assigned to you as advisees.” *Id.* No concerns about the alleged informal advising of students not assigned to Dr. Sweeney had been brought to his attention since the hearing on June 8, 2021 about the January 29, 2021 letter of warning. There is no mention of it in Dr. Schweinle’s April 8, 2022 list of assignments. R3, Ex. 1, p. 29, BR 87, APP. 43. This comment showed a retaliatory animus. President Gestring denied the grievance and rejected Dr. Sweeney’s proposed remedies.

Findings of Fact 16 and 18 are clearly erroneous because they state that Dr. Sweeney’s grievance is based upon the belief that his agreement to the changed assignments was a necessary predicate to the new assignments. He did not take that position at any time in the hearing.

Conclusion of Law 6 is an erroneous reading of BOR policies because it concludes that the University has unfettered discretion to make workload assignments. Conclusion of Law 7 is erroneous because it is premised on the conclusion that Dr. Sweeney’s argument about BOR Policy 4:38.C.4 requires that he agree with any workload assignment, and because the assignments do fall within “other specific activities” as implemented in 4:38.C.4. Conclusion of Law 8 is in error for the same reasons stated for Conclusions of Law 6 and 7.

The USD Faculty Workload Policy, effective January 2021, R3, Ex. 2, R 88, references BOR Policies 4:1, 4:13, and 4:38, and states specifically “This document shall be consistent with BOR Policy Manual 4:38.1.” Workload Policy, R3, Ex. 2, p. 1, BR

88. The policy may be “revisited periodically . . . with revisions developed in consultation with the faculty.” *Id.* Revisions “require consultation” with faculty in five listed colleges within USD.¹⁵ In the list of definitions at the beginning of the South Dakota Code, “shall” is defined, but “may” and “should” are not. SDCL 2-14-2 and -2.1. In *SPX Transcontinental, Inc. v. Ocean Airlines, S.P.A.*, the Court stated, regarding a forum selection clause that used “should”, “[t]hus, at best, the Agreement is ambiguous as to whether the forum selection clause was mandatory or permissive.” 2008 WL 11331835, *1, (S.D. Fla. March 25, 2008). Therefore, the Workload Policy at Ex. 2, p. 3, quoted above, is “at best . . . ambiguous.”

Dr. Sweeney also testified about why past practice is relevant and important in this case. In a case where the union wanted past practice to help interpret a contract, the South Dakota Supreme Court held, in *American Federation of State, County & Municipal Employees v. State*, 444 N.W.2d 10, 12 (SD 1989) “if the language is ambiguous and does not speak to a subject it normally would be expected to, then the court may go beyond the four corners of the contract”, quoting *MEA/AFSCME Local 519 v. City of Sioux Falls*, 423 N.W.2d 164 (S.D. 1988). “Other jurisdictions have recognized this rule. When a latent ambiguity in the terms or language of an agreement, extrinsic sources such as bargaining history and past practices may be considered.” *Id.*¹⁶ Dr. Sweeney has not taken the position that the Administration cannot make new assignments.

[T]he administration does have the ability to assign different activities to faculty members. And I’m not disagreeing with

¹⁵ Even though some faculty consultation requirements envision or allude to faculty member committees, that does not mean that all faculty consultation requirements only refer to committees. See, Workload Policy, Ex. 2, p. 2: “Specific assignments are discussed during the annual performance evaluation”. Once again, the administration is attempting to add language to written policies which is not in the document.

¹⁶ One court recognized that, even without ambiguity, past practice may be considered. *MEA/AFSCME Local 519 v. City of Sioux Falls*, 423 N.W.2d 164, 168, (S.D. 1988).

that, um, you know, analogy, but there is one more step to that and that is that's within a faculty member's background knowledge if a faculty member has a wholesale different set of training and experience, expertise, background, discipline. Then you know, the agreement to recognize other activities has to be taken into consideration.

R3, TR 32, BR 15. But where the new activities significantly deviate from a faculty member's background and experience, there needs to be discussion.

Then there needs to be a rather serious discussion and negotiation about those activities to be able to assure that a faculty member is not being unjustly treated and literally set up for failure because of their lack of background and knowledge in that area.

R3, TR 35, BR 16. Failure to so engage, and to remove Dr. Sweeney altogether from his prior role, can have negative impacts on students. R3, TR 52-5, BR 20-21; hearing Exs. 4 and 5 show it did. Dr. Sweeney had no advanced knowledge that another student was going to be removed from his section, nor did the student. R3, TR 56, BR 21; Ex. 6. In fact, two students working at Teachwell, in Sioux Falls, were summarily transferred to another professor, without any discussion with Dr. Sweeney and the students. R3, Ex 7, BR 106; TR 56-60, BR 21. Those were not college sophomores, but graduate students already teaching at a location in Sioux Falls from which the USD School of Education wants to attract students. The "past practice has been that the advisor has been the one that coordinates the student teaching experience." R3, TR 61, BR 23.

"Ambiguity" exists when something is capable of being understood by reasonably well-informed persons in either of two or more senses. *Kling v. Stern*, 2007 SD 51, ¶ 6, 733 N.W.2d 615, 617. An ambiguity is not created simply because the parties differ as to the interpretation of an instrument, instead, an instrument is "ambiguous" when it is reasonably capable of being understood in more than one sense. *Guardianship of*

Novotny, 2017 SD 74, ¶ 14, 904 N.W.2d 346, 350. An ambiguous provision is construed against the drafter. *Liberty Mutual Fire Insurance Company v. Btzzack Construction, LLC*, 259 F.Supp.3d 451, 461 (W.D. Virginia 2017). The USD administration is the drafter of the 2021 USD Faculty Workload Policy. This policy includes ambiguous provisions, in addition to p. 3 cited above:

Workload may include teaching, research, and service with the exact allocation based on faculty rank and responsibilities as approved by the dean or the dean's designee.

A faculty member's standard instructional load may include both on-campus and off-campus instruction, including face to face, hybrid and online courses.

"Based on faculty rank and responsibilities" cannot mean ignoring 27 years of experience for a tenured professor, but it is unclear what it does mean. The heart of this grievance was that the BOR and USD policies require consultation and discussion, not just unilateral fiat.

The 2021 USD Faculty Workload Policy states, under "Workload assignment and annual evaluation", that

Discussion of workload between a faculty member and chair should occur as an integral part of the annual performance evaluation, since workload and performance expectations are linked.

R3, Ex. 2, p. 3, BR 90. The plain language is clearly not referring to a faculty committee. On April 8, 2022, at the meeting between Dr. Schweinle and Dr. Sweeney, there was no consultation and no agreement. Dr. Schweinle handed Dr. Sweeney a written order. BR 87, APP. 43. The brusque manner in which this order was given to Dr. Sweeney, and the discrepancy with what he has done the past 27 years, shows this action to be retaliatory

for Dr. Sweeney's audacity in bringing on the previous two grievances. This is discussed below.

Even though Dr. Schweinle assigned Dr. Sweeney the role of SARA Administrator, she had no idea how long it would take to review the licensure requirements in the 50 states. R3, TR 103, BR 33. Logically, this would indicate more discussion, not zero. Dr. Schweinle testified that the teaching, research, and service assignment given to Dr. Sweeney are consistent with 4:38 but did not state why or how. R3, TR 103, BR 33. Dr. Sweeney agreed to take a Summer training course to familiarize himself with the task upcoming. R3, Ex. 8, BR 113. If he had been otherwise committed (he's not on contract in the Summer), she said she would have mandated training in the Fall. R3, TR 108, BR 34.

President Gestring's response to Dr. Sweeney's Step 3 was that the Agreement to Recognize Other Activities in Policy 4:38 did not require an agreement to not recognize the activities that would otherwise not be given workload credit. R3, BR 69.

President Gestring suggested that because the broad categories of alternative activities are present in BOR Policy 4:38.C.6, related to potential teaching, service, and creative activities (i.e., research), that the modified activities in the new workload assignment of the 2022-2023 academic year are not covered under BOR Policy 4:38.C.4. The policy does not say this. See *In re Black Hills Power*, 2016 SD 92 ¶ 8, 889 N.W.2d at 633. Therefore, since President Gestring does not believe that the new workload activities are covered under this BOR policy, she believes that the

Dean of the School of Education can unilaterally assign whatever activities she deems as necessary within this academic unit. There is no basis for this.

“Workload policies *shall* acknowledge workload expectations relating to the overall number of expected workload units, credit hours, contact hours, *preparation, clinical work*, instructional methods, research, service and other factors deemed appropriate.” BOR Policy 4:38.C.2 (emphasis added). R3, APP. 61. With no discussion of these factors, there could be no acknowledgment, particularly because Dr. Schweinle had no idea how much work was required for the SARA assignment. “Undergraduate ELED, SEED, SPED and PE field experiences, internships and practicum are considered course offerings . . .” R3, Workload Policy, p. 7, BR 94, APP. 50. “Dissertation/thesis supervision is considered both teaching and research.” *Id.* “Nine-month professional rank faculty are usually assigned workload units for scholarship and research activity.” R3, Workload Policy, pp. 7-8, Ex. 2, BR 94-95, APP. 50-51.

President Gestring incorrectly argued “As to your assertion that teaching has been taken away entirely, that assertion is incorrect. The activities assigned under your teaching allocation of workload are recognized as teaching activities.” R3, Ex. 1, p. 11, BR 69. These comments are not consistent with what Dr. Sweeney stated in the Step 1/Step 2 Grievance submitted to Dr. Hackemer on April 21, 2022. Dr. Sweeney was asked about his statement, at R3, Ex 1, p. 27, BR 85, “But teaching has been taken away entirely contrary to South Dakota BOR policy 4:38.C.6.” TR 70, R 25. Dr. Sweeney admitted that at R3, Ex. 1, p. 25, BR 85 he described this as:

The new workload removed Dr. Sweeney of his didactic teaching responsibilities and reduced his allocated research workload that were espoused in his annual performance evaluation and considered consistent with

his 27 years of a successful professor at the University of South Dakota.

R3, TR 71, BR 25. He conceded perhaps he should have also included “didactic.” *Id*

Based upon experience, Dr. Sweeney testified, there were other professors in the School of Education better equipped to perform the Headstart administration assigned to Dr. Sweeney. Lisa Newland had performed research in the field of early childhood education and has “a very good knowledge of the inner workings of our Headstart at USD.” R3, TR 46, BR 19. Also, Dr. Monica Iverson, “who places our undergraduate students in internships uses Headstart as one of her sites.” *Id* It is not as though Dr. Sweeney was Dr Schweinle’s only alternative.

IV. RETALIATION

Retaliation is explicitly prohibited by BOR Policy 4:7.I.D.3:

Neither the institution nor the Board of Regents will retaliate or effect reprisals against any faculty member for processing or participating in a grievance.

APP. 55. Findings of Fact 19 is a mixed question of law and fact and is therefore fully reviewable. R 3, BR 6, APP. 39. Regarding Dr. Sweeney’s assertion of retaliation, the finding states that “this allegation was denied by Dr. Schweinle and Dr. Sweeney was unable to offer any evidence beyond his conjecture.” *Id* The record does not support this. Even if not a mixed question of law and fact, it is clearly erroneous because Dr. Sweeney did offer evidence: Dr. Zalud’s late assignment of SPED 260; President Gestring’s *sua sponte* comment about advising; and Dr. Schweinle’s April 8, 2022 assignments. Conclusion of Law 5 is in error because it states that Dr. Sweeney’s argument for retaliation is merely conjecture.

Regarding Dr. Zalud's late assignment of SPED 260, teaching a new course required considerable preparation. Dr. Sweeney estimated that from October 21, 2021 and the beginning of the Spring 2022, he spent 80-120 hours preparing to teach this course. Also, at no time during the second grievance, either in the complete grievance package, or during the February 1, 2022 hearing, was there any mention of "misadvising" or advising unassigned students. This was not addressed or discussed, but it suddenly appeared in President Gestring's letter. R3, BR 69, APP. 11.

Dr. Schweinle candidly admitted that she informed Dr. Sweeney that the April 8, 2022 assignments of workload was not subject to negotiation because:

Well, for a few reasons: first of all it is an administrative prerogative to make assignments of workload. And, um, that's in the BOR statement on faculty expectations. And he's also previously opposed workload assignments.

R3, TR 101, BR 33 (emphasis added). Of course, there is no provision in any BOR policy, and certainly not in 4:38 or 4:7, which states or implies that a faculty member grieving any assignment thereby lessens the Administration's obligation to engage in discussions.

The April 8, 2022 assignments were retaliatory even if allowed by BOR 4:38. For example, it's well-established in federal discrimination law that even if the underlying discrimination claim is not sustained, there can still be a retaliation claim which prevails. USD has argued that "Dr. Sweeney must establish a 'tangible change of duties or working conditions that constitute a material employment disadvantage.'"¹⁷ He has done that. USD cannot seriously argue that the April 8,

¹⁷ USD cited *Cosette v. Minnesota Power & Light*, 188 F.3d 964, 972 (8th Cir. 1999). Dr. Sweeney does not argue that *Cosette* states the proper standard under these circumstances. *Cosette* correctly states the three elements: protected activity, adverse employment action, and causation.

2022 assignments are not a tangible change of duties, when Dr. Sweeney's 80% teaching load was reduced to 20%, and he was given administrative assignments he had never performed, SARA and Headstart. "What I had been doing in the past was close to 80 percent in terms of teaching responsibilities." R3, TR 9, BR 10.

Plaintiff need not allege that he was denied a promotion, discharged, or received a salary reduction; he "must point to an action that a reasonable employee would have found materially adverse." *Bonnette v. Shinski*, 907 F.Supp.2d 54, 69-70 (D.D.C. 2012) (internal quotation marks omitted). Plaintiff has done so here.

Paschal v. District of Columbia, 65 F.Supp.3d 192, 178 (D.D.C. 2014). Dr. Sweeney has done so here.

For President Gestring to allege that he is one who is "*unable to learn and take on new responsibilities should not be trusted with teaching students how to learn and meet the challenges of an ever-changing world*" (R3, Ex. 1, p. 10) (emphasis added) is demeaning, hostile, and not in keeping with the collegial expectations discussed in the Civility in Working with Colleagues, Staff Members, Students and Others in SD BOR 4:38.C.5.1. This civility clause within SD BOR 4:38.C.5.1 is:

Universities play a special role in preparing students to lead the complex social organizations through which businesses and professions operate and through which free people govern themselves. Students must be taught, and they must be shown through the example given by institutional employees, that members of stable, effective and prosperous social organizations observe norms of conduct under which all participants treat one another civilly and carry out their respective tasks in a constructive and informed manner. Complex social organizations derive their strength from the cooperation of those who participate in them. *By virtue of their special role in preparing future generations of leaders, universities have a particular concern with conduct that destroys the bonds of cooperation and common purpose*

on which society rests by demeaning members of the community, and such conduct cannot be tolerated in an institution whose very purpose is to shape the skills and conscience of the rising generations.

(emphasis added). President Gestring's unprompted comment is so contrary to this policy that it is evidence of retaliatory animus.

Given Dr. Sweeney's record of successful teaching/advising, research/scholarship and service to his discipline and academic unit, the University, local and regional schools, and most of all his students, these comments are not constructive to informed dialogue. Dr. Sweeney accurately contended that this new workload assignment was meant to punish, isolate, and exclude him from directly working with students or within his discipline at this institution, in retaliation for Dr. Sweeney filing the first and second grievances.

President Gestring summarily dismisses Dr. Sweeney's allegations of the new workload assignment as being retaliatory because she believes the decisions related to this new assignment were not a "*material adverse action*" and that "*the assignments are within those contemplated for a faculty member under the relevant policies.*" R3, Ex. 1, p. 11, BR 69 (emphasis added). Once again, these statements are not consistent with the "*past and present*" workload assignments, nor the context and scope of Dr. Sweeney's discipline, expertise, background, and training. Her legal conclusions are also inconsistent with the law:

Adverse actions in the retaliation context encompass a broader sweep of actions than those in a pure discrimination claim." *Baloch v. Kempthorne*, 550 F.3d 1191, 1198 n. 4 (D.C. Cir 2008) (internal quotation marks omitted). Retaliation actions are "not limited to [those] that affect the terms and conditions of employment." *Burlington N.& Santa Fe Ry. Co. v. White*, 548 U.S. 53, 64, 126 S.Ct. 2405,

165 L. Ed. 2d 345 (2006). A materially adverse action is one that ‘could well dissuade a reasonable worker from making or supporting a charge of discrimination.’

Paschal, 65 F.Supp.3d at 177.

President Gestring further stated the following in her Step 3 Grievance response:

“There are also ongoing concerns about your informal advising of students not assigned to you as advisees.” R3, Ex. 1, p. 11 (emphasis added). President Gestring specifically links the contents of Dr. Sweeney’s previous grievances, related to his allegations of retaliation, reinforcing his concerns related to this issue. No ongoing concerns had been brought to Dr. Sweeney’s attention since the first grievance hearing. R3, TR 44, BR 18. These comments by President Gestring are direct evidence of a retaliatory animus, when made in defense of the April 8, 2022 assignments.

Direct evidence “may include evidence of actions or remarks of the employer that reflect a discriminatory attitude,” comments which demonstrate a discriminatory animus in the decisional process, or comments uttered by individuals closely involved in employment decisions. *King v. Hardesty*, 517 F.3d 1049, 1058 (8th Cir. 2008). If the Court finds there is direct evidence of retaliation, then “the burden rests with [employer] to show that it more likely than not would have made the same decision without consideration of the illegitimate factor.” *Kratzer v. Rockwell Collins, Inc.*, 398 F.3d 1040, 1046 (8th Cir. 2005).

One cannot expect to find smoking-gun evidence of retaliatory evidence in a University setting. Intelligent, highly educated people are not going to be so foolish as to send an email saying, “Get Sweeney!” but President Gestring’s totally unfounded comments are as close to that as one could reasonably expect.

President Gestring and Dr. Hackemer did not provide any specific criteria, policy, or procedures for investigating alleged retaliatory actions that are expressly forbidden in BOR Policy 4.7 and SD BOR Policy 1.1 I. This lack of addressing specific criteria, policy, or procedures for investigating alleged retaliatory actions is a violation of SD BOR policy as well as concepts of statutory construction. A decision not based on any criteria or evidence is arbitrary and capricious. President Gestring's summary dismissal of Dr. Sweeney's allegations of retaliation for previous grievance submissions is itself evidence of retaliatory motive.

On appeal to Circuit Court, Dr. Sweeney argued there was no basis in his record for the comment about "inability to learn new things," and that this comment was demeaning, and not in keeping with the collegial expectations discussed in the Civility in Working with Colleagues, Staff Members, Students and Others in SD BOR 4: 38.C.5.1., APP. 63. The Circuit Court held that Dr. Sweeney failed to provide a causal link between the new assignments and the past grievances. APP 16, Dr. Schweinle's testimony provides a causal link; she refused to discuss them with him because "he's also previously opposed workload assignments," R3, TR 101, BR 33. President Gestring initiating the comment about "ongoing concerns about your informal advising of students not assigned to you," R3, BR 69, without any basis was another link. The Circuit Court should be reversed on this.

CONCLUSION

The letter of warning was a violation of BOR Policies 4:38.C.3.1 and 1.11.1.A, the USD Faculty Workload Policy, and the School of Education Graduate Programs and Procedures. Disciplining Dr. Sweeney for the out-of-class consultation with R.A. is a

violation and misapplication of BOR Policies 2:29.2.A and 4:38.C.1. Basing the discipline or upholding it because of a form that did not exist at the time of the letter of warning is a violation of BOR Policy 4:7.IE(4)(c). The letter of warning should be removed from Dr. Sweeney's personnel file and Dean Schweinle's negative comment about advising in the 2019-2020 evaluation, Ex. 1, pp. 26-27R 190-191, should be excised from that evaluation, in excess of the 30-workload hour maximum.

The second grievance does not only arise from BOR policies, but also other policies adopted by USD. BOR Policy 4:7.I.C(3). Dr. Sweeney has identified violations of the BOR policies and the 2021 USD Faculty Workload Policy. These violations resulted in workload being assigned to Dr. Sweeney without any discussion or consultation, in excess of the 30-workload hour maximum.

In the third grievance, the April 8, 2022 assignments were ordered by disregarding workload policies and in retaliation for the previous grievances. The nature of the assignments and the absence of any discussion, as well as other comments, show the assignments were made in retaliation for the two previous grievances. The assignments of April 8, 2022 were made contrary to BOR policies, and in retaliation for previous protected activity.

That grievances should have been sustained. The Circuit Court should be reversed.

Dated this 29th day of April, 2024.

HAGEN, WILKA & ARCHER, LLP

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 29th day of April, 2024, a true and correct copy of the above and foregoing **Appellant's Brief** was served via Odyssey the following:

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By /s/ Thomas K. Wilka
Thomas K. Wilka

CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4), I hereby certify that this brief complies with the requirements as set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word and contains 16,333 words from the Statement of Jurisdiction through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

/s/ Thomas K. Wilka

Thomas K. Wilka

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State of South Dakota

)

In Circuit Court

: SS

County of Clay

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First Judicial Circuit

WILLIAM J. SWEENEY,

Appellant,

-VS-

SOUTH DAKOTA BOARD OF
REGENTS and the UNIVERSITY OF
SOUTH DAKOTA,

Appellee.

13CIV22-120

ORDER AND FINAL JUDGMENT

The above-captioned matter is a consolidation of three appeals by William J. Sweeney, Appellant, from determinations by the South Dakota Board of Regents ("BOR"), Appellee, regarding three separate faculty grievances initiated by Dr. Sweeney. Dr. Sweeney filed his appeal of the BOR's decision on his first grievance on September 2, 2021, his second grievance on June 3, 2022, and third grievance on October 14, 2022. The appeals were consolidated by the Court's Order Granting Motion to Consolidate entered June 8, 2023.

The Court issued a Memorandum Decision on November 8, 2023, which is incorporated herein by reference, affirming the BOR's decision regarding Grievance # 2 and Grievance # 3. Regarding Grievance # 1, the Court affirmed in part and remanded, in part, for further proceedings to determine the two factual allegations in the letter of warning that were not addressed by the agency decision and entry of findings and conclusions thereon. The specific factual allegations were:

1. Dr. Sweeney utilized an outdated form as part of informally advising students; and
2. Dr. Sweeney incorrectly advised students that they may waive a course due to prior work experience or coursework.

The Parties subsequently entered a Stipulation to dismiss these remanded issues, which is incorporated herein by reference. Pursuant to the Parties' Stipulation, the Court ORDERS that the factual allegations remanded for further proceedings are hereby dismissed. The BOR's decision regarding Grievance # 1 is hereby affirmed subject to the Parties' Stipulation.

Therefore, it is hereby ORDERED, ADJUDGED AND DECREED:

The BOR's decision regarding grievance # 1 is hereby AFFIRMED.

The BOR's decision regarding grievance # 2 is hereby AFFIRMED.

The BOR's decision regarding grievance # 3 is hereby AFFIRMED.

1/13/2024 12:12:32 PM

BY THE COURT:



The Honorable Tami Bern
Circuit Court Judge

Attest:
Zimmerman-Walker, Nadyne
Clerk/Deputy





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November 8th, 2023

Mr. Thomas K. Wilka
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RE: Memorandum Decision
William J. Sweeney vs. The South Dakota Board of Regents and
The University of South Dakota 13CIV22-120

Dear Counsel:

The above-entitled matter was appealed to the court by William J. Sweeney, a tenured professor at the University of South Dakota, from a determination by the Board of Regents ("BOR") in regard to three separate grievances which have been consolidated in this file.

Because the letter of warning and evaluation notation do not misinterpret, misapply or violate any law, BOR policy or academic freedom as to the two specific factual findings entered which constitute advisement of students not assigned and incorrect advisement of the necessity of the Praxis Core exam, the determination by the BOR dismissing the grievance is affirmed, in part. The agency decision is remanded, in part, for further proceedings to determine the additional factual allegations in the letter of warning that were not addressed by the agency decision and entry of findings and conclusions thereon. Because Dr. Sweeney has failed to meet his burden to establish that the calculation of his teaching workload was incorrect; that his assignments subsequently exceeded the acceptable established percentage; that the court has jurisdiction to determine a grievance concerning workload discussion and, alternatively, that a BOR policy was violated in regard to workload discussion, the determination by the BOR as to grievance #2 is affirmed. Because Dr. Sweeney has failed to meet his burden of proof that BOR 4:38.C.4 required his agreement for the April 8th, 2022 workload assignment or that the assignment was retaliatory, the determination by the BOR is affirmed as to grievance #3.

Filed on: 11.08.2023 Clay County, South Dakota 13CIV22-000120

App. 3

Procedural History

This matter is a consolidation of three civil files asserting grievances against The South Dakota Board of Regents and The University of South Dakota.

Dr. Sweeney timely filed a Step 1 grievance on February 18, 2021 with Dr. Kurt Hackemer seeking, in part, that a letter of warning and comments from the interim dean placed on his 2019-2020 evaluation be removed. No relief was afforded by Dr. Hackemer. Dr. Sweeney timely appealed the Step 1 result to Dr. Sheila Gestring, President of the University of South Dakota (USD). No relief was afforded by President Gestring. Dr. Sweeney timely appealed this result to the Office of the Executive Director of the Board of Regents (BOR). The BOR received the appeal as a Step 3 grievance and proceeded accordingly. The hearing examiner determined the letter of warning did not misinterpret, misapply or violate any laws of the State or South Dakota or rule, policy or regulation of the BOR or USD. The hearing examiner further held Dr. Sweeney's requested remedies 2 and 3 requesting, in part, implementation of policy to address issues raised in his grievance were beyond the scope of the grievance policy in BOR Policy 4:7. The BOR adopted the hearing examiner's recommended decision, findings and conclusions.

Dr. Sweeney filed his appeal of the BOR's decision in regard to this first grievance on September 2, 2021.

Dr. Sweeney filed a subsequent Step 1 grievance on November 1, 2021 alleging a new teaching assignment violated BOR, USD and workload policies. No relief was afforded. Dr. Sweeney filed a Step 2 grievance on November 29, 2021. No relief was afforded. Dr. Sweeney filed a Step 3 grievance on December 3, 2021 with President Gestring. No relief was afforded and President Gestring also denied Dr. Sweeney's request to rescind the assignment of the new course for the spring semester. Dr. Sweeney filed a Step 4 grievance with The BOR. A Step 4 grievance hearing was held on February 1, 2022. The hearing examiner issued its Recommended Decision and Findings of Fact and Conclusions of Law on April 14th, 2022, concluding Dr. Sweeney did not show that USD misinterpreted, misapplied or violated a specific term or provision of the applicable policies and recommended that the grievance be dismissed. The BOR adopted the hearing examiner's recommended decision, findings and conclusions.

Dr. Sweeney filed his appeal of the BOR's decision in regard to the second grievance on June 3, 2022.

Dr. Sweeney filed a third grievance on April 21, 2022 alleging workload assignment in violation of BOR policy and as retaliation for Dr. Sweeney's prior grievances. Dr. Hackemer responded on April 26, 2022 declining relief. Dr. Sweeney proceeded to Step 3 by sending the proper form to President Gestring on May 3, 2022. President Gestring responded on May 16, 2022, agreeing with Dr. Hackemer's response and declining relief. Dr. Sweeney filed a Step 4 grievance with The BOR. A Step 4 grievance hearing was held on July 15, 2022. The hearing examiner issued its Recommended Decision and Findings of Fact and Conclusions of Law on

August 29, 2022, concluding that Dr. Sweeney's allegations were "without factual support." The BOR adopted the hearing examiner's decision, findings and conclusions.

Dr. Sweeney filed his appeal of the BOR's decision in regard to the third grievance on October 14, 2022.

The appeal files were consolidated by virtue of the court's Order Granting Motion to Consolidate entered on June 8th, 2023. Hearing was held on the consolidated file on July 12, 2023.

Jurisdiction

The BOR challenges the court's jurisdiction over the first grievance. Although not raised by either party, the court also reviewed subject matter jurisdiction over a portion of Dr. Sweeney's second grievance wherein he alleges violation of BOR policy by the lack of workload discussion during the annual evaluation process.

As to the first grievance, BOR asserts SDCL 1-26-1 fails to vest the circuit court with jurisdiction in this matter as Dr. Sweeney is not a "person" and he is not aggrieved by a final decision in a contested case.

The BOR's argument that this court lacks jurisdiction to consider the matter as Dr. Sweeney is not a "person" as defined by SDCL 1-26-1(7) and referenced in the definition of party pursuant to SDCL 1-26-1(6) is without merit. Adopting the BOR's construction of the statute would mean that only political subdivisions and agencies may seek review of agency actions. The court does not interpret a statute to reach an absurd result. *Klein v. Sanford USD Med. Ctr.*, 2015 S.D. 95, 872 N.W.2d 802. See also *State ex rel. Johnson v. Pub. Utilities Comm'n of S. Dakota*, 381 N.W.2d 226 (S.D. 1986) holding customers were an "aggrieved party" for purposes of SDCL 1-26.

The BOR also cites the modification of its policy 4:7 after the grievance accrued (the warning letter) but before the action for the first grievance was filed with the circuit court as depriving the court of jurisdiction. Specifically, the BOR amended its policy 4:7 to modify the definition of grievance to acts "that directly affect [] the terms and conditions of employment for the individual employee" arguably excluding grievances such as the warning letter and file notation. It argues that the matters Dr. Sweeney complains of no longer give rise to the grievance process and, thus, subject matter to review them does not exist.

Dr. Sweeney objects arguing that the BOR has waived the issue and that the policy may not be applied retroactively.

Dr. Sweeney's argument as to waiver of subject matter jurisdiction is without merit. Subject matter jurisdiction cannot be waived and may be raised at any time. *Goin v. Houdashelt*, 2020 S.D. 32, ¶22, 945 N.W.2d 349, 355.

The South Dakota Legislature has addressed retroactive effect of administrative rules as follows, "If any rule is proposed to have retroactive effect, the burden is on the agency to show that the retroactivity is authorized by law or is necessary to implement new provisions of law." SDCL 1-26-8.3. While the BOR explains the rationale for amending the policy and its general appropriateness, it has wholly failed to address whether retroactivity is authorized by law or is necessary to implement new provisions of law. The BOR has failed to meet this burden imposed by SDCL 1-26-8.3. See also *West v. John Morrell & Co.*, 460 N.W.2d 745 (S.D. 1990) citing the general rule of statutory construction that a statute will not operate retroactively unless the act clearly expresses an intent to do so.

The BOR seems to alternately infer this court lacks jurisdiction to consider the appeal in this matter as policy 4:7 in existence at the time the grievance accrued required appeals be directed to the Department of Labor and Regulation pursuant to SDCL 3-18-15.2. That argument is likewise without merit. It is well settled that modification of remedies is an exception to the general rule prohibiting retroactive application of statutes. *Schultz v. Jibben*, 513 N.W.2d 923 (S.D. 1994). As the policy modification changed the definition of grievance affected the substantive rights (not merely the remedies) of Dr. Sweeney it cannot be applied retroactively, however, the modification changing the appeal procedure is remedial, and thus, is applied retroactively.

As to jurisdiction vested in the circuit court pursuant to Chapter 1-26 for the first grievance, "[i]n order for the provisions of SDCL Chapter 1-26 to apply, the matter at hand must be a 'contested case' as defined in SDCL 1-26-1(2). . . . [T]here are three ways that a hearing can be 'required by law': . . . (2) an agency rule requirement." *Carlson v. Hudson*, 277 N.W.2d 715, 717-18 (S.D. 1979). Here, BOR policy 4:7(I)(E)(4)(d) provides that "if the grievant is not satisfied with the decision [of the BOR], the grievant may grieve to the circuit court in accordance with SDCL ch. 1-26." This is an agency rule requirement creating a contested case that places the matter at hand within the purview of this court.

As to jurisdiction for Dr. Sweeney's second grievance asserting, in part, violation of BOR policy for the lack of workload discussion during his annual evaluation, this does meet the definition of grievance for purposes of application of the Faculty Grievance Procedure in effect at the time. Accordingly, the court lacks subject matter jurisdiction, and that portion of the grievance is dismissed as set forth herein.

