

FILED: August 10, 2011

IN THE COURT OF APPEALS OF THE STATE OF OREGON

JAMES C. WALLACE,
Plaintiff-Appellant,

v.

STATE OF OREGON ex rel Public Employees Retirement Board
and Public Employees Retirement System;
PUBLIC EMPLOYEES RETIREMENT BOARD;
PAUL R. CLEARY, individually;
and GAY LYNN BATH, individually,
Defendants-Respondents.

Marion County Circuit Court
08C10873

A141065

Joseph C. Guimond, Judge.

Argued and submitted on May 18, 2010.

James C. Wallace argued the cause and filed the briefs *pro se*.

Erin C. Lagesen, Assistant Attorney General, argued the cause for respondents. With her on the brief were John R. Kroger, Attorney General, and Jerome Lidz, Solicitor General.

Before Haselton, Presiding Judge, and Armstrong, Judge, and Duncan, Judge.

ARMSTRONG, J.

Dismissal of breach-of-contract, due process, equal treatment, and section 1983 claims reversed and remanded; otherwise affirmed.

1 ARMSTRONG, J.

2 Plaintiff appeals a judgment that dismissed his claims against defendant,
3 raising three assignments of error.¹ We write to address only one of his assignments, *viz.*,
4 that the trial court erred in dismissing six of plaintiff's seven claims for relief for lack of
5 jurisdiction. The court concluded that it lacked subject matter jurisdiction over those
6 claims because plaintiff had begun but not completed a contested case proceeding under
7 the Oregon Administrative Procedures Act (APA), ORS 183.310 to 183.690, that
8 challenged the legality of the state agency actions that formed the basis of plaintiff's
9 claims, and, hence, plaintiff had not exhausted his administrative remedies regarding the
10 challenged agency actions. We review the dismissal of an action on jurisdictional
11 grounds for legal error, [Parker v. City of Albany](#), 208 Or App 296, 298, 144 P3d 976
12 (2006), and conclude that the court erred in dismissing the claims on which plaintiff
13 requested compensatory relief. Accordingly, we reverse and remand as to those claims.

14 I. BACKGROUND

15 We state the facts as alleged in plaintiff's complaint, accepting as true his
16 well-pleaded allegations with the benefit of all favorable factual inferences. [Sulliger v.](#)
17 [Lane County](#), 190 Or App 359, 361, 79 P3d 888 (2003). Plaintiff had been a participant
18 for about 15 years in the Oregon Savings Growth Plan (Plan), a deferred-compensation

¹ As discussed below, plaintiff brought this action against the State of Oregon, the Public Employees Retirement Board, and, individually, Paul R. Cleary and Gay Lynn Bath under various theories of recovery. Because plaintiff does not request relief against Cleary or Bath individually in the six claims addressed in our decision, we refer to all of the defendants, collectively and individually, as "defendant" throughout this opinion.

1 plan for state employees under the Public Employees Retirement System (PERS) that is
2 administered by the Public Employees Retirement Board (PERB), ORS 243.470. During
3 that time, defendant restricted plaintiff's ability to transfer funds among various
4 investment options in the Plan and imposed sanctions against plaintiff when he violated
5 those restrictions.

6 In 2002, PERB adopted a policy under which Plan participants who made
7 more than an average of two transfers, including purchases or redemptions, per month
8 into or from the International Stock investment option (IS option) in a three-month period
9 would be "flagged." Once flagged, PERS would not process more than one redemption
10 request per month by the flagged participant in the IS option. In March 2002, plaintiff
11 received a letter indicating that, because one of the investment funds in the IS option had
12 determined that the frequency of plaintiff's trading activity had been detrimental to the
13 fund's performance, plaintiff could not make more than one redemption per month from
14 the IS option.

