B. Newal Squyres, ISB #1621
Mary V. York, ISB #5020
A. Dean Bennett, ISB #7735
Special Deputy Attorneys General
HOLLAND & HART LLP
U.S. Bank Plaza, Suite 1400
101 South Capitol Boulevard
Post Office Box 2527
Boise, Idaho 83701-2527
Telephone: (208) 342-5000
Facsimile: (208) 343-8869
nsquyres@hollandhart.com
myork@hollandhart.com
adbennett@hollandhart.com

Attorneys for Defendants

**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF IDAHO**

PAMELA LOWE,

Plaintiff,

vs.

IDAHO TRANSPORTATION DEPARTMENT, an executive department of the State of Idaho, and DARRELL MANNING, Chairman of the Board, R. JAMES COLEMAN, Board Member, JERRY WHITEHEAD, Board Member, GARY BLICK, Board Member, NEIL MILLER, Board Member, and LEE GAGNER, Board Member, in their individual and official capacities,

Defendants.

Case No. 09-653-S-REB

**DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS**

# TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY OF ARGUMENT .......................................... 1

II. STANDARD UNDER 12(c)—A MOTION ON THE PLEADINGS ......................... 2

III. ARGUMENT ............................................................................................ 3

A. The Director of ITD is a Nonclassified Position, Not Governed by the Personnel System Act, and Lowe's Employment Relationship was Not Modified by Contract. ............................................................................ 3

B. Idaho Code § 40-503 Provides That the Director of ITD is Appointed by the ITD Board and Shall Serve at Its Pleasure, Meaning that the Director is an "At-Will" Position and Does Not Have an Expectation of Continued Employment. ............................................................................ 4

1. The Clause "Shall Serve at the Pleasure of the Board" Vests the Board With the Authority to Remove the Director At-Will. ........................ 5

2. The Use of the Permissive and Discretionary Word "May" in the Clause Lowe Relies On and the Absence of a Fixed Term, Restrictive Language, or Notice and Hearing Requirements Confirms the Legislature's Intent that the Director is an At-Will Position. ................ 7

3. Even if the Statute Read "Can Only be Removed", the Director Would Not Have an Expectation of Continued Employment. .................... 10

4. The Authority Relied on by Lowe Does Not Support Her Reading of § 40-503, and Instead Supports the Plain Meaning of the Statute that the Director of ITD is At-Will Without an Expectation of Continued Employment. ............................................................................ 12

(a) A Statute that Provides a Fixity of Term May Create an Expectation of Continued Employment but the Identification of Reasons for Removal, Standing Alone, Does Not. .............................. 12

(b) Cases Involving Civil Service Employees Do Not Advance Lowe's Argument that § 40-503 Creates an Expectation of Continued Employment. ................................................................... 14

(c) Because Lowe Was Not Appointed for a Fixed Term, the Only Idaho Case Cited by Lowe Does Not Apply. ...................................... 15

(d) The Idaho Attorney General Opinion (Cited by Lowe) is Entirely Consistent With and Supports the Analysis of § 40-503 Set Forth in This Memorandum. ................................................................... 16

C. Lowe Executed an Employment Agreement Acknowledging the Director's Status as an At-Will Employee and Thus Agreed to Waive any Claim for Continued Employment. ............................................................ 18

D. Lowe Received All Process She was Due. .................................................... 19

E. Questions of Fact and Defendants' Affirmative Defenses Bar All Relief Requested by Lowe. ......................................................................... 20

IV. CONCLUSION ........................................................................................ 20

The Idaho Transportation Department ("ITD") and its Board members, Darrell Manning, R. James Coleman, Jerry Whitehead, Gary Blick, Neil Miller, and Lee Gagner (collectively "Defendants"), file this Memorandum in Opposition to Plaintiff's Motion for Partial Judgment on the Pleadings (Dkt. #21).

## I. INTRODUCTION AND SUMMARY OF ARGUMENT

Under Idaho Code § 40-503, the Director of the Idaho Department of Transportation ("ITD") is appointed by its Board and "shall serve at the pleasure of the board." The Director is not appointed for a fixed term of office, and the Board is not required by statute to provide procedural process before removing the Director from office. The universal rule of law is that a public employee who serves at the pleasure of the appointing authority is an at-will employee. The issue raised by Lowe's motion is whether the phrase "may be removed for inefficiency, neglect of duty, malfeasance or nonfeasance in office" (which follows the "at the pleasure" clause) means that the Director of ITD is a permanent employee, with an expectation of continued employment and terminable only for cause after due process. Put simply, is the clause "shall serve at the pleasure of the board" nullified by the "may be removed" clause as Lowe contends?

The answer to this question is No. Under established Idaho law, the plain meaning of Idaho Code § 40-503, when read as a whole and giving effect to all of its words and provisions, is that the legislature intended for the Director of ITD to be an at-will office. Lowe has not cited a single case from Idaho or any other jurisdiction that supports a contrary conclusion. And her suggested interpretation of the statute focuses solely on the "may be removed" phrase and also ignores the word "may," thus violating the accepted principles of statutory interpretation she acknowledges are controlling.

