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JOHN DOE, APPELLANT, V. BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA ET AL., APPELLEES.

809 N.W.2d 263

Filed February 17, 2012. No. S-11-214.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's granting of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Judgments: Appeal and Error.** An appellate court will affirm a lower court's ruling which reaches the correct result, albeit based on different reasoning.
4. **Colleges and Universities.** Deference should be given to the substantive decision to dismiss a medical student for academic reasons.

Appeal from the District Court for Lancaster County: JODI NELSON, Judge. Affirmed.

John Doe, pro se.

Amy L. Longo and George T. Blazek, of Ellick, Jones, Buelt, Blazek & Longo, L.L.P., for appellees.

HEAVICAN, C.J., CONNOLLY, MCCORMACK, and MILLER-LERMAN, JJ., and SIEVERS and MOORE, Judges.

MILLER-LERMAN, J.

NATURE OF CASE

John Doe filed a lawsuit arising from the termination of his enrollment as a medical student at the University of Nebraska Medical Center (UNMC) College of Medicine against the Board of Regents of the University of Nebraska (Board of Regents), UNMC, and the following UMNC faculty members in each individual's official and individual capacities: John Gollan, M.D., Ph.D.; Robert Binhammer, Ph.D.; Jeffrey Hill, M.D.; Gerald Moore, M.D.; David O'Dell, M.D.; Wendy Grant, M.D.; Sharon Stoolman, M.D.; and Michael Spann, M.D. (collectively defendants). The amended complaint filed December 21, 2009, is the controlling complaint.

During the pendency of the case, all causes of action except the claim for breach of contract were dismissed. The defendants filed a motion for summary judgment as to the remaining contract cause of action. On February 17, 2011, the district court for Lancaster County determined that Doe's dismissal was not in violation of the October 3, 2006, contract regarding the conditions of his continued enrollment. The district court sustained the defendants' motion for summary judgment and dismissed Doe's cause of action for breach of contract, thereby dismissing the case. Doe appeals. Because we determine that the district court did not err when it sustained the defendants' motion for summary judgment, we affirm.

STATEMENT OF FACTS

This is Doe's second appearance before this court in connection with his dismissal from UNMC. In addition to the two state cases, Doe filed an action in the U.S. District Court for the District of Nebraska, which was dismissed without prejudice on October 27, 2010. The current case concerns only a breach of contract claim. In *Doe v. Board of Regents*, 280 Neb. 492, 788 N.W.2d 264 (2010) (*Doe I*), this court treated the breach of contract claim alleged therein as a reformulation of his due process claims and affirmed the dismissal of Doe's breach of contract claim as alleged therein. In *Doe I*, Doe did not rely on the October 3, 2006, agreement, whereas in the present appeal, he relies on the October 3 document, discussed below. Although the current breach of contract claim has not been previously considered by this court, certain facts and legal principles are common to both cases. Accordingly, we make reference to *Doe I* as it relates to the jurisprudence applicable to this case.

Doe began his enrollment as a medical student at UNMC in the 2003-04 academic year. During Doe's second year of medical school, UNMC granted Doe a leave of absence from school to receive treatment for depression, insomnia, and anxiety.

In the fall of 2005, Doe returned to UNMC and began his third year of medical school. During his third year, Doe received failing grades in his internal medicine clerkship and his obstetrics and gynecology clerkship. He also received a

near-failing grade in his pediatrics clerkship. Doe appealed his obstetrics and gynecology grade, which was upheld by both the obstetrics and gynecology department and UNMC. Doe did not appeal his pediatrics clerkship grade or his internal medicine clerkship grade. He alleges that O'Dell told him that his failure of the "NBME shelf exam," one component of his internal medicine clerkship grade, was not appealable and resulted in an automatic failure of the clerkship.

In July 2006, Hill, the associate dean for admissions and students, and Binhammer, the chair of the Scholastic Evaluation Committee (SEC), met with Doe to discuss his academic performance. The SEC had determined that Doe would have to repeat his third year of medical school. The SEC presented a contract to Doe that set forth terms for Doe's continued enrollment at UNMC. Doe did not sign this contract, and the matter was referred to the SEC for further consideration.

