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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 REPLY 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 Reply Memorandum in support of her Motion for Partial Judgment on the Pleadings.

INTRODUCTION

Ms. Lowe's Motion requires the Court interpret Idaho Code Section 40-503 ("§ 40-503") in order to determine whether it provides the Idaho Transportation Department Director a protected property interest in continued employment. The parties agree that, "where the language of a statute is plain and unambiguous, the court must give effect to the statute as written . . . unless the clearly expressed legislative intent is contrary. . . ." *Bruderer v. Pacificorp*, 2007 WL 1725456 (D. Idaho June 11, 2007), cited by Defendants at page 8 of their Memorandum in Opposition ("Opp."), Document # 28.

Both parties assert that the plain meaning of the statute supports their respective positions. While Defendants' argument ends there, Ms. Lowe further asserts that the legislative history also supports her position. Defendants fail to address the legislative history, instead contending that the Court's consideration of the legislative record converts Ms. Lowe's motion to one for summary judgment. *See* Opp., p. 3, n. 1. This is simply not the case. Under Idaho law, the Court may "take[] judicial notice of public and private acts of the legislature and the journals of the legislative bodies for the purpose of ascertaining what was done by the legislature." *Idaho State Tax Comm'n v. Haener Bros., Inc.*, 828 P.2d 304, 306 (Idaho 1992).[1]

Defendants' failure to contend with the legislative history is not surprising. Senate Bill 1295's Statement of Purpose demonstrates that the legislature's intent was that the ITD Director be removed "only for stated cause." Because the Court's objective is to decipher the legislature's intent, the Statement of Purpose submitted by Ms. Lowe is critical to the Court's determination. However, because Defendants failed to address that issue, this Reply will focus on their contentions regarding the plain meaning of the statute.

REPLY

I. TO "SERVE AT THE PLEASURE OF THE BOARD" DOES NOT EVISCERATE MS. LOWE'S PROPERTY INTEREST IN HER CONTINUED EMPLOYMENT

Defendants agree that principles of statutory construction require that "effect is given to all its provisions" but then ignore that principle by arguing that the language "shall serve at the pleasure of the Board" can be read standing alone. *See* Opp., pp. 6-7. However, the case law in Idaho makes clear that, because §40-503 goes on to restrict the grounds for removal of the

[1] Courts may only take judicial notice of a fact that is "not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably questioned." Fed. R. Evid. 201. Although Defendants imply that they question the validity of the Statement of Purpose, which was copied directly from the legislative library, they provide no assertion that the source is dubious.

Director, the "at the pleasure of" language does not strip Ms. Lowe of the property interest she held in her continuing employment.

In support of their argument, Defendants cite several Idaho cases all of which are easily distinguishable. *Kerner v. Johnson*, 583 P.2d 360 (Idaho 1978), addressed the question of whether the board of an irrigation district could remove the board president. *See Id.* at 382-383. The statute/ordinance in *Kerner* was clear that the president was selected and held "office during the pleasure of the board." *Id.* at 383. The law did not contain any additional direction or restrictions about the president's removal as § 40-503 does here. Furthermore, *Kerner* and the cases it cites for the proposition that "at the pleasure of the board" creates an at-will relationship are clear that this is true only in the "***absence*** of a statute or regulation fixing the terms of office **or grounds for dismissal**." *Hansen v. White*, 762 P.2d 820, 825 (Idaho 1988) (emphasis added) (distinguishing *Gowey v. Siggelkow*, 382 P.2d 764, 773 (Idaho 1963)). [2]

The Idaho Supreme Court made it abundantly clear: "[A]n employee 'hired pursuant to a contract which specifies the duration of the employment *or* limits the reasons for which the employee may be discharged' is not an employee 'at-will.'" *Harkness v. City of Burley*, 715 P.2d 1283, 1286 (Idaho 1986) (emphasis in the original), *quoting MacNeil v. Minidoka Memorial Hosp.*, 701 P.2d 208, 209 (Idaho 1985); *See also Village of Kendrick v. Nelson*, 89 P. 755, 756 (Idaho 1907); *Dorr v. County of Butte*, 795 F.2d 875, 878 (9th Cir. 1986) ("[a] law establishes a property interest in employment if it restricts the grounds on which an employee may be discharged.") In Ms. Lowe's case, the Court cannot ignore that § 40-503 restricts the grounds

[2] The other two Idaho cases cited by Defendants are equally inapplicable. *See Strongman v. Idaho Potato Commission*, 932 P.2d 889, 895 (Idaho 1997) (grievance procedure did not "in any way limit the employer's right to terminate", and statute stated that the employer could "at its pleasure discharge [employees]"); *Bunt v. City of Garden City*, 797 P.2d 135, 137 (Idaho 1990) (addressed a city ordinance stating that police officers hold office "at the pleasure of the Board of Trustees" but does without restricting grounds for discharge.)

for the Director's dismissal to "inefficiency, neglect of duty, malfeasance or nonfeasance" thereby vesting a property interest in her continued employment.[3]

II. LEGISLATURE'S USE OF THE TERM "MAY" DOES NOT NEGATE THE NECESSITY THAT THERE BE CAUSE TO TERMINATE THE DIRECTOR

Once again ignoring that principles of statutory construction require that "effect is given to all its provisions," Defendants single out the word "may" and contend that its use means that the specific listed reasons for the Director's removal are merely discretionary. *See* Opp., pp. 7-9. Plaintiff does not dispute that "may" and "shall" can have different meanings or that in some cases "shall" indicates something is requisite while "may" indicates permissiveness. However, there is no rule that the legislature's use of "may" must always be interpreted as discretionary and the cases cited by Defendants do not state otherwise.[4]