Pam Lowe worked for ITD for over 13 years as a classified employee protected by the Idaho Personnel System Act. When the Board appointed her Director of the Department, it is undisputed that she became a nonclassified employee. She

acknowledged this fact by signing an employment agreement describing the Director position as "at-will." Lowe was on notice and agreed to this change in status along with the substantial increase in pay and the significant increase in responsibility, and she has no legitimate claim to an expectation of continued employment.

The Defendants respectfully submit that Lowe's motion should be denied, so they can defend against the remaining and baseless claims that Lowe was terminated on the basis of her gender or because she was a whistleblower.

## II. STANDARD UNDER 12(c)—A MOTION ON THE PLEADINGS

"The standard for deciding a motion under Rule 12(c) is virtually identical to the standard for a motion to dismiss for failure to state a claim under Rule 12(b)(6)." *State of Idaho v. Plum Creek Timber Co., Inc.*, No. CV03-297-N-EJL, 2005 WL 2415991, *2 (D. Idaho Sept. 30, 2005). "All allegations of fact by the party opposing the motion are accepted as true, and are construed in the light most favorable to that party." *See Gen. Conference Corp. of Seventh-Day Adventists v. Seventh-Day Adventist Cong. Church*, 887 F.2d 228, 230 (9th Cir. 1989). "As a result, a plaintiff is not entitled to judgment on the pleadings when the answer raises issues of fact that, if proved, would defeat recovery." *Id.* Likewise, "if the defendant raises an affirmative defense in his answer it will usually bar judgment on the pleadings." *Id.* (citing 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1368 (1969)).

The Court is limited to the content of the pleadings and exhibits incorporated by reference into the pleadings. *See United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). And if the Court considers material outside the pleadings, the motion on the pleadings converts to a motion for summary judgment. *See* Fed. R. Civ. P. 12(d); *see also Necessary v. State Farm Auto. Ins. Co.*, No. 08-16683, 2009 WL 4912635, at *2 (9th Cir. Dec. 10, 2009) (providing for conversion where "matters outside the pleadings are presented to and not excluded by the court"). If converted, "[a]ll parties must be

given a reasonable opportunity to present all the material that is pertinent to the motion." Fed. R. Civ. P. 12(d).[1]

## III. ARGUMENT

Lowe contends that when the Idaho legislature established the Department of Transportation and created the office of Director under Idaho Code § 40-503, it intended for the Director of ITD to hold a permanent position and enjoy a property right in continued employment. Lowe is wrong and she suggests a tortured interpretation of § 40-503 that does not withstand scrutiny. Lowe invites the Court to ignore: (1) that the Director is a nonclassified employee appointed by the ITD Board; (2) that the Director "shall serve at the pleasure of the board"; (3) that the Director is not appointed for a fixed term; (4) that the Director's removal is not conditioned by any restrictive language such as "just cause," "only for," "except for," or "for cause"; (5) that the Director's removal is not conditioned on any notice and hearing requirements; and (6) that she acknowledged that the Director's employment is "at-will."

### A. THE DIRECTOR OF ITD IS A NONCLASSIFIED POSITION, NOT GOVERNED BY THE PERSONNEL SYSTEM ACT, AND LOWE'S EMPLOYMENT RELATIONSHIP WAS NOT MODIFIED BY CONTRACT.

Employment with the State of Idaho is generally governed by statute. The Idaho Personnel System Act ("PSA"), Idaho Code § 67-5301 *et seq.*, governs the "classified" system of employment. Classified employees are permanent employees entitled to statutory procedural protections and thus have a property interest in their continued employment. *See Arnzen v. State*, 854 P.2d 242, 247-48 (Idaho 1993). But nonclassified employees are not permanent employees, are not entitled to procedural

[1] Lowe attaches a single page of a Statement of Purpose to "Proposal Number 12" with the handwritten notation of "S 1295" at the bottom of the document. *See* Dkt. # 22, Ex. 3. To the extent the Court considers this document, a full statutory construction analysis is required, including the "reasonableness of [the] proposed interpretations, the policy behind the statute, and its legislative history." *Doe v. Boy Scouts of Am.*, 224 P.3d 494, 497 (Idaho 2009). If the Court converts Lowe's motion, Defendants respectfully request the opportunity to fully develop the record and brief the statutory construction of § 40-503 consistent with the language of Fed. R. Civ. P. 12(d).

protections and thus do not have a property interest in continued employment. *See Gardner v. Evans*, 719 P.2d 1185, 1196-98 (Idaho 1986).

The Director of ITD is a nonclassified employee, and Lowe does not contend otherwise. If she did, her claims would fail because she did not exhaust her administrative remedies as required under the PSA. *See Swisher v. State Dept. of Envtl. & Cmty. Serv.*, 569 P.2d 910, 912 (Idaho 1977). It is also undisputed that the employment contract Lowe executed (or what she calls an offer letter) states that the Director is an "at-will" position. *See* Dkt. # 9, Ex. A.

Yet Lowe begins her argument by citing cases where the source of the expectation of continued employment (the property right) was from the employee's status as a classified civil service employee or from a contract. *See* Dkt. # 22 at 4. These cases do not help Lowe establish an expectation of continued employment. *See Arnett v. Kennedy*, 416 U.S. 134 (1974) (discussing the property interest of a federal civil service employee); *Harkness v. City of Burley*, 715 P.2d 1283, 1286-87 (Idaho 1986) (concluding that a property right could be found from specific notice and hearing requirements of employee manual coupled with city council's resolution describing the plaintiff as a "permanent employee"); *Farner v. Idaho Falls Sch. Dist. No. 91*, 17 P.3d 281, 285 (Idaho 2000) (holding that those aspects of school teacher's contract protected by "just cause" provision cannot be denied without due process); *Ferguson v. Bd. of Trustees*, 564 P.2d 971, 976 (Idaho 1977) (deciding whether a tenured teacher was provided sufficient notice and hearing process required under Idaho Code § 33-513(4)).