On October 3, 2006, the SEC held its regular meeting and placed Doe's academic issues on the agenda. Doe attended this meeting, and the SEC again presented him with a contract for continued enrollment. This time, the proposed contract contained a "professionalism clause," which stated: "I understand that any ratings of –2 or below on the professionalism ranking system, coupled with any negative comments concerning professional behavior, on any required clerkship or senior elective will be grounds for termination of enrollment." Doe signed this contract, and the SEC permitted Doe to continue his enrollment under the terms and conditions expressed in the October 3 contract. Throughout this case, the "rating" encompassed in the expression "ratings of –2 or below on the professionalism ranking system" has been referred to as the "checklist" and the expression "comments concerning professional behavior" has sometimes been referred to as an "evaluation."

In the fall of 2006, Doe was completing his surgery clerkship. During this time, Doe developed an umbilical hernia. Doe scheduled a surgery to repair the hernia for the afternoon of October 20, 2006. On the morning of October 20, all third-year medical students on surgery clerkship were scheduled to take the required surgical shelf exam.

Doe did not take the surgical shelf exam. Before the exam, Spann required Doe to participate in patient rounds, beginning at 6:30 a.m. Spann released Doe from rounds early so that Doe could take the surgery shelf exam. After rounds, Doe met with Grant, who was the associate director of medical student clerkships in the department of surgery. Grant gave Doe the option of taking the surgical shelf exam that morning or postponing the exam until after his pediatric clerkship, which would be several weeks later. Doe chose to postpone his exam. Grant informed Doe that she would review this decision with Hill or the SEC, because not taking the shelf exam would result in an incomplete or a failure grade for the rotation.

On November 7, 2006, the SEC held its regular meeting and again placed Doe's academic issues on its agenda. Doe was notified of the meeting, and he attended. At the meeting, the SEC determined that Doe violated the October 3, 2006, contract for continued enrollment and recommended the termination of Doe's enrollment at UNMC. By a letter from the SEC dated November 7, 2006, Doe was notified of the SEC's decision and was informed of his right to appeal.

Doe timely appealed the SEC's decision to the "Appeal Board." On December 19, 2006, the Appeal Board reviewed evidence and decided that dismissal was indicated. By a letter dated December 19, 2006, Gollan, the dean of the UNMC College of Medicine, agreed with the Appeal Board's decision and terminated Doe's enrollment at UNMC. Doe requested further review of the decision, but none was granted.

The present case is the second of three lawsuits Doe has filed regarding the termination of his enrollment at UNMC. The first two cases were filed in state court and the third was filed in federal court. Doe filed his first lawsuit in the district court for Douglas County against the Board of Regents, UNMC, and UNMC faculty members. This case resulted in *Doe I*. Doe sought damages for fraudulent concealment, alleged violations of his constitutional rights, and breach of contract. In that suit, the district court for Douglas County dismissed with prejudice Doe's complaint against the UNMC faculty members in their individual capacities, because Doe did not perfect service. The court also dismissed with prejudice Doe's complaint against

the Board of Regents, UNMC, and the UNMC faculty members in their official capacities. The court determined that Doe failed to state a claim for which relief can be granted or that his claims were barred by sovereign immunity.

Doe appealed the district court's decision to this court. In *Doe I*, this court affirmed in part, reversed in part, and remanded for further proceedings. This court concluded that Doe failed to state a claim for relief on his claims of fraudulent concealment, violations of due process, and breach of contract and affirmed the district court's decision in this regard. However, this court concluded that the district court erred when it dismissed Doe's lawsuit against the UNMC faculty members in their individual capacities without determining whether service by certified mail on the risk manager of UNMC was reasonably calculated to notify the members, in their individual capacities, of the lawsuit. This court also concluded that the district court erred when it dismissed Doe's claims under the Americans with Disabilities Act of 1990 and the Rehabilitation Act against the Board of Regents, UNMC, and the faculty members in their official capacities, based on our conclusion that the Americans with Disabilities Act of 1990 abrogates 11th Amendment immunity for title II claims against the State.

Doe filed the third lawsuit stemming from his termination as a medical student at UNMC in the U.S. District Court for the District of Nebraska, in case No. 8:10CV85, against the Board of Regents, UNMC, and UNMC faculty members. Doe filed a motion to dismiss that case on October 1, 2010, and the federal district court dismissed it without prejudice on October 27.

In the present case, Doe filed the initial complaint in the district court for Lancaster County against the defendants on July 31, 2009. On December 21, Doe filed a second amended complaint, which alleged five causes of action. Doe subsequently filed a motion to dismiss his causes of action one through four, which the district court sustained on September 24, 2010. Therefore, the only remaining cause of action considered by the district court and this court in the instant appeal concerns the fifth cause of action, in which Doe alleged that

the defendants breached the contract of October 3, 2006, when the SEC determined to dismiss him from the UNMC College of Medicine without sufficient proof he had violated its terms.