15 In 2004, PERS adopted a policy that delegated authority to the manager of
16 the Plan to implement reasonable restrictions on trading activity by Plan participants; the
17 basis of the policy was that excessive trading by Plan participants increased
18 administrative expenses and adversely affected the performance of Plan investment
19 funds. Pursuant to that policy, the Plan manager further restricted plaintiff's trading
20 activities in 2005, prohibiting him from transferring more than \$100,000 into or from the
21 IS option--a violation of which would result in a prohibition against making any transfers
22 involving the IS option. Despite the 2005 restriction, plaintiff transferred over \$200,000

1 in 2006 from the IS option into another investment option. As a result of that transfer,
2 the Plan manager instituted further restrictions on plaintiff's account in 2006, including a
3 prohibition against transferring funds by telephone or the Internet.

4 Shortly thereafter, the Plan manager revised the 2006 restrictions, which
5 ultimately resulted in restrictions on the frequency and monetary amount of plaintiff's
6 trading in all of the investment options in the Plan. Plaintiff challenged the revised
7 restrictions, and PERS issued a determination letter that concluded that the revised
8 restrictions had been properly imposed and that plaintiff's excessive trading activity
9 justified their imposition. Plaintiff requested a contested case hearing on the restrictions,
10 which PERS granted.

11 In May 2007, to deter Plan participants generally from engaging in frequent
12 trading, PERS adopted OAR 459-050-0037 (2008), which provided for a number of
13 restrictions on trading activity by Plan participants. Importantly for this case, the rule
14 provided:

15 "(1) Definitions. For the purposes of this rule:

16 "* * * * *

17 "(b) 'Trade' means a purchase or redemption in an investment option
18 for the purpose of moving monies between investment options.

19 "(2) Restrictions. The following restrictions apply to all participants:

20 "(a) A participant may not make a trade that exceeds \$100,000.

21 "(b) A purchase that is attributable to a trade may not be redeemed
22 from the investment option in which the purchase was made for a period of
23 90 days following the date of the trade.

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"* * * * *

"(3) The Deferred Compensation Manager, if necessary to comply with trading restrictions imposed by a participating mutual fund * * *, may establish additional temporary trading restrictions."

As a result of the adoption of OAR 459-050-0037 (2008), the administrative law judge (ALJ) in plaintiff's contested case proceeding issued a proposed order that granted a motion by PERS for summary determination and that dismissed plaintiff's request for a hearing, concluding that the rule rendered moot plaintiff's challenges to the unique, individualized trading restrictions that had been placed on plaintiff's account between 2002 and 2008. PERB subsequently entered a final order that was consistent with the ALJ's proposed order.² Plaintiff sought judicial review in this court of PERB's final order, and that review is pending. *Wallace v. State ex rel PERS* (A144617).

Before PERB issued its final order in the contested case proceeding, plaintiff filed the present action in circuit court based on the trading restrictions that PERS had placed on his account, asserting seven claims against defendant--of which six are pertinent to this appeal.

In plaintiff's first claim (the lack-of-authority claim), he alleged that the trading restrictions imposed by the 2002 and 2004 PERS policies had not been lawfully imposed and that the Plan manager lacked authority under the appropriate statutes and rules to impose sanctions against plaintiff. The claim sought declaratory relief, *viz.*,

² PERB also concluded that PERS was entitled to summary determination, in part, because plaintiff could not recover in a contested case proceeding under the APA the monetary damages that he sought as a result of the trading restrictions that had been imposed on him.

1 declarations that the trading restrictions were unlawful and invalid.

2 In plaintiff's second claim (the breach-of-contract claim), he asserted that
3 the statutory provisions and rules governing the Plan, along with a written agreement
4 between plaintiff and defendant pertaining to his participation in the Plan, provide the
5 terms and conditions of a contract between plaintiff and defendant that was breached by
6 the trading restrictions that defendant had placed on plaintiff's account. For his breach-
7 of-contract claim, he sought declaratory relief establishing the contract and its breach,
8 injunctive relief, and compensatory damages for the breach.

9 In his third claim (the due process claim), plaintiff asserted that he was not
10 provided a hearing to contest any of the trading restrictions that had been imposed on his
11 account and that the denial of such a hearing had violated his right to due process as
12 guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States
13 Constitution. For his due process claim, he sought declaratory relief--*viz.*, declarations
14 that his rights to due process had been violated--and compensatory relief for the violation.