Lacking the traditional means by which a public employee gains a property right in continued employment, Lowe attempts to use Idaho Code § 40-503 as a substitute.

### B. IDAHO CODE § 40-503 PROVIDES THAT THE DIRECTOR OF ITD IS APPOINTED BY THE ITD BOARD AND SHALL SERVE AT ITS PLEASURE, MEANING THAT THE DIRECTOR IS AN "AT-WILL" POSITION AND DOES NOT HAVE AN EXPECTATION OF CONTINUED EMPLOYMENT.

The operative language of Idaho Code § 40-503 at issue here reads as follows:

> An office of the director of the Idaho transportation department is established, and the board shall appoint a director having knowledge and experience in transportation matters. 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.

Lowe asserts that by the phrase "may be removed by the board for inefficiency, neglect of duty, malfeasance or nonfeasance in office," the statute "makes clear" that the Director can "only" be removed for cause. *See* Dkt. # 22 at 5. Lowe relies solely on this phrase, standing alone, and contends that it "nullifies" the phrase that precedes it—"that the director shall serve at the pleasure of the board." *Id.* at 8. Lowe consistently adds the word "only"—a word that does not appear in the statute—when describing the isolated "may be removed" clause as creating a "just cause" standard for the Director's removal from office. *Id.* at 5.

Lowe's reading of the statute is properly rejected for at least three reasons: (1) she avoids the fact that the Director is appointed by the ITD Board and "shall serve at the pleasure of the board," which is universally construed to mean the relationship is at-will; (2) she makes no attempt to give meaning to all the language, words, and clauses used by the legislature and attaches no significance to the legislature's choice not to use certain words; and (3) the case law she relies on does not support the conclusion that the "may be removed" clause in this statute creates an expectation of continued employment, but rather establishes just the opposite—that because the Director is a nonclassified employee, serving at the pleasure of the Board without a fixed term, she was subject to removal as an at-will employee. When the statute as a whole is analyzed according to established principles of Idaho law, there is no basis to conclude that § 40-503 makes the Director of ITD a permanent employee with an expectation of continued employment.

**1. The Clause "Shall Serve at the Pleasure of the Board" Vests the Board With the Authority to Remove the Director At-Will.**

The legislature's use of the language—the Director "shall serve at the pleasure of the board"—means exactly what it says. The person appointed by the Board to the

office of Director serves at the pleasure of the Board and does not hold a permanent position with an expectation of continued employment. The employment relationship is at-will. The Idaho Supreme Court has held that a statutorily-appointed office held at "the pleasure of the board" creates an employment relationship that "is at the will of the authority which appointed the officer." *Kerner v. Johnson*, 583 P.2d 360, 382-83 (Idaho 1978); *see Strongman v. Idaho Potato Comm'n*, 932 P.2d 889, 895 (Idaho 1997) (construing "at its pleasure" to "circumscribe[] the employer's power to contract with its employees for any form of employment other than at-will employment"); *Bunt v. City of Garden City*, 797 P.2d 135, 137 (Idaho 1990) (stating that "pleasure of the Board" language does not accord a right to notice or a hearing prior to removal).

The Ninth Circuit subscribes to the same rule. *See, e.g., Heath v. Redbud Hosp. Dist.*, 620 F.2d 207, 212 (9th Cir. 1980) ("shall serve at the pleasure of the Board" language establishes an employment-at-will relationship). And jurisdictions across the country are in accord. *See, e.g.*, *Covell v. Menkis*, 595 F.3d 673, 677 (7th Cir. 2010) ("at the pleasure" creates an at-will relationship); *Schmitz v. Village of Breckenridge*, No. 08-14559-BC, 2009 WL 3273255, at *9 (E.D. Mich. Oct. 9, 2009) ("Plaintiff's contention that his employment could not be terminated without 'just cause' is untenable" because the Village Manager serves "at the pleasure of the Council").[2]

The overriding control conferred by the phrase "shall serve at the pleasure of the board" is shown by cases holding that even where there are other statutory requirements for termination of an officer who serves "at the pleasure of the Board," the power of the appointing authority to remove the officer will not be disturbed. *See Hofschneider v.*

[2] Secondary authorities confirm the universal rule. *See, e.g.*, 63C Am. Jur. 2d, Public Officers and Employees § 174 (2000) ("a public employee serving at the pleasure of the appointing authority is subject to removal without judicially recognized good cause"); 56 Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 285 (2000) (noting that if an "office is in fact held at the 'pleasure' of the appointing authority, there seems to be no doubt removal may be accomplished without notice or hearing").