The contract upon which Doe relies is the October 3, 2006, document. Doe alleged that under the "professionalism clause" of the October 3 contract, the SEC could terminate Doe's enrollment only if both a "–2 or below" rating on a checklist and a negative comment concerning professional behavior on an evaluation were in existence and presented to the SEC at the time the SEC made its decision. There is no material dispute that the SEC had a negative evaluation before it. Doe alleged, however, that the undated "Professionalism Checklist" completed by Spann upon which the defendants rely, which contained more than one rating below –2, did not exist at the time the SEC terminated Doe's enrollment on November 7. Doe alleged that the defendants breached the October 3 contract when they dismissed him without proof before the SEC of both a negative checklist rating and a poor evaluation.

On August 18, 2010, the defendants moved for summary judgment. A hearing on the motion for summary judgment was held on December 20. During the hearing, the defendants offered exhibits that were received, including a "Primary Clerkship Clinical Evaluation Form" and a Professionalism Checklist concerning Doe's surgery clerkship. Spann completed the Primary Clerkship Clinical Evaluation Form and the Professionalism Checklist as part of Doe's plastic surgery clerkship. On the Primary Clerkship Clinical Evaluation Form, Spann commented that Doe was "often late for rounds, minimal active participation in [patient] care" and that Doe was "severely deficient in many areas: knowledge, patient care, team approach, communication, personal responsibility." On the Professionalism Checklist, Spann gave Doe four ratings of –3, one rating of –1, and one rating of "[p]redicted." Neither the Primary Clerkship Clinical Evaluation Form nor the Professionalism Checklist was dated. The defendants contended that this poor evaluation and this checklist established Doe's lack of professionalism and justified the recommendation of dismissal by the SEC under the October

3, 2006, contract. Doe questioned whether the checklist existed on November 7 and was presented to the SEC. Doe asserts throughout this case that the first time he saw the Professionalism Checklist was on December 18, which was after the November 7, 2006, SEC ruling but 1 day before his hearing with the Appeal Board.

At the hearing on the motion for summary judgment, the defendants also offered an e-mail from Spann to Grant dated October 20, 2006, which was received. In the e-mail, Spann provided a summary of Doe's performance during his plastic surgery rotation. Spann stated, "[Doe] continually demonstrated a lack of responsibility to the service and his education." Spann also stated that Doe "has critical weaknesses in many areas: knowledge base, communication, responsibility, motivation, and patient care."

On February 17, 2011, the district court sustained the defendants' motion for summary judgment and dismissed Doe's remaining cause of action for breach of contract. Although it expressed some doubt whether the October 3, 2006, agreement constituted a contract, the district court nevertheless proceeded to the merits, stating that the motion for summary judgment should not be sustained on the basis of an absence of a contract. Instead, the court found that there was no evidence to support Doe's claim the checklist was not before the SEC and that therefore, the defendants did not breach the contract. The court dismissed all the claims against all the defendants, including all persons named in their official and individual capacities.

Doe appeals.

ASSIGNMENT OF ERROR

Doe claims, restated and summarized, that the district court erred when it granted the defendants' motion for summary judgment and dismissed Doe's remaining cause of action for breach of contract.

STANDARDS OF REVIEW

[1,2] An appellate court will affirm a lower court's granting of summary judgment if the pleadings and admitted evidence

show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Alsidez v. American Family Mut. Ins. Co.*, 282 Neb. 890, 807 N.W.2d 184 (2011). In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence. *Id.*

ANALYSIS

Doe claims that the district court erred when it sustained the defendants' motion for summary judgment. Doe contends that the October 3, 2006, contract ensured his continued enrollment unless both a negative checklist and a poor evaluation were presented to the SEC. Doe argues that the Professionalism Checklist completed by Spann was neither in existence nor before the SEC at its meeting on November 7 and that therefore, the SEC did not have evidence of both checklist "ratings of –2 or below on the professionalism ranking system" as well as an evaluation reflecting "negative comments concerning professional behavior." Doe asserts that because the SEC did not have evidence of checklist ratings of –2 or below when it terminated Doe's enrollment as a medical student at UNMC, the defendants breached the October 3 contract of continued enrollment. We reject Doe's argument.

