Giving Repose to the Exhaustion Doctrine: An Argument for More Exceptions to Exhaustion of Administrative Remedies in the Context of the University of Minnesota Grievance Procedure

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Note

Giving Repose to the Exhaustion Doctrine:
An Argument for More Exceptions to Exhaustion of Administrative Remedies in the Context of the University of Minnesota Grievance Procedure

Jennifer Callahan Berry*

In the past several decades, the field of employment law has grown tremendously. Between 1960 and 1990, Congress enacted two-dozen major employment law statutes; and in the twenty years between 1971 and 1991, employment litigation increased by 430%. To cope with this explosive change, employers have sought alternative mechanisms to resolve disputes and stay out of court. Once strictly a labor law phenomenon, alternative dispute resolution (ADR) practices like mediation and arbitration are proliferating in the employment law context.  

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Employers have incorporated formal ADR practices into what are becoming increasingly sophisticated grievance policies. Now, disputes that would have gone directly to court are getting there later or perhaps not at all. Employees who wish to appeal an ADR decision may find that they can only obtain limited judicial review, if any.

The adoption of in-house grievance procedures and increasing use of ADR practices present interesting questions regarding how informal dispute resolution procedures mesh with pre-established judicial structures like judicial review. This Note explores some of these issues as they arise in relation to two recent Minnesota Court of Appeals cases. Both *Stephens v. Board of Regents of the University of Minnesota* and *University of Minnesota v. Woolley* involved university employees seeking review of adverse employment decisions. After these cases, some stages of the University of Minnesota's grievance process are subject to judicial review by writ of certiorari, while others are governed by the Minnesota Uniform Arbitration Act (MUAA) and are almost entirely insulated from any review.

The University of Minnesota grievance process and judicial review of university employment decisions are of particular significance because the university is one of the largest employers in the state. Despite the number of employees, Minnesota courts and the state legislature are reluctant to weigh in on university employment practices out of respect for its special legal status under the Minnesota Constitution. As a result, university employment decisions are not subject to the same type of review that decisions by other employers receive. As

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4. See id. at 237–38.
7. See id. at 306; see also infra notes 81–82 and accompanying text.
8. See id. at 307–08; see also infra notes 78–83 and accompanying text.
9. In 2003, the University of Minnesota employed over 17,000 full-time equivalent employees. Press Release, Program Evaluation Division, State of Minnesota Office of the Legislative Auditor, Compensation at the University of Minnesota (Feb. 17, 2004), at http://www.auditor.leg.state.mn.us/ped/2004/0402sum.htm (offering an executive summary of a study by the same name).
10. See infra notes 43–48 and accompanying text.
11. Minnesota courts apply low-level review (by certiorari) to the employment decisions of other public employers as well. See, e.g., Dietz v. Dodge County, 487 N.W.2d 237, 239 (Minn. 1992) (concluding that certiorari is proper for a nursing home administrator's challenge to her employment termination by the county); State ex rel. Ging v. Bd. of Educ., 7 N.W.2d 544, 556 (Minn. 1942), overruled on another point of law by Foesch v. Indep. Sch. Dist.
Stephens and Woolley demonstrate, Minnesota courts justify this treatment by applying legal doctrine and review mechanisms that are rooted in administrative law.12

Part I of this Note describes Stephens and Woolley in detail, exploring the courts’ reasoning and doctrinal support. Part II considers the propriety of applying administrative law doctrine outside the administrative context. Part II also explores some of the problems that arise when pre-established judicial structures are forced onto informal grievance procedures. Part II concludes that University of Minnesota employees’ rights are not sufficiently protected when low-level appellate review is applied to the employment setting, where there is a risk of fewer procedural safeguards, and where employees may bring less bargaining power to the table. Part III proposes a solution whereby courts carefully allow exceptions to the exhaustion doctrine when the interests of the individual employee outweigh administrative convenience.

I. STEPHENS AND WOOLLEY: LIMITING JUDICIAL REVIEW OF THE UNIVERSITY GRIEVANCE PROCESS

A. STEPHENS V. BOARD OF REGENTS OF THE UNIVERSITY OF MINNESOTA

In 2000, the Minnesota Court of Appeals decided Stephens v. Board of Regents of the University of Minnesota, in which a former University of Minnesota employee sought review of the university president and board of regents’ decision to reassign her and not to renew her employment contract.13 The university hired Georgina Stephens for the position of Associate Vice President for Finance and Operations and Treasurer in 1997.14

No. 646, 223 N.W.2d 371 (Minn. 1974) (holding that certiorari is the only method for review of school board decisions); Bahr v. City of Litchfield, 420 N.W.2d 604, 606 (Minn. 1988) (finding that the proper vehicle for obtaining judicial review of city’s and police civil-service commission’s promotion and hiring procedures is by writ of certiorari). This Note argues that low-level judicial review is particularly problematic for university employment decisions because the university enjoys greater autonomy as compared to other administrative agencies. However, one could argue that, for the reasons cited in this Note, review by certiorari is inadequate as applied to all public employers’ employment decisions.

12. See infra Part I.
14. Id.
In 1999, one of Stephens's former coworkers alleged that Stephens had engaged in conduct which made her unfit in her present position at the university. An ongoing investigation revealed that Stephens had lied in submissions to a Minnesota district court, failed to file income-tax returns for the three years prior to her appointment, and neglected to disclose required information in bankruptcy petitions. This conduct made Stephens uninsurable under the university's fidelity-and-crime insurance policy. On November 20, 1999, University President Mark Yudof informed Stephens that it would be inappropriate for her to continue employment in her current position. On December 1, the university notified Stephens that her contract—set to expire on June 30, 2000—would not be renewed. The university reassigned her to other duties pending the expiration of her employment contract.

Stephens originally filed a grievance pursuant to the University of Minnesota Grievance Policy (UGP) with the University Grievance Office on November 8, 1999—the same day the university interviewed her as part of the investigation into her conduct. Stephens later suspended her grievance pending the outcome of the university's investigation. After receiving notice of the university's decision to not renew her employment contract, Stephens revived the grievance process by filing an amended grievance. Pursuant to the UGP, a university griev-
ance officer scheduled a meeting between President Yudof and Stephens for December 15, 1999. However, Stephens withdrew from the grievance process one day before her scheduled meeting with President Yudof. She then petitioned the Minnesota Court of Appeals for certiorari review of the university’s decisions to reassign her and to not renew her contract. Specifically, Stephens’s petition alleged that the university had “defamed her, retaliated against her because of her public statements regarding the university, violated her due-process rights, and discriminated against her because she had filed for bankruptcy.” She also alleged that the university breached her employment contract and violated its own policies by reaching its decision to terminate in an arbitrary and capricious manner.