*Demapan-Castro*, No. CV-04-0022-ARM, 2005 WL 817710, at *2-3 (D. N. Mar. I. Apr. 11, 2005); *Youngblood v. City of Galveston*, 920 F. Supp. 103, 106 (S.D. Tex. 1996) (plaintiff "serves at the pleasure of the City Council" and therefore "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"); *see also* Dkt. # 22, Ex. 2 (1996 Attorney General Opinion) at 4 ("serve at the pleasure of the board" trumps the fixed term set by Idaho Code § 20-210 and provides for an at-will employment relationship).

**2. The Use of the Permissive and Discretionary Word "May" in the Clause Lowe Relies On and the Absence of a Fixed Term, Restrictive Language, or Notice and Hearing Requirements Confirms the Legislature's Intent that the Director is an At-Will Position.**

Lowe's entire argument rests on isolating a phrase of § 40-503 that begins with the discretionary and permissive word "may." "The Idaho courts have held that the word 'may' is a permissive term expressing a right of discretion, whereas, the words 'must' or 'shall' are mandatory." *Wheeler v. Idaho Transp. Dept.*, 223 P.3d 761, 768 (Idaho Ct. App. 2009) (citing *Rife v. Long*, 908 P.2d 143, 150 (Idaho 1995) ("This Court has interpreted the meaning of the word 'may' appearing in legislation, as having the meaning or expressing the right to exercise discretion."); *see State ex rel. Parsons v. Bunting Tractor Co.*, 77 P.2d 464, 466 (Idaho 1938) ("This court has heretofore judicially interpreted the word 'may' appearing in legislation as having the meaning or expressing the right to exercise discretion; a permissive right, rather than the imperative or mandatory meaning of 'must.'").

Not only does Lowe ignore the impact of "shall serve at the pleasure," she jumps right over the permissive and discretionary "may"—the first word in the very phrase that supposedly creates her right of continued employment. Lowe focuses on the conjunction "and" as if that word had some independent legal significance. *See* Dkt. # 22 at 8. But the legislature's use of a conjunction between the two phrases does not change the plain meaning of the statute. And it certainly does not justify her suggested

interpretation of § 40-503 to nullify a clause beginning with the mandatory "shall" followed by the phrase "serve at the pleasure of the board." *W. Watersheds Project v. Kraayenbrink*, 538 F. Supp. 2d 1302, 1315 (D. Idaho 2008) ("The term 'shall' makes a provision mandatory, and the rules of statutory construction presume that the term is used in its ordinary sense unless there is clear evidence to the contrary."). There is no principle of statutory interpretation to support reading the "may be removed" clause of § 40-503 as overriding the "shall serve at the pleasure" provision. *See Stafford v. Briggs*, 444 U.S. 527, 535 (1980) (it is not permissible to rest an interpretation upon isolated words, phrases, clauses, or sentences); *Bruderer v. PacifiCorp*, No. CV-06-0271-E-JLQ, 2007 WL 1725456, at *7 (D. Idaho June 11, 2007) ("In determining a statute's meaning, the court must apply 'the plain and ordinary meaning of the terms and, where possible, every word, clause and sentence should be given effect.'") (quoting *Robinson v. Bateman-Hall*, 76 P.3d 951, 954 (Idaho 2003)).

Lowe recognizes "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." *See* Dkt. # 22 at 5 (citing *Norton v. Dep't of Employment*, 500 P.2d 825, 829 (Idaho 1972)). But Lowe's reading of the statute violates this principle. Lowe reads "at the pleasure of the board" out of the statute, making that portion of § 40-503 "inoperative," "superfluous," "void" and "insignificant." She reads the "may be removed" language to (in her words) "nullify" the "shall serve at the pleasure of the board" clause. *See* Dkt. # 22 at 8. There is no reason, other than Lowe's result-oriented objective, to read these clauses as if they conflict. *See, e.g., Total Success Invs., LLC v. Ada County Highway Dist.*, 227 P.3d 942, 945-46, 2010 WL 728997 (Idaho Ct. App. 2010) (interpreting a statute containing both the words "shall" and "may" and concluding that "may" creates a "discretionary sentence" allowing for action while the use of "shall" creates a "mandatory sentence" mandating action).

Furthermore, where Idaho's legislature intended to create an expectation of continued employment, the statutory scheme reflects this intent by establishing a fixed term for the position, the use of restrictive language for removal such as "may not remove . . . except for" and notice and hearing requirements. *See, e.g.*, Idaho Code § 20-203 (providing for six-year terms for the Department of Correction Board, stating that removal may not occur "except for" enumerated reasons and providing specific notice and hearing requirements); Idaho Code § 72-501 (providing for six-year terms for the Industrial Commission, stating that removal is appropriate "for cause," and providing specific notice and hearing requirements).

Even more to the point, in drafting ITD's enabling legislation, the legislature set a fixed term of office and provided other limitations on the removal power for positions other than the Director. Idaho Code § 40-303(2) provides fixed terms of office for the six ITD Board members appointed by the Governor. The Chairman, however, while also appointed by the Governor, "shall serve at the pleasure of the Governor for an indefinite period." *Id.* And § 40-305, entitled **Removal of board members**, provides for a very specific notice and hearing procedure before the governor can remove an ITD Board member:

> The governor may remove any board member for incompetency, inefficiency, intemperance, misconduct in office, neglect or dereliction of duty. Charges in writing, setting forth fully and concisely the cause and grounds of removal, together with a citation directing the member within fifteen (15) days after the service of the charges and citation to appear and be afforded a public hearing in the office of the governor . . . . The appearance may be personal or by answer, and by counsel. . . . A complete transcript of the hearing, including the charges, answers, exhibits and testimony and proceedings, findings, decision and order, shall be made. If the member is removed from office, the completed transcript shall within ten (10) days after the decision be filed with the secretary of state.