Standard of Review

The circuit court's standard of review in these matters is set forth by the South Dakota Supreme Court referencing its own as follows:

"We review the Department's decision in the same manner as the circuit court." *Hughes v. Dakota Mill and Grain, Inc.*, 2021 S.D. 31, ¶ 12, 959 N.W.2d 903, 907; see SDCL 1-26-37; SDCL 1-26-36. We review the Department's findings of fact for clear error and overturn them only if "after reviewing the evidence we are left with a definite and firm conviction that a mistake has been made." *Hughes*, 2021 S.D. 31, ¶ 12, 959 N.W.2d at 907 (quoting *Schneider v. S.D. Dep't of Transp.*,

2001 S.D. 70, ¶ 10, 628 N.W.2d 725, 728). But “[w]e review the Department’s factual determinations based on documentary evidence, such as depositions and medical records, de novo.” *Id.*; see *Peterson v. Evangelical Lutheran Good Samaritan Soc’y*, 2012 S.D. 52, ¶¶ 18–19, 816 N.W.2d 843, 849 (explaining that proposed amendments to SDCL 1-26-36 failed, leaving this standard of review intact with respect to agency findings of fact derived from documentary evidence). “The Department’s conclusions of law are fully reviewable.” *Hughes*, 2021 S.D. 31, ¶ 12, 959 N.W.2d at 907.

News Am. Mktg. v. Schoon, 2022 S.D. 79, ¶18, 984 N.W.2d 127, 133.

...reviewing courts are required to “give great weight to the findings made and inferences drawn by the agency on questions of fact.” “However, questions of law are reviewed de novo.” *Manuel*, 2012 S.D. 47, ¶ 8, 815 N.W.2d at 670 (citing *Vollmer v. Wal-Mart Store, Inc.*, 2007 S.D. 25, ¶ 12, 729 N.W.2d 377, 382). “Mixed questions of law and fact require further analysis.” *Id.* (quoting *Darling v. W. River Masonry, Inc.*, 2010 S.D. 4, ¶ 10, 777 N.W.2d 363, 366). “If ... the question requires us to consider legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles, then ... the question should be classified as one of law and reviewed de novo.” *Id.*

Easton v. Hanson Sch. Dist. 30-1, 2013 S.D. 30, ¶7, 829 N.W.2d 468, 471.¹

¹ The test to determine whether a question is a mixed question of law and fact is set forth as follows:

To furnish some guidance in this area of the law, we adopt the reasoning of *United States v. McConney*:

In our view, the key to the resolution of this question is the nature of the inquiry that is required to decide ‘whether the rule of law as applied to the established facts is or is not violated.’ [*Pullman-Standard*, 456 U.S. at 289 n. 19, 102 S.Ct. at 1790 n. 19, 72 L.Ed.2d at 80 n. 19] If application of the rule of law to the facts requires an inquiry that is ‘essentially factual,’ *Id.* at 288, 102 S.Ct. at 1790—one that is founded ‘on the application of the fact-finding tribunal’s experience with the mainsprings of human conduct,’ *Commissioner v. Duberstein*, 363 U.S. 278, 289, 80 S.Ct. 1190, 1198, 4 L.Ed.2d 1218 (1960)—the concerns of judicial administration will favor the district court, and the district court’s determination should be classified as one of fact reviewable under the clearly erroneous standard. If, on the other hand, the question requires us to consider legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles, then the concerns of judicial administration will favor the appellate court, and the question should be classified as one of law and reviewed de novo.

As the Supreme Court appeared to indicate in *Pullman-Standard*, 456 U.S. at 289 n. 19, 102 S.Ct. at 1790 n. 19, the concerns of judicial administration will generally favor the appellate court, justifying de novo review. This is so because usually the application of law to fact will require the consideration of legal concepts and involve the exercise of judgment about the values underlying legal principles.

Permann v. S. Dakota Dep’t of Lab., Unemployment Ins. Div., 411 N.W.2d 113, 119 (S.D. 1987) citing *United States v. McConney*, 728 F.2d 1195, 1202 (9th Cir.1984) (emphasis added) (overruled on other grounds by *Est. of Merch. v. Comm’r*, 947 F.2d 1390 (9th Cir. 1991)).

1. Grievance #1.

Dr. Sweeney's first grievance is in regard to correspondence dated January 29th, 2021 from Dr. Amy Schweinle and a corresponding notation in an evaluation dated February 3, 2021. The correspondence relays concern regarding Dr. Sweeney's purported informal advisement of students not assigned to him, utilizing an outdated advising form and misadvising students. Misinformation regarding necessity of taking the Praxis Core exam and course waivers were cited as nonexclusive examples of the misadvisement in the correspondence. At hearing, Dr. Schweinle cited a further example of Dr. Sweeney advising a student not assigned to him as to change of advisors and providing incorrect information as to that issue.

The BOR adopted the hearing examiner's findings which only entered findings to two of the foregoing allegations. The first finding set forth in FOF #21, from which Dr. Sweeney appealed, found that Dr. Sweeney gave incorrect information regarding the Praxis Core examination requirement. The other factual finding entered by the hearing examiner and adopted by the BOR is FOF #20 finding it came to Dr. Schweinle's attention that Dr. Sweeney had provided a student incorrect or conflicting information regarding university policy as to change of advisors. Dr. Sweeney was not assigned as an advisor to this student. Dr. Sweeney did not appeal this finding of fact. FOF #20 is not a mere recitation of the record but sets forth three factual findings – that Dr. Sweeney provided advice to a student not assigned to him for advising; the advice was incorrect and Dr. Schweinle became aware of the act.

A. Praxis Core examination.

Dr. Sweeney contests finding of fact 21 finding he provided students with incorrect information as to the Praxis Core examination requirement for Multicategorical Special Education master's students. He asserts the finding is a mixed question of law and fact, is fully reviewable and constitutes an error law. Alternatively, Dr. Sweeney asserts the finding is clearly erroneous.

Presuming the finding is fully reviewable as asserted by Dr. Sweeney, the finding correctly determines that the Praxis Core is a requirement and that, accordingly, Dr. Sweeney's statement to the student that the Praxis Core was not a requirement was incorrect. Exhibit A is the USD Graduate Catalog which specifically sets forth the requirement. Dr. Sweeney's testimony as to "past practice" and ancillary issues are not persuasive to refute the black letter requirements of the policy.

B. Authorization of acts

Dr. Sweeney contests Conclusions of Law 4, 5, 6, and 7 concluding his acts are not authorized on the grounds of academic freedom, faculty member discretion, out of class consultations or pursuant to any BOR policy or faculty manual.²

² Dr. Sweeney also asserts Conclusion of Law 4 incorrectly states or infers his position as being that academic freedom permits him to give incorrect information to students. This conclusion does not state that. Grievant's position is set forth in the first sentence only.

I. Academic Freedom

Although Dr. Sweeney asserts authority for his acts on the grounds of academic freedom, he fails to define the term or provide supporting authority for that argument. BOR Policy 1:11(1)(b) received as Exhibit 5 defines Academic Freedom. That definition is confined to teaching, learning and subject matter. No portion of the policy can be construed to address the advisement of students as to university policies and procedures and Dr. Sweeney has not cited a specific provision of this policy or any other persuasive authority in support of his academic freedom argument.³ While Dr. Sweeney cites advisement of students as a faculty duty, lack of first amendment protection for official duties has been addressed by the United State Supreme Court decision in *Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006). There, the Court held that when public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline. *Id.*

Concern regarding the effect of the *Garcetti* ruling on academic freedom was raised by Justice Souter in his dissent and subsequently addressed by the majority as follows:

There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.

Id. at 425.

The subsequent variance in courts' application of *Garcetti* prompted a movement for the creation of institutional policies ensuring faculty speech rights⁴ such as the one enacted by the SD BOR.

The plain language of the SD BOR policy, however, does not provide practical global protection for faculty duties as asserted by Dr. Sweeney. It is narrowly tailored to address that speech traditionally implicated in academic freedom context. This interpretation is also adopted by courts in analyzing the speech encompassed within academic freedom as follows:

Likewise, other post-*Garcetti* decisions have granted public university employers wide latitude to impose disciplinary action in response to individual faculty speech uttered in the course of performing official duties, especially those

³ Dr. Sweeney's citation of the USD Faculty Workload Policy as authority that academic advising constitutes teaching for purposes of inclusion in academic freedom ("Explicitly, academic advising is part of teaching. Therefore, advising is subject to the principles of academic freedom") is unpersuasive and contrary to the plain language of the policy as well as case law construing that term.

⁴ Kerry Brian Melear, Ph.D., *Garcetti, Faculty Speech, and the Official Duties Standard in Higher Education: Analysis of the Fourth Circuit's Decision in Adams v. University of North Carolina-Wilmington*, 274 Ed. Law Rep. 353 (2012) citing Peter Schmidt, *Professors Try to Shore Up Speech Protections Undermined by Courts*, CHRON. HIGHER EDUC., June 21, 2010 at fn1 93.

duties involving administrative functions. In *Gorum v. Sessoms*, a 2005 decision by the Delaware State University president to terminate a faculty member and department chairperson for changing withdrawals, incompletes, and failing grades without authorization was challenged on First Amendment grounds....

The district court granted the university's motion for summary judgment, and the Third Circuit affirmed the finding that Professor Gorum's speech was not protected by the First Amendment.

The court relied on *Garcetti* but took some care to explain that the Supreme Court did not answer whether the "official duty" analysis would apply in a case involving speech related to scholarship or teaching. As such, the court acknowledged Justice Kennedy's caveat in *Garcetti* that an argument may be sustained that expressions related to academic scholarship and classroom instruction may trigger constitutional concerns not addressed by customary employee-speech jurisprudence. Because Professor Gorum's speech was unrelated to scholarship and classroom instruction, the court believed it was bound to apply the official duties test, thereby resolving that Professor Gorum's speech was not entitled to First Amendment protection....

...It is worth noting that Professor Gorum's advising activities with the student-athlete, DaShaun Morris, were found within the scope of his official duties because it was through his position as a faculty member and department chair that he was able to advise the student. Despite this finding, Professor Gorum's speech was not entitled to First Amendment protection. This suggests that speech made in the course of advising or mentoring students may not be constitutionally protected as a function of academic freedom; however, it is plausible that the nature of the "advising" might dictate a different result. For example, faculty speaking in an advisory capacity regarding the content of a student essay would make a stronger case for academic-freedom protection as compared to advising on a student disciplinary matter....

...While individual faculty may rely on academic freedom to protect speech regarding their scholarly and instructional activities, student mentoring and advising that lacks an academic foundation is arguably outside the reach of academic-freedom protection.

Oren R. Griffin, *Academic Freedom and Professorial Speech in the Post-Garcetti World*, 37 Seattle U. L. Rev. 1 (2013) citing *Gorum v. Sessoms*, 561 F.3d 179 (3d Cir. 2009) (additional internal citations omitted).

The conclusion of law correctly states that the policy of academic freedom does not provide protection to Dr. Sweeney's statements to students in regard to University policies and procedures when they are not his students. Academic freedom protection would not be available even if the students were assigned to Dr. Sweeney for advising because of the nature of the speech implicated.

2. Faculty Member Discretion and Out of Class Consultation

Alternatively, Dr. Sweeney asserts his acts are authorized as faculty member discretion and out of class consultation.

As cited by BOR,

... [u]niversities have an interest as employers "in promoting the efficiency of the public services" they perform through their faculty members. Under the aegis of academic freedom, a university may "determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.

Yarcheski v. Reiner, 2003 S.D. 108, 669 N.W.2d 487, 497 (internal citations omitted.)

Dr. Sweeney asserts his acts discussing University policies are authorized as "faculty member discretion" and as an "out of class discussion". They are not. The BOR has designated assignment of advisors. The conduct engaged in by Dr. Sweeney is that which is not assigned to him. He has no authority to engage in that conduct under BOR policy 1:11, BOR policy 4:38 or the guise of academic freedom.

As to the facts found, conclusions of law 5-8 correctly state Dr. Sweeney's acts are not authorized as "faculty member discretion", out of class consultation or any other BOR policy.

3. Student Remedy Outside University Process

Dr. Sweeney asserts that it was an error of law for the hearing examiner to ignore the issue of, and the evidence about, Dr. Sweeney discussing with a student a remedy outside the University process. As set forth previously, Finding of Fact #20, which was not appealed by Dr. Sweeney, addressed that allegation. The other allegation regarding appeal of advisor assignment was addressed in "Conclusions" #5 and not deemed advising as it was made to prospective students.

Finding of Fact 21 and Conclusions of Law 4 and 5 are not errors of law or clearly erroneous. Conclusions of Law 6, 7 and 9 and "Conclusions" 1 and 4 are not errors of law.

In conclusion as to Grievance #1, the court affirms the decision of the SD BOR as to the letter of warning in regard to the specific factual findings entered which constitute advisement of students not assigned and incorrect advisement of the necessity of the Praxis Core exam. The evaluation notation is affirmed on those same grounds. The case is remanded for further proceedings for determination of the additional allegations in the letter of warning not addressed by the agency findings and conclusions as follows: 1) utilizing an outdated form as part of informally advising students; 2) incorrectly advising students that they may waive a course due to prior work experience or coursework.

2. Grievance #2

Dr. Sweeney's second grievance is in regard to assignment for instruction of an undergraduate course. Dr. Sweeney was advised of the course assignment on October 21, 2021 for instruction during the 2022 spring semester. Dr. Sweeney asserts the assignment is in violation of BOR and USD policies including workload policies and the University failed to discuss the workload assignment with him as required by BOR policies.

The BOR adopted the hearing examiner's findings of fact and conclusions of law that Dr. Sweeney had not established by a preponderance of the evidence that USD's calculation of his teaching workload was incorrect or that his assignments exceeded the acceptable percentage set forth in the USD Expectations of Faculty document. The BOR adopted the conclusion that Dr. Sweeney had not shown that USD misinterpreted, misapplied or violated BOR policies.

A. Workload Calculation

Dr. Sweeney protests assignment of the new course on the grounds that such would result in a workload allocation in excess of that permitted by BOR policy. He disputes the current workload calculation determined by USD on the grounds that it did not allocate credit or correctly allocate credit for supervision of student teaching, internship supervision, student group advising, academic advising, new and online course preparation and instructed courses.

Dr. Sweeney supervised one teacher candidate.⁵ USD Workload Policy, pg. 7 provides, that supervision of 3 teacher candidates equates to 1 workload unit. No workload unit was credited for this supervision. Dr. Sweeney argues he is entitled to a prorated share of a workload unit arguing the policy is ambiguous and, as such, should be resolved by past practice. The policy is not ambiguous and, as such, construction is not necessary. Even if the policy were ambiguous, the Workload Policy was newly enacted for 2021 thereby rendering past practice irrelevant.⁶

The construction of an administrative rule is a question of law which is fully reviewable by the court without deference to the agency determination. *Appeal of Schramm, supra*; *Permann v. South Dakota Dept. of Labor, Unemp. Ins. D.*, 411 N.W.2d 113 (S.D.1987); *Coe v. Bd. of Regents of the Univ. of Wis.*, 140 Wis.2d 261, 409 N.W.2d 166 (Wisc.App.1987).

Although the final construction of a rule is a question of law, an agency is usually given a reasonable range of informed discretion in the interpretation and application of its own rules when the language subject to construction is technical in nature or ambiguous, or when the agency interpretation is one of long standing. *Matter of Southeastern Minn. Cit. Action Coun.*, 359 N.W.2d 60 (Minn.App.1984); *Iowa Fed. of Labor v. Dept. of Job Serv.*, 427 N.W.2d 443

⁵ BOR states Dr. Sweeney supervises two student teaching candidates. Appellee's Brief page 9. This appears to be an error. See FOF #29 which was not appealed by Dr. Sweeney.

⁶ Even if past practices were relevant in construing the current workload policy, neither the 2006 nor the 2008 Workload Policies Dr. Sweeney relied on in calculating his workload were received in evidence.

(Ia.1988); *Matter of Stone Creek Channel Improvements*, 424 N.W.2d 894 (N.D.1988).

Nelson v. S. Dakota State Bd. of Dentistry, 464 N.W.2d 621, 624 (S.D. 1991)

There can be no evidence of long-standing interpretation of the policy as the policy is newly enacted. The policy does not provide for a prorated share of workload assignment for supervision of less than three teacher candidates. The policy was applied correctly.

Dr. Sweeney also asserts that workload credit should be assigned for supervision of internship or practicum experience.

The workload policy sets forth the expectation of faculty supervision of practicum and internship experiences. While the policy assigns no workload credit to the supervision, it provides that, "In situations where supervision of internships and field experiences is disproportionate, a faculty member's workload may be assigned additional workload credit with the approval of the dean." No additional workload credit was assigned Dr. Sweeney for his internship supervision. No evidence was introduced that Dr. Sweeney's supervision was disproportionate to that of other faculty members. The policy was applied correctly.

The USD 2021 Faculty Workload Policy does not require workload allocation for every faculty duty or expectation. Although Dr. Sweeney protests that as being unfair, he cites no persuasive authority that precludes its application.

Dr. Sweeney further asserts that allocation of 1.5 workload units for supervision of dissertation students was insufficient, arbitrary and capricious. Dr. Sweeney supervised 5 students in the 2021 fall semester and 7 students in the 2022 spring semester. The policy recognizes that supervision of these students is considered both teaching and research as faculty research is bolstered by student research participation and provides, "Mentoring 1-2 student theses/dissertations is an expectation for faculty receiving scholarship workload and will be assigned equitably within programs. In situations where mentorship of these projects is disproportionate within a division/program, a faculty member may be awarded additional workload." Although Dr. Sweeney argues evidence or implication of time allocation for such supervision, no evidence was introduced that Dr. Sweeney's mentorship is disproportionate within the division or program which is the relevant measure for the award of additional workload units. The policy was applied correctly.

Dr. Sweeney serves as a co-advisor to a student group and asserts that such service is required workload credit. SDBOR 4:38(C)(6.3.1) provides that advisement of student organization are service activities to the institution rather than teaching activities. No evidence was received as to whether or not the student group advisement was factored into Dr. Sweeney's workload credit for service. Dr. Sweeney has failed to establish that failure to assign a teaching workload for the student group advisement is error.

Dr. Sweeney further asserts that his service as an academic advisor requires workload credit. The policy does not recognize academic advising as receiving workload credit. The policy was applied correctly.

Dr. Sweeney further asserts that workload credit should be assigned for time spent preparing for a new course and time spent with on-line course preparation. In support of his position, Dr. Sweeney argues that the workload policy does not exclude workload credits for those purposes. This argument is not persuasive. As the workload policy does not provide for an award of workload credit for new or online course preparation, the policy was applied correctly.

Dr. Sweeney finally asserts the workload unit credited for teaching three separate classes was calculated incorrectly. Dr. Sweeney's submissions to this court cite no authority for his calculations. The workload policy clearly provides, "Each course credit generally equates to 1 workload unit...". While SPED 715 may be either a 2 or 3 credit course depending on how students enroll, there was no evidence that students were enrolled in the class as 3 credits. The policy was applied correctly.

The USD Expectations of Faculty provides that teaching should not constitute more than 85% of the tenure-track faculty member's effort which would constitute 25.5 workload units as applied to Dr. Sweeney. The 15.5 workload units for the academic year at issue is well within those limits.

B. Failure to discuss workload assignment at annual evaluation.

As set forth supra., Dr. Sweeney's complaint that BOR policy was violated when there was not a discussion of workload at his annual performance evaluation does not constitute a grievance as defined by the BOR policy giving rise to the faculty grievance procedure as it does not directly affect terms and conditions of Dr. Sweeney's employment. Accordingly, the court lacks subject matter jurisdiction and that portion of the complaint is dismissed.

Even if the court's conclusion as to subject matter jurisdiction is in error, there is no violation of BOR policy because: 1) the discussion is not mandatory; 2) no failure to discuss workload pursuant to an annual evaluation was timely grieved; and 3) the annual evaluation reflects discussion. As cited by the hearing examiner, the term "shall" requires mandatory action. That is not implicated by the plain terms of the policy. As admitted by Dr. Sweeney, the annual evaluation for the year at issue had not been completed and was not due by the time his grievance was submitted. SR 25. Further, the evaluation completed subsequent to the grievance reflects discussion. SR 171.

Findings of Fact 30, 46 and 53 are not errors of law. Findings of Fact 10, 34, 35, 38, 39, 42 and 50-52 are not clearly erroneous. Conclusions of Law 5, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21, 25 and 26 are not errors of law.

Dr. Sweeney has failed to meet his burden of establishing that the calculation of his teaching workload was incorrect and that his assignments exceeded the acceptable percentage

established. The complaint that there was no workload discussion pursuant to BOR policy does not constitute a grievance over which this court has jurisdiction. Alternatively, Dr. Sweeney has failed to meet his burden of proof that a BOR policy was violated in regard to workload discussion.

3. Grievance #3

Dr. Sweeney's third grievance is in regard to an assignment of duties received on April 8, 2022. Dr. Sweeney asserts that the new workload assignment is a significant departure from previous assignments and is subject to BOR 4:38.C.4 thus requiring his agreement. Dr. Sweeney asserts that this policy was not applied by the University and that the assignment of duties was in retaliation for Dr. Sweeney having filed the two prior grievances detailed *supra*.

The BOR adopted the hearing examiner's determination that Dr. Sweeney had not established that the workload assignment violates BOR policy 4:38 or Dr. Sweeney's right to academic freedom. It was also found that Dr. Sweeney was unable to offer any evidence beyond his conjecture to support his allegation that the assignment was retaliatory.

A. BOR Policy 4:38.C.4.

BOR 4:38.C.4. policy generally provides that faculty members and their department heads may agree that other specific activities other than those already recognized shall be considered teaching, scholarship, or service contributions. Dr. Sweeney asserts the assignment of SARA administrator and analyst for Head Start federal grants are significant deviations from his historical workload assignments, no longer incorporate his discipline and expertise and thus are "other specific activities" requiring his agreement before assignment. SR 62. Dr. Sweeney's interpretation of BOR 4:38.C.4 is without merit. The subject of the policy is recognition of other activities as teaching, scholarship or service contributions in limited circumstances. It has no effect on the University's ability to assign activities and does not require the faculty member's agreement for assignment. The evidence established that the assigned duties were among those described in the teaching, research and service categories in BOR 4:48 (TR 105-6). Dr. Sweeney presents no evidence that the activities assigned to him are not among those already included in the institutional statement of recognized activities and no justification that the same should be recognized in "terms of the mission of the university, the role or mission of the faculty member's department or discipline or the faculty member's assignment" as required by the rule for recognition much less that his agreement is required before assignment.

B. Retaliation

BOR 4:7.1.D.3 provides that neither the institution nor the BOR will retaliate against any faculty member for processing a grievance.⁷ Dr. Sweeney asserts the April 8th assignment is in retaliation for the grievances previously made against the University.

⁷ The court presumes the hearing examiner's reference to "academic freedom" was in the mistaken context that this was the protected activity subject to the retaliation claim. As addressed *supra*, none of the acts subject to this grievance are protected under the theory of academic freedom.

Presuming that the April 8th assignment constitutes adverse employment action, Dr. Sweeney has failed to establish a causal link between the prior grievances and the adverse employment action. The evidence established the department experienced a number of retirements including that of department chairs (TR 100), a plan to merge the Divisions of Curriculum and Instruction with the Division of Teacher of Residence and Education (TR 100), restructuring due to budget constraints (TR 114) and the University's request to complete licensure disclosures across all states for the out-of-state physical presence of USD students necessitating creation of the SARA administrator role (TR 101). The licensure disclosures are required by federal regulations and are a requirement for federal financial aid (TR102). Dr. Sweeney was the faculty most qualified to perform the disclosures and license review (TR 104, 108). Dr. Sweeney was the faculty most qualified to perform the Head Start analysis (TR 114). There was also a concern that Dr. Sweeney would advise students not assigned to him and interrupt the efficiency of the programs who have newly appointed department chairs as well as a planned merger (TR105). Even if a causal link had been established, the foregoing constitutes evidence of legitimate, nonretaliatory reasons for the assignment.

Dr. Sweeney cites President Gestring's Step 3 Grievance response as "direct evidence" of retaliation for the prior grievances filed. The statement made by President Gestring, however, was not in regard to the prior grievances made by Dr. Sweeney but in regard to the past concerns regarding advisement of students not assigned to him. Contrary to Dr. Sweeney's assertion, this is not direct evidence of retaliation for past grievances but evidence of the continuing concern of the University.

Dr. Sweeney has failed to introduce any evidence that the reasons cited by the University are pretextual. Dr. Sweeney's reliance on President Gestring's response in his grievance appeal process is not relevant to whether the April 8th assignment was retaliatory.

The University has produced a legitimate, nonretaliatory reason for the work assignment. Dr. Sweeney has failed to produce any evidence beyond his own speculation that the stated reasons are merely a pretext for the retaliation.

Findings of Fact 16 and 18 are not clearly erroneous. Finding of Fact 19 and Conclusions of Law 5-8 are not errors of law.

Dr. Sweeney has failed to meet his burden of proof that BOR 4:38.C.4 required his agreement for the April 8th, 2022 workload assignment or that the assignment was retaliatory.

In conclusion, the BOR decision regarding grievance #1 is affirmed, in part, and remanded, in part. The BOR decision regarding grievance #2 is affirmed. The BOR decision regarding grievance #3 is affirmed. Mr. Franken may prepare an Order incorporating this Memorandum Decision as if set forth in full therein.

Sincerely,

Tami Bern
Circuit Court Judge



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August 13, 2021

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RE: BOR Grievance – Dr. Sweeney

Gentlemen,

I am writing to notify you of the Board of Regent's decision from its August 3-5, 2021 meeting regarding Dr. Sweeney's grievance filed with the Board. The Board reviewed and adopted the enclosed proposed findings and conclusions of the Hearing Examiner dated July 21, 2021, effectively denying Mr. Sweeney's grievance and upholding the decision(s) made by USD.

Any further appeal of this matter would occur, as allowed, in circuit court pursuant to SDCL ch. 1-26.

Sincerely,

A handwritten signature in cursive script, appearing to read "Brian J. Maher".

Dr. Brian Maher
Executive Director & CEO
South Dakota Board of Regents

cc: Sheila Gestring, USD President

Enclosure: Findings and Conclusions

App. 17

**DEMERSSEMAN JENSEN
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July 21, 2021

MICHAEL V. WHEELER
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NATHAN R. CHICOINE

Dr. Brian L. Maher
SD Board of Regents
306 E Capitol Ave, Suite 200
Pierre, SD 57501

Re: Step 3 Grievance of Dr. William J. Sweeney

Dear Mr. Maher:

A Step 3 Grievance Hearing was held before Hearing Examiner, Attorney Roger Tellinghuisen, on June 8, 2021, on the campus of the University of South Dakota, Vermillion, South Dakota. Grievant Dr. William J. Sweeney was present with his attorney, Tom Wilka of Hagen, Wilka and Archer. Respondent, University of South Dakota (USD) was present and represented by Amy Schweinle, Dean of the School of Education, Curt Hackemer, Provost and Vice President for Academic Affairs, and Attorney AJ Franken, counsel for USD.

Grievant testified in his own behalf. In addition, both Julie Large (via telephone) and Bruce Fischbach testified on behalf of Grievant. Appearing on behalf of USD was Amy Schweinle and Curt Hackemer.

The parties stipulated to the admission of all exhibits.

Based on the testimony and the evidence offered during the hearing, the hearing examiner makes the following findings of fact and conclusions of law.

Findings of Fact

1. Grievant is a tenured faculty member in the School of Education, Division of Curriculum and Instruction at the University of South Dakota where he has been employed for twenty-six years.

2. This grievance stems from the placement of a letter of warning Grievant's personnel file by (then interim) Dean of the School of Education, Dr. Amy Schweinle, on

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January 29, 2021.

3. Grievant's position is that the letter of warning was inappropriately included in his personnel file and violates University and Board of Regents' policies regarding faculty expectations, academic freedom and responsibilities, and faculty workloads, as well as the University Faculty Handbook and School of Education Programs and Procedures. As such, Grievant bears the burden of persuasion that such action violates state law, University policy or BOR policy.

4. Grievant has requested three remedies consisting of: 1) that the letter of warning as well as the comments from the interim dean placed on his 2019-2020 evaluation annually be retracted and removed from his personnel file; 2) that the University be required to develop a consistent policy related to the clause related to admission to teacher education that acknowledges advisor discretion and academic freedom as well as the implementation of required coursework for graduate students in the Multicategorical Special Education Program, and 3) that the University develop a thorough training and discussion of policies and procedures for all graduate-level advisors of students in the Multicategorical Special Education Program that is respectful and acknowledges advisor discretion and academic freedom as well as the implementation of required coursework for graduate students.

5. Grievant initially filed his formal grievance on February 18, 2021, with Dr. Curt Hackemer, USD Provost and Vice President for Academic Affairs. Dr. Hackemer determined the grievance was timely filed and concluded that Grievant's grievance should not result in Grievant's requested remedies, which included removal of the letter of warning from his personnel file.

6. Grievant appealed the Step 1 result to Dr. Sheila Gestring, President of the University of South Dakota on March 3, 2021. President Gestring accepted the appeal as timely and concluded that Grievant's appeal did not warrant reversal of the underlying determinations.

7. A timely appeal to the Office of the Executive Director of the Board of Regents was filed.

8. This matter has been treated as a Step 3 Grievance pursuant to BOR Policy 4:7.

9. The impetus for this grievance stems from the January 29, 2021, letter from then interim Dean of the School of Education Dr. Amy Schweinle addressed to Grievant wherein she stated "this letter is to address continued concerns with your practice of advising students informally with information that is not current or accurate".

10. In support of Dean Schweinle's statement of concern, she advised Grievant

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that he continued to informally advise students and had also used an outdated advising form as part of that process. She went on to give examples of Grievant telling students who need certification that they may enter student teaching without taking the Praxis Core exam. She pointed out that the USD graduate catalog clearly states the contrary. She also stated that on other occasions, the Grievant advised students that they may waive a course or practicum due to work experience or prior undergraduate course work which is contrary to graduate school policy which does not allow course waivers and does not give credit for work experience. Dean Schweinle indicated these were examples of misadvising and not necessarily reflective of the whole.

11. Dean Schweinle advised Grievant that he must immediately cease advising students who were not formally assigned to him as advisees and he must strictly adhere to BOR Policies, University of School and Education Policies, Procedures and University Catalogs.

12. Dean Schweinle went on to state that because the Grievant had been previously warned by Dean Easton-Brooks in a January 2019 letter, which Grievant acknowledged receiving about these same activities, that if this behavior continued more serious measures would be taken as described in BOR Policy 4:14. She further advised the Grievant that she was placing this letter of warning in Grievant's personnel file.

13. Grievant thereafter filed a response to Dean Schweinle's letter on February 8, 2021 in essence disputing that he had been advising students who were not on his advising roster, but instead was providing them with information and answers to questions about their educational program, thus giving such inquiring students the information and resources they needed to be successful at USD.

14. Grievant further advised that he always informs students who are not his advisees that he cannot formally advise them unless they are one of his advisees and that these exchanges with students who were not his assigned advisees were purely informational and not advisement. It is Grievant's position that providing students with information about the University and the policies that govern it does not constitute "advising them" in the academic sense of the word.

15. Regarding the accusation of using outdated forms as part of the allegations of not following policy and procedures, Grievant denies having any knowledge about "outdated" official forms utilized in his advisement of graduate students. He went on to state that "working programs of study" are developed that address the sequence of courses for his advisees. This "informal working program of study" is used for students during the recruitment process before they apply to the graduate school. Grievant states that this "informal working program of study", was not intended for use as part of the official documentation required by the graduate school, but instead was used as a tool for recruitment of possible attendees to graduate school at USD."

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16. Grievant maintains that he went out of his way to tell students that he could not advise them but only give them general information when they were not formally assigned to him as an advisee.

17. On February 18, 2021, Grievant filed a Step 1 Grievance with additional supporting materials. In his Step 1 Grievance, Grievant cites SD BOR Policy Manual 4:38:6.1, Statement Concerning Faculty Expectations; SD BOR Policy Manual 1:11.1.1, 1.2, 1.3, Academic Freedom and Responsibility; and 2018 USD Faculty Handbook as the rule, policy or regulation the Board of Regents or Institutions violated.

18. Grievant's supplemental attachment to his Step 1 Grievance stated that Dean Schweinle's letter of warning violated his advisor's discretion and academic freedom by impeding his ability to: 1) address important mitigating circumstances; 2) implement important aspects of past practice and advise within the Multicategorical Special Education Program; 3) substitute applicable course work; and, 4) provide information, when requested, to other graduate students not on his advising roster who request "out of class consultation".

19. During the 2021 academic year, the Division of Curriculum and Instruction moved to a "single advisor model", under which new graduate students were assigned to a single university employee as their advisor. Grievant was permitted to continue to advise graduate students who had previously been assigned to him for such purpose.