The court of appeals held that a university employee challenging an adverse employment decision by the university must exhaust the applicable grievance process before seeking review of the decision by writ of certiorari. Because Stephens withdrew from the university grievance process before completing Phase I, she could not appeal her reassignment or the university’s failure to renew her employment contract. Only after

24. Id.
25. Id.
26. Id. By writ of certiorari, a superior court may review the record and decision of an inferior court or body acting in a quasi-judicial capacity. See, e.g., Dietz v. Dodge County, 487 N.W.2d 237, 289 (Minn. 1992). Certiorari is generally the only method available for judicial review of a University of Minnesota employment decision. Shaw v. Bd. of Regents of the Univ. of Minn., 594 N.W.2d 187, 191 (Minn. Ct. App. 1999); see also infra note 85 and accompanying text. The Minnesota Court of Appeals hears certiorari appeals from University of Minnesota employment decisions in accordance with Minn. Stat. § 606.01. See Heideman v. Metro. Airports Comm’n, 555 N.W.2d 322, 324 (Minn. Ct. App. 1996).
27. Stephens, 614 N.W.2d at 768.
28. Id. The Minnesota Court of Appeals declined to address several of Stephens’s other claims on the ground that she provided no legal analysis or citation to relevant authority. Id. at 771 n.4.
29. Id. at 777.
30. See id. at 775. The grievance policy is comprised of four phases. Stephens’s scheduled meeting with President Yudof was part of Phase I, which consists of an informal meeting between the grievant and a university representative, usually the person responsible for the action that is grieved. UGP, supra note 21, § 6(1). The meeting is chaired by a university grievance officer, whose goal is to facilitate grievance resolution through informal discussion and negotiation between the parties. Id. § 6(3). If the grievant is unsatisfied after Phase I, he or she may proceed to a Phase II informal meeting with a university administrator, typically the supervisor of the person responsible for
exhausting the university's internal remedies could Stephens seek some sort of judicial review—most likely by writ of certiorari.31

In arriving at its holding, the Stephens court relied upon two doctrines grounded in administrative law. First, the court applied the doctrine of exhaustion of administrative remedies, which directs disputes involving administrative bodies to the relevant administrative grievance process. Under the exhaustion doctrine, a claimant may apply for judicial review only after exhausting any existing administrative process.32 Second, the court invoked the tenet that certiorari, a nonintrusive and expedient form of judicial review, is the only review available from quasi-judicial decisions made by administrative bodies.33

B. EXHAUSTION OF REMEDIES

Exhaustion of administrative remedies is a judge-made doctrine applicable to cases involving an administrative process.34 The doctrine developed out of several early twentieth century cases in which plaintiffs sought injunctive relief against administrative bodies.35 Specifically, the doctrine provides that

the action that is grieved. See id. § 7. Phase III consists of an evidentiary hearing before a three-member panel. Id. § 8(1). When a grievant is dissatisfied with the decision of a Phase III panel, he or she may proceed to Phase IV arbitration. See id. § 8(7).

31. Stephens, 614 N.W.2d at 774. But see Lee v. Regents of the Univ. of Minn. 672 N.W.2d 366, 371 (Minn. Ct. App. 2003) (finding that a university employee is not limited to certiorari review when her claim does not involve an inquiry into the university's decision to terminate her employment, but instead involves the university's alleged noncompliance with a Phase III panel's order). The court of appeals in Stephens indicated that certiorari review should not be applied to statutory claims. Stephens, 614 N.W.2d at 771-75. In a later opinion, when Stephens returned to the court of appeals to challenge the district court's dismissal of her statutory claims, the court of appeals held that statutory claims are similarly exempt from the exhaustion requirement articulated in Stephens's first case. Stephens v. Bd. of Regents of the Univ. of Minn. (Stephens II), No. C3-01-1772, 2002 WL 1315809, at *3 (Minn. Ct. App. June 18, 2002); see also Lee, 672 N.W.2d at 371 (finding that statutory claims are not limited to certiorari review, but are within district court jurisdiction).

32. Stephens, 614 N.W.2d at 773-74.
33. Id. at 769-71.
34. See, e.g., McKart v. United States, 395 U.S. 185, 193 (1969) (describing exhaustion of administrative remedies as a "judicial doctrine").
a plaintiff must exhaust the appropriate administrative process before filing an action for judicial review.\textsuperscript{36}

The exhaustion doctrine serves two primary functions: recognizing agency autonomy and promoting judicial efficiency. Disallowing circumvention of administrative procedures preserves agency authority by encouraging people to respect agency rules and decisions.\textsuperscript{37} Protection of agency authority is particularly compelling when agency decision making involves either the exercise of powers delegated by the legislature or the application of special expertise not within the conventional experience of judges.\textsuperscript{38} Agencies are given the first chance to exercise discretion or apply expertise precisely because of the body of experience and knowledge they amass over time.\textsuperscript{39}

The exhaustion doctrine furthers efficiency interests by allowing agencies to correct their own errors before involving the judiciary. Judicial economy is most obviously served by reducing court docket loads; a favorable decision for a claimant keeps the dispute out of the courts entirely.\textsuperscript{40} But agencies also play an important fact-finding role. When a claimant exercises the right to judicial review after exhausting the available administrative remedies, courts benefit from the existing administrative record.\textsuperscript{41} Additionally, judicial deference to administrative remedies serves efficiency by ensuring a more uniform approach to issues within an agency's jurisdiction.\textsuperscript{42} Allowing various courts to concurrently interpret an agency's policies may result in conflicting and confusing opinions.

\begin{itemize}
  \item line Co. v. Slattery, 302 U.S. 300 (1937); Myers v. Bethlehem Shipbuilding, 303 U.S. 41, 50–51 (1938) (formally referring to the rule requiring exhaustion for the first time).
  \item \textsuperscript{36} Myers, 303 U.S. at 50–51.
  \item \textsuperscript{37} McKart, 395 U.S. at 193–94.
  \item \textsuperscript{38} Id. at 194; see also Weinberger v. Bentex Pharm., Inc., 412 U.S. 645, 654 (1973) ("[I]n cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over.") (quoting Far E. Conference v. United States, 342 U.S. 570, 574–75 (1952)).
  \item \textsuperscript{39} McKart, 395 U.S. at 195.
  \item \textsuperscript{40} Id.
  \item \textsuperscript{41} McCarthy v. Madigan, 503 U.S. 140, 145 (1992), superseded by statute as stated in Gonzalez v. O'Connell, 355 F.3d 1010 (7th Cir. 2004). According to the Court, this is particularly true when addressing a complex or technical issue. \textit{Id}.
  \item \textsuperscript{42} See Weinberger, 412 U.S. at 654 (citing uniformity and consistency as benefits of the exhaustion doctrine).
\end{itemize}
Although the University of Minnesota is technically not an administrative agency, the Stephens court was persuaded that the university deserves an analogous level of autonomy. According to the court, exhaustion of remedies is at least as important in the university context because of the unique grant of constitutional authority bestowed upon the university and its board of regents. The University of Minnesota was incorporated by the state constitution in 1857. As a result, full control and management of the university's affairs rests with the board of regents to the exclusion of the state legislature. The Stephens court reasoned that because the constitution placed internal management of the university in the hands of the regents alone, courts should not interfere with the board's exercise of authority until its internal review processes are exhausted or unless it has clearly exceeded its jurisdiction. The court was concerned that allowing employees direct access to