15 In his fourth claim (the contract-impairment claim), he asserted that the
16 restrictions imposed by the 2002 and 2004 PERS policies and OAR 459-050-0037 (2008)
17 impaired defendant's contractual obligations to plaintiff in violation of Article I, section
18 21, of the Oregon Constitution and Article I, section 10, of the United States Constitution.
19 For that claim, plaintiff sought declaratory relief--*viz.*, the same declarations requested
20 under the breach-of-contract claim and declarations establishing that the policies and rule
21 had violated his constitutional rights and, therefore, were void.

22 In his fifth claim (the equal treatment claim), plaintiff alleged that (1) the

1 trading standards established by the 2004 PERB policy were unconstitutionally vague
2 under the Due Process Clause; (2) the 2005 restriction, the 2006 restrictions, and OAR
3 495-050-0037 (2008) violated his rights to substantive due process as guaranteed by the
4 Due Process Clause; (3) the delegation of discretionary authority by PERB to the Plan
5 manager through the 2004 PERB policy and OAR 459-050-0037 (2008) violated the
6 separation of powers provision of the Oregon Constitution; and (4) the application of the
7 2004 PERB policy, the 2005 restriction, and the 2006 restrictions was arbitrary and
8 disparate among participants in the Plan and, therefore, violated Article I, section 20, of
9 the Oregon Constitution and the Equal Protection Clause of the Fourteenth Amendment
10 to the United States Constitution. For his equal treatment claim, plaintiff sought
11 declaratory relief--viz., declarations establishing that the trading restrictions identified in
12 the claim violated his constitutional rights and, therefore, were void--and compensatory
13 relief for the violation.

14 In plaintiff's sixth claim (the section 1983 claim)--the final claim at issue in
15 this case--he asserted that the constitutional violations that he had alleged in his other
16 claims entitled him to declaratory and compensatory relief under 42 USC section 1983.

17 Defendant moved under ORCP 21 A(1) to dismiss plaintiff's claims for lack
18 of subject matter jurisdiction and under ORCP 21 A(8) to dismiss them for failure to state
19 ultimate facts sufficient to constitute a claim. In support of its subject matter jurisdiction
20 contention, defendant argued, in part, that

21 "the state [APA] provides the exclusive remedy for challenging defendant's
22 actions regarding any alleged violation of any law, constitutional
23 protection, or fiduciary duty, * * * [plaintiff] should have raised his claims

1 regarding any alleged breach of any law, constitutional protection, or
2 fiduciary duty during the contested case process, * * * [and] plaintiff is
3 barred from challenging the 2002 and 2005 restrictions because he did not
4 exhaust his administrative remedies[.]"³

5 Plaintiff responded, in essence, that a contested case proceeding is not the exclusive
6 forum to challenge the legality of the trading restrictions imposed on his Plan account
7 but, rather, that PERS and the trial court have concurrent jurisdiction over those aspects
8 of his claims. Further, he contended that the considerations delineated in *Boise Cascade*
9 *Corp. v. Board of Forestry (S42159)*, 325 Or 185, 935 P2d 411 (1997), do not militate in
10 favor of the court invoking the doctrine of primary jurisdiction and abating the court
11 action until PERS had addressed the issues within PERS's primary jurisdiction.

12 At the hearing on defendant's motion, defendant reiterated that plaintiff

13 "raises a variety of claims, and * * * almost all of them say that there was
14 some statutory violation, there was a constitutional violation, there was
15 some sort of violation of an agency policy. The agency did something
16 wrong during the administrative process. Every one of those claims and
17 every one of those issues is subject to review under the [APA]. It is what
18 [plaintiff] could raise during his contested case process and it is what he
19 can appeal to the Oregon Court of Appeals. * * * So to the extent that
20 [plaintiff] is arguing any claim of any violation of the statute or a rule or a
21 policy, [there is] APA exclusivity and he should have raised it during the *
22 * * APA process and he cannot raise it here."