20. Dr. Schweinle became concerned about Grievant's "informal advising" activities when a student asked for a change of advisors. During the course of the inquiry, it came to Dr. Schweinle's attention that Grievant, who was not assigned to this student as an advisor, gave incorrect or conflicting information regarding university policies to the student.

21. Further, in an email dated November 2, 2020, Grievant advised a student in writing that there was "no agreed upon policy" regarding the Praxis Core examination being required for Multicategorical Special Education master's students and that the requirement "is a requirement of the undergraduate teacher education program not the graduate Multicategorical Special Education Program". This advice or statement on part of the Grievant to this student was incorrect.

22. Grievant maintains that not being allowed to consult with students regarding University policies, even if they are not his advisees, violates his rights of academic freedom and advisor discretion.

23. Grievant further maintains that one of his responsibilities is to be available for "out of class consultation" with students and that his statements to these students during such consultations was nothing more than his compliance with that BOR policy.

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Based on the foregoing, the Hearing Examiner now makes the following conclusions of law.

Conclusions of Law

1. Grievant's appeal to the Step 3 Grievance was timely filed.
2. The time frames within the BOR's Policy 4:7 have been waived by the parties hereto.
3. Grievant has been afforded an opportunity for a hearing.
4. Grievant's position that being prohibited from making statements to students in regard to University policies and procedures when such students are not his advisees violates his rights under his "academic freedom" is misplaced. Academic freedom does not permit a faculty member to give incorrect or false information to students.
5. Further, "faculty member discretion" as an advisor does not permit a faculty member to give incorrect or misleading information to students whether they are assigned to the faculty member as advisees or not.
6. Out of class consultation does not encompass being available to meet with students who are not your advisees and discuss with them particular University policies or procedures or course requirements.
7. Grievant's justifications for his conduct in advising students who are not his advisees and for giving incorrect information is not justifiable under any of the Board of Regent's Policies or Faculty Manual.
8. Grievant's remedies 2 and 3 are beyond the scope of the grievance policy and thus should not be granted. Board of Regent's Policy 4:7 is intended to remedy "misinterpretation, misapplication, or violation of the laws of the State of South Dakota or of a rule, policy, or regulation of the Board of Regents or the institution of which the faculty member is employed, and which affects him personally." The Grievant's requested remedies 2 and 3 do not seek to correct a misinterpretation of existing policy and therefore are beyond the scope of SD BOR Policy 4:7 for this purpose.
9. The letter of warning placed in Grievant's personnel file by Dean Schweinle did not misinterpret, misapply or violate any laws of the State of South Dakota or any rule, policy, or regulation of the Board of Regents or the institution to which the Grievant is employed.

July 21, 2021

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Conclusions

1. Grievant's allegation that the letter of warning placed in his personnel file violates his right to academic freedom guaranteed to him under BOR Policy 4:38 and 1:11 as well as University Faculty Handbooks and workload documents, is misplaced. Academic freedom, addresses the right of a faculty member to determine for themselves how they will teach, what they will teach and how it will be taught. It does not permit a faculty member to disseminate incorrect information or violate University policy insofar as advising students who are not assigned to the faculty member as advisees.

2. BOR's Policy 4:38 states that the university has the authority to assign or not assign certain tasks to faculty members which includes the assignment of advising duties.

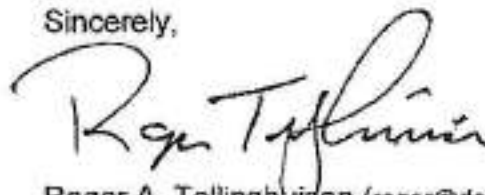
3. Academic freedom does not encompass permitting a faculty member to advise students who are not assigned to the faculty member as advisees nor does it permit a faculty member to disseminate incorrect information.

4. Advisor discretion does not permit a faculty member to disseminate incorrect information nor does it permit a faculty member to offer advice to students to whom are not assigned to such faculty member.

5. While the Grievant may have offered informal information to prospective graduate students and such does not amount to improperly advising, it does appear from the record that the Grievant offered advice to a non-advisee concerning University Policies and Procedures which he should not have done.

6. Interim Dean Schweinle did not violate any of Grievant's rights under BOR's Policies or Faculty Handbook in placing a letter of warning in Grievant's personnel file.

Sincerely,



Roger A. Tellinghuisen (roger@demjen.com)
DEMERSSEMAN JENSEN
TELLINGHUISEN & HUFFMAN, LLP

RT/ag



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May 12, 2022

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RE: BOR Grievance – Dr. Sweeney

Gentlemen,

I am writing to notify you of the Board of Regent's decision from its May 10, 2022 meeting regarding Dr. Sweeney's grievance filed with the Board. The Board reviewed and adopted the enclosed Recommended Decision and Findings of Fact and Conclusions of Law of the Hearing Examiner dated April 14, 2022, effectively denying Mr. Sweeney's grievance and upholding the decision(s) made by USD.

Any further appeal of this matter would occur, as allowed, in circuit court pursuant to SDCL ch. 1-26.

Sincerely,

Dr. Brian Maher
Executive Director & CEO
South Dakota Board of Regents

cc: Sheila Gestring, USD President

Enclosure: Recommended Decision and Findings of Fact and Conclusions of Law

6. Dr. Sweeney has accepted SPED 260 and is currently teaching the course. He estimates that he spent 80 to 120 hours preparing to teach the course.

7. On November 1, 2021, Sweeney filed a Step 1 grievance with Dr. Amy Schweinle, Dean of the School of Education, alleging the assignment of SPED 260 violated several BOR and USD policies including workload policies.

8. Specifically, Sweeney alleged his existing workload before the assignment of SPED 260 already exceeded projected workload limits and that the Department Chair was required to discuss workload with him. He questioned whether he would receive workload credit for additional preparation time, release time, and overload compensation. He questioned the failure to allot workload credits for advising students, monitoring student teachers, and supervising a student practice teaching which he classified as non-didactic.

9. On November 7, 2021, Schweinle wrote to Sweeney explaining she had reviewed and investigated his Step 1 grievance and that she found the addition of SPED 260 would not violate existing workload policies.

10. Schweinle determined that Sweeney had 15.5 workload credits for the 2021-22 academic year.¹ She did not award workload credits for supervision of internships, student teaching, or student advising.

11. On November 8, 2021, Sweeney filed a Step 2 grievance with Dr. Kurt Hackemer, Vice President for Academic Affairs & Provost.

12. On November 29, 2021, Hackemer responded to the Step 2 grievance finding it to be without merit.

13. On December 3, 2021, Sweeney filed a Step 3 grievance with USD President Sheila Gestring.

14. On December 17, 2021, President Gestring denied the grievance and denied Sweeney's request to rescind the assignment of SPED 260 for the spring semester.

15. On December 21, 2021, Sweeney filed a Step 4 grievance with Dr. Brian Maher, the Executive Director of the South Dakota Board of Regents.

16. Pursuant to SDBOR policy 4:7(E)(4), a hearing on Sweeney's grievance was held on February 1, 2022. Attorney Tom Wilka appeared on behalf of Sweeney and AJ Franken appeared on behalf of USD. Sweeney appeared live and was the only witness who offered testimony.

17. Sweeney offered 8 Exhibits – Ex. 1 – Step 4 Grievance Package, Ex. 2 – Annual Faculty Review 2020-2021, Ex. 3 – Annual Faculty Review 2019-2020, Ex. 4 – Annual Faculty

¹ Schweinle's calculation states that the workload total was 16.5 hours; however, this appears to be an arithmetic error.

Review 2018-2019, Ex. 5 – Annual Faculty Review 2017-2018, Ex. 6 – Annual Faculty Review 2016-2017, Ex. 7 – Annual Faculty Review 2015-2016, and Ex. 8 – USD Faculty Workload Policy effective January 2021.

18. The parties also submitted the South Dakota Board of Regents Policies 4:38 and 4:17 and the Expectations of Faculty with Professorial Rank at the University of South Dakota dated August 2012.

19. According to Exhibit 1, page 32, USD calculated Sweeney's teaching workload for the 2021-22 academic year to be 15.5 credits.

20. According to Exhibit 1, page 40, in submitting his grievance, Sweeney calculated his entire workload for the 2021-22 academic year to be 33 workload units with 29 of those related to teaching.

21. In calculating his workload, Sweeney relied on the 2006 School of Education Workload Policy and the Revised School of Education Workload Policy from 2008. In his Step 2 grievance submissions, Sweeney also refers to the 2012 Workload Policy.

22. Neither the 2006 or 2008 policies were introduced into evidence or provided to the hearing examiner. A portion of the 2012 policy was submitted in Exhibit 1. The parties, however, agree that none of these Policies were in effect for the 2021-22 academic year.

23. SDBOR Policy 4:38(C)(2) provides that "each institution shall establish workload policies in consultation with their faculty." In addition, "Faculty members will be expected to undertake an effort equivalent to that needed to deliver thirty (30) work load units. Ordinarily each work load unit corresponds to approximately three (3) hours of effort per week. The administration reserves the prerogative to make other assignments in exceptional circumstances as approved by the institutional president."

24. SDBOR policy 4:38(3)(3.1) provides: "The universities have substantial autonomy to select and determine the relative importance of various activities in the areas of teaching, scholarship, and creative activity and service." Furthermore, "The selection of activities and the relative importance of the activities may vary within a university, and across the system." *Id.*

25. USD's 2021 Faculty Workload Policy provides that the purpose of the document is to provide "guidance to faculty members and their supervisors in the assignment of duties in the area of teaching, research and creative scholarship, and service." It also refers to the Policy provisions as "guidelines." (2021 Faculty Workload Policy p. 1.)

26. The USD 2021 Faculty Workload Policy provides specific guidance on the amount of workload units which should be given for certain duties performed by faculty. For other duties, the Policy specifically states no workload units shall be given, and for still other duties, the Policy is silent on whether these are acknowledged duties and whether they merit the award of workload units.

27. Sweeney contends that he should have been awarded teaching workload credit for academic advising, supervising a student teacher, supervising internships or practicum experience, co-advising a student group, and new and on-line course preparation. He contends he should have been awarded additional credit for supervising dissertation students and for teaching SPED 703, 730, and 715.

Supervision of student teacher

28. According to the Workload Policy, "supervision of 3 teacher candidates equates to 1 workload unit." (USD Workload Policy, p. 7.)

29. Sweeney supervised only one teacher candidate.

30. The Policy does not provide a prorated share of the workload unit must be awarded when a faculty member has less than 3 teacher candidates.

Supervision of internships or practicum experience

31. Sweeney supervised an internship in the fall of 2021.

32. The USD Workload Policy provides that "Faculty in Curriculum and Instruction and Educational Leadership are expected to observe graduate students, in person or via video at least once per semester." (*Id.*) The policy does not assign workload units for supervising internship and practical experience credits. It is "assigned equitably across program faculty where possible." (*Id.*)

33. If USD finds the supervision assignments are disproportionate among faculty members, the Dean may assign additional workload credit. (*Id.*)

34. No evidence was introduced that Sweeney's supervision was disproportionate to other faculty members.

Supervision of dissertation students

35. Sweeney was awarded 1.5 teaching credits for supervision of dissertation students. He supervised 5 students in the fall of 2021 and 7 in the spring of 2022.

36. According to the Workload Policy, "Mentoring 1-2 student theses/dissertations is an expectation for faculty receiving scholarship workload and will be assigned equitably within programs. In situations where mentorship of these projects is disproportionate within a division/program, a faculty member may be awarded additional workload." (USD Workload Policy, p. 8.)

37. Sweeney's supervision of dissertation students is considered both teaching and research. (*Id.* at 7.)

38. Because Sweeney supervised more than 2 dissertation students, he was awarded 1.5 workload credits.

39. Sweeney has not presented any evidence that he is entitled to additional workload credits for supervision of dissertation students, nor does the Workload Policy require it.

Co-advising a student group

40. Sweeney serves as a co-advisor for the student group, Kappa Delta Phi.

41. According to SDBOR 4:38(C)(6.3.1), "Coordination, advisement and supervision of student organizations or student activities," are service activities to the institution rather than teaching activities.

42. No evidence was presented as to whether or not co-advising the student group activity was factored into the calculation of Sweeney's workload credit for service.

Service as academic advisor

43. According to the Workload Policy, "academic advising of both undergraduate and graduate students is part of teaching." (USD Workload Policy, p. 4.) "Advisees may be assigned to any faculty member. . . ." *Id.*

New and on-line course preparation

44. Sweeney spent time preparing for a new course and spent time with on-line course preparation.

45. Sweeney testified that he had not received workload credit for new course preparation in the past.

46. The Workload Policy does not provide for an award of workload credit for new or online course preparation.

Teaching SPED 703, 730, and 715.

47. SPED 703 is a 3 credit course for which USD awarded Sweeney 3 workload units. Sweeney contends he is entitled to 4 workload units.

48. SPED 730 is a 2 credit course for which USD awarded Sweeney 2 workload units. Sweeney contends he should have been awarded 2.66 workload units.

49. SPED 715 is a 2-3 credit course depending up how students register for which USD awarded Sweeney 2 workload units. Sweeney contends he is entitled to 4 workload units for this course.

50. According to the USD Faculty Workload Policy (effective January 2021), "Each course generally equates to 1 workload unit, provided the course meets the minimum enrollment requirement or has been approved as an exception to the Small Section Limitation rule as defined in BOR Policy 5:17.4." (USD Workload Policy, p. 1.)

51. Sweeney has not presented any evidence that he is entitled to additional workload credits for teaching these classes, nor does the Policy require it.

52. The USD Expectations of Faculty document provides that teaching should not constitute more than 85% of the tenure-track faculty member's effort. This would equate to 25.5 workload units.

53. Sweeney has not established by a preponderance of the evidence that USD's calculation of his teaching workload at 15.5 units for the 2021-22 academic year was incorrect or that his assignments exceeded the acceptable percentage set forth in the USD Expectations of Faculty document.

CONCLUSIONS OF LAW

1. According to South Dakota Board of Regents policy 4:7(C)(3), a grievance is defined as "An alleged misinterpretation, misapplication, or violation of a specific term or provision of Board policy, or other agreements, contracts, policies, rules, regulations, or statutes that directly affect terms and conditions of employment for the individual employee."

2. The burden of proof rests with Sweeney because his grievance does not concern discipline or a termination. SDBOR policy 4:7(D)(10).

3. Sweeney alleges that under the 2021 USD Workload Policy and SDBOR Policy 4:38, his assigned teaching workload exceeds the limits of teaching workload and that USD is thus required to provide him with overload compensation.

4. South Dakota Board of Regents policy 4:38, Statement Concerning Faculty Expectations, and 2021 USD Faculty Workload Policy govern the relationship between Sweeney and USD.

5. The 2006, 2008, and 2012 Workload Policies were replaced by the 2021 Workload Policy and are no longer in effect.

6. The 2021 Workload Policy was validly adopted, and the parties agree that it is the applicable workload policy for this grievance.

7. The collective bargaining agreement between COHE and the SDBOR has expired and was not in effect during the 2021-22 academic year.

8. Sweeney contends that the 2021 Workload Policy is ambiguous due to its silence on the award of certain workload units under certain circumstances. As such, Sweeney contends

the past practices regarding workload unit assignment between USD and Sweeney should be considered.

9. When policy language “is clear, certain, and unambiguous, [the hearing examiner’s] function is confined to declaring its meaning as clearly expressed.” *In re Black Hills Power, Inc.*, 2016 SD 92, 9, 889 N.W.2d 631, 634 (quoting *Citibank N.A. v. S.D. Dept. of Revenue*, 2014 SD 67, 12, 868 N.W.2d 381, 387).

10. Words and phrases in a policy “must be given their plain meaning and effect.” Intent will be determined from the policy as a whole. *Hayes v. Rosenbaum Signs and Outdoor Advertising, Inc.*, 853 N.W.2d 878, 885 (S.D. 2014).

11. It is well settled that “silence does not necessarily equate to ambiguity.” (Internal quotation marks omitted.) *Hartford/Windsor Healthcare Properties, LLC v. Hartford*, 298 Conn. 191, 198, 3 A.3d 56 (2010); accord *Mayfield v. Goshen Volunteer Fire Co.*, 301 Conn. 739, 745, 22 A.3d 1251 (2011); see also *Hansen v. Barron’s Oilfield Serv., Inc.*, 2018 COA 132, ¶ 10, 429 P.3d 101, 104. Rather, “[i]n determining whether legislative silence renders a statute ambiguous, we read the statute in context to determine whether the language is susceptible to more than one reasonable interpretation.” (Internal quotation marks omitted.) *Hicks v. State*, 297 Conn. 798, 802, 1 A.3d 39 (2010).

12. Guidelines and guidance offer instruction and recommendations and are not mandatory. See *Nebraska Press Ass’n v. Stuart*, 423 U.S. 1327, 1330, 96 S. Ct. 251, 254, 46 L.Ed.2d 237 (1975) (“Without rehearsing the description of those Guidelines set forth in my prior opinion, it is evident that they constitute a “voluntary code” which was not intended to be mandatory. Indeed, the word “guidelines” itself so indicates. They are merely suggestive and, accordingly, are necessarily vague.”); *Hobbs v. Jones*, 412 S.W.3d 844, 861 (Ark. 2012), Baker, J. dissenting (“[A] guideline is a recommended practice that allows discretion in its implementation rather than a ‘mandatory’ directive. Guidance does not require a dictation of all terms, and such a construction is antithetical to our case law.”); see also *Guideline*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/guideline> (last visited Apr. 12, 2022).

13. The 2021 Faculty Workload Policy when read as a whole and considering the fact that it refers to itself as “guidelines” is not ambiguous. It provides discretion to USD when assigning workload units to USD faculty.

14. The parties disagree on the assignment of workload units for the following duties: student teacher supervision, dissertation and graduate student supervision, advising a student group, academic advising, course preparation, and teaching.

15. USD’s award of zero workload units for Sweeney’s supervision of the student teacher did not violate, misinterpret, or misapply applicable policies.

16. Pursuant to the plain language of the Workload Policy, an award of workload credits for supervision of internships or practicum experience is not contemplated. USD’s award

of zero workload units for Sweeney's supervision did not violate, misinterpret, or misapply applicable policies.

17. USD's award of 1.5 workload units for Sweeney's supervision of dissertation students did not violate, misinterpret, or misapply applicable policies.

18. USD's award of zero workload teaching credits for co-advising the student group did not violate, misinterpret, or misapply applicable policies.

19. The applicable policies do not provide for an award of workload units for service as a general academic advisor, and thus, USD's determination to make no award for that service did not violate, misinterpret, or misapply applicable policies.

20. The applicable policies do not provide for an award of workload units for course preparation, and thus, USD's determination to make no award for this preparation did not violate, misinterpret, or misapply applicable policies.

21. USD's assignment of 3 workload credits for teaching SPED 703, 2 credits for SPED 730, and 2 credits for SPED 715 did not violate, misinterpret, or misapply applicable policies.

22. The Workload Policy provides, "Discussion of workload between a faculty member and chair should occur as an integral part of the annual performance evaluations, since workload and performance expectations are linked." (USD Workload Policy, p. 3.)


23. The word "should" expresses a sense of duty or an expectation. *Garner's Modern English Usage*, 827 (Brian A. Garner, 4th ed. 2016.).

24. The South Dakota Supreme Court and the South Dakota legislature have both held that the word "shall" requires mandatory action. "As a rule of statutory construction, we have determined that 'when shall is the operative verb in a statute, it is given obligatory or mandatory meaning.'" *Reck v. South Dakota Board of Pardons and Paroles*, 2019 SD 42, ¶ 12, 932 N.W.2d 135, 139 (quoting *Discover Bank v. Stanley*, 2008 SD 111, ¶ 21, 757 N.W.2d 756, 762.) "As used in the South Dakota Codified Laws to direct any action, the term, shall, manifests a mandatory directive and does not confer any discretion in carrying out the action so directed." *Discover Bank*, 757 N.W.2d at 762.

25. Even though this provision of the Workload Policy requires discussion between the faulty member and chair, ultimately the Workload Policy itself is a guideline. Regardless, a discussion of workload was had between Sweeney and his chair as is noted in Exhibit 2 – Sweeney's annual faculty review for 2020-21 – page 32. Thus, no violation of the Policy occurred.

26. Sweeney has not shown that USD misinterpreted, misapplied or violated a specific term or provision of the applicable policies, and thus, it is recommended that Sweeney's grievance be dismissed.

Dated this 14th day of April, 2022.



Melanie Carpenter
Hearing Examiner
Melanie.carpenter@woodsfuller.com



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October 12, 2022

Tom Wilka
Hagen Wilka Archer
600 S Main Ave
Sioux Falls, SD 57104

Sent via electronic mail to: tom@hwalaw.com

AJ Franken
University of South Dakota
414 E Clark St
Vermillion, SD 57069

Sent via electronic mail to: aj.franken@usd.edu

RE: BOR Grievance – Dr. Sweeney

Gentlemen,

I am writing to notify you of the Board of Regents' decision from its October 5-6, 2022, meeting regarding Dr. Sweeney's grievance filed with the Board. The Board reviewed and adopted the enclosed proposed findings and conclusions of the Hearing Examiner dated August 29, 2022, effectively denying Dr. Sweeney's grievance and upholding the decision(s) made by USD.

Any further appeal of this matter would occur, as allowed, in circuit court pursuant to SDCL ch. 1-26.

Sincerely,

Dr. Brian Maher
Executive Director & CEO
South Dakota Board of Regents

cc: Sheila Gestrung, USD President

Enclosure: Findings and Conclusions

**DEMERSSEMAN JENSEN
TELLINGHUISEN & HUFFMAN, LLP**

L A W Y E R S

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MICHAEL B. DEMERSSEMAN
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August 29, 2022

MICHAEL V. WHEELER
GREGORY C. STROMMEN
NATLAN R. CHICOINE

Dr. Brian L. Maher
SD Board of Regents
306 E Capitol Ave, Suite 200
Pierre, SD 57501

Re: Step 4 Grievance of Dr. William J. Sweeney

Dear Mr. Maher:

A Step 4 Grievance Hearing was held before myself as Hearing Examiner on July 15, 2022, on the campus of the University of South Dakota, Vermillion, South Dakota. Dr. Sweeney, Dr. William J. Sweeney, was present with his attorney, Tom Wilka of Hagen, Wilka & Archer, LLP. Respondent, University of South Dakota (USD) was present and represented by Dr. Amy Schweinle, Dean of the School of Education, and its attorney AJ Franken.

Dr. Sweeney testified on his own behalf. Dr. Schweinle appeared on behalf of USD.

The parties stipulated to the admission of all exhibits.

Based on the testimony and evidence offered during the hearing. The Hearing Examiner makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Dr. Sweeney is a tenured faculty member in the School of Education, Division of Curriculum and Instruction at the University of South Dakota where he has been employed for 27 years.
2. This grievance stems from the workload assignment given to Dr. Sweeney on April 8, 2022, by the Dean of the School of Education, Dr. Amy Schweinle.
3. It is Dr. Sweeney's position that the assignment of the duties was in

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retaliation for Dr. Sweeney having filed two previous grievances on the subject of his workload assignments and a letter of warning dated January 29, 2021.

4. On April 21, 2022, Dr. Sweeney filed his Step 2 Grievance with Dr. Kurt Hackemer, Provost and Vice President for Academic Affairs. The Step 2 Grievance was determined to have been filed timely.

5. By letter dated April 26, 2022, Dr. Hackemer concluded that there was no evidence that Dean Schweinle acted inappropriately in making Dr. Sweeney's workload assignment for the 2022-2023 academic year, nor could he find any basis for an allegation that such workload assignment was in retaliation for the two previous grievances filed by Dr. Sweeney.

6. Dr. Sweeney appealed the Step 2 Grievance determination to USD President Sheila Gestring on May 3, 2022. The Step 3 Grievance was determined to have been timely filed.

7. In a letter dated May 16, 2022, President Gestring upheld the workload assignment and denied the grievance.

8. By letter dated May 23, 2022, Dr. Sweeney filed a Step 4 Grievance with Dr. Brian Maher, Executive Director of the South Dakota Board of Regents. The Step 4 Grievance has been timely filed.

9. Dr. Sweeney's grievance stems from a belief that the new workload assignment for the 2022 – 2023 academic year violates the USD faculty workload policy, effective January 2021 and Board of Regents ("BOR") Policy 4:38.

10. BOR Policy 4:38.C.1 "Faculty Activities and Performance Expectations" states:

All faculty members will be significantly active in the broad areas of teaching, scholarship, and service as assigned by their institution. Within each area of professional responsibility, faculty members will be expected to achieve levels of service that are consistent with national standards for excellence. The quantitative expectations for activity in each area depend broadly on the mission of the university, the faculty members discipline and its role within the university, and on specific past and present role assignments of individual faculty responsibility. Given the relationship between the expectation for individual activity and the mission of a person's university, department, discipline, and assignments, a variety of activities may warrant recognition in each area. (emphasis added).

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11. BOR Policy 4:38.C.2 Workload Policies provides:

The Board recognizes the value of policies that communicate workload expectations for faculty. Each institution shall establish workload policies and consultation with their faculty. Workload policies shall acknowledge workload expectations relating to the overall number of expected work load units, credit hours, contact hours, preparation, clinical work, instructional methods, research, service and other factors deemed appropriate.

12. USD Faculty Workload Policy was adopted effective January 2021. "Full-time workload" provides that workload is based on a total of thirty workload units or its equivalent per academic year for a full-time faculty member on a nine month contract. Workload may include teaching, research, and service with the exact allocation based on faculty rank and responsibilities as approved by the Dean or the Dean's designee.

13. BOR Policy 4:38.C.3.1 provides

The universities have substantial autonomy to select and determine the relative importance of various activities in the areas of teaching, scholarship and creative activity and service. Faculty members have legitimate interest in knowing which professional activities are to be recognized and their university's determination of the relative importance of the recognized activities. To that end:

- Each university shall select the teaching, scholarship, and service activities, consistent with those activities and principles identified herein, that are to be recognized in the evaluation and promotion processes;
- Each university shall determine the relative importance of the three areas of professional activity and the relative importance of selected activities within each category;
- The university's selections shall be consistent with the mission and programs of the university as approved by the Board;
- The selection of activities and the relative importance of the activities may vary within a university, and across the system;
- After selecting activities and determining their relative importance, each university shall adopt standards that describe the facts and circumstances that will be considered when evaluating the

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range of individual faculty member activities and the quality of effort that faculty members achieve;

- The university's selections shall be consistent with the guarantee of academic freedom as provided to faculty members in Board Policy 1:11;

- The university's selection of activities and determinations of relative importance shall be disclosed in writing to each faculty member.

(emphasis added)

14. BOR Policy 4:38.C.3.2 provides:

Each institution has discretion in determining the responsibilities of faculty in all ranks. (emphasis added)

15. Dr. Sweeney was assigned teaching, scholarship and creative activity, and service responsibilities in the 2022-2023 Workload Assignment communicated to him by Dr. Schweinle on April 8, 2022.

16. Although Dr. Sweeney agrees that the subcategories in each of the three areas for which he was assigned responsibilities fall within the three areas set out in BOR Policy 4:38.C.6, it is Dr. Sweeney's position that BOR Policy 4:38.C.4 was applicable and ignored. Dr. Sweeney's position is that the workload assignments for the upcoming academic year should have been the subject of negotiation and discussion between himself and Dr. Schweinle and that absent Dr. Sweeney's agreement to the specific workload assignments, such assignments could not be imposed upon him.

17. Dr. Sweeney further alleges that the departure from his historic workload assignments which included face-to-face teaching (referred to as "didactic teaching") violates BOR Policy 1:11 Academic Freedom and Responsibility.

18. Dr. Sweeney asserts that a significant departure from his historical workload assignments required that he be consulted and that he agree to specific assignments assigned to him. However, Dr. Sweeney does agree that all of the workload assignments assigned to him by Dr. Schweinle are within the categories of teaching, scholarship and creative activity, and service as set forth in BOR policy 4:38.C.6.

19. Dr. Sweeney asserts that the change in workload assignments is in direct retaliation for him filing two previous workload grievances, however this allegation was

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denied by Dr. Schweinle and Dr. Sweeney was unable to offer any evidence beyond his conjecture to support this allegation.

20. The College of Education has undergone a reduction in force and as a result has a smaller number of faculty within its available pool of faculty. Other faculty members are by necessity taking on workload responsibilities within the Department of Education that are new to them. Dr. Sweeney is no exception. The service component of Dr. Sweeney's workload assignment includes a responsibility to SARA Program. This is a new program to the Department of Education and there was no faculty member assigned to this workload requirement previously.

21. In preparation for some of the new workload responsibilities assigned to Dr. Sweeney, he participated in a voluntary, but compensated, fellowship this summer to prepare him for one of his responsibilities under this workload assignment.

Based on the forgoing, the Hearing Examiner now makes the following Conclusions of Law.

CONCLUSIONS OF LAW

1. Dr. Sweeney's appeal to the Step 4 Grievance was timely filed.
2. Timeframes within BOR's Policy 4:7 have been waived by the parties hereto.
3. Dr. Sweeney has been afforded an opportunity for a hearing and was represented by competent counsel.
4. Dr. Sweeney bears the burden to show a "misinterpretation, misapplication, or violation of specific term or provision of Board policy, or other agreements, contracts, policies, rules, regulations, or statutes that directly affect terms and conditions of employment for the individual employee". SD BOR Policy 4:7.C.3.
5. Dr. Sweeney bears the burden of establishing that under the policies, his assigned workload violates the explicit terms of BOR policies. For a claim of retaliation in violation of SD BOR Policy 4:38, Dr. Sweeney bears the burden of proof in all elements of retaliation. Dr. Sweeney's conjecture that his workload assignment is the result of retaliation is without factual support in the record.
6. The workload assignments given to Dr. Sweeney for 2022-2023 academic year all fall within the four corners of the provisions of BOR Policy 4:38.C.6 and the University has the discretion and substantial autonomy to make workload assignments they deem to be in the best interests of the mission of the University.

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7. Dr. Sweeney's reliance upon BOR Policy 4:38.C.4. to require that he be consulted and agree with his new workload assignment under these circumstances is misplaced. All of the provisions of the new workload assignments for Dr. Sweeney fall within the published components of the three areas consisting of teaching, scholarship and creative activity, and service. Thus, the assigned duties for Dr. Sweeney do not constitute "other specific activities" for the purposes of requiring consultation and agreement between the faculty members and their department heads as provided in BOR Policy 4:38.C.4.

8. The workload assignments for Dr. Sweeney in the 2022-2023 academic year do not misinterpret, misapply or violate any laws of the State of South Dakota or any rule, policy, or regulation of the Board of Regents or the institution for which Dr. Sweeney is employed.

CONCLUSIONS

Dr. Sweeney's allegation that his workload assignment violates BOR policy 4:38 is without factual support. The University has discretion and autonomy to make workload assignments as necessary to the mission of the University and within the provisions of BOR policies and the USD Faculty Workload Policy. Dr. Sweeney's assertion that his new workload assignment violates his protections to academic freedom under BOR Policy 1:11 is misplaced. "Academic freedom" addresses the right of a faculty member to determine for themselves how they will teach, what they will teach, and how it will be taught. It does not permit a faculty member to dictate the areas of responsibility to which they will be assigned by their department heads.

Dean Schweinle did not violate any of Dr. Sweeney's rights under BOR policies or the USD Faculty Workload Policy in assigning the workload assignments to Dr. Sweeney for the 2022-2023 academic year.

Thank you.

Sincerely,

/s/ Roger A. Tellinghuisen

Roger A. Tellinghuisen (roger@demjen.com)
DEMERSSEMAN JENSEN
TELLINGHUISEN & HUFFMAN, LLP

RT/ag



January 29, 2021

Dr. William Sweeney
Division of Curriculum and Instruction
School of Education

Dr. William Sweeney

This letter is to address continued concerns with your practice of advising students informally with information that is not current or accurate.

As you are aware, the Division of Curriculum and Instruction moved to a single advisor concept for all master's students within the Division. I have been advised that you have continued to informally advise students and have also used an outdated advising form as part of that process. For example, you have told students who need certification that they may enter student teaching without taking the Praxis Core. The USD graduate catalog clearly states that, "Students pursuing initial teacher certification will need to pass the Praxis II Special Education Core Knowledge, and the Principles of Learning and Teaching (PLT) exam for successful completion of the program and teacher licensure. Students who do not possess certification will need to have completed all of the admission requirements for teacher education at the University of South Dakota." On other occasions you have advised students that they may waive a course or practicum due to work experience or prior undergraduate coursework. The graduate school does not allow any course waivers and never gives credit for work experience. A student must always be enrolled in a course to get credit on a transcript. These are examples of misadvising and do not necessarily reflect the whole.