43. Stephens v. Bd. of Regents of the Univ. of Minn., 614 N.W.2d 764, 774 (Minn. Ct. App. 2000). According to the court, "[t]he University of Minnesota . . . is not a mere administrative agency—it is much more than that." Id. In the 1952 case of State ex rel. Sholes v. University of Minnesota, the Minnesota Supreme Court was careful to distinguish the university from an administrative agency, the latter of which it described as an "organ of government" born of legislative will. 54 N.W.2d 122, 126 (Minn. 1952). Instead, the Sholes court analogized the university to a corporate body, with the board of regents acting as the corporate board of directors. Id. at 127. Along these lines, the court applied a doctrine "common to the law of corporations," requiring a private corporate shareholder to exhaust all the means within the corporation itself before instituting litigation for redress of any grievance. Id. at 127–28. Arguing that Sholes applied the functional equivalent of the administrative exhaustion doctrine, the Stephens court cited Sholes as authority for its holding. Stephens, 614 N.W.2d at 771–73.

44. Stephens, 614 N.W.2d at 774.

45. Winberg v. Univ. of Minn., 499 N.W.2d 799, 801 (Minn. 1993).

46. See generally State ex rel. Univ. of Minn. v. Chase, 220 N.W. 951, 953 (Minn. 1928) (describing the constitutional authority bestowed upon the university). In the 1931 case of Fanning v. University of Minnesota, the Minnesota Supreme Court commented that "although the powers of the regents are not subject to legislative or executive control, the university is not above the law." 236 N.W. 217, 219 (Minn. 1931). See generally Michael J. Sherman, How Free Is Free Enough? Public University Presidential Searches, University Autonomy, and State Open Meeting Acts, 26 J.C. & U.L. 665, 677–87 (2000) (documenting substantial judicial and nonjudicial support for university independence from the legislature, particularly in reference to academic matters like curriculum selection); cf. RICHARD T. DE GEORGE, ACADEMIC FREEDOM AND TENURE: ETHICAL ISSUES 60–61 (1997) (arguing that the university is properly autonomous in the areas in which its epistemic authority is appropriate and decisive).

47. See Stephens, 614 N.W.2d at 774.
the judicial system would "weaken the constitutional authority of the institution." 48

According to Stephens, application of the exhaustion doctrine to the university grievance process further aids in promoting judicial efficiency. 49 As in the administrative setting, the grievance procedure may keep disputes out of court entirely; if not, reviewing courts still benefit from the evidentiary record developed in the process. 50 Under the UGP, Phase III panels are specifically responsible for conducting evidentiary hearings and acting as finders of fact. 51 Upon completion of each hearing, panel members prepare a statement documenting their findings, as well as the issues, contentions of the parties, opinion, and award. 52 Certiorari review of a Phase III panel decision by the Minnesota Court of Appeals is limited to the record developed by the panelists. 53

Notably, courts have not uniformly required compliance with the exhaustion doctrine in the administrative context unless statutorily mandated. 54 Without an express statutory requirement, whether to require exhaustion of administrative remedies is a matter of judicial discretion. 55 Courts typically apply a balancing test, weighing the interests of the individual

48. Id.
49. Id.
50. Id.
51. UGP, supra note 21, § 8(1). Phase III three-person panels include one member of the University Grievance Board chosen by the grievant, one delegate of the senior administrator of the unit in which the grievant is employed, and one hearing officer of the same employee category as the grievant (faculty, administrative, etc.) to be selected by the university grievance officer. Id. § 8(2). The hearing officer presides over the Phase III hearing. Id. § 8(5). The grievant and the university representative each have the right to peremptorily challenge the person selected as hearing officer. Id. § 8(3). A majority of panelists is required to reach a decision. Id. § 8(5).
52. Id. Financial awards are generally limited to back pay and benefits actually lost. Id. § 10(9). The UGP does not allow compensation for fees and expenses of advocates, pain and suffering, emotional distress, penalties, or punitive damages. Id.
53. Minnesota regulations provide that an appellate court shall rely upon a record comprised of the papers, exhibits, and transcripts of any testimony considered by the panel. See MINN. R. CIV. APP. P. 110.01; see also MINN. R. CIV. APP. P. 115.04 (instructing that Rule 110 should be applied to certiorari proceedings to the extent possible).
against the policies favoring exhaustion. A court electing not to apply the doctrine where an administrative procedure exists typically turns to one of several broad categories of exceptions.

According to the U.S. Supreme Court, exceptions to the exhaustion doctrine may be placed into three categories. First, a claimant may be allowed to circumvent the administrative process and go directly to court when the exhaustion requirement would cause undue prejudice to a subsequent assertion of a court action. For example, prejudice might result from an unreasonable or indefinite timeframe for administrative action that would conflict with a statute of limitations. Second, an agency's lack of authority or inability to provide adequate relief may prompt an exception. Under this category, the Court offers the example of an agency that is unable to consider whether to grant relief because of a lack of institutional competence to resolve a particular type of issue, such as the constitutionality of a statute. A third exception may arise when the adequacy of the administrative procedure itself is challenged, as opposed to the merits of a particular decision.

In comparison, the Stephens court acknowledged only a single exception to exhaustion of the University of Minnesota's grievance procedure for cases where exhaustion would prove

56. Id. at 146. Depending on the specific facts of each case, courts might rely upon the interests of justice, the need to correct an emergency, or the existence of undefined exceptional circumstances. See Marcia R. Gelpe, Exhaustion of Administrative Remedies: Lessons from Environmental Cases, 53 GEO. WASH. L. REV. 1, 25–26 (1984).

57. See McCarthy, 503 U.S. at 146–49 (listing "undue prejudice to subsequent assertion of a court action," "doubt as to whether the agency was empowered to grant defective relief," and "where the administrative body is shown to be biased" as categories of exceptions).

58. Id. According to critics, the breadth of these categories is negatively compounded by a lack of judicially imparted definition. See Gelpe, supra note 56, at 25–31 (urging consistent application of the exhaustion doctrine).


60. McCarthy, 503 U.S. at 147.

61. See id. at 147–48.

62. Id.; see also Reid v. Engen, 765 F.2d 1457, 1461 (9th Cir. 1985) ("We may decide an issue not raised in an agency action if the agency lacked either the power or the jurisdiction to decide it").

63. See McCarthy, 503 U.S. at 148–49.
futile. In fact, Stephens tried to persuade the court that it would have been futile for her to exhaust the remedies available to her under the UGP. She asserted that no disinterested person could be impaneled to hear her grievance because any hearing panelist would be directly or indirectly responsible to President Yudof or to the board of regents. The court of appeals disagreed, finding that the panel selection process and university grievance policy statement that “[n]o panelist shall have a direct interest in the grievance” properly safeguarded against a conflict of interest. Furthermore, the court stated that Stephens’s position would lead to the untenable conclusion that the pursuit of any grievance involving the university’s president must be futile.