23 Plaintiff responded that

24 "the strongest argument [defendant] made pertains to the fact that I
25 separated--I created a claim one[--the lack-of-authority claim--]that just
26 addressed the rule and the statute, and I think in the complaint I just asked

³ Defendant also contended that plaintiff had failed to exhaust his administrative remedies as to the 2002 and 2005 trading restrictions because he did not seek administrative review of the restrictions within the 60-day time limit imposed by OAR 459-001-0030.

1 for declaratory relief [on that claim]. * * * [Defendant] ha[s] a much
2 stronger argument that the agency has exclusive jurisdiction over that. * * *
3 [But claim one] underlies, as I said, the [other claims], and so * * *
4 notwithstanding the fact that maybe the Circuit Court did not have
5 jurisdiction just to determine whether or not a statute or a rule is valid
6 because it underlies another claim, * * * the Court has to decide that."

7 After the hearing, the court issued a letter opinion, concluding that all of the
8 claims

9 "are barred as Plaintiff failed to exhaust his administrative remedies. The
10 APA 'establishes a comprehensive pattern for the judicial review of
11 administrative decisions. The various APA statutes governing judicial
12 review provide the sole and exclusive methods of obtaining judicial
13 review.' *Eppler v. Bd. of Tax Service Examiners*, 189 Or App 216, 219, 75
14 P3d 900 (2003) (internal citations omitted). * * *

15 "The doctrine of exhaustion applies when a party, without
16 conforming to the applicable statutes or rules, seeks judicial determination
17 of a matter that was or should have been submitted to the administrative
18 agency for decision.

19 "In this case, Plaintiff was provided a contested case hearing
20 wherein he had the ability to challenge the [trading] restrictions. Plaintiff
21 admits that, '[e]xcept for the tort claims, Plaintiff's claims in these
22 proceedings are identical [to] those he made before PERS[.]' Having begun
23 the administrative process with a request for an administrative hearing, and
24 regardless of the outcome of that hearing, review of the agency's ruling
25 would have been by petition for judicial review in the Court of Appeals
26 under the APA. However, Plaintiff chose to bring his action in a new
27 forum. That decision is inconsistent with the [principle] of exhaustion.
28 This demonstrates that Plaintiff did not exhaust his administrative
29 remedies."

30 (Internal citations omitted; second and fourth alterations in original.) Therefore, the court
31 determined that it lacked subject matter jurisdiction over plaintiff's six claims.⁴ Based on

⁴ In the letter opinion, the court acknowledges that, "[a]lthough [the parties] will note below that [the court's] decision [on] several of the [claims] is based upon procedural grounds, [the court] still analyzed the merits of those claims before making

1 its reasoning in the letter opinion, the court dismissed plaintiff's complaint with prejudice.

2 II. ANALYSIS

3 On appeal, plaintiff argues, among other things, that the court and PERS
4 have concurrent jurisdiction over the claims on which plaintiff sought compensatory
5 relief because he cannot obtain compensatory relief through the APA contested case
6 proceeding. As to his lack-of-authority and contract-impairment claims--in which
7 plaintiff requested only declaratory relief--he contends that the court and PERS also have
8 concurrent jurisdiction over those claims because they are incidental to the claims for
9 which he requested compensatory relief. Further, plaintiff argues that, if PERS has
10 primary jurisdiction over any of the issues raised in any of the claims subject to
11 concurrent jurisdiction, then the court should have abated the action, rather than
12 dismissing it with prejudice, pending the resolution of his contested case proceeding.

[its] decision." But, because the court did not expressly address whether the six claims for which it concluded that it lacked subject matter jurisdiction also failed to state ultimate facts sufficient to constitute such a claim, we are unable to discern whether the purported failure to state ultimate facts was determined by the court to be an independently sufficient ground on which to dismiss plaintiff's claims. Further, other than the section 1983 claim, which is addressed below, defendant did not argue on appeal that we should affirm the court's dismissal on the alternative basis that none of plaintiff's claims alleged facts sufficient to state a claim. In all events, it would not be appropriate for us to resolve the case on such a basis because the dismissal of plaintiff's claims on jurisdictional grounds foreclosed any opportunity for plaintiff to replead his claims to address the purported deficiencies in them. *See, e.g., Outdoor Media Dimensions Inc. v. State of Oregon*, 331 Or 634, 660, 20 P3d 180 (2001) ("[E]ven if the record contains evidence sufficient to support an alternative basis for affirmance, if the losing party might have created a different record below had the prevailing party raised that issue, * * * then [the court] will not consider the alternative basis for affirmance." (Emphasis omitted.)). For all of those reasons, we address only whether the court erred in dismissing the claims for lack of subject matter jurisdiction.