[3] As explained below, regardless of whether the checklist was before the SEC, the negative checklist and a poor evaluation were before the Appeal Board and justified the dismissal. We believe the district court was in error when it states there was no evidence to support Doe's assertion that the Spann checklist was not before the SEC. To the contrary, there are inferences supporting Doe's claim. However, we will affirm a lower court's ruling which reaches the correct result, albeit based on different reasoning. See *Tolbert v. Jamison*, 281 Neb. 206, 794 N.W.2d 877 (2011) (affirming summary judgment for reasons different from that of lower court). Although our analysis differs from that of the district court, the district court did not err when it determined that the defendants did not breach

the October 3, 2006, contract and granted summary judgment in favor of the defendants.

As an initial matter, we note that there is no issue that Doe complied with the State Contract Claims Act, see Neb. Rev. Stat. § 81-8,304 (Reissue 2008), and that his contract-based case was filed in the district court for Lancaster County, see Neb. Rev. Stat. § 25-21,206 (Reissue 2008). He was entitled to pursue his contract cause of action in the district court for Lancaster County.

Although the district court expressed doubt whether the October 3, 2006, agreement constituted a contract, neither Doe nor the defendants challenge the existence or enforceability of the October 3 contract. It is commonplace to find a contractual relationship between a public postsecondary educational institution and a student. See *Kashmiri v. Regents of University of Cal.*, 156 Cal. App. 4th 809, 67 Cal. Rptr. 3d 635 (2007). We agree that the October agreement is a contract. Indeed, in *Doe I* in dicta, we referred to the October 3 agreement as a "contract" and distinguished it from the SEC guidelines, which permit an appeal and allegedly formed an additional "implicit contract between [Doe] and the Board [of Regents], UNMC, and the UNMC faculty members in their official capacities." 280 Neb. at 532, 788 N.W.2d at 294. The due process feature of the SEC guidelines, not the October 3 contract, was at issue in the breach of contract claim in *Doe I*.

In *Doe I*, we recognized that with regard to dismissed medical students, the U.S. Supreme Court has distinguished between "academic" and "disciplinary" dismissals. See *Board of Curators, Univ. of Mo. v. Horowitz*, 435 U.S. 78, 98 S. Ct. 948, 55 L. Ed. 2d 124 (1978). In *Doe I*, as in the instant case, Doe's claim of wrongful dismissal involves an academic dismissal. Courts have found that academic decisions made by universities are given deference. E.g., *Bell v. Ohio State University*, 351 F.3d 240 (6th Cir. 2003); *Abdullah v. State*, 771 N.W.2d 246 (N.D. 2009); *Gupta v. New Britain General Hosp.*, 239 Conn. 574, 687 A.2d 111 (1996).

[4] In *Abdullah, supra*, the Supreme Court of North Dakota concluded that the trial court properly applied deference to a medical school's decision to dismiss a student and that

the trial court did not err when it granted summary judgment against the student on his breach of contract claim. In *Abdullah*, the student was dismissed from a residency training program at a public educational institution for reasons involving professionalism and academic performance. In analyzing the student's breach of contract claim, relying on statements made by the U.S. Supreme Court, the North Dakota Supreme Court noted, "'Courts are particularly ill-equipped to evaluate academic performance.'" *Abdullah*, 771 N.W.2d at 254 (quoting *Horowitz, supra*). Additionally, the court stated, "'Academic evaluations of a student, in contrast to disciplinary determinations, bear little resemblance to the judicial and administrative factfinding proceedings . . . which . . . traditionally attached a full-hearing requirement.'" 771 N.W.2d at 254 (quoting *Horowitz, supra*). The court also stated, "'[T]he determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking.'" 771 N.W.2d at 254 (quoting *Horowitz, supra*). In *Doe I*, we recognized that "expertise" is required in matters of academic judgment. 280 Neb. at 531, 788 N.W.2d at 294. It has been stated that deference should be given to the substantive decision to dismiss a medical student for academic reasons. See *Abdullah, supra.* We apply deference in this case.

The parties agree that the evaluation form completed by Spann was in existence and before the SEC at its November 7, 2006, meeting, when the SEC decided to terminate Doe's enrollment at UNMC for failure to meet professionalism standards. The evaluation form contains obvious negative comments concerning Doe's professional behavior. To the extent this decision and that of the Appeal Board were based on the evaluation, we give it deference.