While the Stephens court may have established a general principle of exhaustion for employment claims against the university, it failed to resolve some of the specifics. In particular, the court declined to answer the question of whether a claimant could proceed too far within the university grievance process and foreclose the opportunity for any judicial review by subjecting a claim to Phase IV, which calls for final and binding arbitration. The opinion’s final footnote explains that:

Because Stephens failed to exhaust any phase of the university’s grievance process, we do not address whether a party would be precluded from seeking judicial review before exhausting “Phase IV” arbitration in which a grievant agrees to binding arbitration and purportedly “waive[s] and release[s] all rights to pursue substantially the same claim in any other forum.”

The court of appeals left this question unanswered until University of Minnesota v. Woolley.

C. UNIVERSITY OF MINNESOTA V. WOOLLEY

In 2003, the Minnesota Court of Appeals picked up where Stephens left off. The university terminated Woolley, a physician at the university’s student health clinic, for sexually har-
assisting one of the health service employees. Because the Phase I meeting between Woolley and the administrator responsible for his termination failed to resolve the issue, Woolley proceeded to a Phase II meeting with the supervisor of the administrator responsible for his termination. This second meeting also failed to resolve the issue. Woolley then proceeded to a Phase III hearing before a three-person panel. Because the Phase III panel sustained Woolley's termination, he proceeded to Phase IV arbitration before an arbitration panel selected pursuant to university guidelines. After the arbitration panel issued an opinion denying Woolley's grievance, Woolley attempted to challenge the merits of the arbitration decision by filing for writ of certiorari.

Woolley argued that he had exhausted the remedies available to him, in accordance with Stephens, and therefore deserved review by certiorari. The university argued that certiorari review is not available from arbitration proceedings, which, pursuant to the MUAA, are final and binding on the parties. Under the MUAA, a party who agrees to arbitration has limited rights of judicial review, not including direct judi-

72. Id. at 302.
73. Id. at 302-03; see also supra note 30 (describing the four phases of the UGP). The purpose of the Phase II meeting, which consists of an informal meeting between the grievant and the administrator or supervisor of the person responsible for the action being grieved, is "to facilitate resolution by informing and involving higher University administration." UGP, supra note 21, § 7(1).
74. Woolley, 659 N.W.2d at 302-03.
75. Id.; see also supra notes 30 and 51 (describing Phase III panel).
76. Woolley, 659 N.W.2d at 303; see also supra note 30 (noting that when a grievant is dissatisfied with the decision of a Phase III panel, he or she may proceed to Phase IV arbitration). To proceed to arbitration, the grievant must sign an agreement waiving and releasing all rights to pursue the same claim in any other forum. UGP, supra note 21, § 8(8). A three-person panel oversees arbitration. See id. § 9(2). The panel is comprised of an arbitrator, a member of the University Grievance Board selected by the grievant, and a senior administrator. Id. In cases involving faculty or academic professional and administrative staff, arbitrators must be non-Minnesota residents, members of the National Academy of Arbitrators, and persons holding either tenured faculty rank or emeritus status at a U.S. university outside of Minnesota. Id. According to the UGP, the grievant and the university are each responsible for one-half of the arbitrator's fees and expenses. Id. § 9(5).
77. Woolley, 659 N.W.2d at 303.
78. Id. at 307.
79. Id. at 307-09. Although the UGP has no direct reference to the MUAA, UGP text repeatedly refers to the arbitration decisions as final and binding upon the parties. UGP, supra note 21, §§ 8(8), 9(1), 9(4).
cial review of an administrative body’s decision. The court agreed with the university. It affirmed Stephens by recognizing that the university’s grievance process must be exhausted before seeking judicial review, but it limited certiorari review to Phase III panel decisions. Because a Phase IV arbitration decision is not subject to judicial review, a party must seek review by certiorari upon completion of Phase III. Woolley lost his chance to obtain certiorari review when he proceeded to Phase IV arbitration from the Phase III hearing.

The central issue in Woolley was whether the decisions following Phase III panel hearings or Phase IV arbitration proceedings should be subject to certiorari review. A 1999 case had already confirmed that writ of certiorari is the appropriate method of review for a University of Minnesota employee’s challenge to an adverse employment decision. Because certiorari is an extremely deferential form of judicial review and gives a distinct advantage to the university in this context, it is worth exploring the reasoning behind its application.

D. REVIEW BY CERTIORARI

It is a tenet of administrative law in Minnesota that “in the absence of an adequate method of review or legal remedy, judicial review of the quasi-judicial decisions of administrative bodies, if available, must be invoked by writ of certiorari.”

80. Woolley, 659 N.W.2d at 308–09. For a list of rights of judicial review available upon arbitration proceedings, see MINN. STAT. §§ 572.18, 572.19, 572.20, 572.26 (2002).
81. Woolley, 659 N.W.2d at 306.
82. Id.
83. Id.
84. Id. at 303. Several cases previously established that termination of a public employee is a quasi-judicial decision. See, e.g., Mowry v. Young, 565 N.W.2d 717, 719 (Minn. 1997) (holding the same and listing cases). See infra notes 101–04 and accompanying text for a three-part test to determine whether an action constitutes a quasi-judicial decision.
86. Dietz, 487 N.W.2d at 239. State ex rel. Ging v. Board of Education is one of the earliest cases addressing this issue in Minnesota. 7 N.W.2d 544 (Minn. 1942), overruled on another point of law by Foesch v. Indep. Sch. Dist. No. 646, 223 N.W.2d 371 (Minn. 1974). In Ging, the Minnesota Supreme Court held that certiorari is the only method for review of school board decisions because a school board, as a derivative of the executive branch, should enjoy a “wide field wherein their decision, even though wrong, is final.” Id. at 556 (quoting Lindquist v. Abbett, 265 N.W. 54, 57 (Minn. 1936)). To hold otherwise
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rari mandates nonintrusive and expedient judicial review in order to maintain fundamental separation of powers principles. 87 Central to its application in the administrative context are the requirements that there be no other prescribed method of review or legal remedy and that the challenged administrative action constitute a quasi-judicial decision. 88

Certiorari review is limited and deferential in nature. It is limited to an inspection of the record of the inferior tribunal, 89 which is comprised of the papers, exhibits, and transcripts of any testimony considered by the body whose decision is being reviewed. 90 The petitioner on appeal has the heavy burden of demonstrating that the agency's order or determination was "arbitrary, oppressive, unreasonable, fraudulent, under an erroneous theory of law, or without any evidence to support it." 91 The scope of review also extends to questions affecting the regularity of the proceedings. 92 Some critics argue that given this deference, certiorari is only appropriate for cases involving detailed records, and that claimants should be granted direct access to the district courts when a record is deemed insufficient. 93 Minnesota courts, however, hold that an incomplete record does not change writ of certiorari as the appropriate method of review. 94

and allow potentially searching review would result in an unconstitutional invasion of the school board's decision-making process. See Dietz, 487 N.W.2d at 239. It would also compromise the executive body's efficient operation. Id.