1 In response, defendant argues, as it did before the trial court, that, until
2 plaintiff establishes through the contested case proceeding the invalidity of the trading
3 restrictions at issue in this case, the court lacks authority to address his claims, regardless
4 of the type of relief that he requested. Defendant contends, in effect, that this case is
5 indistinguishable from [Muller v. Dept. of Agriculture](#), 164 Or App 11, 988 P2d 927
6 (1999), and, therefore, the court correctly dismissed with prejudice all of the claims
7 except the section 1983 claim. As to the section 1983 claim, defendant concedes that the
8 court erred in dismissing the claim for plaintiff's failure to exhaust his administrative
9 remedies. That concession is well taken, *see Nutbrown v. Munn*, 311 Or 328, 338, 811
10 P2d 131 (1991), *cert den*, 502 US 1030 (1992) ("A state generally may not erect
11 procedural barriers such as requiring that state remedies be sought and denied, before the
12 federal remedy is invoked."), and, accordingly, the court erred in dismissing the section
13 1983 claim.⁵ Further, for the reasons stated below, we conclude that the court did not err
14 in dismissing plaintiff's lack-of-authority and contract-impairment claims but erred in
15 dismissing plaintiff's breach-of-contract, due process, and equal treatment claims.

⁵ Defendant contends that, despite the court's error in dismissing the section 1983 claim for lack of subject matter jurisdiction, we should nonetheless affirm the dismissal under the "right for the wrong reason" principle because plaintiff had failed to allege ultimate facts in that claim sufficient to constitute a claim. However, as we stated above, the Supreme Court has explained in [Outdoor Media Dimensions Inc. v. State of Oregon](#), 331 Or 634, 660, 20 P3d 180 (2001) (emphasis omitted), that, "even if the record contains evidence sufficient to support an alternative basis for affirmance, if the losing party might have created a different record below had the prevailing party raised that issue, * * * then [the court] will not consider the alternative basis for affirmance." That exception applies here, and, therefore, we decline to consider defendant's proffered alternative basis for affirmance.

1 The critical inquiry in this case is twofold. First, we must determine
2 whether plaintiff had to exhaust his administrative remedies under the APA before
3 pursuing his court action because administrative remedies could afford him complete
4 relief. If we conclude that plaintiff could not obtain complete relief on his claims, then
5 we must determine whether the court had to abate the action in order to allow plaintiff to
6 exhaust his administrative remedies as to the issues that the agency has the authority to
7 decide.

8 A. *The Declaratory Relief Claims*

9 The premise that an agency has initial authority under the APA to resolve a
10 dispute over the agency's actions stems from the oft-repeated principle that the review
11 procedure established in the APA, when it is available, is the exclusive means of
12 reviewing the legality of an agency's action. *See FOPPO v. County of Marion*, 93 Or
13 App 93, 97, 760 P2d 1353 (1988), *rev den*, 307 Or 326 (1989) (circuit court did not have
14 authority to decide the plaintiff's claims for declaratory relief against PERS because
15 "PERS is subject to the APA; therefore, the APA provides the exclusive methods for its
16 actions and for review of those actions"); *see also Bay River v. Envir. Quality Comm.*, 26
17 Or App 717, 720, 554 P2d 620, *rev den*, 276 Or 555 (1976) ("The [APA] establishes a
18 comprehensive pattern for the judicial review of administrative decisions. The various
19 APA statutes governing judicial review provide the sole and exclusive methods of
20 obtaining judicial review."). *But cf. Nutbrown*, 311 Or at 338 (explaining that exhaustion
21 of state administrative remedies is generally not required to pursue a section 1983 claim).
22 That principle flows from the exhaustion requirement in administrative law, *viz.*, "that as