The contrast between the provisions of § 40-503, relating to the Director, and §§ 40-303(2) and 40-305, illustrates well the distinction between a public official who serves at-will and those who have an expectation of continued employment. *See, e.g., Boyle v. Jerome Country Club*, 883 F.

Supp. 1422, 1432 (D. Idaho 1995) ("Where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute governing a related subject is significant to show that a different intention existed.") (quoting 2A Southerland, Statutory Construction § 51.02 at p. 123 (5th ed. 1992)). If the legislature intended the Director to have an expectation of continued employment, it could easily have given the Director a fixed term in office, included restrictive language, and provided for procedural protections incident to any decision to remove.

The Board has the authority to remove the Director at its pleasure, and it may do so for, among other reasons, inefficiency, neglect of duty, malfeasance or nonfeasance. This plain reading gives effect to all of the provisions of § 40-503, gives effect to the complete statutory scheme, and thus fulfills the requirement that a statute is to "be construed so that effect is given to all its provisions." *See Norton*, 500 P.2d at 829. *See also Federated Publ'ns, Inc. v. Idaho Bus. Review, Inc.*, 192 P.3d 1031, 1034 (Idaho 2008) ("Unless the result is palpably absurd, this Court must assume that the legislature meant what it wrote in the statute.").

**3. Even if the Statute Read "Can Only be Removed", the Director Would Not Have an Expectation of Continued Employment.**

Even if Lowe had her wish and the "may be removed" clause was transformed to a "can only be removed" clause, the statute still would not create an expectation of continued employment.

This conclusion is confirmed by *Edwards v. Brown*, 699 F.2d 1073, 1077 (11th Cir. 1983). The court there analyzed a statute that provided the plaintiff officer "shall serve during good behavior and efficient service, to be judged by the commission or a designee." The issue was whether the statute conferred a property right in continued employment. 699 F.2d at 1077. Answering the question in the negative, the court reasoned that while the statute limited the reasons that Edwards could be terminated, the "language seems clearly to indicate the purpose of the city in its ordinance [was] to give direction to the commissioner that although he could discharge only for the stated

reasons, he was the person in whom was placed the power to determine whether the reasons existed." The court continued, "[i]t would have been a simple matter for the sentence to have continued after the words 'to be judged by the commissioner or designee' by such words as 'after notice and hearing' or 'after trial' if that had been the purpose of the ordinance." *Id.* Thus the *Edwards* court held that "[i]nstead of providing for a discharge for cause, we equate this provision with a discharge 'at the will' of the commissioner." *Id.*

The Ninth Circuit followed *Edwards* in *Dorr v. County of Butte*, 795 F.2d 875, 878 (9th Cir. 1986), where an "employee effectively served 'at the will' of the commissioner where [the] ordinance provided that he could be discharged only on enumerated grounds but existence of enumerated grounds was 'to be judged by the commissioner or his designee.'" Other courts apply a similar analysis. *See, e.g., Warren v. Crawford*, 927 F.2d 559, 563 (11th Cir. 1991); *Griffith v. Fed. Labor Relations Auth.*, 842 F.2d 487, 498 (D.C. Cir. 1988); *Burns v. Sullivan*, 619 F.2d 99, 104 (1st Cir. 1980); *Owen v. City of Independence*, 560 F.2d 925, 938 (8th Cir. 1977), *vacated on other grounds*, 438 U.S. 902, 98 (1978).

What *Edwards*, *Dorr*, and these cases illustrate is that where a public employee serves at the pleasure of the appointing authority and is subject to removal at the discretion of the appointing authority, even if the reasons for removal may be limited, the public employee does not have a property right in continued employment.

Our case is even stronger than the cases cited above because the statutory language here is more explicit. The Director, appointed by the Board, "shall serve at the pleasure of the board." This language creates an at-will position and relationship. This clause is followed by the permissive and discretionary "may be removed" language which does not establish a for cause standard, but only provides direction or guidance to the Board to exercise its discretionary authority to remove. Finally, the legislature included a provision which states, "[t]he board shall . . . [e]xercise *exclusive control*

over the employment, promotion, reduction, dismissal and compensation of all employees of the department." Idaho Code § 40-311 (emphasis added). In sum, the decision to remove the Director is the Board's to make and § 40-503 does not create a property right in an expectation of continued employment.

**4. The Authority Relied on by Lowe Does Not Support Her Reading of § 40-503, and Instead Supports the Plain Meaning of the Statute that the Director of ITD is At-Will Without an Expectation of Continued Employment.**

Focusing solely on the "may be removed" clause, Lowe asserts that "[i]dentical or virtually identical language has been interpreted by the courts to provide a for cause limitation on termination." *See* Dkt. # 22 at 6. She is wrong. The cases do not interpret "identical or virtually identical language." But more significantly, none of the cases involve, much less interpret, the phrase "shall serve at the pleasure of the board." In fact, an analysis of the cases she relies on, beyond the mere parenthetical characterizations of the facts and law, reveals that they support the conclusion that § 40-503 does not give the ITD Director an expectation of continued employment.