You must immediately cease advising students who are not formally assigned to you as advisees. Any advising must strictly adhere to BOR, University and School of Education policies, procedures and the university catalogs, which is why we moved to the single advisor concept. You were previously warned


OFFICE OF THE DEAN

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by Dean Easton-Brooks in a January 2019 letter which you acknowledged receiving about these same activities. If this behavior continues, more serious measures will be taken as described in BOR Policy 4-14.

I intend to place this letter of warning in your personnel file.

Sincerely,



Amy Schweinh, Ph.D.
Interim Dean, School of Education

CC Kurt Hackemer, Ph.D., Provost and Vice President for Academic Affairs
Garreth Zalud, Ph.D., Chair, Division of Curriculum and Instruction
Emery Wasley, Assistant Vice President, Human Resources

I acknowledge receipt of this letter and understand I can submit comments for rebuttal to Dr. Schweinh for inclusion in my personnel file within two weeks of receipt of this letter.

William Sweeney, Ph.D.

Date

William Sweeney
Workload Academic Year 2022-2023

Teaching 20%

- Dissertation supervision at the graduate level
- Serving on graduate committees
- Continuing to advise student currently assigned
- Conducting extramurally sponsored teaching/learning activities
 - o Review syllabi for externally funded courses

Research 20%

- Conduct research or scholarship as defined by the unit-level Expectations of the Faculty document.
- Publication of scholarly journal articles, books, book chapters
- Delivery of invited and contributed lectures, speeches, performances, or readings at other universities, professional conferences, or in front of other learned audiences
- Administration and execution of sponsored grants or contracts and application for grants related to research/creative scholarship.

Service 60%

- Service work on department/division, school/college, and university committees, including the Senate and its committees
- Service to the following special projects, programs, initiatives or support units of the university
 - o SOE SARA administrator
 - o Data analysis and interpretation for Head Start
 - o Representative to Destination Delzell Planning Committee
 - o Collaborate with CDE as initiated by the associate dean.

Division: Educational Leadership

Direct Supervisor: Amy Schweinta



USD Faculty Workload Policy

College of Arts & Sciences, Beacom School of Business, School of Education,
College of Fine Arts, School of Health Sciences, University Libraries
Effective January 2021

References for this section are the *BOR Policy Manual*, Sections 4:1, 4:13 and 4:38, and the *Expectations of the Faculty at the University of South Dakota* document. These guidelines apply to the professorial, lecturer, librarian, research professor, and professor of practice ranks.

Purpose of document

This document provides guidance to faculty members and their supervisors in the assignment of duties in the areas of teaching, research and creative scholarship, and service. This document shall be consistent with *BOR Policy Manual*, Section 4:38.2. Further, it is intended to inform the expectations of faculty productivity as outlined in *Expectations of the Faculty at The University of The University of South Dakota*. This document may be revisited periodically by the administration, either as an administrative action or in response to a request initiated by the University Senate, with revisions developed in consultation with the faculty. Revisions to the general document require consultation with faculty in the College of Arts & Sciences, Beacom School of Business, School of Education, College of Fine Arts, School of Health Sciences, and University Libraries. Revisions to Appendix A or Appendix B require consultation only with faculty in the affected units.

Faculty Contract Year

Faculty will be required to report for assigned duties no earlier than five working days prior to the first day of classes for each academic term within their annual contract. They will be released from duties incidental to their assigned courses no later than five working days after the last day of final examinations in the last academic term of their appointments. During their contract period, faculty are not required to be present during student breaks. Faculty members are expected to meet all Board of Regents and USD requirements associated with course preparation and delivery as defined in USD policy, including requirements for training and the provision of materials that may fall outside the faculty contract year.

Full-time workload

Workload is based on a total of 30 workload units or its equivalent per academic year for a full-time faculty member on a 9-month contract. Workload may include teaching, research, and service, with the exact allocation based on faculty rank and responsibilities as approved by the dean or the dean's designee.

A faculty member's standard instructional load may include both on-campus and off-campus instruction, including face to face, hybrid, and online courses. Each course credit generally equates to 1 workload unit, provided the course meets the minimum enrollment requirement or has been approved as an exception to the Small Section Limitation rule as defined in BOR Policy 5.17.4. Ordinarily each credit hour corresponds to approximately one (1) hour of contact and three (3)

hours of effort per week that includes course preparation. Cross-listed courses count as a single course for workload purposes. Team-taught courses will have workload assigned based on prorated contributions to the course by each assigned faculty member.

When a course offered within a faculty member's workload allocation, whether face to face, hybrid, and/or online, fails to meet minimum enrollment requirements, the course may be offered as an approved exception to the Small Section Limitation rule or the workload allocation may be adjusted by the administration. If offered as an approved exception, the university administration will determine the minimum enrollment needed to justify offering the class. Workload allocation adjustments may take the form of an alternate teaching assignment, additional research time, or additional service.

Unit workload addenda

Individual academic units may have variations based on the nature of the specific academic enterprise and/or specialized accreditation standards, including acknowledgement of clinical work, noted within Appendix A to this document. The expectations of specialized accrediting agencies regarding workload will be met in those areas that have such accreditation and will be reflected as special circumstances, as indicated in Appendix A. Workload guidelines for Librarians are found in Appendix B.

Variability of workload

Workload calculations will reflect the special contributions and talents of individual faculty members as those contributions relate to the overall mission of the academic unit and the University. For example, some faculty members may show higher or lower teaching loads than others because of differential contributions to the teaching and advising, research and creative scholarship, and service responsibilities of the unit. Individual workloads may be determined by the unique mission of the unit, as well as the unit's contribution to USD's undergraduate signature programming, including but not limited to the First-Year Experience, the Honors Program, Undergraduate Research, and advancing diversity, equity, and Inclusive Excellence initiatives and programs. In general, it is expected that workloads will reflect the tripartite expectations of the faculty members.

Faculty workload variations may also occur in order to meet specialized accreditation requirements, clinical education standards and program specifications.

Faculty members holding professorial rank whose primary responsibilities involve delivery of instruction will be assigned workload units to support active research, scholarship or creative scholarship or active discipline-related professional service. Specific assignments are discussed during the annual performance evaluation.

Allocated time for research, creative scholarship, and service workload units, however, are not automatically awarded if a faculty member is not doing an appropriate level of work in that area to receive the workload units. This allocation of time for research, creative scholarship, and service may be limited if in the previous annual evaluation the faculty member has not "met expectations."

The chair may assign an increased instructional role for a faculty member, upon written approval of the dean or the dean's designee. Tenure track faculty members, however, will be provided with adequate time for research, creative scholarship, and service appropriate to be successful in the discipline.

Workload allocations for all faculty members require, in writing, the approval of the dean or the dean's designee.

Workload approval

All faculty member workload assignments, including re-assignments, are to be in writing and require written approval of the dean or dean's designee. Further, in determining class size or capacity and classroom space, faculty members may provide counsel and recommendation, but such decisions are made by and require written approval of the dean or dean's designee.

Faculty members who unilaterally agree to supervise independent study courses, internships, directed practices and directed studies courses will not be compensated for this supervision, unless the activity and compensation are specifically approved by the chair and the dean or the dean's designee, in writing, at the time of the assignment.

Adjuncts and part-time instructors who teach face to face, hybrid, and/or online courses that have low enrollment may have such courses canceled or may be asked to teach such courses at reduced compensation.

Workload assignment and annual evaluation

Discussion of workload between a faculty member and chair should occur as an integral part of the annual performance evaluations, since workload and performance expectations are linked. Anticipated instructional assignments should also be documented as determined by the university. Colleges, schools, and the libraries may have additional forms and/or workload planning meetings to help faculty members, chairs, and the dean outline and approve annual workload consistent with these guidelines.

Academic Governance Responsibilities

All faculty members who hold professorial rank are expected to participate in the academic governance of the university, college/school, and department. Service to the institution may include, but is not limited to the following:

- a. Work for departmental, school, college and university committees or task forces;
- b. Service on the University Senate and its committees;
- c. Responsibilities relating to the academic or support services of the university community;
- d. Contributions to the development of library or other learning resources, or institutional studies or reports such as those required by accrediting organizations;
- e. Participation in departmental/division-sponsored activities that support student success.
- f. Contributing to USD's diversity, equity, and Inclusive Excellence initiatives, such as

serving on the President's Council for Diversity or unit-level diversity, equity, and inclusion committees.

Faculty members in the non-professorial ranks may participate fully in academic governance responsibilities provided they have adequate experience and qualifications as determined by the institution.

Administrative Appointments

Faculty member time allocated for administrative duties should be determined in conversation with the chair, and the written approval of the dean or dean designee, with consideration of the remaining workload units available for instruction, scholarship and service.

Academic Advising

Per BOR Policy 4:38, academic advising of both undergraduate and graduate students is part of teaching. Advising may be assigned to any faculty member, regardless of home location, but not every faculty member is expected to have advisees. All active students will be assigned an advisor, either a professional advisor or a faculty member, so faculty may find themselves advising students at both their home location and remotely.

Graduate Research Project, Thesis, Individual Study, and Dissertation, and Undergraduate Research Expectations

Schools and colleges should develop guidelines in their unit expectation documents reflecting the workload expectations associated with undergraduate and graduate research projects, thesis, individual study, studio, ensemble, performance and applied teaching, and dissertation direction, consistent with the flexibility provided by BOR Policy 4:38.

Additional time for instruction, research/creative scholarship, service, or special assignments

With the specific written approval of the chair or next level supervisor and the dean, additional workload units may be granted to faculty members who are engaged in:

- a. Externally-supported projects that specifically fund a portion of the faculty member's salary or otherwise carry expectations of a significant time commitment necessary for successful completion of the project.
- b. Activities that are determined to be time-intensive beyond standard expectations.

Off-Contract Appointments (Typically Summer)

Faculty members who are not under contract may be offered course assignments to teach during their non-contract session. In the interest of quality instruction, a faculty member's teaching assignment during that non-contract session will not exceed 10 workload units. Any exceptions to this stipulation must be approved by the VPAA prior to a contract being issued to the faculty member.

When a course, whether face to face, hybrid, and/or online, fails to meet the specific minimum enrollment, the contract may be voided by the administration or the administration may request an opportunity for the faculty member to teach the course at reduced compensation. The university administration will determine the minimum enrollment needed, consistent with sound fiscal practices, to justify offering the class. Faculty members will be advised of the minimum enrollments specified by the university at the time the contract is offered. When a course has not achieved that minimum enrollment at least one week prior to the first scheduled class meeting, the administration will contact the faculty member to discuss whether the faculty member would be willing to teach the course at reduced compensation.

Faculty members who unilaterally agree to supervise independent study courses, internships, directed practices and directed studies courses while not on contract will not be compensated for this supervision, unless the activity and compensation are specifically approved by the chair and the dean or the dean's designee, in writing, at the time of the assignment.

Overload Appointments

Faculty members may not be assigned overload courses that would interfere with completion of other assigned responsibilities while under contract. For purposes of this section, overload classes include only courses assigned in addition to a faculty member's base course load. The administration may only offer contracts to faculty members who already carry a full workload for the academic year. Faculty are limited to four workload units of overload teaching per term unless their dean approves an exception.

Appendix A to the Workload Policy

Guidelines Specific to Colleges/Schools

College of Arts & Sciences

Effective January 2021/Revised June 2021

The basic assumption in assigning teaching workloads will be, as stated in the USD Workload Policy, 1 credit hour of teaching is the equivalent of an approximate average of 3 hours of work per week. With the specific written approval of the Chair and Dean, the teaching workload calculation may reflect special circumstances for courses that regularly meet more than the specified credit hours in a week.

Advising workload is calculated based on the number of advisees for whom they serve as primary advisor, with 1 workload unit (1 credit hour) being approximately equivalent to 25 undergraduate student advisees.

Because significant variability exists in workload calculations among and within clinical programs, quantifying workload in a single formula is not attainable. Instead, workload units within a certain range may be assigned by departments to specific activities such as those listed in the table below. As stated previously, 1 workload unit (or credit hour of teaching) is the equivalent of an approximate average of 3 hours of work per week. This relationship can be scaled for varying clinical teaching assignments. For example, 6 workload units of direct clinical supervision would equate to approximately 18 hours of work per week.

Activity	Workload Units Assigned
Direct clinical supervision/preception	<p>Workload units may be assigned to a faculty member for providing direct supervision/preception of students in a clinical setting. The number of workload units will depend upon the number of students and the scope of the experience (e.g. duration of time spent in clinical setting, percent time of supervision/preception, etc.). Those courses (as specified by the department) that require direct clinical supervision/preception but have workload representations through the credit hours of the class may not be provided additional workload if the time expectation of the course is in-line with the credit hours for the course.</p> <p>Within Communication Sciences and Disorders, the amount of time spent in efforts outside of direct clinical supervision (e.g. preparation, grading, meeting time) are generally equal to the time spent in direct clinical supervision. As such, for most clinical supervision assignments, three hours of work per week would translate to one and a half hours of direct clinical supervision and one and a half hours of effort outside of direct clinical supervision. This division between direct clinical supervision and effort outside of direct clinical supervision time may vary based upon the number of students being supervised in that assignment, percent time of supervision/perception, and setting. Variations from this delineation in clinical supervision workload assignments must be approved by the department chair.</p>
Clinical placement coordination	Workload units may be assigned to a faculty member who performs clinical placement coordination. This workload is reflected in service workload allocation.

Clinical doctorate research projects or doctorate student project (sometimes called research projects but distinctly different from a PhD dissertation)	Mentorship of clinical doctorate research projects is expected from program faculty and will be assigned equitably across program faculty where possible. In situations where mentorship of these projects is disproportionate, a faculty member may be assigned additional workload. This excludes projects that are counted as part of a course for which the faculty receives workload representation.
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Beacom School of Business

Effective January 2021

Beacom School of Business faculty workload variations may occur in order to meet current AACSB accreditation standards.

School of Education

Effective January 2021

Student teaching for Initial Licensure, including 488/688

University supervisors observe student teachers a minimum of 3 times per semester in person or via video, and complete all required documentation and paperwork related to supervision. Residency Instructors teach courses offered within residency and others as assigned. Supervision of candidates varies with enrollment each semester. In cases where supervision responsibilities are disproportionate, a residency instructor's workload may be revised. For non-residency instructors, supervision of 3 teacher candidates equates to 1 workload unit.

Practicum and Internship Experiences (outside of the course assignments).

Faculty in Curriculum and Instruction and Educational Leadership are expected to observe graduate students, in person or via video, at least once per semester.

Supervision of internships and field experiences is expected from program faculty where applicable and will be assigned equitably across program faculty where possible. In situations where supervision of internships and field experiences is disproportionate, a faculty member's workload may be assigned additional workload credit with the approval of the dean.

Undergraduate ELED, SHED, SPED, and PE field experiences, internships and practica are considered course offerings when enrollments are consistent with BOR policy and courses have regular meetings face to face or via distance technology, assignments, and are not graded pass-fail.

Practicum and Internship experiences in Counselor Education and Kinesiology and Sport Management are considered course offerings when courses have regular meetings face to face or via distance technology, assignments, and are not graded pass-fail.

Thesis/Dissertation

Dissertation/thesis supervision is considered both teaching and research. Faculty research is bolstered by student research participation. Supervising student research also involves a significant amount of mentoring and teaching of method, knowledge and skill. Nine-month professorial rank

faculty are usually assigned workload units for scholarship and research activity. Mentoring 1-2 student theses/dissertations is an expectation for faculty receiving scholarship workload and will be assigned equitably within programs. In situations where mentorship of these projects is disproportionate within a division/program, a faculty member may be awarded additional workload. This excludes projects that are counted as part of a course for which the faculty receives workload representation.

College of Fine Arts Effective January 2021

The College of Fine Arts is unique in the variety of instructional opportunities it provides for its students. Workload credit for didactic courses will generally follow the policies described within this document. Applied lessons are generally calculated at a 3:2 ratio for workload hours (in other words, 3 contact hours of applied lessons are equal to 2 contact hours for didactic courses). Exceptions to this ratio may be granted after consultation with the faculty member and chair, with final approval by the dean. Workload ratios for other types of university-sponsored activities, such as (but not limited to) 0-credit instruction, studio instruction, thesis supervision, ensemble conducting, directing (stage, technical, and musical direction), choreography and design will be assigned by the chair in consultation with the faculty and should be informed by best practices identified by departmental accrediting bodies (NASAD, NASM, and NAST). These workload ratios will be approved by the dean, consistent with the flexibility provided by BOR Policy 4:38.

School of Health Sciences Effective January 2021

Purpose and Scope

The purpose of this Addendum is to outline the policies and procedures governing the assignment of faculty workload specific to departments and programs within the School of Health Sciences (SHS), mainly in areas related to student clinical supervision, fieldwork and clinical instruction.

Responsibility

The Dean of the SHS, in consultation with the department chairs, approves and updates the policy. Department chairs and program directors are responsible for implementing the policies and for ensuring compliance with accreditation standards and individual program clinical education requirements. Each department within the SHS is expected to adequately meet its overall responsibilities within the parameters of its approved budget. Departments are expected to employ equitable and efficient practices when allocating faculty workload. Program chairs must consult with the SHS dean to ensure alignment with BOR and university policies, as well as efficiencies and equity in workload distribution.

Definitions and Terms

Refer to the following BOR policies:

- BOR 2:32 Credit Hour Assignment
<https://www.sdbor.edu/policy/documents/2-32.pdf>
- Instructional Funding BOR 5:17

App. 51 ⁸

Ex. 5

SOUTH DAKOTA BOARD OF REGENTS

Policy Manual

SUBJECT: Academic Freedom and Responsibility

NUMBER: 1:11

1. Academic freedom is guaranteed to faculty members subject only to accepted standards of professional responsibility including, but not limited to, those herein set forth:
 - A. The importance of academic freedom to teaching and learning is recognized and accepted. Academic freedom includes the right to study, discuss, investigate, teach and publish. Academic freedom applies to both teaching and research. Freedom in research is fundamental to the advancement of truth. Academic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of students to freedom in learning. It includes the freedom to perform one's professional duties and to present differing and sometimes controversial points of view, free from reprisal. The faculty member is entitled to freedom in research and in the publication of the results, subject to the performing of other assigned academic duties.
 - B. Faculty members are entitled to freedom in the classroom in the discussion of their subject. They have the freedom to include the presentation of various scholarly views.
 - C. The concept of freedom should be accompanied by an equally demanding concept of responsibility. The faculty members are members of a learned profession. When they speak or write as citizens, they must be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As learned people and as educators, they should remember that the public may judge their profession and their institution by their utterances. Hence, they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others and should indicate that they are not speaking for the institution.
2. To secure student freedom in learning, faculty members in the classroom and in seminar should encourage free and orderly discussion, inquiry and expression of the course subject matter. Student performance may be evaluated solely on an academic basis, not on opinions or conduct in matters unrelated to academic standards.
 - A. Students should be free to take reasoned exception to the data or views offered in any course of study and to reserve judgment about matters of opinion, but they are responsible for learning the content of any course of study for which they are enrolled.

- B. Each institution shall establish an academic appeals procedure to permit review of student allegations that an academic evaluation was tainted by prejudiced or capricious consideration of student opinions or conduct unrelated to academic standards. These procedures shall prohibit retaliation against persons who initiate appeals or who participate in the review of appeals.
- C. Students are responsible for maintaining standards of academic performance established for each course in which they are enrolled.

SOURCE: BOR, Aug. 1979; BOR, December 2005.

SOUTH DAKOTA BOARD OF REGENTS

Policy Manual

SUBJECT: Grievance--Faculty

NUMBER: 4:7

I. Faculty Grievance Procedure

The following grievance procedure is applicable to non-bargaining unit faculty. Special Schools bargaining unit faculty grievance procedures are contained in the Special Schools COHE/BOR contract.

A. Purpose

All problems should be resolved, whenever possible, before the filing of a grievance. Open communication is encouraged between administrators and faculty members so that resorting to the formal grievance procedure will not be necessary. The purpose of this policy is to promote prompt and efficient procedures for investigating and resolving grievances.

B. Resorting to Other Procedures

If the faculty member seeks resolution of any civil rights claim in any forum or by any set of procedures other than those established in this policy, whether administrative or judicial, the institution or Board will be under no obligation to proceed any further with the matter unless the grievant is under an obligation to exhaust administrative remedies in order to bring such other action. The act of filing an action or claim in any other forum in order to avoid violating a time limitation will not be considered a violation of the intent of this policy.

C. Definitions

- (1) Day: Calendar days.
- (2) Executive Director: The chief executive officer of the Board of Regents.
- (3) Grievance: An alleged misinterpretation, misapplication, or violation of a specific term or provision of Board policy, or other agreements, contracts, policies, rules, regulations, or statutes that directly affect terms and conditions of employment for the individual employee.

- (4) Grievant: A named faculty member or a group of named faculty members who has filed a grievance under this procedure.
- (5) Institution: Black Hills State University, Dakota State University, Northern State University, South Dakota School of Mines & Technology, South Dakota State University, South Dakota School for the Blind and Visually Impaired, South Dakota School for the Deaf, University of South Dakota, and the Office of the Executive Director.
- (6) President: The chief executive officer of a South Dakota Board of Regents University.
- (7) Superintendent: The chief executive officer of a South Dakota Board of Regents Special School.

D. General Provisions:

- 1) No offer of settlement of a grievance by either party to the grievance will be admissible as evidence in later grievance proceedings, or elsewhere. No settlement of a grievance will constitute a binding precedent in the settlement of similar grievances.
- 2) If the grievance concerns non-renewal, denial of promotion, or denial of tenure, the grievance review will be limited to determining whether the decision was the result of failure to follow procedures. The burden of proof in such cases shall rest with the grievant.
- 3) Neither the institution nor the Board of Regents will retaliate or effect reprisals against any faculty member for processing or participating in a grievance.
- 4) In the event a grievance is filed near the end of an academic year and strict adherence to time limits will result in hardship to any party, the parties will do everything reasonable to allow the grievance to be processed in an expeditious manner.
- 5) If the grievant fails to act within the time limits provided herein, the administration will have no obligation to process the grievance and it will be deemed waived.
- 6) If the administration fails to act in time, the grievant may proceed to the next review level by filing the grievance with the appropriate official and within the timeframe required under Section E and any subsequently issued decision on the matter at the bypassed level will be void.

- 7) The parties to the grievance may, in their discretion, waive any of the time limitations provided for herein; provided, however, that such waiver must be in writing and signed by both parties involved at the particular level or step of the grievance process.
- 8) Required written notice may be sent via the Postal Service, delivered by hand, or sent through electronic mail. Notice will be effective on the date postmarked by the Postal Service, on the date delivered by hand, or on the date sent electronically, provided that, where disruption of institutional electronic communications systems interferes with delivery of an electronic notice, the effective date of notices sent electronically will be delayed until service has been restored.
- 9) Grievance records will not be maintained in any faculty member's institutional personnel file.
- 10) In the case of a grievance concerning discipline or a termination pursuant to reduction procedures, the burden of proof will rest upon the administration to the extent required by law. In all other cases the burden of proof will rest upon the grievant.
- 11) Each party to the grievance will bear his own expense in a grievance proceeding. The institution or the Board will bear the expense of providing the Hearing Examiner and all attendant costs thereto.
- 12) A grievant will be permitted at any time prior to the time the Hearing Examiner sets the matter down for hearing, by written notice, to amend a grievance by further specifications. However, the filing of such amendments will not act to extend any time constraints.
- 13) Throughout the grievance process, the grievant shall include copies of the original grievance and all responses and decisions from prior steps, if any.
- 14) Throughout each step of the grievance process, any response or decision issued by the institution shall be provided simultaneously to the grievant and each administrator who issued a decision in prior steps, if any. All decisions issued by the institution in response to a grievance shall include a statement of findings and conclusions supporting the decision.
- 15) Faculty members, in processing grievances, may represent themselves or may be represented by someone of their choice.
- 16) The grievance proceedings will be maintained as confidential, subject only to the necessity of the parties to prepare their cases. All meetings and conferences will be held in a confidential setting.

- 17) Informal resolution may be attempted by the parties to a grievance at any point during the grievance procedure. If a grievance is resolved informally, the institution will be under no obligation to proceed further with the grievance.
- 18) If the deadline for any action(s) set forth herein falls on a Saturday, Sunday, legal holiday, or any other day in which the institution's administrative offices are closed, the timeframe for the action shall continue to run until the end of the first day thereafter when the institution's administrative offices are open.

E. Grievance Procedure

1) Step One

- a. The grievant may file a grievance in writing with the lowest administrative level having authority to dispose of the grievance within fourteen (14) days of the date on which the grievant knew, or should have known, of the action or condition which occasioned the grievance.
 - i. If the appropriate Vice President of the institution is the lowest administrative level having authority to dispose of the grievance, the grievance will be filed as a first instance at Step Two. The applicable filing period remains fourteen (14) days.
 - ii. If the President or Superintendent is the lowest administrative level having authority to dispose of the grievance, the grievance will be filed as a first instance at Step Three. The applicable filing period remains fourteen (14) days.
- b. The administrator, upon receipt of the grievance, will investigate and provide a response to the grievant within seven (7) days of receipt of the grievance.
- c. If a grievant is not satisfied with the response, the grievant has seven (7) days to proceed to Step Two.

2) Step Two

- a. The grievant may file, in writing, a grievance of the Step One decision with the appropriate Vice President of the institution.
- b. The Vice President of the institution shall review the grievance and provide a response to the grievant within fourteen (14) days following receipt of the grievance.
- c. If a grievant is not satisfied with the response, the grievant has seven (7) days to proceed to Step Three.

3) Step Three

- a. The grievant may file, in writing, a grievance of the Step Two decision with the President or Superintendent of the institution.

- b. The President or Superintendent shall, personally or through a designee, review the grievance and provide a response to the grievant within fourteen (14) days.
 - c. If a grievant is not satisfied with the response, the grievant has seven (7) days to proceed to Step Four.
 - i. If the grievant has filed a grievance based on corrective action imposed pursuant to Board Policy 4:14.1.D.1., the grievant has seven (7) days to request review of the response pursuant to Board Policy 1:6.C.5.
- 4) Step Four
 - a. The grievant may file, in writing, a grievance of the Step Three decision with the Board.
 - i. If the grievant has filed a grievance based on corrective action imposed pursuant to Board Policy 4:14.1.D.1., the only additional grievance process available shall be under Board Policy 1:6.C.5.
 - b. The Executive Director shall select a hearing examiner within fourteen (14) days following receipt of the grievance.
 - c. The hearing examiner shall hold a hearing pursuant to SDCL ch. 1-26 with all parties involved in the grievance no later than thirty (30) days after the hearing examiner is appointed. The hearing examiner shall prepare a proposed determination including findings of fact and conclusions of law for the Board's consideration. The proposed determination shall be provided to the board within thirty (30) days of the hearing or fourteen (14) days prior to the next regularly scheduled Board meeting, whichever is sooner.
 - d. The Board's decision shall be issued to the grievant within ten (10) days from the date the grievance is considered by the Board. If the Board fails to respond within the specified time period or if the grievant is not satisfied with the decision, the grievant may grieve to the circuit court in accordance with SDCL ch. 1-26.

SOURCE: Current Policy Manual 5.4.6; BOR April 2009; BOR May 2021; BOR December 2021.

Ex 7

SOUTH DAKOTA BOARD OF REGENTS

Policy Manual

SUBJECT: Statement Concerning Faculty Expectations

NUMBER: 4:38

A. PURPOSE

The purpose of this policy is to describe the Board's expectations for faculty in performing their work duties.

B. DEFINITIONS

None

C. POLICY

1. Faculty Activities and Performance Expectations

All faculty members will be significantly active in the broad areas of teaching, scholarship, and service as assigned by their institution. Within each area of professional responsibility, faculty members will be expected to achieve levels of service that are consistent with national standards for excellence. The quantitative expectations for activity in each area depend broadly on the mission of the university, the faculty member's discipline and its role within the university, and on specific past and present role assignments of individual faculty responsibility. Given the relationship between the expectations for individual activity and the mission of a person's university, department, discipline, and assignments, a variety of activities may warrant recognition in each area.

Although institutions inform faculty members of the activities to be reviewed when evaluating performance, the assessment of faculty performance cannot be reduced to a mere inventory of activities by kind and quantity. The institution shall evaluate not merely the kind and quantity of actions, but also the quality of the results achieved or services provided.

Quality of performance in teaching, advising, research, scholarship and creative activity and service is to be distinguished from quantity and not equated. For example, advising a large number of students does not speak to how well students are advised. Similarly, publishing several articles does not speak to the quality of the publications. Consequently, there must be evidence of quality performance in addition to the breadth and intensity of participation in workload activities and contribution to the profession. Furthermore, performance indicators are not intended to be used as a checklist in which faculty check off various indicators after completing a task or activity. In the absence of quality, the mere number of performance indicators met or exceeded does not insure the grant of promotion, tenure or performance-based salary increases. If a faculty member or department head is

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not sure how to assess the quality of performance, several indicators that could be considered (in no particular order):

- What evidence is there of student learning?
- Does the faculty member employ acceptable and valid research, theory, teaching, and advising methods?
- Does the work reflect increasing professional competence?
- Does the profession, through its periodicals and other information outlets, recognize the merit of the work?
- Is the work valued by other reputable professionals, as evidenced by favorable citation or adoption of the work or its derivatives?
- Do the faculty member's colleagues or public recognize the quality and impact of the faculty member's service?

2. Workload Policies

The Board recognizes the value of policies that communicate workload expectations for faculty. Each institution shall establish workload policies in consultation with their faculty. Workload policies shall acknowledge workload expectations relating to the overall number of expected work load units, credit hours, contact hours, preparation, clinical work, instructional methods, research, service and other factors deemed appropriate. Institutional workload policies shall include expectations for all faculty classifications (e.g., professors, librarians, instructors, lecturers, professors of practice). Institutional workload policies shall include consideration of national standards, institutional standards and priorities, and benefits to the state of South Dakota.

Faculty members will be expected to undertake an effort equivalent to that needed to deliver thirty (30) work load units. Ordinarily each work load unit corresponds to approximately three (3) hours of effort per week. The administration reserves the prerogative to make other assignments in exceptional circumstances as approved by the institutional president. To teach graduate courses, unit faculty must meet institutional requirements and be approved as graduate faculty. Independent study courses (instructional method I) do not factor into calculation of workload.

3. Institutional Selection of Activities

3.1. The universities have substantial autonomy to select and determine the relative importance of various activities in the areas of teaching, scholarship and creative activity and service. Faculty members have a legitimate interest in knowing which professional activities are to be recognized and their university's determinations of the relative importance of the recognized activities. To that end:

- Each university shall select the teaching, scholarship, and service activities, consistent with those activities and principles identified herein, that are to be recognized in the evaluation and promotion processes;

- Each university shall determine the relative importance of the three areas of professional activity and the relative importance of selected activities within each category;
 - The university's selections shall be consistent with the mission and programs of the university as approved by the Board;
 - The selection of activities and the relative importance of the activities may vary within a university, and across the system;
 - After selecting activities and determining their relative importance, each university shall adopt standards that describe the facts and circumstances that will be considered when evaluating the range of individual faculty member activities and the quality of effort that faculty members achieve;
 - The university's selections shall be consistent with the guarantee of academic freedom as provided to faculty members in Board Policy 1:11;
 - The university's selection of activities and determinations of relative importance shall be disclosed in writing to each faculty member.
- 3.2. Each institution has discretion in determining the responsibilities of faculty in all ranks. This includes participation in curriculum review, academic programming operations, advising, and other factors. Faculty in non-professorial ranks assigned shared-governance and service responsibilities shall have adequate experience and qualifications as determined by the institution. Workload expectations will reflect all such assignments.
- 3.3. It may be necessary from time to time to review and to revise institutional priorities. It is expected that the modification of institutional statements shall not result in the change in expectations of a faculty member during the then-current annual evaluation cycle.

4. Agreement to Recognize Other Activities

Faculty members and their department heads may agree that other specific activities shall be considered teaching, scholarship, or service contributions and that significant performance will be recognized, provided that such specified activities are consistent with the university's mission, the faculty member's specific assignment as agreed to by the faculty member and the department head, and approved by the institution's chief academic officer, and the policy goals stated in this appendix and university statements implementing them. Provision for agreement to recognize other activities is intended to permit the modification of institutional statements only where warranted by unique circumstances.