1 to matters within the jurisdiction of an administrative agency [j]udicial review is only
2 available after the procedure for relief within the administrative body itself has been
3 followed without success," *Mullenaux v. Dept. of Revenue*, 293 Or 536, 539, 651 P2d 721
4 (1982) (internal quotation marks omitted; brackets in original).⁶ Therefore, if APA
5 review could resolve the legality of a challenged agency action, then a party may not
6 initiate a declaratory judgment action regarding the challenged agency action *while the*
7 *APA proceeding is pending* and, thereby, circumvent the exclusive APA review process.
8 [*Eppler v. Board of Tax Service Examiners*](#), 189 Or App 216, 219, 75 P3d 900 (2003); *see*
9 *also Bay River*, 26 Or App at 720 ("A party cannot ignore the judicial review provisions
10 of the APA in favor of a general equitable or declaratory remedy.").

11 Here, plaintiff asserted two claims in his court action--the lack-of-authority
12 and contract-impairment claims--in which he seeks solely declaratory relief establishing
13 that PERS's trading restrictions were unlawful in some respect. When plaintiff filed the
14 court action, the contested case proceeding that he had initiated to resolve the same
15 issues--the legality of PERS's actions--was pending. Because plaintiff could obtain in
16 the contested case proceeding the relief that he seeks on his declaratory relief claims--
17 *viz.*, a determination of the legality of the trading restrictions--he cannot circumvent
18 PERS's authority to resolve those issues by seeking declaratory relief without first
19 exhausting his administrative remedy through the contested case proceeding. Therefore,

⁶ See *Bay River*, 26 Or App at 721-22 ("Th[e] [exhaustion] principle could hardly be more relevant in this case. * * * [W]e hold that the circuit court has no jurisdiction to review agency orders that, as in this case, trigger the availability of a contested case hearing, and that are subject to modification in such an agency proceeding.").

1 the court did not err in dismissing the lack-of-authority and contract-impairment claims.⁷

2 B. *The Compensatory Relief Claims*

3 In contrast to a court's lack of authority to resolve a claim when a party has
4 failed to exhaust an administrative remedy that could afford the party complete relief on
5 the claim, the exhaustion principle does not defeat a court's authority to resolve a claim
6 when the available administrative remedy, even if pursued successfully, would not
7 accomplish the party's desired result. *Lyke v. Lane County*, 70 Or App 82, 85, 688 P2d
8 411 (1984). Put differently, a party may invoke the exhaustion principle as a basis for
9 dismissal when the available administrative remedy is "adequate to redress the aggrieved
10 party's interests." *Ayres v. Board of Parole*, 194 Or App 429, 436, 97 P3d 1 (2004).⁸

11 Therefore, to determine if the exhaustion principle denies the court the
12 authority to resolve plaintiff's breach-of-contract, due process, and equal treatment
13 claims, we must decide whether the contested case proceeding could afford plaintiff
14 complete relief on those claims, specifically, the compensatory relief that he seeks in

⁷ Plaintiff did not assign error to the court's dismissal of his claims with prejudice, and, therefore, we express no opinion as to whether the court erred in doing that.

⁸ Similarly, the United States Supreme Court has concluded that the exhaustion principle does not apply under federal common law where "an administrative remedy may be inadequate because of some doubt as to whether the agency was empowered to grant effective relief." *McCarthy v. Madigan*, 503 US 140, 147, 112 S Ct 1081, 117 L Ed 2d 291 (1992) (internal quotation marks omitted). In *McCarthy*, the Court concluded that the exhaustion principle did not prevent the petitioner from bringing his claim seeking compensatory relief for a violation of his rights as guaranteed by the Eighth Amendment to the United States Constitution because, in part, "the administrative 'remedy' does not authorize an award of monetary damages--the only relief requested by [the petitioner] in this action." *Id.* at 152.

1 them.

