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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

PAMELA LOWE Plaintiff, vs. IDAHO TRANSPORTATION DEPARTMENT, *et al*. Defendants.	**PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS** Case No.09-CV-00653-REB Judge Ronald E. Bush

Plaintiff, Pamela Lowe, by and through her undersigned attorneys, hereby submits this Memorandum in support of her Motion for Partial Judgment on the Pleadings pursuant to Federal Rule of Civil Procedure 12(c).

INTRODUCTION

Ms. Lowe worked for the Idaho Transportation Department ("ITD") for over fifteen years until she was terminated in July 2009. At the time of her termination, Ms. Lowe had been serving as ITD's Director for two-and-a-half years. As Director she received satisfactory performance evaluations and was not informed of any serious deficiencies in her performance

prior to her termination. The ITD Board requested her resignation just three days after the 2009 legislative session ended. When Ms. Lowe refused to resign, she was terminated. Ms. Lowe's suit includes claims for violations of her constitutional rights to due process and equal protection, the Idaho Protection of Public Employees Act, and the Equal Pay Act.

PROCEDURAL BACKGROUND

Ms. Lowe initiated this action against Defendants by filing a Verified Complaint in the Fourth Judicial District on November 6, 2009. Defendants removed this action to Federal Court and Ms. Lowe filed her Second Amended Complaint on December 29, 2009 (Document # 5). Defendants filed their Answer on January 8, 2010 (Document # 9).

This Motion addresses Ms. Lowe's due process claims (specifically her Second through Fifth Claims for Relief) and requests the Court determine that Ms. Lowe had a property interest in continued employment as ITD Director.

STATEMENT OF FACTS[1]

1. Ms. Lowe began working for ITD in the fall of 1993 as a Transportation Staff Engineer. *See* Defendants' Answer, Document #9, ¶ 12.

2. Plaintiff received satisfactory performance evaluations during her employment with ITD and was promoted to a number of different positions. *Id.* at ¶ 13.

3. For example: In 2000 Ms. Lowe was promoted to District Engineer position; in 2004 she became the Administrator of the Division of Motor Vehicles; and in September 2006, she was appointed Deputy Director of ITD. *Id*. at ¶ 14; Plaintiff's Second Amended Complaint, Document #5, ¶ 19.

[1] As this is a Motion for Judgment on the Pleadings and does not require the Court to examine anything outside the pleadings that have thus far been filed, Ms. Lowe has endeavored to rely solely on the facts that are relevant only to this Motion and which have been admitted to by Defendants in their Answer.

4. In December of 2006, Ms. Lowe was promoted to ITD Director. Ms. Lowe was the first female Director at ITD. *See* Answer at ¶ 15.

5. Ms. Lowe's performance evaluation in March 2008, the last one she received as Director prior to her termination, stated that she "achieves solid sustained performance." *Id*. at ¶ 21.

6. On July 16, 2009 the Board voted to terminate Ms. Lowe's employment effective July 31. *See* Answer, ¶ 37; Second Amended Complaint ¶¶ 40, 43-44.

7. Ms. Lowe was never provided with adequate notice and opportunity to respond to the supposed reasons for her firing and she was denied either a pre- or post-termination hearing. *See* Answer at ¶ 38; Second Amended Complaint at ¶45.

STANDARD OF REVIEW

Under Rule 12(c) of the Federal Rules of Civil Procedure, after the pleadings are closed, any party may move for judgment on the pleadings. Judgment on the pleadings is appropriate when, taking everything in the pleadings as true, the moving party is entitled to judgment as a matter of law. *Honey v. Distelrath*, 195 F.3d 531, 532 (9th Cir. 1999).

ARGUMENT

Public employees who have a property interest in continued employment are entitled to due process of law with respect to their termination. *Board of Regents v. Roth*, 408 U.S. 564, 568-69 (1972). To establish a violation of due process, the plaintiff must show that: 1) a protected property interest was taken; and 2) procedural safeguards surrounding the deprivation were inadequate. *Id*. In this case, Ms. Lowe was never provided with adequate notice and opportunity to respond to the supposed reasons for her firing, either pre- or post-termination. *See* Statement of Fact ("SOF") ¶ 7. Thus, she received no due process in her termination.

As further set forth below, the Court should rule that as a matter of law Ms. Lowe had a property interest in her job and that Defendants violated her procedural due process rights.

I. MS. LOWE HAS A PROPERTY INTEREST IN HER CONTINUED EMPLOYMENT

"Property interests are not created by the Constitution, 'they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . .'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985), quoting *Roth, supra* 408 U.S. at 577. The U.S. Supreme Court and Idaho Supreme Court have ruled that when an employee may be discharged only for limited reasons or "for cause"[2] an employee has a property interest in employment. *See Arnett v. Kennedy*, 416 U.S. 134 (1974) (statute requiring cause for termination vested a property interest in federal employee); *Harkness v. City of Burley*, 110 Idaho 353, 356-57, 715 P.2d 1283, 1286-87 (Idaho 1986). *See also, Farner v. Idaho Falls School Dist. No. 91*, 135 Idaho 337, 341 17 P.3d 281, 285 (Idaho 2000) (teachers right to not be discharged except for cause vested employee with a property interest in employment); *Ferguson v. Board of Trustees*, 98 Idaho 359, 364, 564 P.2d 971, 976 (1977), *cert. denied*, 434 U.S. 939 (same).

Ms. Lowe's employment as Director is specifically governed by Idaho Code Section 40-503. The statute provides that, "The director shall serve at the pleasure of the board and may be

[2] This term has several iterations that are used interchangeably in this brief. "Cause," "for cause," "just cause," and "for good reason," all mean that an employer must have a justifiable or good reason for terminating an employee. This is contrary to the concept of "at-will" employment which provides that an employer may fire an employee for a good reason (like poor work performance), bad reason (like that the employee was just annoying or dressed poorly), or no reason at all. *Sorenson v. Comm Tek, Inc.*, 118 Idaho 664, 666, 799 P.2d 70 (Idaho 1990)(unless an employee is hired pursuant to an agreement that limits the reasons s/he may be terminated, the employment is at-will and either party may terminate the relationship at any time for any reason.)

removed for inefficiency, neglect of duty, malfeasance or nonfeasance in office . . . ." The legal issue is whether this statutory language confers a property interest in the Director's employment.