87. Id.
88. See id.
89. Zahavy v. Univ. of Minn., 544 N.W.2d 32, 36 (Minn. Ct. App. 1996), impliedly overruled on another point of law as recognized by Shaw, 594 N.W.2d 187.
90. See supra note 53.
91. Manteuffel v. City of North St. Paul, 538 N.W.2d 727, 729 (Minn. Ct. App. 1995); see also Zahavy, 544 N.W.2d at 36.
92. Zahavy, 544 N.W.2d at 36.
93. See, e.g., Dietz, 487 N.W.2d at 241 (Gardebring, J., dissenting) ("Al- though I agree that administrative decisions made by the executive branch of government are entitled to deference, I believe the decision in this case exalts form over substance and effectively denies persons in appellant's position any meaningful appellate review."). In addition to the deferential standard of review, the dissent complained that the sixty-day deadline to petition for certiorari was particularly harsh and resulted in inefficiency. Id.; see also El Ghandour v. Univ. of Minn., No. C2-02-834, at 3 (Minn. Ct. App., June 20, 2002) (order denying certiorari) ("Even if relator was not required to exhaust her administrative remedies, this appeal is untimely because the writ of certiorari was not issued and served within 60 days after relator received due notice of the ... termination decision.").
94. Shaw v. Bd. of Regents of the Univ. of Minn., 594 N.W.2d 187, 192
Most likely due to its limited nature, certiorari review is only available when no other adequate method of review or remedy exists. As a result, most courts decline to extend certiorari to claims involving statutory causes of action. This limitation expresses courts' concerns regarding the erosion of a claimant's statutory rights. It also acknowledges that when the legislature explicitly provides for a cause of action appealing an administrative action in district court, the separation of powers problem that typically arises from judicial review of administrative agency decisions has been resolved in favor of the courts.

In Stephens, for example, the court held that certiorari review of Stephens's claim alleging bankruptcy discrimination would not be appropriate because the Bankruptcy Code provided a statutory cause of action for redress of her allegation. In contrast, no statute specifically permits an appeal from a decision to terminate a university employee. Without a statute
providing a mechanism for university employees to appeal terminations or other adverse employment actions, certiorari is the only method available for review of a university decision.\textsuperscript{100}

The scope of certiorari is further confined in the administrative context to appeals from quasi-judicial decisions of administrative bodies.\textsuperscript{101} The Minnesota Supreme Court has established three indicia of quasi-judicial actions.\textsuperscript{102} First, the proceeding must involve an "investigation into a disputed claim and weighing of evidentiary facts"; second, "application of those facts to a prescribed standard"; and third, the proceeding must result in "a binding decision regarding the disputed claim.\textsuperscript{103}" Failure to meet any of the three indicia is "fatal" to a claim that the proceedings were quasi-judicial.\textsuperscript{104}

Regarding the first requirement, Minnesota case law indicates that an inherent conflict of interest may remove an administrative body's decision from the purview of certiorari.\textsuperscript{105} For example, it may be inappropriate for the court to rely on the fact-finding functions of an administrative body whose own conduct is the subject of dispute, as in an employment discrimination case.\textsuperscript{106} Minnesota courts have held that claimants are not bound by the findings of an administrative body in cases presenting inherent conflicts of interest without a full

\begin{itemize}
\item \textsuperscript{100} \textit{Shaw}, 594 N.W.2d at 191. \textit{But cf. supra} note 31 (citing \textit{Lee} as an exceptional case).
\item \textsuperscript{101} \textit{Dietz v. Dodge County}, 487 N.W.2d 237, 239 (Minn. 1992).
\item \textsuperscript{102} \textit{Minn. Ctr. for Envtl. Advocacy v. Metro. Council}, 587 N.W.2d 838, 842 (Minn. 1999).
\item \textsuperscript{103} \textit{Id.}
\item \textsuperscript{104} \textit{Id.} at 844.
\item \textsuperscript{105} \textit{See Manteuffel v. City of North St. Paul}, 538 N.W.2d 727, 729 (Minn. Ct. App. 1995) (holding that a deferential standard of review is inappropriate where the court is asked to determine whether the city itself violated the law, as opposed to whether the city had cause to terminate the plaintiff); \textit{see also Graham v. Special Sch. Dist. No. 1}, 472 N.W.2d 114, 118–20 (Minn. 1991) (holding that a school board's findings of fact should not have collateral estoppel effect when the school board was evaluating the lawfulness of its own conduct as an employer).
\item \textsuperscript{106} \textit{See Graham}, 472 N.W.2d at 118–20 (differentiating between a public employer's right to use discretion in evaluating the performance or conduct of an employee and a situation in which the employer is left to decide the lawfulness of its own conduct as the employer); \textit{see also Manteuffel}, 538 N.W.2d at 730–31 (discussing \textit{Graham} and subsequent cases that address whether an "administrative body can fairly adjudicate the propriety of its own conduct").
\end{itemize}
and fair hearing.\textsuperscript{107} Even with the requisite procedural safeguards, such claims may still be beyond the scope of certiorari review.\textsuperscript{108}

The court's analysis in \textit{Woolley} hinged upon the third requirement, specifically, whether Phase III or Phase IV produced a quasi-judicial decision subject to certiorari review.\textsuperscript{109} According to the \textit{Woolley} court, Phase III panel hearings easily pass the first two elements of the three-part test.\textsuperscript{110} The more difficult question for the court was whether a Phase III decision is final and binding.\textsuperscript{111} The court dwelled on the fact that the university policy lacks any language specifically informing a grievant that by electing to proceed to Phase IV he or she will be abandoning the right to seek review by certiorari of a Phase III decision.\textsuperscript{112} Furthermore, there are repeated references throughout the grievance policy to Phase IV as a \textit{final and binding} decision.\textsuperscript{113} Despite this ambiguity, the court in \textit{Woolley} concluded that the policy's language sufficiently put the grievant on notice that upon conclusion of Phase III his involvement with an internal process was at an end and that review of a final administrative proceeding was available to him.\textsuperscript{114} After concluding that Phase III produces a final administrative decision, the court held that review by writ of certiorari is available upon completion of Phase III proceedings.\textsuperscript{115} Phase IV arbitration, on the other hand, is governed by the MUAA.\textsuperscript{116} A party who agrees to Phase IV arbitration has extremely limited rights of review, not including review by certiorari.\textsuperscript{117}