Doe acknowledges that the evaluation was before the SEC. He asserts, however, that at its November 7, 2006, meeting, the SEC did not have evidence of any checklist ratings below –2, and that, given this lacuna in the evidence, the SEC could not have properly found that Doe violated the professionalism clause of the contract. At the summary judgment hearing

and again on appeal, Doe questions whether the checklist was in existence on November 7. Doe asserts that without the checklist rating, the SEC could not have properly found that he violated the professionalism clause of the October 3, 2006, contract and the defendants breached the October 3 contract when the SEC dismissed him.

The defendants contend that the greater weight of the evidence at the summary judgment hearing shows the Professionalism Checklist completed by Spann was in existence and before the SEC at its meeting on November 7, 2006, and that therefore, proof of the two bases for termination was present before the SEC, as the district court found. The defendants acknowledge that the checklist is undated but contend that there is other evidence from which it can be found that the checklist existed prior to November 7 and formed a basis upon which the SEC decided to terminate Doe's enrollment for failure to comply with the conditions for his continued enrollment, set forth in the October 3, 2006, contract. For example, the defendants refer us to the record and note that certain UNMC faculty members stated that the checklist was before the SEC at its November 7 meeting. However, there are inconsistencies among the witnesses as to which documents were presented to the SEC. The defendants also direct us to the termination letter sent to Doe from the SEC immediately after the November 7 meeting which states that Doe's termination was due to professionalism issues.

In reviewing a grant of summary judgment, we view the evidence in the light most favorable to the party against whom the judgment was granted, and give that party the benefit of all reasonable inferences deducible from the evidence. See *Alsidez v. American Family Mut. Ins. Co.*, 282 Neb. 890, 807 N.W.2d 184 (2011). Contrary to the defendants' suggestion that the greater weight of the evidence supports a finding that the checklist ratings were before the SEC, in our analysis, we are required to give the reasonable inferences on this issue in favor of Doe as we review this appeal from a summary judgment ruling. As Doe contends, contrary to the defendants' argument and the district court's finding, a review of the record demonstrates that reasonable inferences can be made which favor

Doe to the effect that the Professionalism Checklist completed by Spann was neither in existence nor before the SEC at its November 7, 2006, meeting.

In addition to the inconsistencies among the witnesses, the evidence from which it can be inferred that the Spann checklist or other checklists did not exist before the SEC on November 7, 2006, includes but is not limited to the following facts. On October 20, 2006, Spann sent an e-mail to Grant which provided a "brief summary" of Doe's performance during his 2-week plastic surgery rotation. After providing the summary, Spann concludes, "I am available to discuss these issues in further detail if necessary." The statement suggests that Spann had completed his reporting and promises nothing further. The e-mail does not make reference to a Professionalism Checklist or ratings given on the professionalism ranking system. The transmittal does not include a checklist, and Spann does not suggest or promise to complete a checklist in the near future.

On October 22, 2006, Grant sent an e-mail to Hill, which stated that she had received but "not yet revie[w]ed two of the three evaluations from the 8 weeks, just the one from plastics, which is poor." The e-mail refers to the evaluation from Spann but does not make reference to having also received a checklist. One can reasonably infer that no checklists had been received on this date and that, as Doe contends, Grant was neither aware of nor awaiting a checklist.

The record shows that on November 6, 2006, in preparation for the meeting, a department of surgery employee indicated that she had Doe's evaluations, had no "ER information," and had found the checklist forms. Given the context, it can be inferred that the employee had discovered blank checklist forms. November 6 was the day before the SEC meeting in question. An inference can be made that no completed checklists had been received, had been anticipated, or were available for the SEC meeting on November 7.

On December 18, 2006, the coordinator for admissions and students faxed 31 pages consisting of many documents to the defendants' counsel, stating that all the information transmitted had been provided to the SEC at its meeting on

November 7, 2006, plus Doe's letter of termination. These documents contained several checklist ratings, including a Professionalism Checklist completed by Spann, a Primary Clerkship Clinical Evaluation Form completed by Spann, and a 2-week course evaluation completed by Dr. Kristine Bott. With the exception of the course evaluation completed by Bott, dated November 10, 2006, none of these documents contained a date. The date on Bott's evaluation is obviously after the SEC meeting held November 7 and casts doubt on the assertion that all these documents had been before the SEC. Doe suggests and we agree that, for purposes of summary judgment, it can be inferred that the remainder of the undated documents were not necessarily in existence or viewed by the SEC at its meeting on November 7, at which it determined to dismiss Doe. This group of documents was, however, before the Appeal Board.