There are no court decisions interpreting this statute. Thus, this is an issue of first impression, which requires court interpretation of this statute. The Idaho Supreme Court recently and succinctly set forth the rules of statutory interpretation in *Doe v. Boy Scouts of America,* 224 P.3d 494, 497, 148 Idaho 427 (Idaho 2009) saying:

> Statutory interpretation begins with the literal words of a statute, which are the best guide to determining legislative intent. *State v. Doe*, 147 Idaho 326, 328, 208 P.3d 730, 732 (2009). The words of a statute should be given their plain meaning, unless a contrary legislative purpose is expressed or the plain meaning creates an absurd result. *Id*. If the words of the statute are subject to more than one meaning, it is ambiguous and this Court must construe the statute 'to mean what the legislature intended it to mean. To determine that intent, [this Court] examine[s] not only the literal words of the statute, but also the reasonableness of proposed constructions, the public policy behind the statute, and its legislative history.' *Id.* (quoting *Hayden Lake Fire Protection Dist. v. Alcorm*, 141 Idaho 388, 398-99, 111 P.3d 73, 83-84 (2005)).

Further, a well-established tenant of statutory construction provides that a statute should be construed "so that effect is given to all its provisions, so that no part thereof will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another." *Norton v. Department of Employment*, 94 Idaho 924, 928, 500 P.2d 825, 829 (Idaho 1972). Applying these tenants of statutory interpretation to I.C. § 40-503, the Court must rule that the statute contains a for cause termination standard, which in turn provides Ms. Lowe with a property interest in her employment.

A. The Plain Language of I.C.§ 40-503 Requires Sufficient Cause for Termination

First, the plain meaning of the words in the statue make clear that the Director can only be removed for cause. The statute provides termination of the Director for only limited reasons. Specifically, the Director may be removed by the board only for "inefficiency, neglect of duty,

malfeasance or nonfeasance in office." Identical or virtually identical language has been interpreted by courts to provide a for cause limitation on termination. A long-established example is found in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). In this case, President Franklin Roosevelt had requested Humphrey's resignation from the Federal Trade Commission because he disagreed with Humphrey's policies concerning the Commission's administration. *Id*. at 619. But Congress, in the Commission's governing statute, provided that the Commissioners may be removed for "inefficiency, neglect of duty, or malfeasance in office." *Id*. at 620. The Supreme Court ruled that this language was "definite and unambiguous" and meant that Humphrey's removal was precluded except for just cause.[3] *Id*. at 623-24. Thus, even though the President had authority to select Commissioners at his will, they could only be removed for good reason. *See also, S.E.C. v. Blinder, Robinson & Co., Inc.*, 855 F.2d 677, 681 (10th Cir. 1988), *cert. denied* 489 U.S. 1033 (1989) (accepting that the President's power to remove the SEC chair, who serves "at the pleasure of the President," limited to just cause based on language "inefficiency, neglect of duty or malfeasance in office"); *Loudermill*, *supra* 470 U.S. at 539 (agreed with lower court that Ohio statute providing public employees "could not be dismissed 'except . . . for . . . misfeasance, malfeasance or nonfeasance in office'" gave plaintiff protected property interest under Ohio law); *Walker v. City of Berkeley*, 951 F.2d 182 (9th Cir. 1991)(finding that civil servant under city regulations could only be terminated for cause sufficient to establish property interest); *Greater Bridgeport Transit Dist. v. City of Bridgeport*, 2005 WL 1545207, (Conn Super. June 1, 2005), attached as Exhibit 1 (housing commissioner

[3] The Court also found that the just cause limitation was supported by the legislative intent, history and purposes. *Id*. at 625. The Court went on to address the constitutionality of Congress' limitation on the President's power under the separations of powers principal and upheld the limitation under that analysis as well. *Id*. at 631-32.

who may be removed for "inefficiency, neglect of duty or misconduct in office" had protected property right.).

Moreover, an Idaho Supreme Court case from 1904 explored what effect similar statutory language had on the right to remove public employees. *Ewin v. Independent School District No. 8*, 77 P. 222, 10 Idaho 102 (1904). The Court reviewed myriad cases dealing with this the termination of government employees and ultimately determined that:

> the general principle running through them all is: That where the power to remove is restricted or limited to certain reasons or causes, the final determination as to whether the case falls within any of those causes rests with the courts and may be reviewed or inquired into by them. And that, on the other hand, where the power is general, unlimited, and unrestricted and is once exercised, it cannot, and will not, be questioned or examined into by the courts. It may be exercised either with or without notice.

Id. at 226. The other cases reviewed in *Erwin* included statutes with language similar to I.C. § 40-503. For example, in the case of *Morley v. Power*, 73 Tenn. 691 (1880), the court reviewed a statute empowering the school director to remove teachers for "incompetence, improper conduct, or inattention to duties," and concluded that "the very fact that the causes of removal are specified demonstrates that the discretion is not unlimited." *Id*. 225.

Further, a 1996 Idaho Attorney General opinion concluded that statutory phrase "inefficiency, neglect of duty or malfeasance in office" means that the employee is not removable without good cause. *See* Exhibit 2. Given the above, I.C. § 40-503 restricts or limits the reasons for removal of the Director and, thus, creates a property interest in the Director's employment at ITD.

Defendants will undoubtedly contend that the phrase "serves at the pleasure of the Board" means that Ms. Lowe could be fired for any reason and was therefore an at-will employee. If the statute ended with that language, such contention would be persuasive.

However, "at the pleasure of" language is directly followed by the limiting language "and may be removed by the board for inefficiency, neglect of duty, malfeasance or nonfeasance in office" (emphasis added). Therefore, this conjunctive clause has to have meaning as it would in any plain reading of the statute. *See Norton, supra* at 500 P.2d at 829 (effect must be given to all provisions); *Sweitzer v. Dean*, 118 Idaho 568, 572, 798 P.2d 27, 31 (1990) ("Supreme Court will not construe statute in a way which makes mere surplusage of provisions included therein.") By including specific, limiting reasons for the Director's removal, the statue clearly nullifies an at-will employment relationship. Thus, the plain meaning of the statute that governed Ms. Lowe's termination from the Director's position vests her with a property interest in that employment.

B. Legislative Intent Was to Require Termination Only for Good Cause.

If the Court determines that the language in the statute is ambiguous, it must determine the intent of the legislature in enacting the law. *Doe v. Boy Scouts of America, supra* 224 P.3d at 497. In this respect, the legislative history also supports the conclusion that the Director can only be removed for good cause (as defined by the statute, for "inefficiency, neglect of duty, malfeasance or nonfeasance.").