Both \textit{Woolley} and \textit{Stephens} rely upon doctrine and review mechanisms designed for administrative agencies. While this may not be misguided per se, such reliance is problematic con-

\begin{itemize}
\item \textsuperscript{107} See Graham, 472 N.W.2d at 119–20.
\item \textsuperscript{108} See Manteuffel, 538 N.W.2d at 731.
\item \textsuperscript{109} Univ. of Minn. v. Woolley, 659 N.W.2d 300, 303 (Minn. Ct. App. 2003).
\item \textsuperscript{110} Id.
\item \textsuperscript{111} Id. at 304.
\item \textsuperscript{112} Id. at 306.
\item \textsuperscript{113} Id. at 305–06.
\item \textsuperscript{114} Id. at 306.
\item \textsuperscript{115} Id.
\item \textsuperscript{116} Id. at 308.
\item \textsuperscript{117} See id. at 308 (citing Falgren v. State Bd. of Teaching, 545 N.W.2d 901, 906 (Minn. 1996), for the proposition that an employee's decision to enter arbitration proceedings amounts to a waiver of broader rights to judicial review).
\end{itemize}
sidering that the University of Minnesota is not itself an administrative agency,118 and that pre-established judicial structures like exhaustion and certiorari review were not intended for informal employee grievance processes like the UGP.119 Part II of this Note addresses potential problems arising from this mismatch: first, application of low-level review is not justified by the same policy considerations that support exhaustion and certiorari in the administrative context; second, the university is not subject to the same checks and balances as an administrative agency; and third, due to the relative informality of the UGP, there are fewer procedural safeguards for plaintiffs.

II. MISMATCHED: EXHAUSTION OF ADMINISTRATIVE REMEDIES, CERTIORARI REVIEW, AND THE UNIVERSITY GRIEVANCE PROCESS

A. EXAMINING THE POLICY CONSIDERATIONS SUPPORTING EXHAUSTION IN THE CONTEXT OF THE UNIVERSITY OF MINNESOTA GRIEVANCE PROCESS

Exhaustion of remedies and certiorari review are appropriate for the administrative context. In particular, the decisions and fact-finding functions of administrative agencies deserve deferential treatment because of agency expertise in a particular area.120 Take, for example, the federal Environmental Protection Agency (EPA). Experts working for the EPA are able to gather, process, and evaluate information related to environmental regulations more quickly and economically than a court.121 Because the EPA's personnel includes highly trained scientists, engineers, and lawyers, the Agency's factual determinations are also likely to be more accurate.122 Increased effi-

118. See supra note 43.
119. See supra notes 35–42 and accompanying text (explaining that the exhaustion doctrine developed out of and was designed for the administrative context).
120. See McKart v. United States, 395 U.S. 185, 194 (1969); see also Weinberger v. Bentex Pharm., Inc., 412 U.S. 645, 654 (1973) ("[I]n cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over." (quoting Far E. Conference v. United States, 342 U.S. 570, 574–75 (1952))).
121. See Gelpe, supra note 56, at 17 (referring to experts in general).
122. See id. at 19 (describing the professional qualifications of EPA personnel and arguing that an initial factual determination by an agency is less important if the agency's personnel lacks real expertise).
ciency and accuracy, by virtue of the Agency's expertise, weigh heavily in favor of the courts' hands-off approach to agency decision making.123

The same argument does not hold up in the employment context. While an employer may understand the nuances of its business better than a court, it is not necessarily in the best position to determine whether it breached an employment contract or discriminated against an employee.124 Courts, not employers, are skilled and practiced in making these determinations and hence more likely to make efficient and accurate assessments of a grievant's claim.125 Furthermore, courts offer neutrality where an employer would otherwise be charged with determining its own liability.126 An employer is likely to be conflicted when deciding employment discrimination claims in a way the EPA reviewing a decision to grant a variance from the Clean Air Act is not. To the extent that there is an inherent conflict in any internal grievance mechanism, extraordinary agency expertise and concomitant gains in efficiency justify exhaustion and the limits it imposes on grievants.127 Without the same level of expertise or increase in accuracy, exhaustion still creates a more efficient process by keeping claims out of court. It seems less justifiable, however, to bar a grievant from court for the sole reason of reducing docket loads.128

123. See supra notes 38-41 and accompanying text.
124. See Graham v. Special Sch. Dist. No. 1, 472 N.W.2d 114, 118-20 (Minn. 1991) (differentiating between a public employer's right to use discretion in evaluating the performance or conduct of an employee and a situation in which the employer is left to decide the lawfulness of its own conduct as the employer); cf. Manteuffel v. City of North St. Paul, 538 N.W.2d 727, 729 (Minn. Ct. App. 1995) (holding that a deferential standard of review is inappropriate when the court is asked to determine whether the city itself violated the law, as opposed to whether the city had cause to terminate the plaintiff).
125. Cf. DE GEORGE, supra note 46, at 60 (arguing that the university is properly autonomous in the areas in which its epistemic authority is appropriate and decisive).
126. See supra note 124.
127. See Reese, supra note 54, at 20 (noting that, in fact, one of the advantages of exhaustion is that it provides agencies an opportunity to correct their own errors).
128. See Gelpe, supra note 56, at 23 (agreeing with commentators that judges invoke the exhaustion doctrine to help them dispose of cases and alleviate calendar pressures); cf. McKart v. United States, 395 U.S. 185, 195 (1969) (commenting that a favorable decision for a claimant in an administrative proceeding may keep the dispute out of the courts entirely).
The court's holding in *Stephens* was largely based on its view that the university deserves at least the same degree of autonomy as an administrative agency. The court may have been correct in assuming that the university was bestowed with greater authority than an administrative agency typically wields, as an administrative agency's authority is subject to more checks from the legislature. For example, the legislature may employ numerous mechanisms to express disapproval with an agency's practices. Aside from reducing appropriations, the legislature might exert control by structuring reporting mechanisms, requiring legislative review of new agency rules and regulations, or applying a variety of political pressures. While close surveillance may not be the norm, the legislature still has the power to monitor and sanction an agency if need be. In contrast, the university and its board of regents exist in greater isolation.

The fact that the university is bestowed with more authority and thereby exists in greater isolation than an administrative agency may actually counteract the argument for exhaustion of remedies and certiorari in the university context. Because an administrative agency's authority is checked by more intense legislative scrutiny, internal grievance mechanisms are less prone to abuse. Courts may more appropriately defer to agency determinations when assured that grievants' procedural and substantive rights will be protected throughout informal proceedings by legislative oversight. Without an equivalent arrangement in the university setting, grievants' rights are arguably more at risk.

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129. *See Stephens v. Bd. of Regents of the Univ. of Minn.*, 614 N.W.2d 764, 774 (Minn. Ct. App. 2000); *see also supra* note 43.

130. *See Stephens*, 614 N.W.2d at 774; *see also supra* notes 45–46 and accompanying text.

131. *See supra* notes 43–48 and accompanying text.