An activity that is not clearly included in the institutional statement of recognized activities or an approved individual agreement must be justified in terms of the mission of the university, the role or mission of the faculty member's department or discipline or the faculty member's specific assignment. The faculty member shall be responsible for providing such justification.

5. Civility in Working with Colleagues, Staff Members, Students and Others

Universities play a special role in preparing students to lead the complex social organizations through which businesses and professions operate and through which free people govern themselves. Students must be taught, and they must be shown through the example given by institutional employees, that members of stable, effective and prosperous social organizations observe norms of conduct under which all participants treat one another civilly and carry out their respective tasks in a constructive and informed manner. Complex social organizations derive their strength from the cooperation of those who participate in them. By virtue of their special role in preparing future generations of leaders, universities have a particular concern with conduct that destroys the bonds of cooperation and common purpose on which society rests by demeaning members of the community, and such conduct cannot be tolerated in an institution whose very purpose is to shape the skills and conscience of the rising generations.

Faculty members are responsible for discharging their instructional, scholarly and service duties civilly, constructively and in an informed manner. They must treat their colleagues, staff, students and visitors with respect, and they must comport themselves at all times, even when expressing disagreement or when engaging in pedagogical exercises, in ways that will preserve and strengthen the willingness to cooperate and to give or to accept instruction, guidance or assistance.

6. Teaching, Scholarship, and Service Activities

6.1. Teaching

A fundamental mission of a university is to provide opportunities for learning and academic achievement. Related to this mission is the professional evaluation of student achievement according to standards of the discipline and university. In order to meet expectations in teaching, all faculty members must achieve a minimum standard of basic performance. Faculty members are expected to:

- Demonstrate competence in teaching and in evaluation of student performance;
- Offer consistently challenging and current courses that afford students opportunities to learn the information, methods of inquiry, and professional skills identified in the course descriptions and relevant departmental or program mission statements;
- Develop and implement plans to review the effectiveness of pedagogical techniques on a regular basis as measured by student learning, and make adjustments in technique in response to such reviews where necessary;
- Instruct and evaluate at levels meeting or exceeding university standards for the discipline;
- Incorporate scholarly activities or findings into their teaching on a regular basis;
- Make available opportunities for students to learn of the primary sources of information associated with the area of study;
- Provide students with information about course objectives, content, activities, and performance expectations;



Be regularly available for out-of-class consultation with students;

- Review and revise periodically course content, classroom activities, out-of-class assignments, and evaluation procedures to be consistent with national expectations concerning content and quality;
- Require all students engaged in course activities to make active use of advanced technological resources employed by professional practitioners in the discipline, including information processing and communications technologies, to the extent that such technological resources are available to the employing institution and appropriate to the course level;
- Participate actively in university efforts to implement assessment policies and procedures;
- Be conscientious in advising students assigned to them with respect to the requirements of academic programs and the selection of electives consistent with the students' goals (the student's responsibility for degree and program requirements is understood); and
- Adhere to the university's standards and procedures for ensuring academic integrity.



Teaching includes the following or similar activities, the recognition and importance of which will vary depending upon the mission of the university, the role of a discipline within the university's functions and the individual faculty member's assignment:



- Teaching undergraduate courses;
- Advising undergraduate students;
- Teaching graduate courses;
- Advising graduate students;
- Developing and teaching new undergraduate courses;
- Developing and teaching new graduate courses;
- Developing, supervising, and evaluating internships;
- Teaching courses in the honors program;
- Teaching continuing education courses for academic credit;
- Teaching continuing education unit courses;
- Conducting noncredit workshops, institutes, and seminars on campus;
- Conducting noncredit workshops, institutes, and seminars off-campus;
- Teaching televised courses;
- Guiding and evaluating undergraduate individual study;
- Guiding and evaluating undergraduate project papers;

- Guiding and evaluating graduate project papers;
- Guiding and evaluating theses;
- Guiding and evaluating dissertations;
- Serving on graduate committees;
- Experimenting with instructional methods and techniques;
- Developing assessment policies and procedures;
- Preparing proposals for curricular change; and
- Sponsoring field trips that provide meaningful learning experiences for students.

6.2. Scholarship and Creative Activity

The mission of a university requires of each faculty member a serious commitment to scholarship. Scholarship, broadly defined, is a prerequisite for competent and current teaching, contributes to the expansion of knowledge and the development of the arts, and enhances the services provided to the public. Each faculty member is expected to continue learning in his or her discipline through appropriate journals and books and to participate in the discipline's professional deliberation.

The product of scholarly activity may take a variety of forms, but it cannot be only for the classroom or take place only in the classroom; it must involve the presentation of one's ideas and works to one's professional peers or the learned public for debate and judgment. Such presentations may occur in a variety of settings reflective of the professional practices of each discipline, but to be worthy of recognition it is expected at a minimum that the presentation be subject to peer review or comparable professional scrutiny and that it be made in a forum appropriate for gaining extramural recognition for ongoing scholarly accomplishment and leadership.

The recognition and importance of the different forms and presentations of scholarship will vary depending upon the mission of the university, the role of a discipline within the university's functions and the individual faculty member's assignment. Thus, although scholarship and creative activity includes the following and similar activities, not all of these need be recognized or judged to be important or sufficient for each faculty member:

- Publication of the results of research, scholarship, and creative endeavor in peer reviewed scholarly journals and books, textbooks, chapters in professional books, abstracts, book reviews or other peer reviewed fora in print or other media;
- Publication of peer reviewed poems, novels, plays, musical compositions or other creative works in print or other media;
- Exhibition of works of art;
- Musical performance;
- Delivery of invited lectures, papers, speeches, or presentations at other universities, professional meetings, conventions, and conferences;

- Creative application of existing technologies;
- Patents on inventions;
- Application for patents;
- Application for research or development grants;
- National recognition as an expert in a field related to the faculty member's professional responsibilities;
- Contribution as a co-author or co-presenter of one's own research results to joint research projects involving other professionals;
- Participation as an expert reviewer on government or private research grant review panels or site visits, participation in accreditation reviews and comparable professional activity.

6.3. Service

Scholars have special insights and abilities to contribute to the deliberative processes through which universities, professions and society as a whole respond to their changing circumstances. The public support for the universities gives rise to significant service responsibilities to the state and society. By tradition, the professorate has contributed to meeting such expectations of public service and has assisted in the governance and operation of universities and of professional groups.

There are three aspects of service:

- Service to the department, college or school, or institution;
- Service to the profession or discipline; and
- Service to the community, state, region, nation, or international community.

A variety of activities are classified as service. The needs of the institution and the expertise of faculty members may require that faculty members concentrate efforts in certain service areas to the exclusion of activity in other service areas.

The recognition and importance of the different forms of service will vary depending upon the mission of the university, the role of a discipline within the university's functions and the individual faculty member's assignment. Thus, although service includes the following and similar activities, not all of these need be recognized or judged to be important or sufficient for each faculty member.

6.3.1 Service to the Institution

All faculty members are expected to be willing to participate in the academic governance of their universities, to contribute to the work of departmental committees or task forces, and to participate in searches for new members for the department. Service to the institution also includes the following or similar activities:

- Significant work for departmental, school, college and university committees;

- Service on the academic senate and its committees;
- significant responsibilities relating to the academic or support services of the university community;
- Contributions to the development of library or other learning resources;
- institutional studies or reports such as those required by accrediting organizations;
- Coordination, advisement and supervision of student organizations or student activities; and
- Participation in institutionally-sponsored student support activities.

6.3.2 Service to the Discipline or Profession

Service to the discipline or profession includes the ranges of activities through which members of the learned professions sustain organizations that advance their disciplines or professions. These include, by way of illustration and without limitations, the following or similar activities:

- Significant contributions as an officer of local, regional, national, or international professional associations;
- Participation in meetings, conferences and conventions of professional associations;
- Editing professional journals;
- Evaluating manuscripts that have been submitted to a journal;
- Reviewing proposals for textbooks in one's field of specialization for publishers;
- Serving as an organizer or session chairperson of a meeting of a local, regional, national, or international professional association;
- Supporting special projects, including academic institutes or workshops.

6.3.3 Service to the Community, State, Region, Nation and World

The mission statements adopted by the Board of Regents direct each university to perform public service. Significant faculty activity that contributes to the institution's performance of its service mission will encompass activities undertaken on behalf of the university, employing the skills and knowledge that faculty members have acquired through the exercise of their respective disciplines or otherwise involving exercise of independent professional judgment. These include, by way of illustration and without limitation, the following or similar activities:

- Discipline-related service to the community, state, region, nation or international community;
- Institutes, short courses, seminars, and workshops related to the faculty member's discipline;

- Consultation related to the faculty member's discipline;
- Service as the designated representative of the university;
- Professional practice involving the exercise of independent professional judgment;
- Participation as an expert reviewer on government or private research grant review panels or site visits, participation in accreditation reviews and comparable professional activity.

FORMS / APPENDICES:

None

SOURCE:

BOR December 2002; BOR March 2006; BOR August 2008; BOR December 2010; BOR August 2020.

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30602

WILLIAM J. SWEENEY,

Plaintiff and Appellant,

v.

SOUTH DAKOTA BOARD OF REGENTS and UNIVERSITY OF SOUTH DAKOTA,

Defendant and Appellees.

APPEAL FROM THE CIRCUIT COURT
FIRST JUDICIAL CIRCUIT
CLAY COUNTY, SOUTH DAKOTA

THE HONORABLE TAMI A. BERN
Circuit Court Judge

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Appeal Filed January 19, 2024

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JURISDICTIONAL STATEMENT

Appellees adopt the jurisdictional statement as set forth by Appellant.

PRELIMINARY STATEMENT

This appeal is from three separate administrative appeals to the Circuit Court, First Judicial Circuit. The cases, each concerning separate grievances were consolidated by the Circuit Court. Documents from 13CIV21-118 will be cited R1 ____, with a transcript cite of TR1 ____. Documents from 13CIV22-060 will be cited R2 ____, with a transcript cite of TR2 ____. Documents from 13CIV22-120 will be cited R3 ____, with a transcript cite of TR3 ____. The documents in the administrative record may be cited by the respective page numbers as numbered by the South Dakota Board of Regents, as BR ____. Appellant's Brief will be cited as Appellant's Brief ____. Appellees' Appendix will be cited as Appendix ____. Appellant's Appendix will be cited as Appellant's Appendix ____.

STATEMENT OF LEGAL ISSUES AND AUTHORITY

- I. Whether the Circuit Court erred in determining that the January 29, 2021 written warning did not violate academic freedom or other applicable policies.

The Circuit Court correctly held that the written warning did not violate Dr. Sweeney's academic freedom under SDBOR Policy 1:11 or otherwise violate applicable policy.

Relevant Authority:

- *Yarcheski v. Reiner*, 2003 S.D. 108, 669 NW2d 487
- *Halls v. White*, 2006 S.D. 47, 715 N.W.2d 577
- SDCL § 13-49-14

- II. Whether the Circuit Court erred in determining that Dr. Sweeney failed to prove that the additional course assignment of SPED 260 for Spring 2022 violated applicable workload policies.

The Circuit Court correctly held that Dr. Sweeney failed to prove that the addition of SPED 260 violated applicable workload policies.

Relevant Authority:

- *Halls v. White*, 2006 S.D. 47, 715 N.W.2d 577
- *United States v. Messino*, 382 F.3d 704 (7th Cir. 2004)
- SDCL § 13-49-14

- III. Whether the Circuit Court erred in determining that the assignment of service duties was not retaliatory and did not violate other policies.

The Circuit Court correctly held that the assignment of the SARA administrator duties and Headstart analysis was not retaliatory and that the assignments did not otherwise violate policies.

Relevant Authority:

- *Williams v. S. Dakota Dep't of Agriculture*, 2010 S.D. 19, 779 N.W.2d 397
- *Davis v. Wharf Res. (USA), Inc.*, 2015 S.D. 61, 867 N.W.2d 706
- *Radabaugh v. Zip Feed Mills, Inc.*, 997 F.2d 444 (8th Cir.1993)
- SDCL § 13-49-3
- SDCL § 13-49-14

STATEMENT OF THE CASE AND FACTS

I. The First Grievance

The first grievance at issue in this case arose from a written warning provided to Dr. Sweeney by Dr. Amy Schweinle, Dean of the University of South Dakota School of Education. At the time this grievance arose, Dean Schweinle was serving as interim dean. R1, BR 110, TR 103. She had been with the University of South Dakota for approximately 18 years and was elevated from interim dean to dean in 2021. Id. Dr. Sweeney had previously been given verbal and written warnings concerning misadvising students, including a written warning issued by Dean Easton-Brooks, the prior dean. R1, TR 104, BR 111, TR 126, BR 133. In her prior role as associate dean, Dean Schweinle had sat in on multiple meetings where Dr. Sweeney was warned about misadvising

students. R1, TR 126, BR 133. Dean Schweinle became concerned that Dr. Sweeney had more recently continued misadvising students, primarily through comments made by students who were engaged in an academic appeal requesting change of advisor. R1, TR 104-105, BR 111-112. Dean Schweinle learned that the students were in part requesting a change of advisor because the students were concerned that they were receiving conflicting information about the program and admission requirements from their assigned advisor and Dr. Sweeney. R1, TR 104-105, BR 111-112. In an email to one student, Dr. Sweeney asserted regarding the Praxis Core exam that "This requirement is a requirement of the undergraduate teacher education program not the graduate multicategorical special education program." Appellant's Brief 27.

Concerned that this advisement was inaccurate, Dean Schweinle provided Dr. Sweeney a written warning dated January 29, 2021, advising him to "immediately stop advising students who are not assigned to [Dr. Sweeney]" and that "[a]ny advising must strictly adhere to BOR, University and School of Education policies, procedures and the university catalogs..." R1, BR 259. Separately, Dean Schweinle added the following comment into Appellant's faculty evaluation: "Some concerns were noted including not strictly following the USD catalog and graduate school policies/procedures. In the future, it is advised that Dr. Sweeney adhere to all BOR, USD, and SOE policies, procedures and course catalogs." R1, BR 192.

After a response letter to Dean Schweinle, Dr. Sweeney filed a Step 1 Grievance with the Provost and Vice President for Academic Affairs, Dr. Kurt Hackemer, asserting that the written warning violated his academic freedom under SDBOR Policy 1:11, as well as violating SDBOR Policy 4:38 entitled "Statement Regarding Faculty Expectations," and the USD workload policies. R1, BR 246-252. Dr. Sweeney requested as a remedy that

the written warning and comment in his evaluation be retracted, and that a new policy be developed regarding admission into teacher education “that acknowledges advisor discretion and academic freedom as well as the implementation of required coursework for graduate students in the Multicategorical Special Education Program.” R1, BR 252. The grievance also requested as remedy “development of a thorough training and discussion of these policies and procedures for all graduate-level advisors of students in the Multicategorical Special Education Program that is respectful and acknowledges advisor discretion and academic freedom as well as the implementation of required coursework for graduate students.” R1, BR 252. Dr. Hackemer rejected Dr. Sweeney’s grievance and proposed remedy. R1, BR 218-19.

After advancing the grievance to USD President Sheila K. Gestring and again having his grievance and proposed remedies rejected, Dr. Sweeney appealed to the South Dakota Board of Regents. A hearing was held by Roger Tellinghuisen, appointed as Hearing Examiner on June 8, 2021. The Hearing Examiner held that the written warning did not violate any Board of Regents policies. Appellant’s Appendix 23. The Board of Regents adopted without modification the decision of the Hearing Examiner. R1, Appellant’s Appendix 17. Dr. Sweeney appealed that decision to the Circuit Court.

II. The Second Grievance

The second grievance arose from the assignment of a two-credit course to Dr. Sweeney for the Spring 2022 semester. On Thursday, October 21, 2021, Dr. Sweeney was notified by Dr. Gary Zalud that Dr. Sweeney was being assigned to teach SPED 260. R2, BR 137. Dr. Sweeney responded by asserting that his assigned courseload was already projected “well above workload limits” and demanded that his concerns be formally and proactively addressed “by noon on Monday, October 25th, 2021” or that he

would have his legal counsel intervene to address the issues. R2, BR 136-37. The next day, Dr. Sweeney went to discuss the matter with Dr. Dan Moulam, chair of the division, who refused to discuss the assignment unless the dean or university counsel were present. R2, TR 13, BR 14; BR 128. Dr. Zalud responded on Tuesday, October 26th that, “We believe the added 2 credit course is within workload policy parameters. Therefore, I will not change the assignment of SPED 260 in spring 2022 to your workload.” R2, BR 136-137.

Dr. Sweeney initiated a Step 1 Grievance on November 1, 2021, alleging violation of SDBOR Policy 4:38, the 2021 USD Faculty Handbook, USD Faculty Expectations Policy, “USD Workload Policy (adopted in May of 2008), “USD Workload Policy (adopted in January)”, and the “2016-2019 COHE/SD BOR Negotiated Agreement-Section 12.3.1.A[.]” R2, BR 127. He requested as remedy that the University rescind the assignment of SPED 260. R2, BR 135. Dean Schweinle responded to Dr. Sweeney’s Step 1 Grievance, providing Dr. Sweeney with her calculation of Dr. Sweeney’s assigned teaching workload units, based on the courses assigned and enrollment. R2, BR 124. She further highlighted that, in line with the USD Workload Policy, internships and field experiences were not assigned workload units unless a faculty member was assigned a disproportionate share, in which case additional workload credit may be assigned with the approval of the dean. R2, BR 125.

In his Step 2 Grievance, Dr. Sweeney asserted that Dean Schweinle’s calculations of workload “incorrectly states the facts of this Step 1 Grievance due to premature use of a new workload policy adopted by the administration in January 2021, but not fully adopted in policy by governing agency of the University of South Dakota, the South Dakota Board of Regents.” R2, BR 118. Dr. Sweeney further asserted that Dean

Schweinle incorrectly omitted workload unit credit for various activities that “previously received workload credit.” *Id.* Dr. Hackemer denied the relief requested in Dr. Sweeney’s Step 2 Grievance, noting that the Grievance relied on inapplicable provisions of the previous workload policy and the expired collective bargaining agreement. R2, BR 111.

Dr. Sweeney filed a Step 3 Grievance with the University President, Sheila Gestring, again asserting there was no basis for following the 2021 USD Workload Policy, and incorrectly asserting that such document must be adopted by the SD Board of Regents. R2, BR 108-109. Upon review, President Gestring denied Dr. Sweeney’s requested relief. R 2, BR 100-101. Dr. Sweeney appealed this determination to the Board of Regents, requesting relief in the form of overload compensation. R2, BR 94-99. The Board of Regents appointed Melanie Carpenter as Hearing Examiner and a hearing on the matter was held February 1, 2022. R2, BR 11-92. The Board of Regents adopted the findings and conclusions of the Hearing Examiner, which found that Dr. Sweeney had not established by a preponderance of evidence that USD’s calculation of his teaching workload was incorrect or that his assignments exceeded the acceptable percentages set forth in the faculty workload policies. Appellant’s Appendix 30. He appealed the determination to the Circuit Court.

III. The Third Grievance

The third grievance at issue in this case concerns Dr. Sweeney being assigned certain service-related duties for the 2022-2023 academic year. Dr. Gary Zalud, the Chair of the Division of Curriculum and Instruction was retiring, so Dean Schweinle took over duties assigning workload to Dr. Sweeney for the upcoming year. R3, TR 8, BR 9. Dr. Zalud announced his retirement in late October, and as of the time of the hearing in this matter,

no replacement had been named. R3, TR 119, BR 37. During Dr. Sweeney's evaluation, the previous October, an anticipated workload of 60 percent teaching, 30 percent research, and 10 percent was provided to Dr. Sweeney for the upcoming year by Dr. Zalud. R3, TR 21, BR 13. However, the School of Education experienced several other retirements, and as a result, planned to merge the Division of Curriculum and Instruction with the Division of Teacher Residency and Education. R3, TR 100, BR 33. Additionally, the University had placed pressure upon academic departments, including within the School of Education, to comply with new federal regulations regarding licensure disclosures for programs leading to professional licensure. R3, TR 101-102, BR 33. The School of Education did not previously have any faculty member or other employee assigned as a coordinator of these duties, as the requirements were new. R3, TR 110-111, BR 35.

As Dr. Sweeney's new supervisor, Dean Schweinle provided Dr. Sweeney a new workload assignment on April 8, 2022 for the 2022-2023 academic year, aimed at completing the necessary licensure disclosures and other outstanding needs of the School of Education. Dr. Sweeney's service workload was increased to accommodate the new responsibilities for work on licensure disclosure, serving as a "SARA administrator." R3, TR 101-102, BR 33. The exact time requirements of these duties were unknown, as it was a new responsibility for the University. R3, TR 103, BR 33. Dr. Sweeney was provided an opportunity for a voluntary, paid fellowship to learn more about the specific requirements of licensure disclosure responsibilities. R3, BR 113-114. He accepted that fellowship opportunity and began working on state licensure disclosures. R3, TR 103, BR 33.

As a secondary addition to his service component, Dr. Sweeney was tasked with providing analysis to the School of Education Headstart Program related to federal grant applications. TR 113-114. The Headstart program had previously asked another faculty member, Lisa Newland for assistance on these tasks, but she had been unable to do it for years. R3, TR 113, BR 36. Dean Schweinle believed that Dr. Sweeney had special expertise in the type of analysis need, particularly in “individual instruction and single-case analysis.” Id.

Dr. Sweeney filed a Step 1 Grievance on April 21, 2022, alleging violation of SDBOR Policies 4:38 and 4:7, and requesting a variety of remedies, including rescinding the workload, constructing a new workload with 60% teaching activities, and providing a new supervisor. R3, BR 83-85. Dr. Sweeney’s grievance and the proposed remedies were rejected through subsequent steps of the grievance process. Ultimately, Roger Tellinghuisen as Hearing Examiner concluded, and the Board of Regents agreed, that Dr. Sweeney’s “conjecture that his workload assignment is the result of retaliation is without factual support in the record.” R3, BR 6. Dr. Sweeney appealed to the Circuit Court.

The Circuit Court granted a motion to consolidate the three grievances on appeal by an order entered June 8, 2023. Appellant’s Appendix 5. A hearing was held on the consolidated appeals July 12, 2023. Id. The Circuit Court issued a Memorandum Decision on November 8, 2023. The Memorandum Decision upheld the Board of Regents’ decision that as to the first grievance, the written warning to Dr. Sweeney and notation on his evaluation did not violate any law, policy or academic freedom. Appellant’s Appendix 3. The Circuit Court remanded the matter for further factual findings as to additional factual allegations not addressed by the agency decision. Appellant’s Appendix 3. The parties subsequently stipulated to the removal of those

references in the written warning and to the dismissal of those remanded issues.

Appellant's Appendix 1. As to the second grievance, the Memorandum Decision upheld the decision of the Board of Regents that Dr. Sweeney failed to meet his burden to establish that the calculation of his teaching workload was incorrect, that his assignments subsequently exceeded acceptable established percentages, or that policy was violated by failure to discuss the assignment. Appellant's Appendix 3. As to the third grievance, the Memorandum Decision upheld the Board of Regents' determination that Dr. Sweeney failed to meet his burden of proof that SDBOR Policy 4:38.C.4 required his agreement for the April 8, 2022 workload assignment or that the assignment was retaliatory. Appellant's Appendix 3. An Order and Final Judgment was entered by the Court on January 13, 2024. Appellant's Appendix 1.

STANDARD OF REVIEW

This court will review the agency's "decision in the same manner as the circuit court." *Hughes v. Dakota Mill and Grain, Inc.*, 2021 S.D. 31, ¶ 12, 959 N.W.2d 903, 907; see SDCL §1-26-37; SDCL §1-26-36. The Court will review the Agency's findings of fact for clear error and overturn them only if "after reviewing the evidence we are left with a definite and firm conviction that a mistake has been made." *Hughes*, 2021 S.D. 31, ¶ 12, 959 N.W.2d at 907 (quoting *Schneider v. S.D. Dep't of Transp.*, 2001 S.D. 70, ¶ 10, 628 N.W.2d 725, 728). "The Department's conclusions of law are fully reviewable." *Id.* The Court will review evidentiary rulings under an abuse of discretion standard. *McDowell v. Citibank*, 2007 S.D. 52, ¶ 26, 734 N.W.2d 1, 10 (citing *Behrens v. Wedmore*, 2005 S.D. 79, ¶ 63, 698 N.W.2d 555, 579). "An administrative agency is usually given a reasonable range of informed discretion in the interpretation and application of its own rules when the language subject to construction is technical in

nature or ambiguous or when the agency interpretation is one of long standing.” *Paul Nelson Farm v. South Dakota Dept. of Revenue*, 2014 S.D. 31 ¶ 22, 847 N.W.2d 550 (citing *Krsnak v. S.D. Dep’t of Env’t & Natural Res.*, 2012 S.D. 89, ¶ 16, 824 N.W.2d 429, 436).

ARGUMENT

I. The First Grievance:

The first grievance involves a written warning by Dean Schweinle provided to Dr. Sweeney on January 29, 2021. A written warning is generally used after a verbal warning for similar conduct and before the University would engage in more formal disciplinary action. The written warning contained two primary factual allegations at issue in this appeal:¹

- 1) “This letter is to address continued concerns with your practice of advising students informally with information that is not accurate.”
- 2) “[Y]ou have told students who need certification that they may enter student teaching without taking the Praxis Core.”

Dr. Sweeney disputes the factual basis of these statements. The written warning also contained two directives to Dr. Sweeney:

- 1) “immediately cease advising students who are not formally assigned to you as advisees” and
- 2) “advising must strictly adhere to BOR, University and School of Education policies, procedures and the university catalogs[.]”

¹ The parties stipulated to the redaction of portions of the warning to using outdated forms and improper advisement as to waiving or substituting coursework. Appellant’s Appendix 1. Thus, those issues are resolved.

Dr. Sweeney asserts that the written warning violated SDBOR Policy 4:38.C.3.1 and 1.11.1.A, as well as the USD Faculty Workload Policy.

A. The Circuit Court Did Not Err in Finding that Dr. Sweeney Provided Inaccurate Information Regarding University Admission Requirements

Dr. Sweeney does not dispute that he advised a student that the Praxis Core Examination “is a requirement of the undergraduate teacher education program not the graduate Multicategorical Special Education Program.” See Appellant’s Brief 27. This is an inaccurate statement of the official written admission standards contained within the University catalogs.

The course catalogs reflect the official published academic guidelines of the University. As the 2020-2021 Graduate Catalog puts it, it is “the official source of the university’s academic programs and courses.”² SDBOR Policy 2.3.1 defines the academic catalogs as “an electronic or printed catalog that provides degree requirements, course requirements, and academic requirements of the university.” Appendix 15. This court has held that “[u]nder the Plain Meaning Rule, if a term ‘appears to be plain and unambiguous on its face, its meaning must be determined from the four corners of the instrument without resort to extrinsic evidence of any nature.’ ” *Halls v. White*, 2006 S.D. 47, ¶ 7, 715 N.W.2d 577, 580–81 (quoting *Harksen v. Peska*, 1998 S.D. 70, ¶ 15, 581 N.W.2d 170, 173).

A plain reading of the University catalogs applicable at the time Dr. Sweeney’s statement was made establishes that the Circuit Court correctly upheld the Hearing Examiner’s determination that Dr. Sweeney’s advisement was inaccurate. The graduate

² Appendix 1. The University maintains a publicly available archive of published academic catalogs. See Archived 2020-2021 USD Graduate Catalog, <https://catalog.usd.edu/index.php?catoid=29>

catalog admissions requirements state that applicants who are not already certified teachers must “have completed all of the necessary admissions requirements for teacher education at the University of South Dakota.”³ Thus, an applicant may not be admitted to the graduate program without meeting teacher education admissions requirements, as well as those requirements listed for graduate admission. The teacher education admission requirements, contained within the undergraduate catalog, require among other things that an applicant must have “passing scores on the Core Academic Skills for Educators test” (otherwise referred to as the “Praxis Core exam”).⁴ Accordingly, the Praxis Core exam is an admission requirement for the graduate program. Dr. Sweeney incorrectly asserted the Praxis Core exam was only required for undergraduate admission.

Dr. Sweeney urges this Court to abandon this plain reading of the catalog by relying on a past practice allegedly announced by former chair of the Curriculum & Instruction Division, Nick Shaduk, on or around 2015. That past practice was to accept a Miller Analogies Test or a GRE in lieu of the Core Praxis exam. Appellant’s Brief 26, BR 255. Dr. Sweeney testified that when Dr. Shudak left the University, Dr. Sweeney “assum[ed]” the practice “had been passed on from Nick Shudak to Karen Kindle, from Karen Kindle to Lisa Newland, from Lisa Newland to Gary Zalud.” TR 141, R 148. No

³ Appendix 3. See Archived USD Graduate Catalog 2020-2021, Special Education (M.A.), “Admissions Information”, https://catalog.usd.edu/preview_program.php?catoid=30&poid=5794&returnto=1728.

⁴ Appendix 10. See Archived USD Undergraduate Catalog 2020-2021, School of Education, “Admission to Teacher Education” section, https://catalog.usd.edu/preview_entity.php?catoid=29&ent_oid=1608&returnto=1676. In addition to passing the Praxis Core, teacher education requires applicants to successfully complete an oral communication course, have a cumulative GPA of at least 2.7, complete certain courses and field experiences, have 20 hours of validated work with youth and have their application reviewed by the Basic Programs Admission and Retention Committee. Id.

evidence was provided to support this assumption or that the practice ever complied with the catalog.

Regardless of whether there had been a past practice within the Division of Curriculum and Instruction, the alleged past practice does not comport with the plain language of the published graduate and undergraduate catalog requirements in effect at the time the statement was made. Dean Schweinle was justified as the Dean of the School of Education and Dr. Sweeney's supervisor to explain in writing that faculty were expected to adhere to the published catalog requirements when advising students. Dr. Sweeney's confusion caused by any previous chairs' failure to adhere to the catalog language does not create ambiguity in the catalog. "A finding of ambiguity, however, requires more than the disagreement of two parties as to the meaning of a term." *Halls*, 2006 S.D. 47, ¶ 7, 715 N.W.2d 577, 580 (citing *Harksen*, 1998 S.D. 70, ¶ 15, 581 N.W.2d at 173). Any confusion surrounding whether past practices were acceptable was resolved by Dean Schweinle asserting that faculty must follow the current, published admissions standards in the catalog.

The Circuit Court was thus correct in upholding the factual findings of the Hearing Examiner that Dr. Sweeney had provided incorrect information regarding the published academic admission standards of the University. Appellant's Appendix 21 (Finding of Fact #21). Dean Schweinle was justified in correcting any erroneous past practice to ensure it aligned with the current, published standards of the University. Her instruction to Dr. Sweeney that "advising must strictly adhere to BOR, University and School of Education policies, procedures and the university catalogs" was appropriate and justified.

B. The Circuit Court was Correct to Find that the Written Warning Did Not Violate Dr. Sweeney's Academic Freedom

Academic freedom is not cloak of immunity to provide inaccurate information to students, nor a tool for a faculty member to dictate to the University who will be advising students regarding the Universities policies, procedures, and academic requirements. The Circuit Court properly recognized the limitations of academic freedom and upheld the Board of Regents' determination that the written warning did not violate Dr. Sweeney's academic freedom under SDBOR Policy 1:11, or otherwise violate SDBOR 4:28 or the university faculty workload policy.

In this instance, the University instructed Dr. Sweeney to "cease advising students who are not formally assigned to [Dr. Sweeney] as advisees." Appellant's Appendix 41. SDCL § 13-49-14 grants authority to the South Dakota Board of Regents to "employ all officers, instructors, and employees" of the various institutions under its control and to "determine their number, qualifications, and duties[.]" SDBOR Policy 4:38 mirrors this statutory authority, granting the university "discretion in determining the responsibilities of faculty in all ranks." Appellant's Appendix 62. SDBOR Policy 4:38 is not a guarantee of the activities that faculty will be assigned, but rather a list of potential activities that can be assigned to a faculty member, "the recognition and importance of which will vary depending on the mission of the university, the role of the discipline within the university's functions and the individual faculty member's assignment[.]" SBOR Policy 4:38.C.6.1; Appellant's Appendix 64. The advisement to Dr. Sweeney to cease advising students not assigned to him was within the bounds of SDBOR Policy 4:38 as a determination of his assigned responsibilities, and was also within the bounds of the USD Faculty Workload Policy, adopted under SDBOR Policy 4:38.