In November 1972 Idaho ratified section 20 to Article 4 of the Idaho State Constitution. Section 20 limited the executive branch to no more than 20 departments. As a result of this constitutional amendment, Idaho's executive departments, then numbering over 200, were reorganized. As part of this reorganization, the Idaho Legislature passed Senate Bill 1295 in 1974 creating the Idaho Transportation Department as an executive department of the state.[4]

[4] Prior to 1974, the state's transportation matters were under the control of the Idaho Board of Highway Directors, which was divided into three districts each headed by a director appointed by the Governor to serve a specific term in office. *See* I.C. §§ 40-112-14 (1973). Further, the Idaho Board of Highway Directors appointed the State Highway Engineer who was the technical and administrative officer of the board. *Id*. at §§40-124-26.

This new Transportation Department was headed by a three member transportation board "vested with the authority control, supervision, and administration of the Idaho transportation department." SB 1295 (1974) §§ 40-112-113. Additionally, the bill created the office of the director of the Idaho transportation department. *Id*. at § 40-124. The bill contained the salient language, "The director shall serve at the pleasure of the board and may be removed by the board for inefficiency, neglect of duty, malfeasance or nonfeasance in office." *Id*.

The Statement of Purpose for SB 1295, relating to the appointment of a director, states, "The Idaho transportation board shall appoint a director having knowledge and experience in transportation matters, who shall serve at the pleasure of the board and may be removed by the board only for stated cause." See Exhibit 3 (emphasis added). SB1295 passed in the Senate on February 5th and in the House on February 11, 1974. The section related to the appointment and removal of the Director is now codified at I.C. § 40-503(1) and is substantively the same as § 40-124 of SB 1295.

This Statement of Purpose, an integral part of the legislative history of the creation of the office of ITD Director, could not be a clearer indication of the legislature's intent to limit the Board's discretion in removing the Director only for good cause. Thus the requirement of cause for removal is also clear from the legislative history.

1. Plaintiff's Offer Letter Does Not Trump Idaho Code.

Defendants will attempt to rely upon the offer letter to Ms. Lowe, attached as Exhibit A to their Answer, to assert that Ms. Lowe was merely an at-will employee with nothing to ensure her continued employment. However, the Idaho Supreme Court recently rebuffed a similar contention in *Boudreau v. City of Wendell,* 147 Idaho 609, 213 P.3d 394, 395-396, (2009). In that case, the court addressed whether the removal of the Wendell City Clerk was subject to the

City personnel policy or limited to the state statute that governed the appointment and removal of the Clerk. *Id*. at 611. The Supreme Court held that state statute governed the removal because "in Idaho local governments cannot override statutes enacted by the legislature." *Id*. at 612 (citations omitted). It stands to reason that similarly, ITD cannot override I.C. § 40-503 with an offer letter dictating that Ms. Lowe's position "is an 'at-will' position."

For the reasons set forth above, the plain language and the legislative history surrounding the enactment of the statute require that the Board have sufficient cause to remove the Director. Thus, Ms. Lowe had a property interest in her continued employment.

II. THE BOARD FAILED TO PROVIDE PROCESS TO MS. LOWE BEFORE TERMINATING HER

It is a clear and established tenant of constitutional jurisprudence that before a person is deprived of a property interest, that individual, "must be afforded opportunity for some kind of a hearing, 'except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.'" *Roth,* 408 U.S. at 569, n. 7 *citing Boddie v. Connecticut*, 401 U.S. 371, 379 (1971). *Sweitzer, supra* 118 Idaho at 573 (government employee is entitled to procedural due process protections of notice and hearing prior to being discharged.) That the opportunity to be heard must be provided at a meaningful time and in a meaningful manner is well established. *See e.g., Hamdi v. Rumsfeld*, 542 U.S. 507, 532 (2004).

When it comes to employment matters, the Supreme Court has said "the significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of the means of livelihood." *Loudermill,* 470 U.S. at 543. Thus, the Constitution requires the opportunity for the employee to present her side of the case prior to the decision. *Id.* This is because:

> even where the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes effect.

Id.

In this case, Defendants do not dispute that Ms. Lowe was never provided with any kind of hearing, either pre- or post-termination. Instead, Defendants maintain that Ms. Lowe was merely an at-will employee and "received all process that was due and to which she was entitled." *See* Answer, Document #9 ¶ 38. It is clear that Ms. Lowe never received a meaningful opportunity to respond to the supposed reasons for her termination in violation of her due process rights.

CONCLUSION

Given the above, Plaintiff respectfully requests that the Court enter partial judgment in her favor as follows and find that:

1. Ms. Lowe had a property interest in her continued employment as Director pursuant to Idaho Code § 40-503.
2. Ms. Lowe did not receive due process related to her termination by the Board.

Based upon those findings, Ms. Lowe respectfully requests that the Court order that ITD reinstate Ms. Lowe and provide the process she was due, including documentation regarding the reasons supporting that she was terminated for "inefficiency, neglect of duty, malfeasance or nonfeasance" and, further award her the damages she has incurred due to Defendants' unconstitutional deprivation of her rights including but not limited to her attorneys fees and costs.

DATED this 12th day of April, 2010

STRINDBERG & SCHOLNICK, LLC

/s/Erika Birch

Lauren Scholnick
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on April 12, 2010 a true and correct copy of the foregoing pleading was served on the following via Electronic Service via CMECF:

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Not Reported in A.2d, 2005 WL 1545207 (Conn.Super.)
(Cite as: 2005 WL 1545207 (Conn.Super.))

HOnly the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of Fairfield.
GREATER BRIDGEPORT TRANSIT DISTRICT et al.
v.
CITY OF BRIDGEPORT et al.
No. CV990359589S.

June 1, 2005.

Daly Weihing & Bodell, Bridgeport, for Greater Bridgeport Transit District, Wilfred Murphy, Constantine Chagares, Angelina Scarpetti, Morgan Kaolian and Raul Laffite.

Bridgeport City Attorney, Office of City Attorney, Bridgeport, for City of Bridgeport and Mayor Joseph P. Ganim.

Berchem Moses & Devlin PC, Milford, for Town of Stratford, Mark Barnhart and Debbie Rose.

Friedman Newman Levy & Sheehan PC, Fairfield, for Town of Fairfield and Kenneth Flatto.

Cohen & Wolf PC, Bridgeport, for Greater Bridgeport Transit Authority.

Eileen Kennelly, Fairfield, for Kenneth Flatto.

Enrico Vaccaro, Bridgeport, for Ronald Dodsworth.

SKOLNICK, J.