**(a) A Statute that Provides a Fixity of Term May Create an Expectation of Continued Employment but the Identification of Reasons for Removal, Standing Alone, Does Not.**

In *Humphrey's Executor v. United States*, 295 U.S. 602, 619 (1935) (Dkt. # 22 at 6), the United States Supreme Court considered whether the power of President Roosevelt to remove William Humphrey, a commissioner of the Federal Trade Commission (appointed by President Hoover), was restricted by the statutorily listed reasons of "inefficiency, neglect of duty, or malfeasance in office." Although the President appoints the commissioners, they do not "serve at the pleasure of the President." And the statute did not in any other way vest the President with the power to remove a commissioner. Based on the fact that each commissioner was appointed to "continue in office" for a "fixed term" of seven years, and the nonpartisan purpose of the FTC, the Court held that "removal should not be made during the specific term except for one of the enumerated causes." *Id.* at 624.

To reach its decision, the *Humphrey* court had to distinguish *Shurtleff v. United States*, 189 U.S. 311, 316-318 (1903). In *Shurtleff*, the Court analyzed similar statutory language, but concluded that the statute did not limit the reasons for which the plaintiff could be terminated. The Court distinguished *Shurtleff* on the basis that the plaintiff in *Shurtleff* had not been appointed for a fixed term. *Humphrey*, 295 U.S. at 623. The Court reasoned that "the fixing of a definite term subject to removal for cause, unless there be some countervailing provision or circumstance indicating the contrary, which here we are unable to find, is enough to establish the legislative intent that the term is not to be curtailed in the absence of such cause." *Id.* Like *Shurtleff*, the Director of ITD is not appointed for a fixed term. And, unlike the statute in *Humphrey*, § 40-503 contains a "countervailing provision"—the Director "shall serve at the pleasure of the board." Neither *Humphrey* nor *Shurtleff* support Lowe's claim of an expectation of continued employment.

Lowe next cites *S.E.C. v. Blinder, Robinson & Co., Inc.*, 855 F.2d 677, 681 (10th Cir. 1988), contending that it stands for the proposition that the power of the President to remove the chair of the SEC was limited to "just cause." *See* Dkt. # 22 at 6. The Tenth Circuit, however, reached just the opposite conclusion, reasoning that where a government officer serves an indefinite term, "it follows that [he] serves at the pleasure of the President." *Id.* In contrast, five members of the commission, who were appointed by the President for a term of five years, were removable only for "inefficiency, neglect of duty, or malfeasance in office." Because the chairman had an indefinite term, however, he served at the pleasure of the President and could be removed without any "just cause" restriction. *Id.* at 681-82. The President's power to discharge the chairman for any reason led to the Court's ultimate holding that the President had sufficient authority over the SEC not to violate the separation of powers doctrine. *Id.* at 682. The determinative question is whether the public official is appointed for a fixed term. If so, there may be an expectation of continued

employment. But absent that fact, *Blinder* provides no support for Lowe's attempt to use the permissive "may be removed" clause as the basis for her claim. Again, this case supports the conclusion that § 40-503 does not vest the Director of ITD with an expectation of continued employment.[3]

**(b) Cases Involving Civil Service Employees Do Not Advance Lowe's Argument that § 40-503 Creates an Expectation of Continued Employment.**

Lowe cites two cases for the proposition that civil servants have a property interest in continued employment. Dkt. # 22 at 6. ITD agrees. Virtually all of its employees enjoy the benefits of Idaho's PSA. But not Lowe—she decided to accept the appointment as Director of ITD.

*Walker v. City of Berkeley*, 951 F.2d 182 (9th Cir. 1991) stands for the unremarkable proposition that if an employee is a civil servant, that person has a property interest in continued employment. *Id.* at 183. The question there was not whether Walker was entitled to due process, but instead what process was due.

Like *Walker*, the question in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 539 (1985) was not whether the plaintiff was entitled to due process, but instead what process was due. In any event, Lowe's parenthetical cite "could not be dismissed 'except . . . for . . . misfeasance, malfeasance or nonfeasance in office'" is meaningless. The Ohio plaintiffs were "classified civil service employees," entitled to retain their positions "during good behavior and effective service," who could not be dismissed "*except* . . . for misfeasance, malfeasance, or nonfeasance in office." *Id.* at 538-39 (emphasis added). Thus they had an expectation of continued employment just

[3] Finally, Lowe also cites but misstates the holding of *Greater Bridgeport Transit Dist. v. City of Bridgeport*, 2005 WL 1545207, (Conn. Super. Ct. June 1, 2005). Her parenthetical states that a "housing commissioner who may be removed for 'inefficiency, neglect of duty or misconduct in office' had a protected property right." *See* Dkt. # 22 at 6-7. The Superior Court of Connecticut concluded, however, that because the statute at issue was "silent with respect to removal of directors," none of the directors "have a constitutionally protected or any other property interest in their appointment." 2005 WL 1545207 at *2.

like classified employees under Idaho's PSA. *Loudermill* provides no support for Lowe. This case cannot be used to create an expectation of continued employment in the nonclassified Director of ITD, appointed by, and serving at the pleasure of its Board. *Id.* at 539.