2 As noted above, plaintiff's argument on appeal assumes that he cannot
3 recover compensatory relief in the contested case proceeding, and defendant does not
4 take issue with that assumption.⁹ Further, based on our review of the applicable law, we
5 have not found any authority for PERS to award compensatory relief to Plan participants
6 of the type sought by plaintiff. Therefore, the authority for plaintiff to obtain
7 compensatory relief in the contested case proceeding would have to be found in the APA.
8 In that respect, the APA gives a reviewing court in either a contested case proceeding or
9 an other than contested case proceeding--the Court of Appeals or the circuit court,
10 respectively--authority to "[o]rder such ancillary relief as the court finds necessary to
11 redress the effects of official action wrongfully taken or withheld." ORS 183.486(1)(b).
12 The Oregon Supreme Court has recognized, in *dictum*, that ORS 183.486(1)(b) "clearly
13 authorizes monetary relief." *Burke v. Children's Services Division*, 288 Or 533, 544, 607
14 P2d 141 (1980).

15 In *Burns v. Board of Psychologist Examiners*, 116 Or App 422, 841 P2d
16 680 (1992), we addressed the scope of ancillary relief under ORS 183.486(1)(b) in the
17 context of an other-than-contested-case review of an agency order. The petitioner sought
18 tort damages on judicial review of the respondent's denial of his application for a
19 psychologist's license. After acknowledging the Supreme Court's *dicta* in *Burke* and

⁹ Further, we note again that part of PERB's reasoning for dismissing the contested case proceeding was that plaintiff could not recover in that proceeding the compensatory relief that he sought.

1 recognizing that the court had not determined in *Burke* the types of monetary relief that
2 are available under ORS 183.486(1)(b), we concluded that tort damages are not available
3 under that provision, reasoning that

4 "ORS 183.482 and ORS 183.484 provide for judicial review of agency
5 orders by the Court of Appeals and the circuit court, respectively. Under
6 both provisions, the court conducts the review, and jury trials are not
7 available. Moreover, the Court of Appeals has *no authority to make an*
8 *initial award of compensatory damages under any circumstances.* * * * [I]f
9 the legislature had intended to give this court and the circuit court the
10 authority to award compensation for tort claims in the course of reviewing
11 administrative orders, we think that it would have been far less oblique in
12 saying so than ORS 183.486(1)(b) reads."

13 *Burns*, 116 Or App at 425 (emphasis added).

14 Here, plaintiff initiated a contested case proceeding under the APA to
15 challenge the trading restrictions placed on his Plan account, and, pursuant to ORS
16 183.482(1), we have jurisdiction to review PERB's order in that proceeding. Because we
17 have no authority under ORS 183.486(1)(b) to award compensatory damages in the first
18 instance, plaintiff cannot recover compensatory damages in the contested case
19 proceeding, and, hence, his administrative remedy is not adequate to redress his interests.
20 Accordingly, the exhaustion doctrine does not operate to deny the court the authority to
21 resolve plaintiff's compensatory relief claims.

22 However, because the pending contested case proceeding could affect
23 plaintiff's entitlement to compensatory relief on the claims for which he seeks that relief,
24 exhaustion does prevent the court from resolving plaintiff's compensatory relief claims
25 until he has exhausted his administrative remedies through the contested case proceeding.
26 *See Premier Technology v. Oregon State Lottery*, 136 Or App 124, 132, 901 P2d 883

1 (1995) ("When an agency uses the administrative process to [breach a contract], the other
2 party may seek to invalidate the agency action that constituted the breach, on the basis
3 that the action did not comport with administrative law. In such a case, APA review
4 would be exclusive as to the validity of the agency action."). Therefore, because the
5 exhaustion principle does not prevent the court from awarding compensatory relief to
6 plaintiff on his breach-of-contract, due process, and equal treatment claims but does
7 prevent the court from doing so until plaintiff has completed the pending contested case
8 proceeding, the court should not have dismissed on exhaustion grounds plaintiff's
9 compensatory relief claims but, rather, should have abated them. *Cf. Boise Cascade*
10 *Corp.*, 325 Or at 193 (explaining that, under the primary jurisdiction doctrine, "[t]he court
11 retains jurisdiction over the dispute itself and all other issues raised by the dispute, but it
12 cannot resolve that dispute until the agency has resolved the issue that is in its primary
13 jurisdiction" (internal quotation marks omitted)); [*Dreyer v. PGE*](#), 341 Or 262, 283, 287,
14 142 P3d 1010 (2006) (concluding that court had "legal duty to abate the proceedings"
15 pending agency's resolution of issues within its primary jurisdiction).¹⁰