***1** This matter came on for trial before the court on March 28, 2005. The plaintiffs, Greater Bridgeport Transit District (GBTD), Wilfred Murphy, Constantine Chagares, Angelia Scarpetti, Morgan Kaolian and Raul Laffite (individual plaintiffs) filed a three-count complaint against the defendants, City of Bridgeport, Town of Stratford, Town of Fairfield (The Municipal defendants), Greater Bridgeport Transit Authority (GBTA), Jospeh P. Ganim, Mark Barnhart, Debbie Rosa and Kenneth Flatto. The plaintiff's complaint seeks temporary and permanent injunctions preventing the defendants from withdrawing from the GBTD, interfering with the operations of the GBTA and prohibiting the GBTD from acting as a transit district.

The individual plaintiffs were directors of the GBTD pursuant to General Statutes § 7-273c.[FN1] The individual defendants were the chief executives of the defendant city and towns.

FN1. General Statutes § 7-273c provides in pertinent part: "The affairs of the district shall be managed by a board of directors chosen from among the electors of the constituent municipalities ... The directors shall be appointed for terms of four years, except that, in municipalities having more than one director, one-half of those first appointed shall serve for two years and one-half for four years, their successors to serve four years each. Any municipality in respect to which a vacancy on the board occurs shall fill it for the unexpired portion of the term ... the directors shall be appointed by the elected chief executive of a city or borough, the board of selectmen in the case of a municipality in which the legislative body is a town meeting or by the board of selectmen of a town with the approval of the legislative body. Notwithstanding the provisions of this section, directors appointed from any municipality which is a member, or becomes a member, of any transit district in existence on May 18, 1972, shall be appointed by the legislative body of each municipality or the board of selectmen in the case of a municipality or the legislative body is a town meeting ... the directors shall meet at least four times annually or more often on the call of the chairman and shall elect officers from among their number. They may adopt bylaws and rules for the conduct of the affairs of the district. They shall appoint and fix the salary of a district manager, who shall be the chief executive officer of the district, and such other em-

ployees as are required for district purposes."

The plaintiffs attempted to prove and the court so finds that the individual plaintiffs were duly serving as directors of the GBTD in 1998, having been so appointed as such by their respective municipality and towns, when the municipal defendants commenced withdrawal proceedings from the GBTD and subsequently created the Greater Bridgeport Transit Authority (GBTA) to replace the GBTD. The evidence discloses that the municipal defendants held a meeting on December 21, 1998, which meeting was not open to the public and was held without notice to the individual plaintiffs. At this meeting the defendants established the GBTA as the new transit authority providing bus transportation in the City of Bridgeport and member towns, thereby replacing the GBTD and the individual directors, plaintiffs herein.

The plaintiffs claim that the municipal defendants, in purporting to withdraw from the GBTD, failed to "pay or secure" their expenses and obligations remaining due to the GBTD, and, in so failing, failed to comply with General Statutes § 7-273b(f).[FN2] The individual plaintiffs claim further that, because the withdrawal was not performed in compliance with § 7-273b(f), they and the towns they represent remain members of the GBTD and that the GBTD should be restored to control of the transit systems in the respective city and towns. Furthermore, the plaintiff asks the Court to preclude the municipal defendants from participating in the GBTA, which they claim was improperly and/or illegally created and, therefore, should be precluded from operating as a transit district. Plaintiffs' final claim is that the individual plaintiffs were wrongfully discharged as directors of the GBTD, depriving them of a constitutionally protected property right and due process and equal protection of the laws.

FN2. General Statutes § 7-273b(f) provides: "Any municipality included in the district may withdraw therefrom if the legislative body thereof votes to do so. In such case the board of directors of the district, including the members chosen from the withdrawing municipality, shall determine the share of the district's expenses and obligations remaining due from the municipality. The municipality shall pay or secure such amount to the district before such withdrawal shall become effective."

"There is no question municipalities may withdraw from a transit district if the legislative body thereof votes to do so." Plaintiffs' *Supplemental Memorandum,* April 15, 2005. Said withdrawal, however, must be accomplished in accordance with and in conformity with the requirements of any statutory scheme permitting same. It would follow then, in the present case, that if the member city and towns withdrew from the GBTD in a manner complying with statutory direction, the plaintiffs' esulting loss of appointments as directors would not be enjoinable unless said directors were deprived of a constitutionally protected "property right" that they could not be deprived of except for cause.

***2** This issue confronting the court is whether the individual plaintiffs had a property interest in their positions as directors which would give rise to a constitutional claim under § 1983 for the loss of said property interest upon withdrawal of the city and towns from the GBTD. For authority on the affirmative of this issue the plaintiffs rely on *James Amato et al v. City of New Britain et al,* U.S. District Court Civil Action No. 396CV01556 (September 1998, Squatrito, J.).

The court, however, regards this case as clearly distinguishable because of Judge Squatrito's expressed authority for his decision:

"Furthermore, in *Loudermill v. Cleveland Bd. Of Education,* the United States Supreme Court found that an Ohio Civil service statute, entitling employees "to retain their positions during good behavior and efficient service, who could not be dismissed except ... for misfeasance, malfeasance, or nonfeasance in office created a property right in such employment. 470 U.S. 532, 538." The Ohio civil service statute in *Loudermill* closely resembles *the Connecticut Statute governing municipal housing authorities. Under Connecticut law, municipal housing commissioners can only be removed for inefficiency, neglect of duty, or misconduct in office.* Conn. Gen.Stat. § 8-43. (Emphasis added.)

Sec. 8-43 reads as follows: "Removal of Commissioners; ... A commissioner of an authority may be removed by the appointing power for inefficiency, neglect of duty or misconduct in office, but a commissioner shall be removed only after opportunity to

be heard ... before the appointing power ...” Because *this statute provides that a housing commissioner can only be terminated for reasons stated above, the plaintiffs possessed a constitutionally protected property right in their positions on the New Britain housing commission.*” (Emphasis added.)

Thus, a housing commissioner is afforded statutory protection with respect to his attempted removal from office. No such statute exists affording transit district directors similar protection. In fact, Sec. 7-273c. entity “Board of Directors” is silent with respect to removal of directors. Nor can the court find any case law supporting the plaintiffs' claim that said directors, appointed by municipalities who withdrew from a transit district, have a constitutionally protected or any other property interest in their appointments. In fact logic would dictate that withdrawal of all appointing authorities (city or towns) from a created district would result in an end to the district including its appointees who otherwise would now be conducting the duties of their office as appointees of a nonexistent entity. Such a wholesale withdrawal of member municipalities occurred in this case.

