

STATE OF NORTH CAROLINA

COUNTY OF WAKE

JASON R. SAINÉ and
DONALD D. REID,

Plaintiffs,

vs.

STATE OF NORTH CAROLINA;
BEVERLY PERDUE, Governor of the
State of North Carolina, in her official
capacity; J. KEITH CRISCO, Secretary
of the North Carolina Department of
Commerce, in his official capacity; and
JOHNSON AND WALES
UNIVERSITY,

Defendants.

FILED IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

Case No. 09 CVS 18806

2010 MAR -4 A 11:01

WAKE COUNTY, CSC

ORDER

THIS MATTER, having been called for hearing on February 16, 2010 before the Honorable Michael R. Morgan, judge presiding, in the Wake County Superior Court, on Defendant Johnson And Wales University's Motion to Dismiss Plaintiffs' Complaint and Petition for Declaratory Judgment filed on November 16, 2009 and the State Defendants' Motion to Dismiss filed on November 16, 2009, and the Court having reviewed the Complaint, the two Motions to Dismiss, and having heard and considered arguments and submissions of counsel, the Court finds and concludes as follows:

1. The Defendants' motions to dismiss seek dismissal of this action on two grounds. First, Defendants seek dismissal of all counts in the Complaint under N.C. R. Civ. Pro. Rule 12(b)(6) for failure to state a claim upon which relief can be granted. Second, Defendants seek dismissal of Count III of the Complaint (Equal Protection Clause and Law of the Land Clause) under N.C. R. Civ. Pro. Rule 12(b)(1) for lack of jurisdiction over the subject matter.

2. Count I of the Complaint alleges that the Defendants violated Article I, Section 32 of the North Carolina Constitution in that preferential benefits, grants, and/or subsidies provided to the Defendant Johnson and Wales University accrued to the University's private financial benefit and are, thus, exclusive and separate emoluments not in exchange for any public service.

3. As in Blinson v. State, 186 N.C. App. 328, 651 S.E.2d 268 (2007), this Court will first analyze and rule upon the public purpose issue raised in Count II of the Complaint before addressing the exclusive emoluments issue raised in Count I of the Complaint.

4. Count II of the Complaint alleges that direct cash grants made by the State of North Carolina to the Defendant Johnson and Wales University violate Article V, Section 2, Subsection 1 of the North Carolina Constitution in that the benefits, grants, and/or subsidies provided to the Defendant Johnson and Wales University were direct government subsidies for a private institution and not for a public purpose.

5. Blinson v. State, 186 N.C. App. 328, 651 S.E.2d 268 (2007) and Maready v. City of Winston-Salem, 342 N.C. 708, 467 S.E.2d 615 (1996) both explain that economic development incentive grants constitute a legitimate public purpose.

6. In Hughey v. Cloninger, 297 N.C. 86, 253 S.E.2d 898 (1979), the North Carolina Supreme Court stated that it is constitutionally permissible for governmental entities to appropriate public funds to a private educational institution as a legitimate public purpose.

7. Both Blinson and Maready cite the case of Madison Cablevision v. City of Morganton, 325 N.C. 64, 386 S.E.2d 200 (1986), which established a two-pronged analysis in determining whether a particular undertaking was done for a public purpose.

8. The two-pronged approach described in Madison Cablevision is as follows:

a. Does the undertaking involve a reasonable connection with the convenience and necessity of the particular municipality; and

b. Does the activity benefit the public generally as opposed to special interests or persons?

9. The Blinson Court also cited Maready for the principle that an expenditure does not lose its public purpose merely because it involves a private actor. Generally, if an act will promote the welfare of a state or local government and its citizens, it is for a public purpose.

10. In the instant case, the General Assembly cited the legitimate public purposes of economic development (as recognized in Blinson and Maready) and the furtherance of education (as recognized in Hughey) to be accomplished by the appropriations made by the General Assembly, as described in Session Law 2003-284, House Bill 387, Section 12.4A, Subsection (a).

11. Based on the precedents described herein and their analysis of the issues that exist also in this case, as to Count II of the Complaint the Defendants' motions to dismiss under Rule 12(b)(6) should be granted as a matter of law and are therefore ALLOWED.