133. *See id.*

134. *See id. at 42.*

135. *See supra* note 130. The judicial and legislative branches are only given license to intervene in cases where the board has clearly exceeded its jurisdiction. *See Stephens*, 614 N.W.2d at 773–74.
The gains in efficiency and agency autonomy that support exhaustion and certiorari review in the administrative context are only justified when grievants' rights are not unduly burdened in the process.\textsuperscript{136} Whenever a plaintiff's recourse for alleged wrongdoing is taken out of the courtroom and restricted to less formal proceedings, there is a risk of unfairness resulting from fewer procedural safeguards.\textsuperscript{137} Because employees appealing Phase III hearings are limited to certiorari review and those proceeding to Phase IV arbitration effectively lose their right to seek any judicial review, it is important to ask whether the grievance process is a fair substitute for an aggrieved employee's day in court.\textsuperscript{138} Along these lines, two aspects of the UGP deserve specific consideration: the remedies available to university employees under the UGP and the policy's statute of limitations.

B. A QUESTION OF FAIRNESS: DISCREPANCY IN REMEDIES AND STATUTES OF LIMITATIONS

An employee may see a difference between the remedies available to him in court and those available under the UGP. Both Phase III and Phase IV panels lack the authority to compensate for fees and other advocate expenses, pain and suffering, emotional distress, penalties, or punitive damages.\textsuperscript{139} Instead, grievants are limited to back pay and benefits actually lost, together with reinstatement.\textsuperscript{140} Had Stephens brought her claims asserting retaliation, defamation, and violation of university policy in district court, she may have been entitled to a broader array of remedies, including compensatory and punitive damages.\textsuperscript{141} In fact, all of the remedies barred by the UGP

\textsuperscript{136} See supra notes 37–42 and accompanying text (describing gains in efficiency and agency autonomy afforded by application of the exhaustion doctrine). \textit{But see supra} notes 54–58 and accompanying text (explaining that the Supreme Court's balancing test instructs courts to consider the exhaustion doctrine's impact on individuals' interests).

\textsuperscript{137} See, e.g., Mary Rowe, \textit{Dispute Resolution in the Non-Union Environment,} in WORKPLACE DISPUTE RESOLUTION: DIRECTIONS FOR THE TWENTY-FIRST CENTURY 79, 80 (Sandra E. Gleason ed., 1997) (citing the absence or risk of sufficient due process protection as a frequently observed shortcoming of internal grievance and appeal channels).

\textsuperscript{138} See supra notes 29–31 and accompanying text (describing the holding in \textit{Stephens}); \textit{supra} notes 81–82 and accompanying text (describing the holding in \textit{Woolley}).

\textsuperscript{139} UGP, \textit{supra} note 21, § 10(9).

\textsuperscript{140} Id.

\textsuperscript{141} See, e.g., Stuempges v. Parke, Davis & Co., 297 N.W.2d 252, 259
are characteristic of tort claims. Under this scheme, any grievant with a tort-based employment claim may be denied the full assortment of remedies otherwise available to a successful plaintiff. In addition to Stephens’s claims listed above, examples of tort-based employment claims include fraud, misrepresentation, tortious interference with contract, wrongful termination, and infliction of emotional distress. There is no indication from the UGP, Stephens, or Woolley that tort-based employment law claims are exempt from the dual requirements of exhaustion and certiorari.

Claimants under the UGP are further limited by the timelines for filing grievances and appealing Phase III panel decisions. Both the UGP and writ of certiorari timelines are substantially shorter than most statutes of limitations. The UGP prescribes a thirty-day window for the filing of employee grievances, even though a general two-year statute of limitations period applies to most employment actions under Minnesota law. The UGP declines to extend the thirty-day filing deadline to mirror applicable statutes of limitations.

Minnesota courts have similarly upheld rules requiring issuance of a writ of certiorari by the court of appeals within sixty days of the decision being appealed. Despite incongruence with otherwise applicable statutes of limitations, an employee’s failure to seek relief within this relatively short period

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143. See id.

144. Thus far, Minnesota courts have only recognized statutory claims as being exempt from exhaustion and certiorari. See Stephens v. Bd. of Regents of the Univ. of Minn. (Stephens II), No. C3-01-1772, 2002 WL 1315809 at *3 (Minn. Ct. App. June 18, 2000); see also Lee v. Regents of the Univ. of Minn. 672 N.W.2d 366, 371 (Minn. Ct. App. 2003) (noting that statutory claims are not limited to certiorari review, but are within district court jurisdiction).

145. UGP, supra note 21, § 5(1).

146. See, e.g., Minn. Stat. § 541.07(1) (2002) (applying two-year statute of limitations to tort claims); Minn. Stat. § 541.07(5) (2002) (actions for recovery of wages to be commenced within two years).

147. See UGP, supra note 21, § 5(1). This is true for nonstatutory claims that would otherwise fall under the statute of limitations, but not statutory claims which are exempt from the requirements of exhaustion and certiorari. See supra note 144.

of time is a jurisdictional basis for dismissal. The courts’ insistence upon prompt judicial review from agency decisions is another example of judicial deference to quasi-judicial agency decision making. In addition to the deference accorded by the standard of review under certiorari, review is limited to an inspection of the record, however incomplete, and places a heavy burden on the challenging party. Critics argue that the truncated timeline for filing a claim is unnecessarily harsh given the amount of deference already accorded to agency decisions.

Any limitations on otherwise available remedies or statutes of limitations are significant because they arguably compromise plaintiffs’ substantive rights. In another context, the U.S. Supreme Court has upheld forum selection clauses binding employees to arbitration with the limitation that plaintiffs’ substantive rights, including remedies and statutes of limitations, remain intact. Although the UGP does not technically include a mandatory arbitration clause—employees are not limited to arbitration but may elect to proceed to arbitration after seeking review from a Phase III panel—there are some key similarities. For example, an employee filing under the UGP essentially loses access to the courts, with the limited exception of extremely deferential certiorari review of a Phase III panel decision, just like an employee who must arbitrate claims against an employer instead of pursuing remedies in court. Because of the limitations faced by university employees who must defend their claims in Phase III panel and Phase IV arbi-

149. See id. at 677–78; see also In re Termination of Gay, 555 N.W.2d 29, 31 (Minn. Ct. App. 1996) (holding that actual service of the issued writ must be accomplished within sixty days in order to vest jurisdiction in the court of appeals).
150. See supra note 91 and accompanying text.
151. See supra notes 89–94 and accompanying text.
152. See Dietz v. Dodge County, 487 N.W.2d 237, 241 (Minn. 1992) (Garderring, J., dissenting) (commenting that the sixty-day deadline to petition for certiorari is particularly harsh and does not result in efficiency); see also BEFORT, supra note 142, §12.42.
154. See UGP, supra note 21, § 8(7).
155. After Stephens, a university employee challenging an adverse employment decision may only access the courts after exhausting the university’s internal remedies, and even then, the employee will most likely be limited to writ of certiorari. See Stephens v. Bd. of Regents of the Univ. of Minn., 614 N.W.2d 764, 775–76 (Minn. Ct. App. 2000).
tration hearings, preservation of plaintiffs' substantive rights is equally important in the context of the UGP.