Thus, in the instant matter, if the withdrawal of the municipalities was accomplished in accordance with statutory prescription, individual plaintiffs, the directors of the GBTD, and the GBTD itself cannot prevail in this action.

***3** If, however, said withdrawal was not accomplished in accordance with statutory direction, then the plaintiffs might prevail on the ground that the withdrawals of said city and towns would not as yet have legally taken place, as said withdrawals were not prefaced by each municipality paying or securing the expenses and obligations remaining due from each municipality.

Statutory Construction & Legislative History

General Statutes § 7-273b(f) provides: “Any municipality included in the district may withdraw therefrom if the legislative body thereof votes to do so. In such case the board of directors of the district, including the members chosen from the withdrawing municipality, shall determine the share of the district's expenses and obligations remaining due from the municipality. The municipality shall pay or secure such amount to the district before such withdrawal shall become effective.” It is clear from the text of the statute that the withdrawal contemplated in § 7-273b(f) is that of a single municipality from a transit district. Chapter 103a provides no direction for the withdrawal of all member municipalities from a transit district at the same time.

“When construing a statute, we first look to its text, as directed by Public Acts 2003, No. 03-154, § 1 (P.A. 03-154), which provides: ‘The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered.’ When a statute is not plain and unambiguous, we also seek interpretive guidance from the legislative history of the statute and the circumstances surrounding its enactment, the legislative policy it was designed to implement, the statute's relationship to existing legislation and common-law principles governing the same general subject matter.” *Teresa T. v. Ragaglia*, 272 Conn. 734, 742, 865 A.2d 428 (2005).[FN3]

> FN3. The Supreme Court further remarked that: “The legislature enacted P.A. 03-154, § 1, in response to our decision in *State v. Courchesne*, 262 Conn. 537, 816 A.2d 562 (2003), and we have recognized that this act has legislatively overruled that part of *Courchesne* in which we stated that we would not require a threshold showing of linguistic ambiguity as a precondition to consideration of sources of the meaning of legislative language in addition to its text.” (Internal quotation marks omitted.) *Teresa T. v. Ragaglia*, *supra*, 272 Conn. at 742, n. 4.

A review of the legislative history of § 7-273b indicates that the bill, in 1961, was a “matter of vital concern to many Connecticut communities ... [T]he bill would authorize the establishment of [a] self-supporting transit district in any town or group of towns where private mass bus transportation had collapsed. All legitimate rights of the community, the owners of the private system being taken over and the employees would be protected.” 9 S. Proc., Pt. 8, 1961 Sess., p. 2607. The 1972 amendment to § 7-273b indicates a legislative declaration that “mass transportation systems are a public necessity.” 15 S. Proc.,

Pt. 4, 1972 Sess., p. 1771. The 1972 amendment "improve[d] the whole procedure ... Municipalities may join or withdraw from transit districts by vote of their legislative bodies to permit speedy formation of transportation districts." 15 S. Proc., Pt. 4, 1972 Sess., p. 1771, remarks of Senator Mondani. Similarly, Representative DeBaise remarked on the 1972 amendment as follows: "It is permissive legislation ... in that it allows municipalities to join and withdraw from transit districts by votes of their respective bodies." 15 H.R. Proc., Pt. 7, 1972 Sess., p. 2580. Representative Lenge supported the bill, "particularly ... with respect to a proposal that the legislative bodies of the municipalities make the decision of approval or rejection to be included in a mass transit district." 15 H.R. Proc., Pt. 7, 1972 Sess., p. 2583.

***4** The focus of the legislative remarks was on the speedy creation of transit districts, the transportation needs and rights of the communities, the rights of private transportation system employees upon takeover by a transit district, and the speedy creation of transit districts. The legislature emphasized the permissive nature of the statute, allowing individual municipalities to vote their participation or withdrawal. The statute, however, is silent on the procedure for the withdrawal of all participating municipalities from a given transit district. Whether the municipalities complied, therefore, with the requirements of § 7-273b(f) must be considered in light of the legislative policy the statute was designed to implement.

Perhaps the legislative policy is no more apparent than in § 7-273b(a), wherein the legislative finding provides: "It is hereby found and declared that the development, maintenance and improvement of systems for the transportation of people and goods within the state ... are essential for the welfare of the citizens of the state and ... that the development and maintenance of modern, efficient and adequate systems of mass transportation are required ... and, that the formation and operation of transit districts with the powers enumerated in this chapter are thus a public necessity." § 7-273b(a). Thus, the focus of the legislature was on the vital need for the *formation* and *operation* of transit districts.

Arguably, the requirements of § 7-273b(1), as to determining the "share of the district's expenses and obligations remaining due from the municipality" and the directive that "the municipality shall *pay or secure* such amount to the district before ... withdrawal" is indicative of the legislature's concern for the transit district's fiscal health and continued operation after a municipality withdraws. But where, as in the present case, transportation operations are to be continued, not by the district from which the municipalities are withdrawing, but rather, by a newly formed transit district, which all the former district's member municipalities have joined, the statutory requirements are less certain.

"[The] GBTA became the assignee and successor-in-interest of all liabilities and assets of [the] GBTD on or about December 19, 1998 ... The Connecticut Supreme Court has stated that: the term successor in interest ordinarily refers to a corporation that by ... duly authorized legal succession, has become invested with the rights and has assumed the burdens of [another] corporation ..." (Citations omitted; internal quotation marks omitted.) *Dodsworth v. Greater Bridgeport Transit District*, Superior Court, judicial district of Fairfield at Bridgeport, Docket No. CV 99 0362734 (May 10, 2000, Moran, J.). In essence, the newly formed district, the GBTA, with all former GBTD member municipalities participating in the district, was in the exact same fiscal and operational position as the GBTD which, in the court's opinion, satisfies the securing of the municipal debts and compliance with the statute.

***5** In light of the legislative history, the court concludes that the purpose of the statutory requirements is to protect the remaining member municipalities and the transit district from fiscal and operational interruption upon the withdrawal of one or more municipalities. Furthermore, because the GBTA, as successor in interest to the GBTD, was in no danger of fiscal or operation interruption, all the municipalities, the GBTA and the GBTD complied with the statutory purpose of § 7-273b(f).

Accordingly, the plaintiff' claims for temporary and permanent injunctions prohibiting and restraining the defendants City of Bridgeport, Town of Fairfield and Town of Stratford, and the defendant GBTA from continuing to act as a Transit District, are denied.

Conn.Super.,2005.
Greater Bridgeport Transit Dist. v. City of Bridgeport
Not Reported in A.2d, 2005 WL 1545207 (Conn.Super.)