Because we are required to view the evidence from the summary judgment hearing in the light most favorable to Doe as the nonmoving party, see *Alsidez v. American Family Mut. Ins. Co.*, 282 Neb. 890, 807 N.W.2d 184 (2011), inferences can be made that no checklist—in particular, Spann's Professionalism Checklist—was in existence or before the SEC at its November 7, 2006, meeting. Given this inference, we must assume that when the SEC decided to terminate Doe's enrollment at UNMC on November 7, it did not have evidence of a checklist rating of –2 or below on the professionalism ranking scale. There is no real dispute that the SEC had a poor evaluation before it when it met on November 7. However, given the inference that the SEC did not also have a negative checklist and lacked evidence that Doe had violated this aspect of the professionalism clause of the October 3, 2006, contract, the defendants were not warranted in terminating Doe's enrollment at this point in time. This determination, however, does not conclude our inquiry.

According to the SEC guidelines which are in evidence, Doe was entitled to a review by the Appeal Board of the SEC's decision to terminate his enrollment. Upon Doe's request, he was given a hearing before the Appeal Board. According to the SEC guidelines, if a student requests a personal appearance

before the Appeal Board, the request shall be granted. The SEC guidelines permit the receipt of additional evidence by the Appeal Board at its review.

The SEC guidelines state, "If a request for a tape recording of the meeting is made, the secretary shall arrange for a tape recording of the student's testimony and the testimony of any other witnesses and also prepare a digest of the hearing." The SEC guidelines further provide:

> After thorough consideration of all the presented written and/or oral testimony, the Appeal Board shall determine by secret ballot, either to sustain the original recommendation of the [SEC] or recommend its abrogation or modification. The decision of the Appeal Board, which will be based solely on the results of its investigation and, if a hearing has been held, the evidence presented at the hearing, shall be presented to the Dean of the College of Medicine as a recommendation. The Dean shall make the final decision.

According to the SEC guidelines, the Appeal Board makes its decision based on the results of its own investigation and evidence that is presented at the hearing. Referring to the guidelines concerning the appeal procedure, in *Doe I*, we described the procedural due process that Doe received thereunder as adequate. We reach the same conclusion here.

According to the SEC guidelines, the Appeal Board is not limited to the record made at the SEC; evidence consists of its own investigation, and such investigation can include additional evidence. Thus, the Appeal Board could consider the Professionalism Checklist completed by Spann, even if it was not before the SEC.

Allowing new evidence to be presented on review, although not commonplace, finds support within our jurisprudence. For example, in *Koch v. Cedar Cty. Freeholder Bd.*, 276 Neb. 1009, 759 N.W.2d 464 (2009), a group of taxpayers sought review in the district court of the decision of the county freeholder board which had approved the transfer of property from one school district to another. We concluded that according to statute and case law, the district court was allowed to accept new evidence on the appeal, because the appeal was taken as a trial

de novo before the district court. In *Koch*, we explained the trial de novo:

> "When an appeal is conducted as a 'trial de novo,' as opposed to a 'trial de novo on the record,' it means literally a new hearing and not merely new findings of fact based upon a previous record. A trial de novo is conducted as though the earlier trial had not been held in the first place, and evidence is taken anew as such evidence is available at the time of the trial on appeal."

276 Neb. at 1019, 759 N.W.2d at 473 (quoting *In re Covault Freeholder Petition*, 218 Neb. 763, 359 N.W.2d 349 (1984)). Thus, allowing an appellate body to accept new evidence on appeal is allowable where provided for by statute or internal guidelines which are consistent with due process. We read the SEC guidelines as permitting the taking of such evidence as is available at the time the Appeal Board meets.

In the present case, there is no dispute that the Professionalism Checklist completed by Spann was in existence and before the Appeal Board at the December 19, 2006, hearing. The parties agree that the Appeal Board received the negative checklist document and considered it in its decision to dismiss Doe from UNMC. Because the Appeal Board had the checklist showing that Doe had received ratings below –2 on the professionalism ranking system as well as the negative evaluation, it had before it the two necessary items which supported the determination that Doe violated the professionalism clause in the October 3, 2006, contract. UNMC did not breach its contract with Doe when it terminated his enrollment. Although our reasoning differs somewhat from that of the district court, the district court did not err when it determined that the defendants did not violate the October 3 contract and sustained the defendants' motion for summary judgment.

CONCLUSION

The district court did not err when it sustained the defendants' motion for summary judgment and dismissed the complaint. Accordingly, we affirm.

AFFIRMED.

WRIGHT and STEPHAN, JJ., not participating.