III. ENSURING JUSTICE THROUGH EXCEPTIONS

Differences between administrative agencies and the university, as well as concerns regarding the level of deference under certiorari review, support recognition of a wider range of exceptions to the exhaustion doctrine. In Stephens, the Minnesota Court of Appeals rightly recognized an exception for futility. The U.S. Supreme Court's three categories of exceptions, however, are broader and better equipped to address concerns regarding procedural safeguards and the relative informality of the grievance proceedings.

A. APPLYING TRADITIONAL EXCEPTIONS TO THE EXHAUSTION DOCTRINE IN THE UNIVERSITY SETTING

The U.S. Supreme Court allows exceptions to the exhaustion doctrine when its application would cause undue prejudice, when administrative agencies are unable to provide adequate relief, or in case of procedural shortcomings of the administrative proceedings themselves. The Court has acknowledged that undue prejudice may result from an unreasonable or indefinite timeframe for administrative action that would conflict with statutes of limitations. As previously discussed, employees are limited by both the thirty-day initial filing period as well as the sixty-day window for filing petitions for certiorari review. Granting an exception in each case of conflict with a statute of limitations would essentially undo the exhaustion and certiorari rules in the context of the UGP. Without taking such an extreme position, it is noteworthy that the Court finds

156. See supra Part II.A.
157. See supra notes 89–94 and accompanying text.
158. See supra notes 54–63 and accompanying text for the full panoply of exceptions allowed by the U.S. Supreme Court.
159. See supra note 64 and accompanying text.
160. See supra notes 58–63 and accompanying text. But see Gelpe, supra note 56, at 25–26 (criticizing the Court's position on exceptions to the exhaustion doctrine as well as application of a balancing test on the basis of inconsistency).
161. See supra notes 58–63 and accompanying text.
163. See supra notes 148–52.
it desirable that administrative grievance procedures not threaten statutes of limitations.164

Moreover, the Court has only provided an outline of a permissive doctrine of exceptions—the ultimate determination is to be made on a case-by-case basis.165 In the context of viable tort claims where a claimant's remedies are also limited by exhaustion of the UGP, the relatively short timeline for filing a claim may provide a more compelling reason to grant an exception. In fact, the Court has included an administrative entity's inability to provide adequate relief as a justifiable reason for granting an exception from the exhaustion doctrine.166 In the context of the UGP, a grievant might argue that a tort-based wrongful termination claim should be exempt from the exhaustion requirements because of particularly egregious circumstances that merit punitive or other compensatory damages disallowed by the university's policy.167

Under the Court's doctrine of exceptions, adequate relief also refers to institutional competence to decide a particular type of claim.168 The decision by Minnesota courts to exempt statutory claims from exhaustion and certiorari requirements can at least partially be explained on the grounds of institutional competence: In the case of statutorily codified causes of action, courts are better equipped to fulfill the legislature's intent by investigating and remedying alleged wrongdoing than the university grievance mechanism.169

A grievant might argue that the university is equally ill equipped to make decisions regarding the lawfulness of its own conduct, as opposed to simply evaluating the performance or conduct of an employee.170 For example, Stephens's allegations

164. See supra note 162 and accompanying text.
165. See supra note 55 and accompanying text.
166. See McCarthy, 503 U.S. at 147.
167. Following the federal model, an exemption from the exhaustion requirement would allow an employee to bring an original cause of action in district court. See, e.g., McKart v. United States, 395 U.S. 185, 203 (1969) (remanding the case to a lower court for judgment upon finding that the petitioner qualified for exemption); Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 53 (1938) (divesting the district court of jurisdiction where exhaustion of administrative remedies is required). Obtaining original jurisdiction in district court would further exempt the aggrieved employee from certiorari review.
169. See supra notes 47, 95–98.
170. See supra notes 105–08, 124 and accompanying text.
of retaliatory conduct and violation of university policy would potentially address the lawfulness of university actions more than the conduct of Stephens herself. This argument spills over into the third broad exception, which addresses the adequacy of the grievance procedure.\textsuperscript{171}

B. RESTORING DISCRETION TO THE EXHAUSTION DOCTRINE

While less efficient than the current bright-line rule requiring exhaustion in all but the most extreme circumstances, a discretionary approach to allowing exceptions to the exhaustion doctrine is consistent with precedent from the administrative context.\textsuperscript{172} Under this approach, courts use discretion in deciding whether to require exhaustion of administrative remedies where not explicitly mandated by statute.\textsuperscript{173} The three categories outlined by the U.S. Supreme Court would serve as a model to Minnesota courts.\textsuperscript{174} Within each category, courts would apply a balancing test, weighing the interests of the individual against the policies favoring exhaustion. This balancing test, as traditionally adopted by courts, is necessary to safeguard the interests of individual claimants.\textsuperscript{175} This is particularly important given that plaintiffs who are subject to the exhaustion requirement essentially lose their day in court, with the exception of limited certiorari review.\textsuperscript{176}

A discretionary approach is even more compelling in the context of the university grievance process because the university is subject to fewer checks from the legislature than an administrative agency.\textsuperscript{177} Less deference should be afforded where there are fewer procedural safeguards by virtue of the university's isolation and autonomy. Furthermore, the doctrines of exhaustion and certiorari were developed with classic administrative processes in mind, not informal in-house employer grievance systems.\textsuperscript{178} Because the university is not always in

\textsuperscript{171} See McCarthy, 503 U.S. at 148 (noting that "an administrative remedy may be inadequate where the administrative body is shown to be biased or has otherwise predetermined the issue before it").

\textsuperscript{172} See Reese, supra note 54, at 22.

\textsuperscript{173} See McCarthy, 503 U.S. at 144–46.

\textsuperscript{174} See supra notes 58–63 and accompanying text.

\textsuperscript{175} See supra note 56 and accompanying text.

\textsuperscript{176} See Stephens v. Bd. of Regents of the Univ. of Minn., 614 N.W.2d 764, 775–77 (Minn. Ct. App. 2000).

\textsuperscript{177} See supra notes 130–35 and accompanying text.

\textsuperscript{178} See supra notes 34–36 and accompanying text.
the best position to determine whether it breached an employment contract or discriminated against an employee, courts should be allowed to step in where increased accuracy, efficiency, and fairness will be served.

CONCLUSION

Application of the exhaustion requirement to the employment setting is understandable given the rise in employment-related litigation and the resulting proliferation of employment grievance systems. Relegating claims to in-house procedures makes sense from an efficiency perspective. However, courts need to make sure that employees do not lose their day in court when grievance processes cannot sufficiently protect or administer employee rights. A discretionary approach to the exhaustion doctrine, wherein a broader range of exceptions are allowed, will make up for losses in efficiency by producing gains in fairness. Presumably, this type of balancing act is precisely what the Supreme Court had in mind when it articulated its broad doctrine of exceptions just over a decade ago.