END OF DOCUMENT

September 9, 1996

Mr. John Hayden, Chairman
Idaho State Board of Correction
P.O. Box 15619
Boise, ID 83715-5619

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Dear Chairman Hayden:

You have requested an opinion from the Attorney General concerning the doctrine of at-will employment in the State of Idaho. There are four aspects to your inquiry: (1) the nature of at-will employment in Idaho; (2) how the courts have applied the at-will employment doctrine in the public sector; (3) the general nature of employment relationships in the Department of Correction; and (4) the various legal restrictions and other limitations applicable to dismissal (or other discipline) of an at-will employee. You will find each of these four areas discussed below.

A. The At-Will Employment Doctrine in Idaho

Idaho's courts have long recognized and followed the at-will employment doctrine: "the employment-at-will doctrine . . . has been adopted and approved by this Court in innumerable decisions . . . ." Metcalf v. Intermountain Gas Co., 116 Idaho 622, 623-24, 778 P.2d 744, 745-46 (1989). The Metcalf decision contains the following oft-cited and quoted statement of the at-will doctrine:

> As the result of numerous decisions of this Court in recent years, it is now settled law in this state that:
>
> > Unless an employee is hired pursuant to a contract which specifies the duration of the employment or limits the reasons for which an employee may be discharged, the employment is at the will of either party and the employer may terminate the relationship at any time for any reason without incurring liability.
>
> Thus, in the absence of an agreement between the employer and the employee limiting the employer's (or the employee's) right to terminate the contract at will, either party to the agreement may terminate the relationship at any time or for any reason without incurring liability. However, such a

limitation on the right of the employer (or the employee) to terminate the employment relationship "can be express or implied."

116 Idaho at 624, 778 P.2d at 746 (citations omitted).

The employment-at-will doctrine, as explained in Metcalf, establishes a *presumption* that an employment relationship in Idaho is terminable at the will of either party, at any time, and with or without notice or cause assigned. Mitchell v. Zilog, Inc., 125 Idaho 709, 713, 874 P.2d 520, 524 (1994). The presumption can be rebutted if it is shown that the parties intended to alter the at-will relationship by: (1) specifying the duration of employment (*e.g.*, a one-year employment contract); and/or (2) limiting the reasons for which an employment relationship can be terminated (*e.g.*, terminable only for specific for-cause reasons).

B. The Nature of Public Employment Relationships in Idaho

Public employment with the state of Idaho is generally governed by statute. The Idaho Personnel System Act ("PSA"), Idaho Code §§ 67-5301 to 67-5342, establishes and governs the "classified" or "merit" system of employment. All employees in state government are classified employees unless specifically defined as nonclassified. Idaho Code § 67-5303.

Employees who are hired under the terms of the PSA are typically referred to as "classified state employees." Idaho's courts have held that classified state employees are not at-will employees because the PSA limits the reasons for which a classified employee may be terminated (or otherwise disciplined). Arnzen v. State, 123 Idaho 899, 904-05, 854 P.2d 242, 247-48 (1993), citing Harkness v. City of Burley, 110 Idaho 353, 715 P.2d 1283 (1986).[1] Classified state employees enjoy a property interest in continued employment; they may be dismissed (or disciplined) for limited, specific reasons, and they are entitled to notice and an opportunity to be heard before the decision to dismiss (or discipline) is made.

Nonclassified state employees do not enjoy the statutory protections afforded by the PSA and, in the absence of a contract for term or other agreement limiting the reasons for which they may be dismissed, they are generally at-will employees. Garner v. Evans, 110 Idaho 925, 936-38, 719 P.2d 1185, 1196-98, *cert. denied*, 479 U.S. 1007, 107 S. Ct. 645, 93 L. Ed. 2d 701 (1986). To this end, nonclassified employees do not enjoy a property interest in continued employment. *Id.* They also do not have the right to file a grievance or appeal under the PSA. *Id*. *See* Idaho Code §§ 67-5315, 67-5316 (only classified employees may grieve and appeal to the Personnel Commission). In the absence of an agreement or understanding otherwise, an employment relationship

between the state and a nonclassified employee is generally terminable at the will of either party at any time with or without notice or cause assigned.

C. The Employment Structure of the Idaho Department of Correction

This section discusses, in general terms, the classified and nonclassified (or at-will) employment structure of the Idaho Department of Correction ("DOC"). The first subsection below addresses the general DOC employment structure below the director level. The second subsection addresses the governing or policymaking entities above the director—the Board of Correction and the Commission on Pardons and Parole.

1. Employment Structure below the Director

The Idaho Department of Correction ("DOC") is an executive department of Idaho state government. Idaho Code § 67-2402(1). Executive department employees above the bureau chief level are generally nonclassified employees: The head of an executive department is the director, who is a nonclassified employee. Idaho Code §§ 20-217A, 67-2403, 67-2404. Directors may appoint deputy directors, who are nonclassified employees. Idaho Code § 67-2403(2). Below the director and deputy director(s) and above the bureau level, each department is divided into divisions, which are headed by nonclassified division administrators.[2] The director also has the power to declare one position in the department nonclassified. Idaho Code § 67-5303(d). Thus, other than the director, deputy director(s), division administrators, and the declared exempt position, department employees are generally classified employees.

2. Employment Structure above the Director

The Board of Correction ("Board") is a constitutional entity above the DOC director which exercises "control, direction and management of the penitentiaries of the state, their employees and properties, and of adult probation and parole . . . ." Idaho Const. art. 10, § 5; Idaho Code §§ 20-201 to 20-249. Board members are appointed by the governor to six-year terms, Idaho Code § 20-201(1), and they are specifically defined as nonclassified employees, Idaho Code § 67-5303(b). However, unlike most nonclassified employees, Board members may only be removed for limited reasons:

> The governor may not remove any member of the board except for disability, inefficiency, neglect of duty or malfeasance in office. Before such removal the governor shall give such member a written copy of the charges against him and shall fix the time when he can be heard in his defense which shall not be less than ten (10) days thereafter. If such member shall be removed, the governor shall file, in the office of the

> secretary of state, a complete statement of all charges against such member and his findings thereon, with a record of the proceedings.

Idaho Code § 20-203. Board members are not, then, removable at-will, because the statute quoted above limits the reasons for which a Board member may be discharged.

The Commission of Pardons and Parole ("Commission") is another DOC entity above the director level, with the statutory directive to "act as the advisory commission to the board on matters of adult probation and parole and may exercise such powers and duties in this respect as are delegated to it by the board." Idaho Code § 20-210. The Commission is composed of five members who are appointed by the Board to serve terms of five years. Commission members "shall serve at the pleasure of the board." Idaho Code § 20-210.