This Court has recognized that "universities have an interest as employers 'in promoting the efficiency of the public services' they perform through their faculty

members.” *Yarcheski v. Reiner*, 2003 S.D. 108 ¶32, 669 NW2d 487, 497 (quoting *Pickering v. Bd. of Education*, 391 U.S. 563, 568; 88 S.Ct. at 1734-35 (1968)). “Under the aegis of academic freedom, a university may ‘determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.’” *Id.* (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263, 77 S.Ct. 1203, 1218, 1 L.Ed.2d 1311 (1957) (Frankfurter, J., concurring in result)).

Many other courts, examining this topic have recognized the appropriate scope of academic freedom as protecting the academic exploration of content within courses assigned and research pursuits, but that academic freedom does not invade on the territory of university administrators to efficiently administer a university. *See Berg v. Bruce*, 112 F.3d 322, 329 (8th Cir. 1997) (“Academic freedom is designed to ‘protect the individual professor’s classroom method from the arbitrary interference of university officials.’” (citing *Parate v. Isibor*, 868 F.2d 821, 830 (6th Cir.1989)); *Riggin v. Bd. of Trustees*, 489 N.E.2d 616, 630 (Ind. App. 1986) (“Academic freedom does not encompass matters inherently destructive of the proper functions of the institution.”); *Stastny v. Bd. of Trustees of Cent. Washington Univ.*, 647 P.2d 496, 504 (Wash. App.1982) (“Academic freedom does not mean freedom from academic responsibility to students, colleagues and the orderly administration of the university.”); *McElearney v. Univ. of Illinois at Chicago Circle Campus*, 612 F.2d 285, 288 (7th Cir. 1979) (“Academic freedom does not empower a professor to dictate to the University what research will be done using the school’s facilities or how many faculty positions will be devoted to a particular area.”). These interpretations of the practical limitations of academic freedom align with SDBOR Policy 4:38, which grants the University authority to assign duties to faculty of all rank, and SDBOR Policy 1:11, which indicates that

“[t]he concept of freedom should be accompanied by an equally demanding concept of responsibility.”

The Circuit Court appropriately determined that BOR Policy 1:11(1)(b) defines academic freedom, and that such definition is “confined to teaching, learning and subject matter.” Appellant’s Appendix 9. SDBOR Policy 1:11 does not guarantee any right to faculty to advise students or prospective students as to program requirements or University policies, as correctly noted by the Circuit Court. Appellant’s Appendix 9 (“No portion of the policy can be construed to address the advisement of students as to university policies and procedures and Dr. Sweeney has not cited a specific provision of this policy or any other persuasive authority in support of his academic freedom argument.”). Rather, SDBOR Policy 1:11 grants academic freedom in line with the First Amendment concept of academic freedom recognized by the courts, within the realm of course instruction and scholarly research.

Early in this grievance, Dr. Sweeney repeatedly referred to the term “advisor discretion,” requesting in his requested relief that policies be adopted that recognize advisor discretion. There is no such blanket term applied to academic freedom in SDBOR Policy 1:11. Neither BOR Policy 4:38, nor the USD Faculty Workload Policy (in using the term “teaching” to describe the categories of workload that may be assigned to a faculty member or given recognition in evaluating faculty) expand this concept of academic freedom described in SDBOR Policy 1:11.

Allowing faculty to present “differing and sometimes controversial points of view” (see SDBOR Policy 1:11) to students regarding program requirements or university policies would prevent the University from giving consistent information to students. This expanded interpretation of academic freedom would significantly interfere with the

efficient operations of the university. Telling a student there is “no agreed upon policy,” even if the faculty member personally doesn’t agree with the policy, might reasonably lead a student to believe there is no requirement, when one does exist. As Provost Hackemer testified, “[s]tudents view faculty as authority figures.” TR 140, R 148.

This Court should refrain from applying an interpretation of academic freedom that would eliminate the University and Board of Regents’ ability to determine the roles of faculty, including the scope of “out-of-class consultation” appropriate for the orderly administration of the public universities of this State. Instead, the Court should rely upon the University and South Dakota Board of Regents to apply a reasonable interpretation of academic freedom, as was upheld by the Circuit Court in this case.

In sum, Dr. Sweeney failed to show that the written warning and directives directly affected the terms and conditions of his employment. Before and after the letter of warning was sent, the University had the ability to assign duties, or not assign duties to Dr. Sweeney. Likewise, before and after the letter of warning, Dr. Sweeney had an obligation to give accurate advice to students assigned to him regarding the University’s official policies, procedures, and handbooks. In short, the action of the University did not “directly affect terms and conditions of employment for the individual employee.” SDBOR Policy 4:7.C.3. The Circuit Court was correct in upholding the decision of the South Dakota Board of Regents, rejecting the grievance on these grounds.

C. Substitution Versus Waiver

In compromise of disputed facts and to expedite review by this Court, the parties entered into a Stipulation Agreement that the BOR would retract the factual allegation that Dr. Sweeney had incorrectly advised students that they may waive a course due to prior work experience or coursework. Appellant’s Appendix 1. Dr. Sweeney agreed to

dismiss the portions of his grievance and administrative appeal relating to those allegations. Accordingly, the Court should not entertain this argument as the issue is moot.

II. The Second Grievance

In the second grievance, the Circuit Court appropriately found that Dr. Sweeney had failed to carry his burden of proving that the assignment of the additional two-credit SPED 260 Course for the Fall of 2022 violated SDBOR Policy 4:38 or the 2021 USD Faculty Workload Policy. Because the second grievance involves a non-disciplinary matter, Dr. Sweeney as the grievant bears the burden of proving a misinterpretation, misapplication, or violation of a specific term or provision that directly affected the terms and conditions of his employment. SDBOR Policy 4:7.10; Appellant's Appendix 54. Dr. Sweeney asserts "that the administration miscalculated his workload credits, by misapplying BOR Policy 4:38.C.2 and the USD Workload Policy, and by the failure to engage in any discussion about workload." Appellant's Brief 28.

A. The Circuit Court Correctly Decided that Dr. Sweeney Failed to Prove the Assignment of the Additional Course Violated Current Workload Policies

The Circuit Court first correctly determined that the Dr. Sweeney had not carried his burden of proving that the University violated SDBOR Policy 4:38 or the 2021 USD Faculty Workload Policy. The stated purpose of SDBOR Policy 4:38 is "to describe the Board's expectations for faculty in performing their work duties." The Policy does not set forth any maximum limit on hours worked, but rather states as an expectation that "Faculty members will be expected to undertake an effort equivalent to that needed to deliver 30 workload units." SDBOR Policy 4:38.C.2. The Policy goes on to say that "*Ordinarily* each work load unit corresponds to approximately three (3) hours of effort

per week.” *Id.* (emphasis added). As with other salaried employees, it can be expected that hours worked can fluctuate depending on the year, month, or day. The percentage of workload allocated to each area of work may be adjusted by the administration, within their “substantial authority to select and determine the relative importance of various activities in the areas of teaching, scholarship and creative activity, and service.”

SDBOR Policy 4:38.C.2. The Policy is, as a whole, about expectations that faculty are evaluated upon, not limitations. However, even if Policy 4:38 is construed to set a hard limit of 30 workload units, the Circuit Court correctly found that Dr. Sweeney failed to prove a violation of policy.

Upon the filing of the grievance in this case, Dean Schweinle provided Dr. Sweeney with a calculation of the teaching workload credits for courses assigned to Dr. Sweeney. In her calculations, Dean Schweinle calculated that Dr. Sweeney had been assigned a teaching workload of 15.5 credits, R2, BR 124. The Circuit Court examined these calculations and upheld the BOR’s determination that Dr. Sweeney failed to establish by a preponderance of the evidence that Dean Schweinle’s calculations were incorrect, or otherwise establish that the work assigned exceeded some limitation in policy. Appellant’s Appendix 14.

In addressing each of the points of alleged error/miscalculations raised by Dr. Sweeney, the Circuit Court determined that Dr. Sweeney’s arguments were not supported in evidence or the plain language of policy. The Circuit Court first rejected Dr. Sweeney’s argument that Dean Schweinle violated policy by not giving him a prorated credit for supervising one teacher candidate. Appellant’s Appendix 12. The Court correctly found that the 2021 USD Workload Policy did not guarantee a prorated workload calculation for supervising less than three teacher candidates. *Id.*

The Court also correctly determined that Dr. Sweeney was not entitled to workload credit for supervising practicum and internship experiences. Appellant's Appendix 13. The 2021 USD Workload Policy provides the dean with discretion to assign additional workload credit "where supervision of internships and field experiences is disproportionate[.]" Appellant's Appendix 50. However, even if Dr. Sweeney believes Dean Schweinle should have exercised this discretion and granted him additional workload credit, the Circuit Court correctly noted that Dr. Sweeney introduced no evidence that his supervision was disproportionate to that of other faculty members.

As to supervision of dissertation students, the 2021 Workload Policy again gives Dean Schweinle discretion in granting workload credit "where mentorship of these projects is disproportionate within a division/program[.]" Appellant's Appendix 51. Dean Schweinle granted him 1.5 workload credits for these assignments. The Circuit Court correctly noted that Dr. Sweeney failed to provide evidence that his mentorship was disproportionate within the division or program. Appellant's Appendix 13. Dr. Sweeney argues to this Court that Dean Schweinle's grant of 1.5 workload credits for the academic year was "arbitrary and capricious." Appellant's Brief 34. Dr. Sweeney, however, fails to cite any basis in policy for his own calculations of 1.68 credits for first semester and .84 credits for second semester. R2, 132. Dean Schweinle appropriately used her discretion granted within policy to grant 1.5 workload credits.

Next, the Circuit Court correctly noted that Dr. Sweeney should not be given teaching workload credits for serving as a co-advisor to a student group. Appellant's Appendix 13. Dr. Sweeney argued below that this co-advising should have been granted teaching workload credit. R2, BR 72, TR 62. SDBOR Policy clearly states that advising student groups is considered as part of the service workload of the faculty member, not the

teaching workload. SDBOR Policy 4:38.C.6.3.1; Appellant's Appendix 66-67 (listing under Service to the Institution "coordination, advisement and supervision of student organizations or student activities"). The Circuit was correct in rejecting Dr. Sweeney's argument that it should be calculated as teaching workload.

The Circuit Court also correctly rejected Dr. Sweeney's argument that he should have been given teaching workload credit for time spent preparing for a course he had never taught before and online course preparation. Appellant's Appendix 14. The Circuit Court correctly noted that the Workload Policy does not provide for an award of teaching workload credits for these preparations. *Id.*

Lastly, and perhaps most importantly, the Court rejected Dr. Sweeney's arguments that Dean Schweinle incorrectly calculated Dr. Sweeney's course teaching workload calculations. Appellant's Appendix 14. Throughout this grievance, Dr. Sweeney has asserted varying, and at times contradictory, calculations as to how many workload units had been assigned to him. None of the calculations presented by Dr. Sweeney have been supported by evidence or current policy.

Dr. Sweeney states to this Court that "[h]e testified about how he calculated his teaching workload at 33.51 workload units, with the new course added." Appellant's Brief 38. In his testimony, he referenced his calculations were "based upon the workload calculations within Digital Measures." R2, TR 52, BR 62. The documentary evidence provided to the Hearing Examiner, containing his own calculations of workload, calculated 31 workload units for the academic year. R2, BR 132. This 31-workload unit calculation by Dr. Sweeney was for total workload, not just teaching workload. *Id.* With the addition of SPED 260, this would be calculated at 33 workload units.

To this Court, Dr. Sweeney presents a new number, stating that the record reflects that “if the workload credits are added up, there were 20.66 for Fall, 2022, BR 147, and 19.17 for Spring, 2021, BR 146-147.” Appellant’s Brief 34-35. The portions of the record cited by Dr. Sweeney offer no discernible support for this assertion, in evidence or in policy. The matter under dispute in this grievance is whether the addition of SPED 260 in Spring Semester of 2022 violated BOR policy by exceeding teaching workload limits for Academic Year 2021-2022 (Fall 2021 semester and Spring 2022). The exhibit referenced, at BR 146-147 does not even list his teaching assignments for Spring 2022. As the Circuit Court noted, “Dr. Sweeney’s submissions to this Court cite no authority for his calculations.” Appellant’s Appendix 14.

Dr. Sweeney’s own calculations of workload found at BR 132, which were presented to the Hearing Examiner, were not based on the 2021 USD Faculty Workload Policy. Dr. Sweeney’s heading to those calculations, which he presents again to this Court, indicate the calculations are “based upon the 2006 School of Education Workload Policy and Formula with revised calculations for dissertation and thesis hours adopted in May of 2008 as well as past practice for additional duties[.]” Appellant’s Brief 34 (citing to R2, p. 40 of Ex. 1 (BR 132)). During the first three steps of this grievance, Dr. Sweeney asserted that the 2021 USD Faculty Workload Policy was not properly adopted, and thus Dr. Sweeney applied previous workload policies and formulas, or relied on past practice utilized under those former policies for his calculations. See R. 104 (Step Three Grievance, stating “There is no authority cited, and none in existence, for following the document entitled “2021 Workload Policy”); R. 118 (Step Two Grievance stating “Until the SD BOR approves the new USD Workload Policy, Dean Schweinle should err on the side of caution by using the SD BOR’s approved USD Workload Policy with Addendums

of January 2012”); R. 131 (Step One Grievance stating “there appears some controversy over whether the South Dakota Board of Regents fully accepted the changes in policy at the University”). Dr. Sweeney based his argument and calculations on the mistaken belief that the 2021 USD Workload Policy would not be effective until approved by the South Dakota Board of Regents.

Despite eventually abandoning this unsupported argument, Dr. Sweeney maintained reliance upon the calculations he made at the earlier stages of this grievance-calculations based on superseded policy (R2, BR 132). Dr. Sweeney relies on these same unsupported calculations to ask this Court to overturn the decisions of the Board of Regents and the Circuit Court and conclude that his workload assignment exceeded some limit found in current policy. Application of current policy to Dr. Sweeney’s own calculations as to course teaching workload reveals significant flaws in his calculations.

The 2021 Faculty Workload Policy states that “Each course credit generally equates to 1 workload unit, provided the course meets the minimum enrollment requirement 7 or has been approved as an exception to the Small Section Limitation rule as defined in BOR Policy 5.17.4.” Appellant’s Appendix 44. Ignoring the 1:1 course credit hours to workload unit ratio stated in policy, Dr. Sweeney incorrectly applied a 4:3 ratio of workload credits to course credit hours for graduate courses. Thus, he calculated SPED 703 as 4 workload units, for a three-credit course. R2, BR 132. He calculated SPED 730 as 2.66 workload credits for a two-credit course. *Id.* He also calculated 4 workload credits for SPED 715. *Id.* SPED 715 is a two or three credit course as provided in the USD Catalog - the credit hours depend on how students enroll. R2, BR 101. Although Dr. Sweeney testified that he “was assuming” that students were taking SPED 715 as a three-credit course (R2, BR 71, TR 61), he went on to admit that he had “no specific indicator”

of whether students were enrolled in the course as a two or three credit course. R2, BR 72, TR 62. Dr. Sweeney did not provide any evidence that Dean Schweinle's calculation of SPED 715 as two workload units for a two-hour course were incorrect, other than a statement of his own assumptions as to how students were enrolled. Dr. Sweeney thus failed to carry his burden of proving that any students were actually enrolled in SPED 715 as a three-credit course.

Adjusting Dr. Sweeney's own assertion of workload calculation of 31 workload units (BR 132) down by these 3.66 workload units, Dr. Sweeney would have been assigned 27.34 total workload units (including teaching, scholarship, and service) before the addition of the 2-credit SPED 260 course. Adding the two-credits for SPED 260, Dr. Sweeney's assignment would still be within the 30 workload unit guidance set forth by SDBOR Policy 4:38. Accordingly, this Court should affirm the Circuit Court's determination that Dr. Sweeney failed to carry his burden of proving that the workload policy had been violated, and that the assigned workload was within any limits set forth by policy.

B. The Circuit Court Appropriately Dismissed Dr. Sweeney's Grievance that Failure to Discuss Workload Assignment at Annual Evaluation Affected the Terms and Conditions of His Employment

The Circuit Court dismissed the second grievance as to Dr. Sweeney's assertion that the University violated policy when there was not a discussion of workload at his annual performance evaluation. The Circuit Court was correct in finding that the allegation did not assert a violation of policy that affected the terms and conditions of Dr. Sweeney's employment. It is unclear whether Dr. Sweeney assigns this dismissal as error by the Circuit Court. He simply asserts that the lack of communication "was not prejudicial until Dr. Sweeney was ordered to teach SPED 260." Appellant's Brief 30. This Court

should uphold the dismissal of Dr. Sweeney's grievance as to failure to engage in discussion of workload during the annual evaluation, as he provides no support for an assertion that the Circuit Court erred in dismissing the grievance.

The policy stated a permissive "should" as to the discussion, and as such was not a "term or condition" of his employment for which he could grieve. See SDBOR Policy 4:7.C.3. This issue was reviewed by the Circuit Court and it appropriately dismissed the grievance as to this issue. Appellant's Appendix 14-15. Alternatively, the Circuit Court appropriately found that the discussion was not mandatory, and thus no policy was violated. *Id.*

The 2021 USD Faculty Workload Policy does not set forth a mandatory discussion of all future course assignments at the time of annual evaluation. Rather, the Hearing Examiner appropriately noted that the policy provides, "Discussion of workload between a faculty member and chair should occur as an integral part of the annual performance evaluations, since workload and performance expectations are linked." Appellant's Appendix 32. Courts from other jurisdictions have specifically held that the word "should" is permissive, and not mandatory. *See United States v. Messino*, 382 F.3d 704, 711 (7th Cir.2004) (finding that a change of jury instructions from "may find" to "should find" had no effect because "[e]ither wording is permissive, not mandatory. 'Should' may be stronger than 'may' but the difference, in practice, is meaningless."); *Lambert v. Austin Ind.*, 544 F.3d 1192, 1196 (11th Cir.2008) (noting that "should" indicates "permissive, rather than mandatory language"). The policy uses the term "should," not "shall", and thus the Circuit Court was thus appropriate in finding that a mandatory discussion was not implicated by the policy.

III. The Third Grievance

A. The Circuit Court Correctly Determined that Dr. Sweeney Failed to Prove that the Assignment of Service Duties to the University Was Retaliatory

In his third grievance, Dr. Sweeney asserts that the assignment of service duties in the 2022-2023 academic year were retaliatory, in violation of SDBOR Policy 4:7. The Circuit Court correctly found that Dr. Sweeney's assignments were in line with SDBOR Policy 4:38 and that Dr. Sweeney failed to establish causal link between the assignments and his prior grievances, or that the legitimate, non-retaliatory reasons for the assignments were merely pretextual. Appellant's Appendix 16.

This Court has not had opportunity to establish an appropriate burden analysis for proving retaliation under SDBOR Policy 4:7, which states that "Neither the institution nor the Board of Regents will retaliate or effect reprisals against any faculty member for processing or participating in a grievance." Appellant's Appendix 55. In the context of discrimination, this Court has determined that to prevail on a retaliation claim, a plaintiff must generally show that he 1) engaged in a protected activity, 2) the employer took adverse action against him, and 3) there is a causal connection between the protected activity and adverse action. *Williams v. S. Dakota Dep't of Agric.*, 2010 S.D. 19, ¶ 14, 779 N.W.2d 397, 402 (citing *Coleman-Santucci v. Sec., U.S. Dept. of Health and Human Serv.*, 754 F.Supp. 209, 216 (D.D.C.1991)). Because the grievant bears the burden of proving violation of policy under SDBOR Policy 4:7, it appears appropriate for this Court to apply the burden-shifting analysis from *McDonnell Douglas*, applied by this Court in *Davis v. Wharf Res. (USA), Inc.*, 2015 S.D. 61, ¶ 17, 867 N.W.2d 706, 713:

the complainant carries the initial burden of establishing a prima facie claim by the preponderance of the evidence. See *McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. at 1824; *Lord v. Hy-Vee Food Stores*, 2006 S.D. 70, ¶ 18, 720 N.W.2d 443, 449–50. If the complainant succeeds in establishing a prima facie case, the burden then shifts to the "employer to articulate a legitimate, nondiscriminatory reason for the employee's rejection." *McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. at 1824.

Finally, if the employer carries this burden, the burden shifts back to the complainant to establish “that the legitimate reasons offered by the [employer] were not its true reasons, but were a pretext for discrimination.” *Burdine*, 450 U.S. at 253, 101 S.Ct. at 1094 (citing *McDonnell Douglas*, 411 U.S. at 804, 93 S.Ct. at 1825).

The Hearing Examiner found that the reasons for the assignment included that the College of Education had undergone a reduction in force, faculty were taking on new responsibilities within the Department, and there was no faculty member previously assigned to this new work. Appellant’s Appendix 39 (FOF #20). Dr. Schweinle testified that she believed Dr. Sweeney was qualified to undertake the new work in licensure review, TR 102, BR 33. She similarly testified that to her knowledge, no other faculty in the School of Education had extensive training or background with that particular duty of licensure review. TR 104, BR 33. She also believed that Dr. Sweeney was uniquely qualified to assist with the Headstart analysis. R3, TR 103, BR 33.

Applying a burden-shifting analysis, the Circuit Court found “the University has produced a legitimate, non-retaliatory reason for the work assignment.” *Id.* In placing the burden back upon Dr. Sweeney to prove pretext, the Circuit Court held that “Dr. Sweeney has failed to produce any evidence beyond his own speculation that the stated reasons are merely a pretext for the retaliation.” *Id.*

Dr. Sweeney asserts that applying the rule in *Kratzer v. Rockwell Collins, Inc.*, 398 F.3d 1040, 1046 (8th Cir. 2005), when there is direct evidence of retaliation “the burden rests with [employer] to show that it more likely than not would have made the same decision without consideration of the illegitimate factor.” However, application of this standard disregards the SDBOR Policy which gives rise to his grievance, SDBOR Policy 4:38, which provides that “in all other cases [except those concerning discipline or a termination] the burden of proof will rest upon the grievant.” App. 56. This grievance

does not involve disciplinary action or a termination, and thus the burden remains on the grievant to prove “a violation of a specific term or provision of Board policy[.]” SDBOR Policy 4:7.C.3, App. 54.

Even if the direct evidence standard is employed, the Circuit Court was correct in finding unpersuasive the “direct evidence” of retaliatory motive asserted by Dr. Sweeney. The Eighth Circuit’s analysis of direct evidence in discriminatory animus is persuasive in this examination. Direct evidence includes “evidence of conduct or statements by persons involved in the decisionmaking process that may be viewed as directly reflecting the alleged discriminatory attitude,” where it is sufficient to support an inference that discriminatory attitude more likely than not was a motivating factor. *Radabaugh v. Zip Feed Mills, Inc.*, 997 F.2d 444, 449 (8th Cir.1993) (internal citations omitted). But “stray remarks in the workplace,” “statements by nondecisionmakers,” and “statements by decisionmakers unrelated to the decisional process” do not constitute direct evidence. *Id.* (internal citations omitted).

The Court appropriately found that President Gestring’s comments in her grievance response were not “direct evidence” of retaliatory motive by Dean Schweinle in making the assignments. President Gestring’s comments reflected that Dean Schweinle had legitimate, ongoing concern for Dr. Sweeney advising students not assigned to him as an advisor, and that “[a]t this time, it was determined that [Dr. Sweeney’s] face-to-face instruction of students was not the best use of University resources for the efficient and effective delivery of services.” R3, BR 69. Simply because Dr. Sweeney had grieved the fact that he was given a written warning about misadvising students does not obviate the responsibility of the University to address that concern and efficiently provide accurate information to students. Additionally, Dr. Sweeney provided no evidence that President

Gestring was involved in the decisions of assigning faculty member duties to meet department needs. Accordingly, he did not establish direct evidence of retaliatory motive or pretext.

Dr. Sweeney further asserts as direct evidence that President Gestring alleged that he was one who “is unable to learn and take on new responsibilities[.]” This comment must also be taken in context. President Gestring was addressing the assertion in Dr. Sweeney’s grievance that assigning him the duties violated SDBOR Policy 4:38 because the duties “would constitute a dramatic deviation from [his] past role and responsibilities[.]” R3, BR 83. He requested as remedy that he be reassigned to a 60% teaching role as he had been assigned in the past. R3, BR 85. President Gestring prefaced her comment with “To limit future workload assignments to those activities assigned in the past would lock the University into the past, preventing necessary change to meet current and future needs.” R3, BR 68. This statement did not reflect retaliatory animosity, but rather the impractical outcome of Dr. Sweeney’s interpretation of the workload policy. President Gestring’s comments simply reflect the practical limitation that the workload policy could not, and cannot, be read to mean that assignments must follow what had been assigned in the past. Faculty must be expected to take on new responsibilities within the categories of teaching, service, and scholarship to meet the changing goals and priorities of the University. Accordingly, the Circuit Court was correct to conclude “that Dr. Sweeney’s reliance on President Gestring’s response in his grievance appeal process is not relevant to whether the April 8th assignment was retaliatory.” Appellant’s Appendix 16.

Similarly, Dr. Sweeney puts much weight on the fact that Dean Schweinle informed him that the assignments were “not negotiable” and that one of the reasons she

stated this was that “he’s previously opposed workload assignments.” Appellant’s Brief 49. Dean Schweinle stated this to make clear that assignments were not a negotiation, and did not require the faculty member’s acceptance. There is not a negotiation element built into SDBOR Policy 4:38 or the 2021 USD Faculty Workload Policy. Policy 4:38 requires the university to “establish workload *policies* in consultation with the faculty.” BOR Policy 4:38.B.2, Appellant’s Appendix 61 (emphasis added). The USD Faculty Workload Policy similarly requires consultation with the faculty when revisions to the document are made. Appellant’s Appendix 44. Neither policy mandates negotiation with individual faculty over assignments. However, Dr. Sweeney believes workload assignments should require negotiation. See R3, TR 25, BR 14 (Dr. Sweeney testifying that “workload should be, you know, in consultation with the faculty. Now that would mean there would be give and take, there would be negotiation...”). The policies require no such negotiation, and a faculty member’s formal or informal opposition to previous workload assignments does not create that obligation. Supervisors must be able to assign faculty duties for the efficient administration of the educational programs of the University. Accordingly, Dean Schweinle’s comments were consistent with policy and do not support a finding of retaliatory motive.

Dr. Sweeney has requested as his precise relief sought that the “grievances should have been sustained. The Circuit Court should be reversed.” Sustaining the grievance would significantly upend the academic decisions of University in determining the relative qualifications of its faculty members and deploying those faculty to efficiently carry out the academic work of the University. This is inconsistent with the statutory authority of the Board of Regents to govern the institutions under its control under SDCL § 13-49-3, and to determine the duties of officers, instructors and employees under SDCL

§ 13-49-14. It is also inconsistent with BOR Policy 4:38, which grants universities the authority to determine the duties of faculty of all ranks. This Court should exercise extreme caution in entertaining Dr. Sweeney's grievance, rejected by the South Dakota Board of Regents, the body tasked with overseeing the public universities and determining how best to assign duties to faculty to carry out the mission of the institutions under its control. Accordingly, the Court should uphold the decision of the Circuit Court.

CONCLUSION

The written warning provided to Dr. Sweeney did not violate policy affecting the terms and conditions of employment. Dr. Sweeney failed to prove in policy and evidence that the assignment of the two-credit course exceeded some limitation of workload found in policy. The assignment service duties did not violate applicable policies and Dr. Sweeney failed to prove that the assignments were made in retaliation of previous grievances. Accordingly, the decision of the Circuit Court should be upheld, and the requested relief by Dr. Sweeney rejected.

Respectfully submitted this 27th day of June, 2024.

Anthony J. Franken
General Counsel
University of South Dakota,
South Dakota Board of Regents

CERTIFICATE OF COMPLIANCE

I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Times New Roman typeface 12-point type. Appellee's Brief contains 8,664 words, excluding the cover, table of contents, table of authorities, jurisdictional statement, statement of legal issues, and certificate of counsel. I have relied on the word count of Microsoft Word, which was used to prepare this brief.

Dated this 27th day of June, 2024.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 27, 2024, a true and correct copy of the Appellees' Brief, via Odyssey on the following:

Clerk of the Supreme Court
500 E Capital Ave
Pierre, SD 57501-5040

Thomas K. Wilka
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PO Box 964
Sioux Falls, SD 57101-0964
Attorney for Appellant

The undersigned hereby certifies that on June 27, 2024, an original copy of the Appellees' Brief was mailed via USPS Certified Mail to:

Clerk of the Supreme Court
500 E Capital Ave
Pierre, SD 57501-5040

Dated this 27th day of June, 2024.

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The University of South Dakota 2020-2021 Undergraduate Catalog

[Archived Catalog]

2020-2021 Undergraduate Catalog

University of South Dakota Undergraduate Catalog 2020-2021

The *Catalog* is the official source of the university's academic programs and courses. The catalog should be used as a guide, in collaboration with an academic advisor, in planning a course of study and in meeting requirements for graduation. The definite source for most current University of South Dakota policies may be accessed at: [University Policies](#). University of South Dakota is governed by the laws, regulations, and policies of the South Dakota Board of Regents (SDBOR) and the State of South Dakota. SDBOR policies may be accessed at: [Policy Manual](#).

Per SDBOR Policy 2:20 (<https://www.sdbor.edu/policy/documents/2-20.pdf>):

The information contained in this catalog is the most accurate available at the time of publication, but changes may become effective before the next catalog is published. It is ultimately the student's responsibility to stay abreast of current regulations, curricula, and the status of specific programs being offered. Further, the University reserves the right, as approved by the Board of Regents, to modify requirements, curricula offerings, and charges, and to add, alter, or delete courses and programs through appropriate procedures. While reasonable efforts will be made to publicize such changes, a student is encouraged to seek current information from appropriate offices.

Please note that the University reserves the right to change graduation or other academic requirements where changes are necessary to comply with Board of Regents policy directives, to meet external demands relating to accountability or accreditation standards, to reflect curriculum changes or substitutions or to implement evolving discipline requirements in major fields.

Notice of Nondiscriminatory Policy

In accordance with the South Dakota Board of Regents Policy 1:19, the institutions under the jurisdiction of the Board of Regents shall offer equal opportunities in employment and for access to and participation in educational, extension and other institutional services to all persons qualified by academic preparation, experience, and ability for the various levels of employment or academic program or other institutional service, without discrimination based on sex, race, color, creed, national origin, ancestry, citizenship, gender, gender identification, transgender, sexual orientation, religion, age, disability, genetic information or veteran status or any other status that may become protected under law against discrimination. The Board reaffirms its commitment to the objectives of affirmative action, equal opportunity and non-discrimination in accordance with state and federal law. Redress for alleged violations of those laws may be pursued at law or through the procedures established by the provisions of 1:18 of this policy. For additional information, please contact the Director, Equal Opportunity and Chief Title IX Coordinator, Jean Merkle, 205 Slagle Hall, Vermillion, SD 57069 Phone: 605-658-3665 Email: Jean.Merkle@usd.edu

Admission decisions are made without regard to disabilities. All prospective students are expected to present academic credentials at or above the minimum standards for admission and meet any technical standards that may be required for admission to a specific program. If you are a prospective student with a disability and need assistance or accommodations during the admission/application process, please contact the Director of Disability Services, Karen Gerety, The Commons Room 116, USD, Vermillion, SD 57069. Phone: 605-658-3745 Fax: 605-677-3172 E-Mail: disabilityservices@usd.edu

Federal Law prohibits discrimination on the basis of disability (Section 504 of the Rehabilitation Act of 1973, The Americans with Disabilities Act of 1990), and the Americans with Disabilities Act Amendment Act of 2009. The University has designated Cheryl Tiahrt, Chief Information Officer, as the Coordinator to monitor compliance with these statutes. This obligates USD and Ms. Tiahrt to provide equal access for all persons with disabilities.

Diversity and Inclusiveness Statement

The University of South Dakota is committed to becoming a regional leader in diversity and inclusiveness initiatives and the practice of Inclusive Excellence.