16 According to defendant's argument, that conclusion appears to conflict with
17 our decision in *Muller*, 164 Or App 11. In *Muller*, the plaintiff sued the Oregon
18 Department of Agriculture for negligently denying the plaintiff's application for a permit

¹⁰ As discussed above, defendant also argued before the trial court that the claims should be dismissed for failure to state ultimate facts sufficient to constitute a claim, but, because of the reasons that we identified above, ___ Or App at ___ n ___ (slip op at 9 n 4), we express no opinion as to whether the court should have dismissed the claims under ORCP 21 A(8).

1 to burn his grass-seed fields, seeking damages for monetary losses that he had suffered as
2 a result of the permit denial. The defendant moved to dismiss the action, arguing that the
3 trial court lacked jurisdiction to review its denial of the plaintiff's application because the
4 validity of that decision was subject to exclusive review under the APA. The trial court
5 denied the motion, and the plaintiff obtained a judgment for damages after a trial.
6 However, before filing the negligence action, the plaintiff had requested a contested case
7 hearing under the APA--as authorized when the defendant denied a field-burning permit--
8 and that proceeding apparently was still pending when the defendant appealed the
9 judgment that the trial court had entered that awarded damages to the plaintiff.

10 On appeal, the defendant argued that the trial court had erred in denying the
11 defendant's motion to dismiss the action for lack of jurisdiction, renewing its argument
12 that the APA was the exclusive means to review the validity of the agency's decision to
13 deny the plaintiff a field-burning permit. In response, the plaintiff argued that he was
14 seeking damages for the consequences of the defendant's denial and was not challenging
15 the validity of the agency's order. We agreed with the defendant that the trial court had
16 erred in denying the motion to dismiss, concluding that the plaintiff's "entitlement to
17 damages depends on the validity of [the defendant's] denial," and, because the plaintiff
18 challenged "the validity of an agency action on the ground that it 'violated a statute or
19 rule or was otherwise in violation of administrative law,'" the plaintiff's challenge was
20 subject to review exclusively under the APA. *Muller*, 164 Or App at 16 (quoting
21 *Premier Technology*, 136 Or App at 132).

22 After noting that the potential for inconsistent decisions and collateral

1 challenges bolstered our conclusion, we considered the plaintiff's argument that "APA
2 review is inadequate, because the remedy [the plaintiff] seeks--damages--is not available
3 under the APA." *Id.* We rejected that argument, reasoning that it "amounts to mere
4 question begging[.] If [the plaintiff] is entitled to a remedy, then [the plaintiff] must
5 establish the invalidity of the agency action in the first place. We merely hold that the
6 exclusive mechanism for establishing the invalidity of the agency action is provided in
7 the APA." *Id.* at 16-17. However, we did not consider whether the exhaustion principle
8 would require the court to abate rather than dismiss the action pending completion of the
9 contested case proceeding--a potential disposition of the court action for which the
10 plaintiff apparently did not contend. Our ultimate conclusion in *Muller*-- viz., that the
11 validity of the agency's action had to be resolved first through the APA review process, if
12 available--comports with our conclusion in this case that plaintiff must exhaust his
13 administrative remedies under the APA as a predicate to establishing his right to recover
14 compensatory relief in the court action. Hence, *Muller* does not conflict with our
15 conclusion that plaintiff's compensatory relief claims had to be abated rather than
16 dismissed.

17 In sum, the court did not err in dismissing plaintiff's lack-of-authority and
18 contract-impairment claims but erred in dismissing plaintiff's breach-of-contract, due
19 process, equal treatment, and section 1983 claims. We therefore reverse the court's
20 judgment as to the latter claims.

21 Dismissal of breach-of-contract, due process, equal treatment, and section
22 1983 claims reversed and remanded; otherwise affirmed.