Commission members, unlike Board members, are clearly removable at-will. Rather than being removable only after notice and for limited reasons, Commission members "serve at the pleasure of the board." *Id.* This language establishes an at-will employment relationship. *See, e.g.,* Figuly v. City of Douglas, 76 F.3d 1137, 1142 (10th Cir. 1996) (city administrator was an at-will employee where, among other things, the city charter provided that the administrator served "at the pleasure of the Mayor and Council"); Garcia v. Reeves County, 32 F.3d 200, 203-04 (5th Cir. 1994) (deputy sheriffs were at-will employees where Texas state law provided that "[a] deputy serves at the pleasure of the sheriff"). Furthermore, the at-will relationship between the Board and Commission is not altered by the statutory term of five years—read together, the statutory language establishes an at-will relationship which is automatically, as a matter of law, terminated after five years. Put another way, while there must be an affirmative action (dismissal by Board or resignation by Commissioner) by either party *before* the employment relationship can end during the five-year term, there is no limitation on reasons for ending the employment relationship—all Commissioners serve at the pleasure of the Board for no more than five years. *See* Youngblood v. City of Galveston, 920 F. Supp. 103 (S.D. Tex. 1996) (municipal judge appointed under city charter for two (2) year term was an at-will employee because the charter also provided that the position served at the pleasure of the city council during the term).[3]

D. Limitations and Restrictions on Dismissing At-Will Employees

The final part of your inquiry deals with removal or dismissal of an at-will employee. Once it is established that an employee serves in an at-will capacity, the rule of law in Idaho is that the employee can be dismissed with or without notice or cause assigned. However, although reasons for dismissal are not limited and it is not necessary to assign cause in order to dismiss an at-will employee, there are a number of limitations (statutory and court-created) on an employer's right to dismiss an at-will employee. The

subsections below discuss these limitations and the potential causes of action available to at-will employees.

1. Discrimination

Public employers are prohibited from discriminating against employees on the basis of various protected classifications. That is, a public employer cannot dismiss (or otherwise prejudice) an employee because of, either in whole or in part, that employee's membership in a protected class. With respect to federal law, Title VII of the Civil Rights Act of 1964, as amended, prohibits public employers from dismissing or otherwise prejudicing employees on the basis of race, color, religion, national origin, and gender; the Age Discrimination in Employment Act protects individuals age forty and over from employment discrimination; and the Americans with Disabilities Act protects qualified individuals with a disability from employment discrimination. With respect to state law, the Idaho Human Rights Act protects individuals from employment discrimination based on race, color, religion, national origin, gender, age or disability. Public employers may not dismiss or otherwise prejudice at-will employees on the basis of any protected classification.

2. The Implied Covenant of Good Faith and Fair Dealing

The Idaho Supreme Court has recognized a "covenant of good faith and fair dealing," which is implied in every employment relationship. The court adopted the covenant of good faith and fair dealing in Metcalf, *supra*, and explained its application as follows:

> [T]he covenant protects the parties' benefits in their employment contract or relationship, and . . . any action which violates, nullifies or significantly impairs any benefit or right which either party has in the employment contract, whether express or implied, is a violation of the covenant which we adopt today.

116 Idaho at 627, 778 P.2d at 749. Thus, because the covenant does not add anything to an employment relationship (it only operates to protect other benefits and rights), the court carefully explained that it does not create a duty to dismiss an employee only for cause. *Id. See* Thompson v. City of Idaho Falls, 126 Idaho 587, 887 P.2d 1094 (Ct. App. 1994) (the covenant does not apply where the employer is simply exercising its right to dismiss an employee); Olson v. Idaho State Univ., 125 Idaho 177, 868 P.2d 505 (Ct. App. 1994), *rev. denied* (covenant cannot be used to attack merits of decision to not renew a contract of a nontenured teacher). The covenant of good faith and fair dealing does not alter the at-will relationship, but it does operate to protect any other rights or benefits enjoyed by the employee as part of the employment relationship.[4]

3. Public Policy

Idaho's courts have also applied another limitation to the doctrine of at-will employment—the public policy exception. In Watson v. Idaho Falls Consol. Hosp., Inc., 111 Idaho 44, 720 P.2d 632 (1986), the Idaho Supreme Court held that an "employee may claim damages for wrongful discharge when the motivation for discharge contravenes public policy." 111 Idaho at 49, 720 P.2d at 637, citing MacNeil v. Minidoka Hosp., 108 Idaho 588, 701 P.2d 208 (1985); Jackson v. Minidoka Irrigation Dist., 98 Idaho 330, 563 P.2d 54 (1977).

The public policy exception appears to apply when an employee is fired because of an action taken protected by a statute. That is, when a statute protects or otherwise provides for the taking of some action but does not create a cause of action for a person who suffers prejudice by taking such action, the courts have created a common law cause of action, the public policy exception to the employment-at-will doctrine. A very recent Idaho Supreme Court decision contains several examples of public policy violations from Idaho cases and other jurisdictions: (1) employee discharged for refusing to commit perjury; (2) employee fired for filing worker's compensation claim; (3) employee fired for serving on jury duty against the wishes of her employer; (4) employee fired for engaging in legal union activities; and (5) employee fired for reporting safety code violations to the state electrical engineer. Hummer v. Evans, No. 21796, 1996 WL 490675, at *5-6 (Idaho Aug. 29, 1996). In Hummer, the court affirmed the district court's judgment that the employer violated public policy by firing the employee for responding to a subpoena. *Id*. These examples illustrate how an action taken based upon statutory or other legal authority can support a public policy cause of action.

4. First Amendment Rights of Public Employees

Public employees may also bring a cause of action for wrongful discharge based upon protected speech. In Lockhart v. State, 127 Idaho 546, 903 P.2d 135 (Ct. App. 1995), the Idaho Court of Appeals set forth the elements of such a claim:

> Whether speech is constitutionally protected and precludes discipline of an employee involves a four-part test: First, the court must determine whether the speech may be fairly characterized as constituting speech on a matter of public concern. [Second,] if the speech involves a matter of public concern, then the court must balance the employee's interest in commenting upon matters of public concern against the interest of the state, as an employer, in promoting the efficiency of the public services it performs. Third, if the balance favors the employee, then the employee must show that the protected speech was a substantial or

> motivating factor in the detrimental employment decision. Finally, if the employee meets this burden, then the employer is required to show by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected speech.