Diversity and inclusiveness, hallmarks of a twenty-first century institution of higher education, are essential elements of the University of South Dakota's future. Members of diverse groups possess gifts, talents, experiences, histories, and cultures that allow them to make valuable contributions to the educational mission of the institution and to all those associated with the institution. A rich mixture of cultures contributes to a positive and vibrant campus climate that benefits all students. Furthermore, diversity and inclusiveness are assets that can be utilized to help prepare all students for living and working in an increasingly complex and global society. Accordingly, gender, race/ethnicity, socio-economic status, sexual orientation, religion, disability, veteran's status, first-generation status,

nationality, citizenship, age, and other personal and social dimensions are respected and also highly-valued at USD, where we continue working to ensure that diversity and inclusiveness pervade every level of the University.

Acknowledging and paying particular attention to our strong historical and cultural Native American roots, USD is committed to strengthening existing relationships and developing new relationships with Native American tribes, organizations, and communities within the state, the region, and the nation.

USD is also committed to graduating globally-aware students who are leaders in working with people from diverse backgrounds. An extremely important element of this commitment is USD's international focus. USD continues to provide and build international-focused opportunities such as study abroad and student exchange, while, also continuing to recruit and retain an increasingly-large and culturally-diverse group of international students who contribute to a vibrant and diverse campus community where everyone belongs.

USD is committed to a systematic, intentional, comprehensive, and holistic approach to diversity and inclusiveness. Approved by Executive Committee on March 14, 2013.

[Archived Catalog]

Special Education (M.A.)

Admissions Information

Typically students seek the Master's degree in Special Education while pursuing certification in one or more areas. A degree of flexibility provides additional opportunities for those not needing or wanting certification. Students wishing to pursue a Master of Arts degree in Special Education must select from the following specializations: Advanced Specialist in Disabilities, Early Childhood Special Education, or Multicategorical Special Education K-12. Students are encouraged to discuss program specializations with an advisor at the time of admission to the program.

NOTE: Students who do not hold either elementary or secondary education certification may only pursue the Multicategorical specialization and will need to complete additional coursework and certification requirements for initial teacher certification. A series of Praxis tests are required for successful completion of the program and to earn initial teaching certification in the state of South Dakota. Students pursuing initial teacher certification will need to pass the Praxis II Special Education Core Knowledge, and the Principles of Learning and Teaching (PLT) exam for successful completion of the program and teacher licensure. Students who do not possess certification will need to have completed all of the admission requirements for teacher education at the University of South Dakota. Students who are seeking teacher certification are encouraged to meet with an advisor for clarification.

Master of Arts, Special Education Plan B (non-thesis): Total 30-34 credit hours

M.A. in Special Education - Advanced Specialist in Disabilities (ASD) Specialization: Total 30 credit hours

Major Area Coursework

ASD specialization core required course work:

- SPED 702 - Diagnostic Teaching 3 cr hrs
- SPED 709 - Special Education Collaboration Or Consultation in the Schools 3 cr hrs
- SPED 794 - Internship (M.A.)(C) 1 to 8 cr hrs **(3 credit hours required)**
- SPED 517 - Vocational-Transitional Programming (C) 2 to 3 cr hrs
- SPED 519 - Medical Issues in Special Education 2 cr hrs

Specialized coursework:

- SPED 711 - Educating Students With Cognitive Disabilities 3 cr hrs
- SPED 737 - Educating Students With Autism Spectrum Disorders 3 cr hrs
- SPED 741 - Educating Students With Emotional & Behavior Disorders 3 cr hrs

Supporting Area Coursework

- EDER 761 - Graduate Research & Design (C) 3 cr hrs
- SEED 688 - Student Teaching (C) 1-8 cr hrs **(4 cr hrs required)**

Or

- Electives approved by advisor (Plan A students can take 4 hours of Thesis credits here) 4cr hrs

Accelerated Master's Program: B.A. or B.S./M.A.

Up to 12 credits applied toward the B.S. program may be used to satisfy graduate credit in the Special Education, M.A.-Advanced Specialist in Disabilities (ASD) specialization, M.A., Plan B (non-thesis) option.

The following restrictions apply:

- Dual-listed courses taken at the 500-level can be applied to both the B.A. or B.S. and M.A. degrees. Dual-listed courses must be taken at the 500-level.
- The student must apply to, and be admitted to, the accelerated program prior to taking courses to be credited toward the accelerated program.
- No courses taken prior to admission to the accelerated program may be counted toward an accelerated graduate degree.
- Courses that are "double counted" must be approved by the program coordinator for inclusion in the program of study prior to registration for the course or the credits will not be applied toward the accelerated graduate degree.
- Only courses taken at the student's home institution are eligible for accelerated program credit. No transferred courses from other institutions will be allowed to count toward the accelerated master's degree.
- Students admitted to the accelerated M.A. Program may be allowed to register for all courses included in his/her program of study and these credit hours may apply to both undergraduate and graduate degree requirements.

M.A. in Special Education - Early Childhood Special Education (ECSE)
Specialization: Total 33 credit hours

Major Area Coursework

ECSE specialization core required course work:

- SPED 705 - Advanced Family/Professional Collaboration 2 cr hrs
- SPED 710 - Survey Cognitive Disabilities 2 cr hrs
- SPED 715 - Behavior Management 2 to 3 cr hrs (3 credit hours required)

Select one of the following two courses:

- SPED 780 - Assessment of Persons With Disabilities 3 cr hrs
- SPSY 893 - Workshop in Preschool Assessment (C) 3 cr hrs

Specialized course work:

- SPED 519 - Medical Issues in Special Education 2 cr hrs
- SPED 770 - Survey: Early Childhood Special Education 3 cr hrs
- SPED 771 - Strategies, Planning & Assessment in Early Childhood Special Ed. 3 cr hrs
- SPED 772 - Atypical Development (Birth-5) 3 cr hrs
- SPED 794 - Internship (M.A.) (C) 1 to 8 cr hrs (3 credit hours required)

Supporting Area Coursework

- EDER 761 - Graduate Research & Design (C) 3 cr hrs
Approved Elective 3 credit hours required

Select one course from the following:

- ELED 592 - Special Topics (C) 1 to 3 cr hrs EARLY LANGUAGE AND LITERACY (3 credit hours required)
Or
- ELED 713 - Advanced Curriculum & Practices in Early Childhood Education 3 cr hrs

M.A. in Special Education - Multicategorical SPED K-12 (MSEK-12) Specialization:
Total 33-46 credit hours

Major Area Coursework

MSEK-12 specialization core required course work (15 credit hours):

- SPED 517 - Vocational-Transitional Programming (C) 2 to 3 cr hrs (2 cr hrs required)
- SPED 705 - Advanced Family/Professional Collaboration 2 cr hrs
- SPED 708 - Low Incidence Disabilities 2 cr hrs
- SPED 715 - Behavior Management 2 to 3 cr hrs (3 cr hrs required)

- SPED 731 - Educating Students With Learning Disabilities 3 cr hrs
- SPED 780 - Assessment of Persons With Disabilities 3 cr hrs

Select two survey courses (4 credit hours):

- SPED 710 - Survey Cognitive Disabilities 2 cr hrs
- SPED 730 - Survey: Learning Disabilities 2 cr hrs
- SPED 735 - Survey: Autism Spectrum Disorders 2-3 cr hrs **(2 credit hours required)**
- SPED 740 - Survey of Emotional & Behavior Disorders 2 cr hrs

Select one disability curriculum and instruction course. (3 credit hours)

- SPED 711 - Educating Students With Cognitive Disabilities 3 cr hrs
- SPED 737 - Educating Students With Autism Spectrum Disorders 3 cr hrs
- SPED 741 - Educating Students With Emotional & Behavior Disorders 3 cr hrs

Supporting Area Coursework (6-9 credit hours)

- EDER 761 - Graduate Research & Design (C) 3 cr hrs
- ELED 757 - Assessment and Interventions for Struggling and Dyslexic Readers 3 cr hrs
- Elective 2-3 cr (Not needed if completing initial certification route)

Field Experience (3-6 credit hours required)

Complete one of the following combinations listed below:

Combination 1 Multicategorical Specialization + Endorsement in Special Education & Initial Teacher Certification (3-6 credit hours):

0-5 credit hours required from the courses below:

- SPED 688 - Student Teaching 1-8 cr hrs (i.e., initial teacher licensure with endorsement in multicategorical SPED) **0-5 cr hrs required**
- ELED 688 - Student Teaching (C) 1-8 cr hrs
- SEED 688 - Student Teaching (C) 1-8 cr hrs

1 credit hour required from the courses below:

- SPED 795 - Practicum in Special Education 1 to 6 cr hrs
- ELED 795 - Practicum 1 to 3 cr hrs
- SEED 795 - Practicum in Secondary Education (M.A.) 1 to 6 cr hrs

Courses for initial certification

Combination 1 Multicategorical Specialization + Endorsement in Special Education & Initial Teacher Certification - 0-15 credit hours

The School of Education Certification Officer will be a resource to audit coursework related to teacher certification. Students are expected to confirm the needed coursework for certification with the School of Education Certification Officer prior to completing a program of study.

*Certification courses taken at the undergraduate level may be considered equivalent to the below courses needed for certification.

- SPED 703 - Education of Persons With Exceptional Needs 3 cr hrs
- EDEN 575 - Human Relations (C) 3 cr hrs
- EPSY 735 - Child/Adolescent Learning and Development 3 cr hrs
- INED 511 - South Dakota Indian Studies (C) 3 cr hrs
- TEL 715 - Sociological and Philosophical Foundations of Education 3 cr hrs

Combination 2 Multicategorical Specialization without endorsement (3-6 credit hours):

Select one of the following (i.e. non-endorsement track) 3 cr hrs required

- SPED 794 - Internship (M.A.) (C) 1 to 8 cr hrs
- ELED 794 - Internship (M.A.) (C) 2 to 8 cr hrs
- SEED 794 - Internship (M.A.) (C) 1 to 8 cr hrs

Student Learning Outcomes

1. Candidates will understand and apply knowledge and skills appropriate to their professional field of specialization.
2. Candidates will demonstrate understanding of principles of learning that are appropriate to their field of specialization.
3. Candidates will demonstrate professional dispositions that are appropriate to their field of specialization.

Courses or Programs Leading to Professional Licensure or Certification

The University of South Dakota as of July 1, 2020, cannot confirm whether any particular course or program meets educational prerequisites for professional licensure or certification in states other than South Dakota. If you are planning to apply for licensure/certification in a state other than South Dakota after completion of your program, contact the academic department offering your major or CDE at 605.658.6152 or by email at cde@usd.edu. USD is working to comply with these requirements and will provide up-to-date information as it becomes available.

If your learning placement course (internship, externship, clinical, rotation, practicum, independent study, study away, etc.) or your online course will be taken outside South Dakota, please reference the State Authorization webpage below.

Information about State Authorization & Professional Licensure

The University of South Dakota

[Archived Catalog]

Education, School of

Amy Schweinle, Interim Dean
Robin Wiebers, Interim Associate Dean
Delzell Education Center
605-677-5437
ed@usd.edu
<http://www.usd.edu/ed>

BACHELOR OF SCIENCE IN EDUCATION, B.S.Ed.

MAJORS:

Elementary Education
Elementary Education/Special Education
Secondary Education
Secondary Education/Special Education

SECONDARY TEACHING MAJORS:

Art Education, B.F.A.
Biology Education, B.S.Ed.
Chemistry Education, B.S.
English Education, B.S.Ed.
History Education, B.S.Ed.
Mathematics Education, B.S.Ed.
Modern Languages Education (B.A.; German, B.A.; and Spanish, B.A. or B.S.Ed.)
Music Education, B.M. (Instrumental and Vocal)
Physics Education, B.S.
Political Science Education, B.A./B.S.
Spanish Education, B.S.Ed.
Speech Communication Education, B.S.Ed.

SINGLE SUBJECT MINORS:

Biology
Chemistry
Earth Sciences
Economics
English
History
Mass Communication
 Journalism
 Radio/TV
Mathematics
Modern Languages (K-12) (German, Spanish)

Music (Instrumental or Vocal)
Physical Sciences (Composite)
Physics
Political Science
Sociology
Speech Communication
Theatre

MINORS:

Child and Adolescent Development
Coaching
English Languages Learning (ELL)
Health (Non-Teaching)
Reading (K-12)

HISTORICAL PERSPECTIVE

In 1927, The Regents of Education formally established the School of Education for the preparation of teachers. Over the years, resources from across the University have been involved in the preparation of professional educators. In each of the subject-matter areas such as fine arts, humanities, languages, mathematics, sciences, and social sciences, the student has a chance to study under the best instructors in the region.

The School of Education prepares professional educators for both inside and outside of the classroom. Its research and practitioner based programs train future educators, counselors, leaders, and fitness and sport-related professionals. The shared vision of the School of Education is that of Inspiring and Leading through Excellence in Education. The School of Education's academic programs are organized to include four divisions: Curriculum and Instruction; Counseling and Psychology in Education; Educational Leadership; Kinesiology and Sport Management; and Teacher Residency and Education. Field-based experiences are integrated throughout undergraduate programs to provide practical application, reflective decision-making, and continual development of life-long learners and leaders.

The National Council for Accreditation of Teacher Education (NCATE) has accredited all the School of Education programs for the preparation of elementary/secondary teachers, and school service personnel through the doctoral degrees. All programs leading to teacher certification or other school services licensures are approved by the State Board of Education of the South Dakota Department of Education (DOE).

FACILITIES

Most campus-based programs and activities for the School of Education are housed in the Delzell Education Center. This Center was designed and constructed in 1963 specifically for the types of activities conducted on campus for the training of teachers, counselors, practitioners, and educational leaders. The two story structure has 52,000 square feet of floor space and has classrooms, seminar rooms, the elementary school science laboratory, and counseling and practicum observation rooms for video and audio taping, computer labs, distance learning labs, Reading Recovery area, conference rooms and offices for faculty.

The offices, specialized learning/teaching stations, and several general classrooms for the Division of Kinesiology and Sport Management are located in the Sanford Coyote Sports Center, although several classes are taught in the DakotaDome. The Dome, a unique facility first occupied in 1979, provides a controlled climate for athletic contests, intramural and recreational activities, and professional studies in health, physical education and recreation.

SPECIALIZED CENTERS AND SERVICES

Center for Student and Professional Services

The School of Education's Center for Student and Professional Services (CSPS), supports education and kinesiology and sport management students from initial career awareness to teacher advisement, preparation, placement, certification, and follow up. CSPS is located in the Delzell Education Center, Rooms 113/114.

CSPS strives to empower students to become competent, dedicated, respectful, professionals who are prepared for the 21st century. The purpose of CSPS is to serve students at the undergraduate and graduate levels by providing services to educational as well as other personnel (a) entering the profession, (b) upgrading professional skills, (c) seeking certification or employment, or (d) changing careers.

Services provided by the CSPS are:

1. **Admission Services:** Admission to the School of Education and teacher education programs are handled through the CSPS (see Admissions).
2. **Student Records:** All official student records for teacher education are maintained in the central office system in the CSPS.
3. **Advising Services:** Undergraduate and graduate curricular, career, and academic advisement is available through the CSPS.
4. **Informational Services:** The CSPS has a collection of information describing programs within the School of Education and other opportunities in the field of education as well as kinesiology and sport management.
5. **Teacher Education Field Placements:** CSPS seeks to provide quality field placement experiences that include diversity experiences appropriate to the students' teaching major and areas of emphasis in cooperation with P-12 schools and centers.
6. **Certification Services:** CSPS serves as the official certification office for all certificated education personnel positions.

Educational Research and Service Center

Established as the Educational Research and Service Center in 1958 by the SD Board of Regents, the School of Education Center for Educational Research provides internal support for faculty and student research, and a place for faculty to collaborate on research studies. The Center also provides technical assistance and consulting services to public and private PK-12 education, higher education, and nonprofit organizations. The Center will also maintain a website to serve as a clearinghouse for dissertation abstracts, white papers, conference presentations, etc.

Supporting Faculty Research

The Center will support and encourage faculty research by assisting with funding, providing consultation on design and analysis, assisting faculty to find collaborators, and assisting with research goal-setting and planning. Center personnel and members will offer opportunities to faculty and personnel to improve research and analysis skills. These opportunities could include workshops, brown bag lunch discussions, book clubs, webinars, symposia, etc. Topics could potentially range from ethical considerations, sampling, writing and publishing to statistical analysis, software, and presentations.

Promoting Research Collaboration

The Center will support and encourage collaboration within and outside the School of Education. Center personnel will assist in identifying and forming teams of individuals with necessary and complementary areas of expertise and skill for Center projects. The Center will also assist faculty in identifying potential collaborators for their own research. It is important that the Center director maintain active involvement within the School of Education and across the university in organizations, the Office of Research, other centers, and other researchers. This involvement will ensure knowledge of activities and expertise leading to collaboration. The Center will collaborate with the Associate Dean and Statistician. This collaboration will primarily entail translating assessment data into research and publication or assisting faculty with this translation.

Providing Services

Center personnel may enter into contracts with other organizations for purposes of assessment, evaluation, and research. Center support includes, but is not limited to: methodological or statistical consultation, data analysis, assistance applying for internal or external funding, contract solicitation or negotiation.

Induction and Mentoring

In 1993, the School of Education at the University of South Dakota established the Professional Development Center (PDC), now known as Induction and Mentoring, with sites in several southeastern South Dakota school districts. The purpose of Induction and Mentoring is to develop the best learning environment for students and teachers. In Induction and Mentoring, mentors from the school districts and first-year teachers serving as graduate interns work together to exchange ideas, materials, teaching demonstrations, software development, and teaching technologies. Induction and Mentoring also fosters collaborative interaction among school educators and university teacher educators in terms of research, curriculum development, and technology enhancement. The Induction and Mentoring concept provides opportunities to influence both existing practices in school districts and the teacher education program at the University of South Dakota to better prepare an information age workforce for the future.

The University of South Dakota Reading Recovery Training Center

The University of South Dakota Reading Recovery Training Center was established in 1997. The Training Center at USD provides training for Reading Recovery Teacher Leaders and Teachers according to international standards set forth by the Reading Recovery Council of North America and the North American Trainers Group. In addition to providing initial Teacher Leader and Teacher training, the Center also provides technical assistance to established Reading Recovery programs within the state and region by developing and delivering continued professional development opportunities for Teacher Leaders and Teachers and monitoring data from several thousand Reading Recovery students each year.

South Dakota Center for Law and Civic Education

The South Dakota Center for Law and Civic Education was established in 1992 and is housed in the Delzell Education Center. The Center's purpose is to equip non-lawyers with knowledge and skills pertaining to the law, the legal process, the legal system, and the fundamental principles and values on which they are based. Law-related education (LRE) helps students develop the knowledge, skills,

understanding, and attitudes necessary to function effectively in our pluralist, democratic society based on the rule of law. The Center serves as a resource clearinghouse for South Dakota and area educators.

ADMISSION REQUIREMENTS

Admission to Teacher Education

The School of Education recruits, admits, and retains candidates who demonstrate potential for professional success in schools. In doing so, the School of Education uses a comprehensive system to assess the qualifications of those candidates seeking admission.

The School of Education's CSPA is responsible for all admission procedures for students enrolling in any teacher education program within the School of Education.

In addition to sophomore standing (completion of or enrollment in 30 hours) the student must satisfy all the criteria for admission to specific teacher education programs offered within the University. The criteria for admission include:

1. successful completion of an oral communication course (with a grade of C or above)
2. passing scores on the Core Academic Skills for Educators tests as approved by the School of Education with consideration of national, regional, state and local standards of practice.
3. cumulative grade point average of at least 2.70.
4. successful completion (with a grade of C or above) of EDFN 338 - Foundations of American Education (C), TET 200, and initial 296 field experience.
5. twenty hours of validated work with youth.
6. completion of an application form with appropriate attachments.

Final decisions regarding a student's application for admission to a teacher education program are reviewed and acted upon by the Basic Programs Admission and Retention Committee (BARC) of the School of Education.

Because of the responsibility of a member of the teaching profession to the total development of young people and notwithstanding a student's enrollment in or graduation from the School of Education, the Dean and faculty of the School of Education reserve the right to refuse to recommend a student for a teaching certificate or to assign a student to a teacher education program if such recommendation or assignment, in their discretion, would appear to be contrary to or in violation of the South Dakota standards for teacher certification, teacher employment, or the Code of Professional Ethics for the Teaching Profession in South Dakota.

Advanced Standing

Because of the nature of programs in teacher education, it is normally necessary for students to spend a minimum of two years in the teacher education program to complete certification requirements. Students transferring after the beginning of the junior year may spend additional time in completion of degrees. Students who have earned nonteaching baccalaureate degrees and then wish to qualify for teacher certification are expected to meet all requirements as outlined for that teaching field in order to obtain recommendation for teaching certification.

Transfer students must have a minimum of 30 semester hours from the University of South Dakota to be recommended for certification.

Continuation in Teacher Education and Admission to the Residency Year

At the time of application to the residency year, students must provide evidence that they have attained second semester junior standing (usually 80 or more hours), achieved an overall cumulative grade point average of 2.70, achieved a grade point average of 2.70 in their major and professional areas, achieved a qualifying score in the Praxis Content test in their major (provide CSPA an official copy of the score report including the subtest scores), show evidence of successful completion of any additional courses or activities stipulated by their advisor in CSPA, be admitted to Teacher Education at least one semester prior to the student teaching semester, and have positive recommendations for student teaching from faculty members in their teaching major and professional areas and from prior field experiences from faculty and field supervisors.

Professional Year and Program Completion

The professional residency year constitutes the capstone experience in the preparation of teachers and includes a combination of study and practice. During the professional residency year, all students must participate in a full-time student teaching and learning experience in K-12 setting, normally from 8:00 to 4:00. Student teachers begin the year on the schedule of the assigned K-12 school. If in the first semester of residency, student teachers will be in the designated placement until the last day of the school district's semester calendar. If in the second semester of residency, candidates will end the placement on the Friday before USD's graduation. The residency year is conducted in off-campus settings during the senior year, thus the student must be prepared to live off-campus during this year. The prime consideration in student teaching placement is the professional development of the individual and verifying that the student has completed placements in a diversity of settings throughout his/her field experiences. The availability of locations for the year-long residency is determined by staffing patterns within the School of Education, master teacher availability at the various schools, and collaborative decisions between the field sites and the USD field placement office.

During the student residency year, students must take the Praxis PLT (Principles of Learning and Teaching) test at their teaching level and present the official copy of the ETS score report including the subtest scores to the School of Education CSPS office to be recommended for graduation. Students must meet the South Dakota qualifying score to be recommended for teaching certification in South Dakota.

Students must apply for the residency year in December if planning on student teaching in the fall, and in April if planning on student teaching the following spring.

Initial Certification for Secondary and K-12 Content Areas

Teacher education programs for secondary and K-12 school teachers are offered to students enrolled in the College of Arts and Sciences, School of Education, or College of Fine Arts. Below are descriptions of the possible ways students can earn a Bachelors Degree with teaching certification.

Bachelors of Science in Education (BSED) Students in this major are learning to teach content areas in 5-12 classrooms. Working with a CSPS advisor (Delzell 114) in the School of Education, students will choose a content area and create a plan to incorporate content and teaching courses into a program of study. Students must meet all admission requirements (**See Admission Requirements**) to continue and complete the BSED program.

Bachelor of Arts or Bachelor of Science (BS or BA) with Certification Students wishing to complete a Bachelor of Arts or Bachelor of Science Degree in a content area from the College of Arts and Sciences may also complete certification requirements to teach at the 5-12 grade levels (k-12 for world languages). Students work with their Arts and Science advisor for content advising and work with CSPS advisors (Delzell 114) for admission to teacher education, residency, and certification requirements (**See Admission Requirements**). Please contact a CSPS advisor immediately if interested in teaching in order to receive information.

Bachelor of Fine Arts (BFA) with Certification

Fine Arts students may work toward K-12 teacher certification while completing their BFA. Students work with their Fine Arts advisor for content advising and work with CSPS education advisors (Delzell 114) for admission to teacher education, residency, and certification requirements (**See Admission Requirements**). Please contact a CSPS advisor immediately if interested in teaching in order to receive information.

GRADUATION REQUIREMENTS

Candidates for the degrees of Bachelor of Science in Education or Bachelor of Science in Kinesiology and Sport Management must have earned a minimum of 120 hours of credit. An exit review may be required by the Basic Programs Admission and Retention Committee for students who wish to be recommended for teacher certification. A recommendation for teacher certification requires that the student shall have completed all academic requirements in the South Dakota Department of Education (DOE) and the National Council for the Accreditation of Teacher Education (NCATE) approved program of study for their teaching major and including the requirements in the School of Education (such as portfolio requirements and program exams), Institutional Graduation Requirements, University Core Curricula, professional education, and the major/minor teaching field requirements. Recommendation for teacher certification requires an overall cumulative grade point average of 2.70 and a grade point average of 2.70 in the major and professional areas. Evidence of successful completion of any additional coursework or activities which were prescribed at the entry level and satisfactory written evaluation of student teaching must be provided. No D's are allowed in the major, minor, and education courses. In computing grade point average, all grades earned will be included; however, in the case of repetition of a course, only the most recent grade will be counted.

Because of the nature of the programs in teacher education, it will be necessary for a student to spend a minimum of two years in order to complete the requirements for certification. Some programs are so designed that entry at the first-year level is mandatory. Students transferring after the junior year can expect to spend additional time in completion of the degree. Students who have earned a non-teaching baccalaureate degree and now wish to qualify for teacher certification will be expected to meet all requirements as outlined for that teaching field in order to obtain a recommendation for teaching certification and assistance in job placement.

Minors

A minor in the School of Education is defined as at least 18 semester hours of coursework in one prefix area except where teacher certification and/or licensure requires additional hours.

Residence

To be recommended for teacher certification, students must earn the last thirty hours of their degree program in residence at the University of South Dakota and complete all requirements in an approved teacher education program as outlined in an undergraduate catalog published to cover a school period within the last four years prior to graduation. Transfer students may find it necessary to earn more than the minimum number of hours in order to complete all degree and certification requirements. Students intending to transfer to the University of South Dakota for teacher education programs should contact CSPS for information on what transfer coursework will meet degree requirements and what requirements need to be completed in residence.

Students who have earned a non-teacher education baccalaureate degree and wish to meet requirements for teacher certification should consult with advisors in CSPS prior to enrollment. Policies of CSPS and the Admission and Retention Committee determine which courses taken prior to admission to teacher education meet the established requirements.

UNDERGRADUATE AREAS OF STUDY

Elementary Education

Offerings in Elementary Education are designed to prepare undergraduate students as elementary school classroom teachers. Specialized coursework in Kindergarten and Early Childhood is also available. A K-12 minor is available in reading.

Health Education (Minor)

Offerings in Health Education focus on health at a personal level, as well as teacher preparation. All courses attempt to portray the dynamic state of health within our society and to look at the individual in terms of physical, social, emotional, spiritual, and intellectual health needs.

Kinesiology and Sport Management

Offerings in Kinesiology and Sport Management focus on the fields of physical education, exercise science, and sport management which prepare individuals in various areas of movement studies.

Secondary Education

Offerings in Secondary Education are designed to provide undergraduate students with the professional skills and experiences to teach in the content areas in secondary schools.

Special Education

Offerings in Special Education are designed to prepare students to teach students with mild and moderate disabilities in K-12 settings. Students pursuing special education must also qualify as an elementary or secondary school classroom teacher in regular education.

Technology Education

Specialized course offerings are available in Education Technology. Contact the School of Education CSPS office for specific information.

SCHOOL OF EDUCATION MINORS

Where there is a major in the School of Education, minors are presented immediately following the major in the catalog. Students may not count credit hours in the minor area when they are required and counted as major credit requirements, unless otherwise noted. See the education advisors in the School of Education for additional information regarding state standards for endorsements.

SCHOLARSHIPS

SOE Single Application

The following scholarships are available for students each spring, with a deadline of March 1, via the School of Education application, which is accessed within the student portal. Some scholarships are available for in-coming freshman; however, most SOE scholarships are available to students once they reach junior status and have been accepted into the Teacher Education Program.

Undergraduate - Freshman

TRE:

- Robert "Bid" and Jonette "Joni" Miller Scholarship (freshman - awarded for 4 years, available FA 2021)
- Edis Juel and Sidney E. Anderson Scholarship (freshman - awarded for 4 years, available FA 2023)

Undergraduate - Junior and/or Senior

TRE:

- Bill Matousek and Marjory Calderia Scholarship
- Wayne H. Evans Sr. and Patricia Evans Teacher Education Scholarship (either UG or GRAD)
- Jane Bartling Christensen Scholarship
- Jeanne Spilde Gonzenbach Scholarship
- Robert and Elizabeth Wood Elementary Education and Special Education Scholarship
- Mary Wanserki Memorial Scholarship
- Grant Heckenlively and Geri Heckenlively Brook Scholarship
- Tony Caeck Outstanding Social Studies Student Scholarship
- Ben and Lillie Otto Scholarship

- Constance L. Hoag Scholarship
- E. Louise Coover Memorial Scholarship
- Hazel Linderman Scholarship
- Roger H. Davies Memorial Scholarship

Graduate

C&I:

- Mary Wanserki Memorial Scholarship
- Wayne H. Evans Sr. and Patricia Evans Teacher Education Scholarship
- Patricia Tschetter Mendell Memorial Scholarship

CPE:

- Hee-sook Choi School Psychology Scholarship
- Anita Johnson Gwin Scholarship
- Robert H. and Myrtle E. Knapp Scholarship
- Marilyn J. Mabee Education Scholarship
- David and Kay Olson Counseling Program Scholarship
- E. Gordon Poling Memorial Scholarship

ED Leadership:

- Floyd and Marlys Ann Boschee Scholarship
- Harry Dykstra Memorial Scholarship
- Jan Ebersdorfer Women in Administration Scholarship
- James W. Flevares Memorial Scholarship
- Leroy Nelson Distinguished Service Scholarship
- Frederic J. Petersen North Central Association Scholarship
- H.C. "Rus" Rustad Memorial Scholarship
- Perry L. Uhl Memorial Scholarship
- Phil Vik Leadership Scholarship
- Shawn P. Winthers Memorial Scholarship

Coyote Commitment (or other use to satisfy scholarship programs)

The following scholarships (to the best of my knowledge) are NOT applicable for students and are used to satisfy Coyote Commitment or other scholarship programs, using the MOA language to justify such use. In addition, some scholarships listed may either have expired or combined with another scholarship to increase funds available for use. Therefore, they should not be listed as available scholarships on webpages or catalogs.

Undergraduate or Graduate

- Allan D. & Lois E. Nelson Family Scholarship
- Andrew D. & Carrie Aust Olson Memorial Scholarship
- Barbara M. White Scholarship
- Benjamin & Ruth Russow Scholarship
- Bernice Newell Memorial Scholarship
- Bessie Lang Owens Scholarship
- Cragg Family Scholarship
- Debra & Gary McKellips Scholarship
- Donald L. Bechtel-School of Education Scholarship
- Donna D. Dwyer Scholarship
- Dr. Deborah Hout Johnson Scholarship
- Education Scholarship
- Elizabeth Fritsch Memorial Scholarship
- Genevieve R. Cool Memorial Scholarship
- Heartland Consumer Power District/Dan & Dot O'Connor Scholarship
- Horace and Donna Walter Scholarship
- HPER Scholarship
- J. Nielsen Scholarship
- Jim & Jean Beddow Family Scholarship
- John & Helen Buehler Scholarship
- John and Patricia Cruzeiro Scholarship
- Katherine Plut Roth Education Scholarship
- Marie (Reetz) Turney, Samuel Reetz Turney & Dello Halsted Turney Memorial Scholarship
- Mark W. Delzell Memorial Scholarship

- Mathnasium Scholarship
 - Maureen Seener Pickering & Leland Steele Scholarship
 - Mavis Fry By Scholarship
 - Norman G. & Midred L. Herren Scholarship
 - Norman Ward Memorial Scholarship
 - Otto Ulrich Scholarship
 - Pauline Champeny Estate Scholarship
 - Raleigh R. Steinbach Memorial Scholarship
 - Robert T. & Dorothy M. Lang Scholarship
 - Roger & Sandy Schaffer Scholarship
 - Russell & Jane Dokken Scholarship
 - School of Education Coyote Commitment Scholarship
 - Superintendent William J. "Bill" Cody Scholarship
 - Tom Walter Memorial Scholarship
 - Viola & Cecil Kipling Jr. Family Scholarship
 - Wilbur & Doris Townsend Scholarship
-

SOUTH DAKOTA BOARD OF REGENTS

Policy Manual

SUBJECT: Academic Catalogs System Requirements

NUMBER: 2.3.1

A. PURPOSE

Academic catalogs are critical for students as they navigate their university experience. Academic catalogs provide information to students regarding academic policies, course descriptions, and degree requirements. This policy sets forth Regental system requirements.