**(c) Because Lowe Was Not Appointed for a Fixed Term, the Only Idaho Case Cited by Lowe Does Not Apply.**

In *Ewin v. Independent Sch. Dist. No. 8*, 77 P. 222 (Idaho 1904), a school teacher sued the Wallace School District, seeking reinstatement and damages. *See* Dkt. # 22 at 7. The issue was whether the district court properly sustained a demurrer. And this turned on whether the school board's power to discharge was governed by statutory provisions applicable to an "ordinary school district" or an "independent school district." *Id.* at 221. Under the ordinary school district provision, the court decided that to discharge a teacher before the end of his term, a hearing must be held and some cause established. *Id.* at 224. That analysis was dicta because the plaintiff was subject to the independent school district provision. But the significance of a fixed term has been carried forward to subsequent claims involving public employees.

Interestingly, for our purpose here, the *Ewin* court went on to state that because the independent school district provision allowed the discharge of "a teacher without limiting that discharge to any cause or requiring any notice, they must be deemed to have purposely omitted the cause and notice from the latter section. It was evidently the intention to authorize a board of trustees of an independent school district to discharge a teacher at will or pleasure." *Ewin*, 77 P. at 225. The court held that "[t]he grant of a general power to remove carries with it the right to remove at any time or in any manner deemed best, with or without notice." *Id.* at 226. *Ewin* does not support reading § 40-503 to create a property right in ITD's Director.

Since *Ewin*, whether a public employee has a property right in continued employment is dependent on whether she serves a fixed or specified term. *See Village of Kendrick v. Nelson*, 89 P. 755, 756 (Idaho 1907) (notice and hearing were required

because the plaintiff served a definite term in office); *Gowey v. Siggelkow*, 382 P.2d 764, 773 (Idaho 1963) (the chairman could be removed without notice or hearing because he did not serve for a specified term); *Buckalew v. City of Grangeville*, 540 P.2d 1347, 1349 (Idaho 1975) (a police chief was terminable only "for cause" because he was employed for a fixed term); *Hansen v. White*, 762 P.2d 820, 825-26 (Idaho 1988) (employee not serving a specified term is terminable "without cause" and an employee serving a specified term is terminable "for cause").

As a passage in Am. Jur. 2d succinctly states, citing two of the cases relied upon by Lowe, "[i]t is the fixity of the term that destroys the power of removal at pleasure." *See* 63C Am. Jur. 2d, Public Officers and Employees § 174 (2000) (citing *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) and *Gowey v. Siggelkow*, 382 P.2d 764 (Idaho 1963)).

**(d) The Idaho Attorney General Opinion (Cited by Lowe) is Entirely Consistent With and Supports the Analysis of § 40-503 Set Forth in This Memorandum.**

The Deputy Attorney General of the Idaho Personnel Commission authored an Opinion in response to a request by the Chairman of the Idaho State Board of Correction ("ISBC"). Dkt. # 22 at 7, Ex. 2. Lowe cites to a single portion of the Opinion, disregarding or simply ignoring the majority of its analysis that severely undermines her position. In that respect, her treatment of the Opinion is similar to the truncated analysis of Idaho Code § 40-503 and the parenthetical characterization of the case law analyzed above. The Opinion is actually consistent with ITD's analysis of § 40-503.

The Chairman of the ISBC inquired as to the employment structure of the Department. In response, the Opinion first identified the nonclassified employees of the Department, and noted that they are excluded from the statutory protections of the PSA. The Opinion then analyzed two sections of the Department's enabling legislation,

Idaho Code § 20-203 (addressing removal of board members) and Idaho Code § 20-210 (addressing removal of commission members).

The Opinion recognizes that § 20-203 provides for a fixed term of employment, limits the reasons that a board member may be terminated, and also provides for specific notice requirements before termination. Then the Opinion quotes the statute: "The governor may not remove any member of the board *except* for disability, inefficiency, neglect of duty or malfeasance in office." (emphasis added). And it quotes the portion of the statute that provides not only for notice requirements, but also a hearing requirement fixing a "time when [the board member] can be heard in his defense." Based on these provisions of § 20-203, the Opinion concludes that the board members are not removable at the will of the governor.

The Opinion then moves on to discuss the removal of commission members under § 20-210. The first section of the statute provides that the commission members "serve at the pleasure of the board." The Opinion states: "[t]his language establishes an at-will employment relationship." This conclusion was reached notwithstanding the fact that the statute specifically fixes a term for the commissioners of five years. Put simply, the phrase "serve at the pleasure of the board" even trumps the fixity of a term.

Consistent with the tortured interpretation of § 40-503, and the citations to inapplicable case law, Lowe mischaracterizes the "conclusion" of the Opinion. Lowe states that the Opinion "concluded that [the] statutory phrase "inefficiency, neglect of duty or malfeasance in office" means that the employee is not removable without good cause." Dkt. # 22 at 7. In fact, the Opinion concluded that a statute: (1) setting a fixed term; (2) establishing specific notice and hearing requirements; and (3) restricting the governor's ability to terminate the board members *except* for the listed reasons, limits the reasons for which a board member maybe discharged. But, the Opinion concluded that a commission member, as opposed to a board member, by serving "at the pleasure of the board" is an at-will position.

The Opinion is entirely consistent with Defendants' analysis of § 40-503 in this memorandum, and the Opinion supports the conclusion that the Director does not have an expectation of continued employment.