127 Idaho at 552, 903 P.2d at 141 (citations omitted). The Lockhart case involved comments made by an employee of the Idaho Department of Fish and Game—at a meeting with another department official and a newly elected female legislator, he commented that many of Idaho's female legislators were "airheads" or had "nothing between their ears." The court held that while the comment involved a matter of public concern, "comments regarding the intelligence of members of Idaho's legislature constitutes a matter of public concern,"[5] it did not merit First Amendment protection because the department's interests in maintaining good relations with the legislative branch and promoting the efficiency of the public services it performs outweighed the employee's interest in making the comment. 127 Idaho at 553, 903 P.2d at 142.

5. The Whistleblowing Law

The Idaho Protection of Public Employees Act ("the Whistleblowing Act"), Idaho Code §§ 6-2101 to 6-2109, protects public employees from adverse actions as a result of reporting waste and violations of a law, rule or regulation. In order to receive protection under the Whistleblowing Act, a public employee is obligated to report waste or violations in good faith. Idaho Code § 6-2104. An aggrieved employee may bring an action for damages, including attorneys' fees and costs, and injunctive relief, and a court may order reinstatement of the employee with lost wages and benefits and impose a $500.00 civil fine on the employer. Idaho Code §§ 6-2105, 6-2106.

E. Conclusion

An at-will employment relationship may be terminated by either party at any time, with or without notice or cause assigned. However, several exceptions and limitations apply: An at-will public employee is protected by all federal and state anti-discrimination laws; an employer may not dismiss an at-will employee in order to deprive the employee of an accrued benefit or right; an at-will employee cannot be dismissed on the basis of taking some action protected by public policy; an at-will employee cannot be dismissed based upon protected speech; and an at-will public employee cannot be dismissed for reporting, in good faith, government waste or violations of law.

I hope this guideline is responsive to your inquiry. If you require further assistance or information, please contact me.

Very truly yours,

THORPE P. ORTON
Deputy Attorney General
Idaho Personnel Commission

[1] The PSA and the Idaho Personnel Commission Rules list seventeen reasons for which a classified employee may be disciplined. "Discipline" is understood to mean dismissal, demotion, suspension, reduction in pay or involuntary transfer. Idaho Code § 67-5309(n); IDAPA 28.01.01.190.01.

[2] Some division administrators may be classified employees. If a division administrator held classified status prior to July 1, 1995 (the effective date of House Bill 299 (1995)), he or she retains that status so long as the position is held, *i.e.*, until separation, promotion, demotion, position elimination, etc.

[3] The rationale and conclusion reached by the federal district court in Youngblood appears to be consistent with Idaho law. The district court recognized that in Texas, which is an at-will state, public employees are also at-will unless the legislature has abrogated its right to dismiss without cause. That is, unless the legislature has passed a law limiting reasons for which an employee may be discharged, the employee is an at-will employee without a property right in continued employment. The specific position at issue in Youngblood was created by statute and further defined by city charter. The Texas statute established a two year term for municipal judges, and prior Texas court opinions had interpreted the statute to permit a city to expressly provide for removal of a municipal judge. To this end, the Galveston city charter provided that a municipal judge served at the pleasure of the city council. The district court reasoned and concluded as follows:

> If a public employee serves at the pleasure of his superiors, the employment relationship is at-will, and the employee has no property interest in continued employment.
>
> . . . .
>
> Here, the Galveston City Charter specifically provides that the Municipal Judge serves at the pleasure of the City Council. Thus, notwithstanding the two-year term provided for by the Galveston City Charter and Tex. Gov't Code Ann. § 29.005, Youngblood was an at-will employee and could be terminated without cause and without a hearing. Youngblood, therefore, had no property interest in continued employment as a municipal judge.

Id. at 106.

[4] For example, in Metcalf, the court applied the covenant where the employee alleged she was fired because of the use of accumulated sick leave. The court also cited a Massachusetts case where the covenant was applied to an employee who was fired so that the employer would not have to pay earned sales commissions. *Id*., citing Fortune v. National Cash Register Co., 364 N.E.2d 1251 (Mass. 1977).

[5] The court noted that speech does not lose First Amendment protection simply because of an inappropriate or controversial character, and "'debate on public issues should be uninhibited, robust, and wide-open, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.'" *Id.* at 552-53, 903 P.2d at 141-42, citing and quoting Rankin v. McPherson, 483 U.S. 378, 387, 107 S. Ct. 2891, 2898, 97 L. Ed. 2d 315 (1987); New York Times v. Sullivan, 376 U.S. 254, 270, 84 S. Ct. 710, 721, 11 L. Ed. 2d 686 (1964).

STATEMENT OF PURPOSE

PROPOSAL NUMBER 12

IDAHO TRANSPORTATION DEPARTMENT

PROPOSAL NO. 12 ESTABLISHES THE IDAHO TRANSPORTATION DEPARTMENT AS AN EXECUTIVE DEPARTMENT OF STATE GOVERNMENT, PURSUANT TO ARTICLE IV, SECTION 20, OF THE CONSTITUTION OF THE STATE OF IDAHO.

The department shall be headed by the Idaho transportation board which shall consist of three members appointed by the Governor from the present three highway districts. At least one member shall have special training, experience or expertise in the field of aeronautical transportation. The board shall administer the state highway and aeronautics laws, and public transportation activities in which the state may become involved.

The Idaho transportation board shall appoint a director having knowledge and experience in transportation matters, who shall serve at the pleasure of the board and may be removed by the board only for stated cause.

The department shall consist of the division of highways and the division of aeronautics and public transportation, which are created by law. Other divisions may be established or assigned.

The director of the Idaho transportation department shall appoint an administrator of the division of highways and an administrator of the division of aeronautics and public transportation. The administrator of the division of highways shall have the same qualifications as the present highway engineer who shall be a registered professional engineer, holding a current certificate of registration in accordance with the laws of the state, or who shall qualify as a registered professional engineer within nine months of his appointment.

The administrator of the division of highways shall also have had five years of actual experience in modern highway engineering, at least three of which shall have been in an administrative capacity involving the direction of a substantial technical engineering staff.

The administrator of the division of aeronautics and public transportation shall have the same qualifications as the present director of aeronautics who shall hold a commercial pilot rating certified by the federal aviation administration.

An aeronautics and public transportation advisory board is created to consult with and advise the director of the department on matters concerning aeronautics and public transportation. The advisory board shall consist of three members appointed by the Governor to five year terms. One member shall be appointed from each of the three existing state highway districts.

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