B. DEFINITIONS

1. **Academic Catalog:** Defined as an electronic and/or printed catalog that provides degree program requirements, course requirements, and academic requirements of the university.
2. **Institution(s):** Defined as one of the six (6) universities: Black Hills State University, Dakota State University, Northern State University, South Dakota School of Mines and Technology, South Dakota State University, and University of South Dakota.

C. POLICY STATEMENTS

1. A statement of the statutory institutional objectives must appear as a part of the catalog published at each institution. The BOR Policy on Institutional Mission for those institutions (BOR Policy 1.2.1 through 1.2.6) shall be added to the Academic Catalog.
2. BOR Policy 1.4.4 shall be posted with the Academic Catalog.
3. BOR Policy 2.6.2 shall be posted in the Academic Catalog.
4. A statement on FERPA rights shall be added to the Academic Catalog.
5. Each university catalog shall contain the following statement:

The information contained in this catalog is the most accurate available at the time of publication, but changes may become effective before the next catalog is published. It is ultimately the student's responsibility to stay abreast of current regulations, curricula, and the status of specific programs being offered. Further, the university reserves the right, as approved by the Board of Regents, to modify requirements, curricula offerings, and charges, and to add, alter, or delete courses and programs through appropriate procedures. While reasonable efforts will be made to publicize such changes, a student is encouraged to seek current information from appropriate offices.

The statement shall be placed in bold typeface on the inside of the front cover of the catalog or on the first page of the catalog.

FORMS / APPENDICES:

None

SOURCE:

BOR December 1995; BOR June 2014; BOR May 2023; October 2023 (Clerical).

**IN THE SUPREME COURT
STATE OF SOUTH DAKOTA**

App. No. 30602

WILLIAM J. SWEENEY

Plaintiff and Appellant

vs.

**THE SOUTH DAKOTA BOARD OF REGENTS and the UNIVERSITY OF SOUTH
DAKOTA,**

Defendants and Appellees

**APPEAL FROM THE CIRCUIT COURT, FIRST JUDICIAL CIRCUIT
CLAY COUNTY, SOUTH DAKOTA**

**THE HONORABLE TAMI A. BERN
CIRCUIT COURT JUDGE**

Appeal Filed January 19, 2024

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PRELIMINARY STATEMENT

This appeal comprises three separate administrative appeals to Circuit Court. These cases were consolidated upon the motion by Appellant. Documents from 13CIV21-118 will be cited R1 _____. Documents from 13CIV22-060 will be cited R2 _____. Documents from 13CIV22-120 will be cited R3 _____. In each case, the documents in the administrative record were sequentially numbered by the BOR; those documents will also be cited by respective page numbers, BR _____. The various transcripts will be cited by TR _____. Documents in the Appellant's Appendix will be cited APP. _____. The Appellees' Brief by the South Dakota Board of Regents and University of South Dakota will be cited as "BOR Brief". The Appendix to the BOR Brief will be cited as "Appendix _____".

REPLY TO STANDARD OF REVIEW

The BOR Brief, p. 10, adopts the rule that

"An administrative agency is usually given a reasonable range of informed discretion in the interpretation and application of its own rules when the language subject to construction is technical in nature or ambiguous or when the agency interpretation is one of long standing." *Paul Nelson Farm v. South Dakota Dept. of Revenue*, 2014 S.D. 31 ¶ 22, 847 N.W.2d 550.

But in *Paul Nelson Farm*, the Court rejected the Department of Revenue's interpretation and application of its own rules. 2014 S.D. 31, ¶ 26, 847 N.W.2d at 558-9. The Court also cited two other cases in which that agency's application of its own rule were rejected. *Id.* n.7. It is very questionable whether this sort of *Chevron*-like analysis even survives. This Court was very critical of this type of analysis in *Pickeral Lake Outlet Ass'n v. Day Cty.*, 2020 S.D. 72, ¶¶ 26-30, 953 N.W.2d 82, 92-94. "[A]n administrative construction is not binding on the court, which is free to overrule the construction if it is deemed to be wrong

or erroneous,” *Wegner Auto Co. V. Ballard*, 353 N.W.2d 57, 58 (S.D. 1984). The June 28, 2024 Supreme Court opinion, *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 219 L.Ed.2d 832 overruled *Chevron USA Inc. v. Natl. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) with resounding force. In each grievance, the BOR’s interpretation of its own policies was infected with a violation of a common rule of statutory construction.

REPLY TO APPELLEES’ ARGUMENT

I. The First Grievance.

In its Statement of the Case and Facts, the BOR Brief notes that “Dr. Sweeney had previously been given verbal and written warnings concerning misadvising students, including a written warning issued by Dean Easton-Brooks, the prior Dean.” BOR Brief p. 2. The evidence about the prior warning was vague and conclusionary. When asked about it, Dean Schweinle replied “It concerned using outdated forms and inappropriate advising.” R1, TR 104, R 111. The 2019 letter was not marked as an exhibit. She testified that Dr. Easton-Brooks warned Dr. Sweeney about using an outdated form but added “I can’t know what Dr. Easton-Brooks was referring to in his letter, but I know we had received notices.” R1, TR 124, R 131. She sat in on the meeting with Dr. Easton-Brooks and one before that. R1, TR 127, R 134, not “multiple meetings” as alleged at BOR Brief, p. 2. The outdated form claim in this case was dropped after the remand.

Dean Schweinle’s concern about Dr. Sweeney’s “misadvising” students primarily arose out of his after-class consultation with a student, R.A., who had exhausted the internal University procedures for appealing the denial of a change of advisor. Dr. Sweeney referred her to a Vermillion lawyer. This is discussed more fully at the Appellant’s Brief, p. 20. This is ignored in the BOR Brief altogether but was the subject

of a substantial amount of testimony at the evidentiary hearing. Neither Dr. Schweinle nor Dr. Hackemer claimed it had nothing to do with the discipline. R1, TR 35-40, 104, 111, 131, 137; BR 42-47, 111, 118, 138, 144. Dr. Schweinle had emphasized in her testimony that the January 29, 2021 letter was substantially motivated by what she heard from Julie Large. R1, TR 104, BR 111. The administration did not call Julie Large as a witness. Dr. Sweeney did. Her testimony at RE1, TR 40-48, BR 47-55 clearly demonstrates Dr. Sweeney was communicating with potential recruits which is not advising. When they ended up at USD, they were disappointed that Dr. Sweeney was not their advisor. R1, TR 44, BR 51. Julie Large emailed Dean Schweinle about effecting an advisor change to Dr. Sweeney. Julie Large's full page letter to Dr. Schweinle names the two graduate students who were also in "Teacher-like roles at Teachwell Solutions in Sioux Falls." She expressed disappointment that they had not been assigned to Dr. Sweeney. She ends the letter with "I have hope the USD School of Education will do the right thing. We both know competent, qualified special education teachers are few and far in between." R1, Ex. 3, BR 263. Apparently that rankled Dean Schweinle.

The other student alleged to have been inaccurate advice was the student who was the subject of Ex. B, the exhibit which is missing from the settled record prepared by the BOR. From the content of the BOR Brief, it appears that this advice related to the taking of the Praxis exams.

At BOR Brief, p. 3, the statement is made that "in an email to one student, Dr. Sweeney asserted regarding the Praxis Core Exam that 'This requirement is a requirement of the undergraduate teacher education program not the graduate multicategorical special education program,'" citing Appellant's Brief 27. This comment

was consistent with the title and content of the undergraduate teacher education requirements. See University of South Dakota, School of Undergraduate Education, Teacher Education Undergraduate Handbook: <https://sites.google.com/a/usd.edu/school-of-education-handbook>, attached to this brief as APP. 69-70. Dr. Sweeney was conveying information to a graduate student. Dr. Schweinle confirmed this; she testified that students wanted to change their advisor to Dr. Sweeney, R1, TR 104, BR 111, and the email related to the process of “the advisor appeal”. R1, TR 105, BR 112. Dr. Sweeney only advised graduate students. She was asked “is the Praxis required” and she responded “yes, it is.” R1, TR 106, BR 113. There are three Praxis exams, but she did not distinguish them. See pp. 5-6 *infra*.

At BOR Brief p. 11, the same point is made, “Dr. Sweeney does not dispute that he advised a student that the Praxis Core Examination ‘is a requirement of the undergraduate teacher education program, not the graduate multi-categorical special education program’, citing Appellant’s Brief 27. Dr. Sweeney gave a correct description of the graduate catalog. Ex. A, R1, R 295, which is also Appendix 3 to Appellees’ Brief.

The BOR Brief then argues that this is an inaccurate statement of the official written admission standards contained within the University Graduate Catalog. This is derived from the statement in the graduate catalog “students who do not possess certification will need to have completed all of the admission requirements for teacher education” One of those is the Praxis Core exam. Excerpts from the University Catalog are included at the Appendix to the BOR Brief.

The source of the confusion is two-fold. Dr. Schweinle concluded that Dr. Sweeney gave wrong information “in e-mails exchanged that [she] received.” R1, TR

106, BR 113. This was an email from a student to Dr. Zalud; neither of them testified.¹ There is no accurate description of what Dr. Sweeney told the student. Dr. Schweinle testified about Ex. B, the email exchange. That exhibit is not in the settled record prepared by the BOR, pursuant to SDCL 1-26-33. Ex. B is “missing”. R1, BR 299. Dr. Schweinle testified:

This e-mail indicates that the student had told Dr. Zalud that she was told that she was not required to take the Praxis Core for admission, yes.

R1, TR 107, BR 114. That is not what Dr. Sweeney told the student; he described the background of the confusion. About other courses, he told her to talk to her advisor. He suggested she meet with Dr. Schweinle. Dr. Sweeney did not engage in academic advising. The graduate student had obviously already been admitted to the graduate SPED program. The second source of confusion is the catalog itself.

Dr. Sweeney had explained this to Dean Schweinle in his February 8, 2021 letter to her. Following a discussion of the admissions policy changes in 2019, Dr. Sweeney wrote:

The Praxis Core, and formerly the PPST, are used for admittance into the undergraduate Teacher Education Program (i.e., formerly known as Teacher Residency and Education).

. . . .

The practice of taking the two Praxis exams (i.e., the Praxis Special Education CORE Knowledge and Applications and the Praxis Principles of Learning and Teaching) are explicitly written in the Graduate Catalog and are required

¹ There was no objection because the hearing examiner instructed the attorneys “this is not a contested case, under the [APA in S.D.] so the hearing will not be conducted under the strict rules of evidence”. R1, TR 3, BR 10. When Ex. 1 was offered by Dr. Sweeney’s counsel, the hearing examiner stated, again, “the rules of evidence don’t apply,” R1, TR 13, BR 20, and that he was “going to take it all. We’ll go from there.” R1, TR 14, BR 21.

for students to pass *during their graduate coursework* for all those pursuing teacher endorsements in this area. Graduate students in the Multicategorical Special Education Program complete these Praxis exams concurrently with their required coursework. In fact, a passing score on the Praxis Special Education Core Knowledge and Applications is required before a graduate student can begin their student teaching, and the successful completion of the Praxis Principles of Learning and Teaching is needed before these students can apply for teacher certification and endorsement in Multicategorical Special Education.

R1, Ex. 2, BR 256. (emphasis added). It describes the two Praxis exams which need to be completed during the graduate course of study.² This letter was ignored, R1, TR 55-57, BR 62-64. Dr. Sweeney's Step 1 grievance to Dr. Hackemer, R1, Ex. 2, p. 55, BR 249 is accompanied by no response from Dr. Schweinle to the rebuttal letter.

Appendix 1 includes the statement that "the *Catalog* is the official source of the University's academic programs and courses. The *Catalog* should be used as a guide, in collaboration with an academic advisor, in planning a course of study in meeting requirements for graduation." Appendix 1.³ At the same page, the statement is made "the information contained in this *Catalog* is the most accurate available at the time of publication, but changes may become effective before the next *Catalog* is published." Regarding the specific requirements of the Special Education M.A.:

Typically students seek the Master's degree in Special Education while pursuing certification in one of more areas. A degree of flexibility provides additional opportunities *for those not needing or wanting certification*. Students wishing to pursue a Master of Arts degree in Special Education must select from the following specialization: Advanced Specialist in Disabilities, Early Childhood Special

² The Praxis Special Education Core Knowledge and Applications exam is often referred to as the Praxis specialty content exam. The Praxis Principles of Learning and Teaching is often referred to as the Praxis PLT exam.

³ It is interesting that the BOR represents the Catalog is mandatory, despite this "guide" language, but in the subsequent grievance treats "guideline" as leaving the Administration with unfettered discretion.

Education, or Multicategorical Special Education K-12. *Students are encouraged to discuss program specializations with an advisor at the time of admission to the program.*

NOTE: *Students who do not hold either elementary or secondary education certification may only pursue the Multicategorical specialization and will need to complete additional coursework and certification requirements for initial teacher certification.*

(emphasis added). The Multicategorical specialization is one of three specializations which a Master's Degree candidate in SPED can pursue, with the others being Early Childhood Special Education and Advanced Specialist in Disabilities. The catalog states "[a] degree of flexibility provides additional opportunities for those not needing or wanting certification." As the catalog NOTE explains, those without elementary or secondary education certification may only pursue Multicategorical specialization. A plain reading is that graduate students who are pursuing Advanced Specialist in Disabilities or Early Childhood Development do not have to take the Praxis Core exam as graduate students, because they must have taken it as undergraduates. Dean Schweinle admitted this was correct about the undergraduate program:

Q So the Praxis Core test, is that for admission to the teacher education program?

A Yes.

Q And somebody can get a master's degree in special education without going through the teacher education program?

A They can.

Q If they went through the teacher education program in undergrad – which they can do; right?

A Yes.

Q -- they would have already taken the PRAXIS Core?

A Yes.

Q And would not have to take it during graduate school

–

A No.

Q -- correct?

R1, TR 124:21-125:11, BR 131-32.

Furthermore, as noted above, there is more than one Praxis examination:

A series of Praxis tests are required for successful completion of the program and to earn initial teaching certification in the state of South Dakota. Students pursuing initial teacher certification will need to pass the Praxis II Special Education Core Knowledge, and the Principles of Learning and Teaching (PLT) exam for successful completion of the program and teacher licensure. Students who do not possess certification will need to have completed all of the admission requirements for teacher education at the University of South Dakota. Students who are seeking teacher certification are encouraged to meet with an advisor for clarification.

Appendix 3 to the BOR Brief. This does not include “those not needing or wanting certification” as discussed above about the first paragraph of Appendix 3. As stated in these sections combined, there are three specializations available for a Master’s Degree candidate in Special Education. One of them can be pursued without the prerequisite of either elementary or secondary education certification, i.e. multi-categorical specialization.

Dr. Sweeney testified that the graduate students must take the Praxis PLT exam and the Praxis specialty content exam, R1, TR 141: 12-17, BR 148, but they do not have to take the Praxis Core while in graduate school. This is consistent with the catalog and with what the student was apparently conveying to Dr. Zalud. The teacher education handbook specifies undergraduate teacher education, not graduate student education. R1, TR 149: 5-10, BR 149. The graduate students do not need to take the Praxis Core because the undergraduate teacher education requirements is specific to undergraduate students

and makes no direct claim about being inclusive of graduate students. APP 69. It describes the undergraduate education admissions requirements.

The BOR Brief claims that Praxis II, the content specialty exam, is required of all graduate students. It is not, as shown above. Only those pursuing a graduate degree in multicategorical SPED must take this test. This makes sense in light of the role of multicategorical, i.e. people who teach at schools whose size allows the employment of only one SPED teacher, or a limited number, who must teach special education students with a variety of special needs.⁴

A South Dakota teacher certificate must include an endorsement for “subjects qualified to teach”. ARSD 24:02:01:01(5). “[A] early childhood special education birth through grade three endorsement requires passage of the state-designated content test.” ARSD 2:28:19:02. A Kindergarten through grade 12 special education endorsement requires completion of the state designated content test and course work. ARSD 24:28:19:03. The content test for SPED is specified at the South Dakota ETS PRAXIS website.

At BOR Brief, p. 4, there is a description of the grievance relief requested by Dr. Sweeney. He did, in fact, request that the written warning be removed from his personnel file and the comment in his evaluation deleted. The other points which had, in fact, been included in his *pro se* grievance, regarding discretion and academic freedom, implementation of required coursework for graduate students, development of a thorough training, and discussion of policies were not pursued during the balance of the grievance process, and not even mentioned at the evidentiary hearing. There is nothing advocated

⁴ Dr. Sweeney described the practical need for multicategorical SPED teachers in a rural state like South Dakota at R1, TR 22, BR 29.

about these original requests for relief in the post-hearing briefing at the administrative level, nor at the Circuit Court level.

At BOR Brief, p. 15, the BOR relies on four cases regarding academic freedom which have no resemblance to the *Sweeney* case. In *Berg v. Bruce*, 112 F.3d 322, (8th Cir. 1997), the Plaintiff who claimed academic freedom was terminated for her refusal to cooperate in evaluating her grading system, failure to correct teaching to deficiencies, and for insubordination, unprofessional conduct and her unwillingness to discuss professional issues. She was a third grade teacher who refused to discuss these issues with her principal. She claimed her first amendment right of academic freedom gave her the right to assign grades as she saw fit without interference from the principal. The Court held, “the First Amendment did not authorize Berg to be totally uncooperative, disrupt classes or obstruct discipline”. *Id.* at 329.

In *Riggin v. Bd. of Trustees*, 489 N.E.2d 616 (Ind. App. 1986), the Plaintiff who claimed academic freedom was ineffective as a teacher, frequently failed to meet classes as scheduled, did not observe regular office hours, and did not cooperate with other faculty at Ball State University. As quoted in the BOR Brief, “academic freedom does not encompass matters inherently destructive of the proper functions of the institution.” That truism is not in dispute here. Such extreme facts are not even alleged in Dr. Sweeney’s case.

In *Stastny v. Bd. of Trustees of Cent. Washington Univ.*, 647 P.2d 496 (Wash. App. 1982), Professor Stastny had several approved absences from his teaching duties, and during the same time, had five unapproved absences. Then, he received an invitation to give a lecture in Jerusalem and he made a request for several days of absence. A

shorter time was approved, but “before receiving a response, on December 25 he left for Israel”. *Id.* at 243. He then informed the University that he would follow his own schedule, and not the schedule which had been approved after his departure. He was terminated for insubordination and he claimed academic freedom had been violated. Therefore, the comment in the opinion that “academic freedom does not mean freedom from academic responsibility to students, colleagues in the orderly administration of the university”, *Id.* at 250, was an appropriate comment under those circumstances. Dr. Sweeney’s circumstances do not even remotely compare with Stastny’s. In *McElearney v. Univ. of Illinois at Chicago Circle Campus*, 612 F.2d 285 (7th Cir. 1979), the non-tenured professor was terminated for cause, and he sued the university for violations of his rights to due process and equal protection. The District Court granted the motion to dismiss for failure to state a claim, and the 7th Circuit easily affirmed. The opinion points out that his claim for a liberty interest in requiring due process was not even raised in the District Court and the claim was frivolous. *Id.* at 288. The professor also claimed a First Amendment right to academic freedom but the opinion states that the university did not prevent him from pursuing his chosen area of research, and thus his right to academic freedom was not violated. Dr. Sweeney’s academic freedom position is not based on a generic First Amendment claim, but on a specific BOR policy BOR 1:11 and the policies establishing that advising is part of teaching, 4:38:6, i.e. teaching includes “Advising graduate students.”

At BOR Brief, p. 10, n.1, the comment is made that the parties stipulated away the issues of waiving/substituting courses and using wrong forms, and “Thus, those issues are resolved”. True, but they are still evidence of Dr. Schweinle’s personal animus toward

Dr. Sweeney. This is especially true of Ex. C, a form dated April 1, 2021, two months after the letter of warning, offered to prove use of wrong forms.

II. The Second Grievance: Workload.

At BOR Brief, p. 5, the BOR neglects to mention that Dr. Sweeney, at no time, actually followed through with any effort to have his legal counsel intervene at that time. He went by himself to discuss the matter with Dr. Dan Mourlam as recommended by Dr. Zalud, but Dr. Mourlam said he would not discuss anything with him without University counsel present. This is discussed in more detail at Appellant's Brief, p. 10. As mentioned at that point, Dr. Sweeney received the distinct impression that Dr. Mourlam was under strict orders to take that position, but this is not responded to nor rejected in the BOR Brief.

His original grievance did mention the USD workload policy (adopted in May of 2008) and the 2016-2019 COHE/BOR Negotiated Agreement, but neither of those were pursued in the grievance process. They were not mentioned at the evidentiary hearing, nor in the briefing to the hearing examiner or the Circuit Court.

The BOR Brief devotes considerable time to the points in the original grievance which were not pursued at the hearing, including the statement that the 2021 USD Workload Policy had not been properly adopted by the SD BOR. Once again, that was not pursued at the evidentiary hearing, nor in the post-hearing or Circuit Court briefing.

For the reasons stated at pp. 1-2, the BOR's interpretations and applications of its policies relevant to the second issue are not entitled to deference. The BOR Brief ignores and avoids Dr. Sweeney's point that USD achieved its interpretation of its policies by

adding words which are not in the published policies, contrary to one of the most common rules of construction. See the authorities cited at Appellant's Brief, pp. 17-19.

III. The Third Grievance: The Assignments.

Dean Schweinle indeed took over the duties of the workload to Dr. Sweeney for the upcoming year, after Dr. Zalud's retirement, in spite of the fact that she had already rejected his previous two grievances. The first grievance was rejected even though the allegation about using the wrong forms was never substantiated. In fact, at the evidentiary hearing the BOR offered an exhibit which was dated in April 2021, two months after the issuance of the letter of warning. With this animus existing, Dr. Schweinle cannot be described as a neutral party regarding her supervision of Dr. Sweeney.

The third grievance demonstrated that. As noted at BOR Brief, p. 7, "the exact time requirements for these duties were unknown as it was a new responsibility for the University." That is exactly why there should have been discussion between Dr. Schweinle and Dr. Sweeney about this assignment, which was, in fact, required by BOR policies. "Faculty members have a legitimate interest in knowing which professional activities are to be recognized and their university's determinations of the relative importance of the recognized activities." BOR Policy 48.C.3.1. "Activities" includes "teaching, scholarship and creative activity and service." *Id.* The violation comes not from Dr. Schweinle not knowing how long these new assignments would take to complete, but from the refusal to discuss that. After all, this is a university, not the U.S. Army. Instead, Dr. Schweinle simply issued an order. At BOR Brief, p. 7, the argument is made that "Dr. Sweeney was provided an opportunity for a voluntary, paid fellowship to learn more about the specific requirements of the licensure disclosure responsibilities",

which he accepted. What the BOR Brief ignores is the testimony by Dr. Schweinle in which she admitted that if Dr. Sweeney had not accepted this summer training, which was beyond his nine-month contract, he would have been ordered to take the training in the Fall. This is discussed in more detail at the Appellant's Brief, p. 46.

IV. Retaliation.

Beginning at p. 26, the BOR Brief argues that the retaliation issue should be analyzed by the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) because South Dakota did in *Davis v. Wharf Resources (USA), Inc.*, 2015 S.D. 61, ¶ 17, 867 N.W.2d 706, 713. There is no basis for this. *McDonnell Douglas* was a race discrimination case; *Wharf Resources* was a gender discrimination case. The *McDonnell Douglas* analysis has been uniformly applied in discrimination cases. This is a grievance appeal.

In a grievance appeal, the standard of review is provided by SDCL 1-26-36. *Cox v. Sioux Falls Sch. Dist.*, 514 N.W.2d 868, 871-2 (SD 1994). All grievance appeals are administrative appeals, first to the Circuit Court and then to the Supreme Court, SDCL 1-16. Discrimination cases generally originate in court (state or federal), but grievance appeals do not, because the employee must exhaust his administrative remedies. *Kolda v. City of Yankton*, 2014 S.D. 60, ¶ 30, 852 N.W.2d 425, 433.⁵ The BOR Brief cites no authority for the proposition that this grievance appeal must be subject to the *McDonnell Douglas* balancing test.

⁵ Discrimination cases are preceded by mandatory agency investigations, but those are not evidentiary hearings, as are BOR grievances and grievance appeals before the Division of Labor & Management of the South Dakota Department of Labor. SDCL 3-18-15.2

Even if the *McDonnell Douglas* analysis is applied, Dr. Sweeney has shown that the employer's actions were motivated by the animus of retaliation. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). The employee need not always introduce new additional and independent evidence after the employer has met the prima facie case of the employee with some articulated, legitimate reason. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 148-49 (2000).

The BOR Brief, p. 26, correctly relies upon *Williams v. S.D. Dep't of Agric.*, 2010 S.D. 19, ¶ 14, 779 N.W.2d, 397, 402 for the elements of a retaliation claim:

1. Protected activity – Dr. Sweeney had filed two grievances;
2. Adverse employment action – Dr. Sweeney was assigned tasks he had never performed and was taken away from teaching, advising and interacting with students, which he loved;
3. A causal connection between the two.

There is not a smoking gun of the causal connection, nor is one required. President Gestring's harsh comments in her denial letter, Dr. Schweinle's testimony that there was no discussion because Dr. Sweeney had already filed two grievances, and the temporal proximity of the provisions grievance and the April 8, 2022 assignments. Certainly, the second grievance was filed on November 1, 2021. R2, Ex. 1, p. 35, BR 127. But the decision of the hearing examiner was not conveyed to the parties until April 14, 2022. R2, BR 1. In *Williams*, there was a two-year gap between the alleged event and the filing of the discrimination complaint.

If the comments were made in 2005, and no other such sexually inappropriate behavior occurred, then there was an insufficient nexus between the time Williams complained about sexual harassment and the adverse action taken against her in 2007. If, however, the comment was made in 2006,

there was a heightened likelihood of probable cause to support Williams's complaint of retaliatory discharge.

2010 SD 19, ¶ 19, 779 N.W.2d at 404. The time between Dr. Sweeney's second grievance and the new assignment was far less than this "heightened likelihood" in *Williams*, and there is other evidence of retaliatory animus.

President Gestring's comments in her denial letter were hardly "stray remarks in the workplace," nor were they "statements by non-decisionmakers" as suggested at BOR Brief, p. 28. Clearly, they were not "statements by decision-makers unrelated to the decisional process." It was the decisional process by the University President.

CONCLUSION

This Court, can, of course, make separate decisions on each of the three grievances; it is not matter of all affirmances or all reversals. Dr. Sweeney urges the Court to reverse on all three. Dr. Sweeney was correct telling a student that for the multicategorical specialty a graduate student had to take the Praxis specialty content exam and the Praxis PLT exam since the Praxis Core exam would have been taken as an undergraduate.

On the second grievance, the USD administration offered no explanation how Dr. Sweeney's workload totally failed to reach the 30 workload units contemplated by BOR Policy 4:38, or that Dr. Schweinle's calculation at R2, BR 124 was correct.

On the third grievance, the record is undisputed that there was no discussion with Dr. Sweeney about his new assignments and that discussion was required by BOR/USD policies. The administration only justified avoiding these policies by adding language to the policies which did not exist.

The BOR/USD interpretation and application of the relevant policies should have been given no deference.

The grievances should have been sustained. At BOR Brief, p. 30, the argument is made that “[s]ustaining the grievance would significantly append the decisions of University in determining the relative qualifications of its faculty members and deploying those faculty”. Why? No basis is given. Based upon that logic, there should be no grievances. But the BOR adopted BOR Policy 4:7. This is not inconsistent with the generic SDCL 13-49-3.

The overall evidence proved that but for the two previous grievances, that the April 8, 2022 assignments ordered for Dr. Sweeney would not have been made. The Circuit Court should be reversed.

Dated this 29th day of July, 2024.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 29th day of July, 2024, a true and correct copy of the above and foregoing **Appellant's Reply Brief** was served via Odyssey the following:

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4), I hereby certify that this brief complies with the requirements as set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word and contains 4922 words from the Preliminary Statement through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

/s/ Thomas K. Wilka
Thomas K. Wilka



Student Handbook

- Teacher Candidate Handbook (<https://sites.google.com/a/usd.edu/school-of-education-handbook>)

Education Undergraduate Admissions

Education majors interested in teaching are admitted to teacher education programs when they have achieved sophomore standing (completion of 30 hours), if they meet the following criteria:

- Application for admission
- Completion of an oral communication course
- Passing scores on the CORE Academic Skills for Educators exam (150 for Math, 156 for Reading and 162 for Writing)
- Completion of the introductory course work.
- Satisfactory evaluation in at least one paraprofessional or field experience
- Proficient in appropriate technology (TET 200)
- Satisfactory evaluation in at least one field experience
- Twenty hours of validated work with youth
- Cumulative GPA of at least 2.7

Additional Testing Requirements

- Students must achieve a passing score on Praxis II Content Exam to be eligible for Student Teaching
- Students must achieve passing scores on Praxis II Principles of Learning and Teaching (PLT) to complete the program

Teacher Education Forms

- Application for teacher education (<https://goo.gl/forms/oRUckAp5R1HMB0c2>)
- Change of cohort form (https://usdsoe.qualtrics.com/jfe/form/SV_bBkvBc9bBmwT50F)

Praxis Requirements, Information and Registration

- Praxis CORE (<https://my.usd.edu/SimpleContentPortlet/content/5ea0c1c2-9280-47d4-801e-b98c2bace46/PraxisCOREInformation.pdf>)
- South Dakota Praxis Qualifying Scores (<https://my.usd.edu/SimpleContentPortlet/content/bc19f1d2-c724-4a18-9a35-a97c8a62558d/SDPRAXISQualifyingScores2018.pdf>)
- Praxis Registration Information (<https://my.usd.edu/SimpleContentPortlet/content/bdc5e886-b1f5-4e5f-a194-48a3259f24c7/RegisterforPraxisExamsonline2018.pdf>)

Praxis Policy

- Students will receive an email from the School of Education Dean's office upon failing any

CORE test the first time. This email will explain the resources available to help students succeed with their subsequent attempts.

- A student who fails to meet the passing required score on any section (Reading, Writing or Math) of the CORE after three (3) attempts will not be eligible to apply to the Teacher Education Program.
- A student may petition the School of Education Dean for an exemption to be allowed to take and submit a 4th set of CORE scores. Should the Dean grant an exception, the student will not be allowed more than four total attempts.

Scholarships

Scholarships are available to students who qualify and are interested in teaching. Students should check with their Education advisor for more information.

- List of available scholarships (<http://www.usd.edu/education/scholarships>) ☞

Residency/Student Teaching

- Teacher Candidate Website (Residency/Student Teaching Application) (<https://sites.google.com/usd.edu/application-for-teacher-ed/residencystudent-teaching>) ☞

We pioneered a yearlong residency, which gives our students a full year of teaching experience incorporated into the four-year program.

This signature portion of our program gives you real-life teaching experiences as part of your education. Your residency will prepare you to graduate as a highly effective teacher while providing you with embedded course experience not available in other education programs.

The first semester of the yearlong residence includes selected courses that provide candidates opportunities to connect theory and practice to a P-12 school setting. Teacher candidates will begin the residence at the same time that their assigned mentor teacher begins their school year with district and building meetings and classroom planning time.

Our students say the program gives them a higher level of confidence in the classroom. They are more prepared to set out in their own classrooms and are more attractive teaching candidates because of this unique training.

Official Transcripts

You may request an official transcript from the Registrar's Office (<http://www.usd.edu/registrar>) ☞.

Certification

- U.S. Certification Offices (<http://www.usd.edu/education/certification>) ☞

Resources

- Job Search (USD Academic & Career Planning Center) (<http://www.usd.edu/acpc/coyote-careers>) ☞
- Associated School Boards of South Dakota Teacher Placement (<http://teacher.asbsd.org/Login.aspx>) ☞
- Teach in Nebraska Job Search (<http://www.nebraskaeducationjobs.com/>) ☞
- Iowa Regional Education Applicant Placement (<http://www.iareap.net/index.php>) ☞
- Teach Iowa (<http://www.teachiowa.gov/>) ☞
- Public School Search (<http://nces.ed.gov/cod/schoolsearch/>) ☞
- International Teaching Positions (<https://www.iss.edu/>) ☞
- Student Loan Forgiveness (<http://www2.ed.gov/fund/grants-college.html?src=m>) ☞