12. Addressing Count I of the Complaint, alleging a violation of the exclusive emoluments clause, the North Carolina Court of Appeals in Blinson embraced the analysis of Peacock v. Shinn, 139 N.C. App. 487, 533 S.E.2d 842 (2000), in which the Court of Appeals stated, "When legislation is determined to promote the public benefit under the public purpose clause, it necessarily is not an exclusive emolument."

13. This Court, having determined that the challenged appropriations were stated to have been created to serve the legitimate public purposes of economic development and education,

finds that the grant of public funds to the Defendant Johnson and Wales University is not an exclusive and separate emolument as alleged by Plaintiffs.

14. Having determined that the challenged appropriations are not an exclusive emolument, consistent with the Blinson analysis it is not necessary for this Court to determine whether or not the appropriations were made in consideration of public services.

15. Based on the precedents described herein and their analysis of the issues existing in this case, as to Count I of the Complaint the Defendants' motions to dismiss under Rule 12(b)(6) should be granted as a matter of law and are therefore ALLOWED.

16. Count III of the Complaint alleges that the Plaintiffs, as non-beneficiaries under the session laws which provided for direct cash grants to Johnson and Wales University, have been denied equal protection of the laws and due process as guaranteed to them by Article I, Section 19 of the North Carolina Constitution.

17. Plaintiffs allege that they are taxpayers and citizens of North Carolina. While Plaintiffs have an interest in the allocation and usage of their tax dollars by the North Carolina General Assembly, they have not alleged that they belong to a legally recognizable and identified protected class of individuals so as to invoke an equal protection claim based on a protected class.

18. Nor have Plaintiffs alleged that they have been treated differently than Defendant Johnson and Wales University as to any actions Plaintiffs themselves took to similarly qualify for or seek funds for economic development or furtherance of educational opportunity.


19. Likewise, in regard to Plaintiffs' equal protection and due process assertions, there is no violation of the rational basis test, as the challenged legislation bears a rational relationship to the valid state objectives of economic development and furtherance of education.

20. Based on the appellate precedents described herein, such as the Blinson decision, this Court concludes as a matter of law that the Defendants' motions to dismiss Count III of the Complaint under Rule 12(b)(1) should be granted as a matter of law and are therefore ALLOWED due to Plaintiffs' lack of standing on their equal protection and due process claims.

21. As to Count IV of the Complaint, the declaratory judgment sought by Plaintiffs would not be consistent with this Court's rulings on Counts I, II and III of the Complaint for the reasons set forth above. Therefore, this Court concludes as a matter of law that the Defendants' motions to dismiss Count IV of the Complaint under Rule 12(b)(6) should be granted as a matter of law and are therefore ALLOWED.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that all claims and causes of action in the Complaint in this matter are hereby dismissed with prejudice as against all Defendants as set forth above.

SO ORDERED, this the 2nd day of March, 2010.



The Honorable Michael R. Morgan
Wake County Superior Court Judge Presiding

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of March, 2010, I served the foregoing Order by depositing the document in a post-paid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service, addressed to the following:

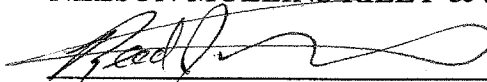
Robert F. Orr
Jeanette K. Doran
333 E. Six Forks Road, Suite 180
Raleigh, NC 27609

Counsel for the Plaintiffs

Norma S. Harrell
Special Deputy Attorney General
North Carolina Department of Justice
114 W. Edenton Street
Raleigh, NC 27603-1013

*Counsel for Defendants State of North Carolina, Beverly Perdue,
and J. Keith Crisco*

NELSON MULLINS RILEY & SCARBOROUGH, LLP



Reed J. Hollander
N.C. State Bar No. 23405
Stephen D. Martin
N.C. State Bar No. 28658
GlenLake One, Suite 200
4140 Parklake Avenue
Raleigh, NC 27612
Telephone: (919) 877-3800
Facsimile: (919) 877-3799

Attorneys for Defendant Johnson and Wales University