### C. LOWE EXECUTED AN EMPLOYMENT AGREEMENT ACKNOWLEDGING THE DIRECTOR'S STATUS AS AN AT-WILL EMPLOYEE AND THUS AGREED TO WAIVE ANY CLAIM FOR CONTINUED EMPLOYMENT.

Lowe acknowledges the significance of the employment agreement she executed by preemptively attempting to argue it away. *See* Dkt. # 22 at 9-10. She concedes that she executed the agreement. And she concedes that the agreement defines her employment relationship with ITD as at-will. Her only argument is that it is non-binding because she was powerless to enter into an agreement that "override[s] a statute enacted by the legislature." *See Id.* at 10. Lowe's argument fails because she did not attempt to contract for additional rights, she only acknowledged that her employment as Director was at-will.

Lowe relies exclusively on *Boudreau v. City of Wendell*, 213 P.3d 394, 395-96 (Idaho 2009). The court held that a government employee cannot contract for additional procedural protections that were not afforded to her under the Idaho Code. *Id.* at 397. Other Idaho Supreme Court cases reach the same conclusion. *See, e.g., Strongman v. Idaho Potato Comm'n*, 932 P.2d 889, 895 (Idaho 1997) (holding that a statute providing for at-will employment "circumscribes the employer's power to contract with its employees for any form of employment other than at-will employment"). These cases, however, are inapplicable here because Lowe did not attempt to contract for additional procedural rights. Instead, through the execution of her employment agreement, Lowe acknowledged the at-will nature of her employment as Director and expressly waived any right to now argue that she had an expectation of continued employment. It follows that even without an evaluation of § 40-503, this Court could deny Lowe's motion for judgment on the pleadings in its entirety and

conclude that Lowe had no property interest in her continued employment as Director of ITD.

In addition, Defendants' Nineteenth Affirmative Defense is that Lowe is precluded from asserting any property right in her continued employment under the doctrines of waiver and estoppel. *See* Dkt. # 9.

**D. LOWE RECEIVED ALL PROCESS SHE WAS DUE.**

Lowe erroneously contends that "Defendants do not dispute that Ms. Lowe was never provided with any kind of hearing, either pre- or post-termination." Dkt. # 22 at 11 (citing Dkt. # 9 at ¶ 38). This is misleading and ignores factual statements and the affirmative defenses set forth in Defendants' Answer. To the extent Lowe was entitled to due process, she was entitled only to "(a) oral or written notice of the reason(s) for the termination, (b) an explanation of the employer's evidence, and (c) an opportunity to present his or her side of the story." *Cantwell v. City of Boise*, 191 P.3d 205, 214 (Idaho 2008). As set forth in Defendants' Answer: "Defendants affirmatively state that Plaintiff was afforded the opportunity to meet with the Board to discuss her performance as Director and that Plaintiff took advantage of the opportunity." *See* Dkt. # 9 at ¶ 36. Defendants provided Lowe all the process she was due. *Heath v. Redbud Hosp. Dist.*, 620 F.2d 207, 212 (9th Cir. 1980) ("Such a meeting would suffice to give her further notice of her deficiencies, an opportunity to examine the evidence against her and an opportunity to present her side of the story to the decision-maker.").

At the very minimum, the statements made in Defendants' Answer, accepted as true and construed in the light most favorable to Defendants as required under the Rule 12(c) standard, create questions of fact as to whether Lowe received whatever process, if any, she was due. *See Gen. Conference Corp. of Seventh-Day Adventists v. Seventh-Day Adventist Cong. Church*, 887 F.2d 228, 230 (9th Cir. 1989).

### E. QUESTIONS OF FACT AND DEFENDANTS' AFFIRMATIVE DEFENSES BAR ALL RELIEF REQUESTED BY LOWE.

Lowe requests that the Court order that ITD reinstate her, provide her additional process, and award her damages. *See* Dkt. # 22 at 11. Her requests are all procedurally premature and cannot be granted through her motion for judgment on the pleadings. Even if the Court concluded that Lowe had a property right (which she did not), and was due some process (which she was not), the pleadings, including statements of fact and affirmative defenses asserted in Defendants' Answer, create questions of fact that preclude the Court from making a determination whether Lowe is entitled to the relief requested. *See Qwest Commc'ns Corp. v. City of Berkeley*, 208 F.R.D. 288, 291 (N.D. Cal. 2002) ("A motion seeking judgment on the complaint may only be granted if all of the defenses raised in the answer are legally insufficient.") (citing William W. Schwarer et al., *Federal Procedure Before Trial*, § 9:319).

## IV. CONCLUSION

Defendants respectfully request that this Court deny Plaintiff's Motion for Partial Judgment on the Pleadings and conclude that Lowe had no property right in continued employment as the Director of ITD.

DATED this 13th day of May, 2010.

By *__/s/ B. Newal Squyres__*
HOLLAND & HART LLP
B. Newal Squyres
Special Deputy Attorney General
Attorneys for Defendants

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 13th day of May, 2010, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

Erika Birch
Lauren Scholnick
Strindberg & Scholnick, LLC
802 W. Bannock Street, Suite 402
Boise, ID 83701
erika@utahjobjustice.com
lauren@utahjobjustice.com

*/s/ B. Newal Squyres*
for HOLLAND & HART LLP

4796919_7.DOC