In fact, in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) use of the term "may" was not found to render the grounds for termination purely discretionary. As set for in Ms. Lowe's original Memorandum (Document #22)("Opening Br."), in this case the U.S. Supreme Court interpreted 15 U.S.C. § 41 ("§ 41") and found that the Federal Trade

[3] Defendants' reliance on other, non-binding cases is likewise futile as these cases do not address statutes that include language limiting the reasons the officer may be terminated. *See Hofschneider v. Demapan-Castro,* 2005 WL 817710 (D. N. Mar. I. Apr. 11, 2005); *Youngblood v. City of Galveston,* 920 F. Supp. 103 (S.D. Tex. 1996); 1996 Idaho Attorney General Opinion (citing cases that include only the "serve at the pleasure" language and do not address any situations where the statute also limits the reasons an officer may be terminated).

[4] Specifically, in *State ex rel. Parsons v. Bunting Tractor Co.*, the court went beyond the language and "plain meaning" and looked to the legislative record including an amendment wherein the legislature changed the language from "shall" to "may" and applied the presumption that the legislature intended a different meaning in that context. 77 P.2d 464, 466 (1938). Likewise, in *Western Watersheds Project v. Kraayenbrink,* Judge Winmill carefully evaluated the purposes behind the federal Act at issue in arriving at his ruling that use the word "shall" was mandatory. 538 F. Supp. 2d 1302, 1312-1316 (D. Idaho 2008). *Wheeler v. ITD,* 223 P.3d 761, 764, 67, 70-71 (Idaho App. 2009) was a split decision regarding interpreting the word "should" (vs. "shall") as used in Idaho State Police regulations with two judges finding it meant certain functions were discretionary and the third judge disagreeing and finding that it was meant to be mandatory. *Bruderer supra,* 2007 WL 1725456 (D. Idaho) did not wrestle with the distinctions between the use of shall or may, and *Total Success v. Ada County Highway District,* was also not a statutory interpretation case in that the distinction between the use of the words "may" and "shall" in the same provision was obvious and not at issue in the case. *Id*. at 227 P.3d 942, 945-46 (Idaho 2010).

Commissioners had a protected property interest in their continued appointment. Plaintiff relied on this case for support that the nearly identical language in § 40-503, "may be removed for inefficiency, neglect of duty, or malfeasance," means that Ms. Lowe had a property right in her job as well. Importantly, § 41 also uses the word "may:" "Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office."[5] The U.S. Supreme Court did not find that use of the word "may" in contrast to "shall" stripped the Commissioners of their property interest and neither should this Court find so with respect to § 40-503. *See also, Summers v. Dooley*, 481 P.2d 318, 320 (Idaho 1971) (holding that term "may" as used in Idaho Code § 53-318(8) should be interpreted as mandatory in accordance with the intent of the legislature).

Defendants also argue that if the legislature intended to limit the reasons for the Director's removal it could have easily done so by using language like "may not remove . . . except for" or "can only be removed for." *See* Opp., p. 9. However, this same logic may be used to support Plaintiff's position. If the legislature had intended to make the Director removable at the will of the Board it could have easily done so by: 1) ending the sentence after the "at the pleasure of" language; 2) adding "may be removed by the Board at its pleasure and may do so, for among other things . . ." as suggested by Defendants' at Opp., p. 10; or 3) simply just saying that the Director can be removed "at will" or at "any time for any reason."

Defendants attempt to take the "may" versus "shall" argument one step further by asserting that Ms. Lowe would not have a property interest even if the statute read that "can only be removed . . . ." *See* Opp., p. 10. To support their argument, Defendants cite a 2-1 decision from the Eleventh Circuit dealing with the interpretation of Atlanta's Code of Ordinances.

[5] Further, § 41 repeatedly uses the term "shall" throughout the rest of the section, specifically12 times in sentences such as, "No Commissioner shall engage in any other business, vocation, or employment," while using the term, "may" just once regarding the removal of the Commissioners. 5 U.S.C. § 41.

Edwards v. Brown, 699 F.2d 1073 (11th Cir. 1983). However, *Edwards* is not binding on this Court and is contrary to Idaho's well established caselaw (referenced above) holding that limitations on the reasons for removal give rise to a protected property interest.[6] Defendants' reliance on *Dorr*, *supra* 795 F.2d at 878 (9th Cir. 1986) is also misplaced. *Dorr* is clearly distinguishable in that it pertains to a deputy sheriff who was terminated one month into his one-year probationary period and who clearly had no constitutionally protected property interest.

In short, the legislature's use of the word "may" in § 40-503 does not transform the plain reading of the statute which limits the reason by which the Board can remove the Director.

III. ABSENCE OF A FIXED TERM DOES NOT DIVEST MS. LOWE OF HER PROPERTY INTEREST

Defendants assert that the "determinative" issue regarding whether there is a property interest hinges on whether a statute affixes a specific term for the position. *See* Opp. p. 13. However, none of the cases cited by Defendants support this assertion. Instead, a fixed term is one factor that the Court may consider in determining whether the statute provides a property interest. As also recognized by the cases Defendants cite, an equally legitimate way to find a property interest is where the reasons for removal are restricted by statute. *See Village of Kendrick, supra* 89 P. at 756 (Idaho 1907)(where employment "is made for a definite term *or* during good behavior, *and* the removal is to be for cause, it is now clearly established . . . that the power of removal cannot, except by clear statutory authority, be exercised without notice and hearing . . .") (emphasis added); *Gowey, supra* 382 P.2d at 772 (Idaho 1963) (recognizing when

[6] The language in § 40-503 is different from the "peculiar language of th[e] ordinance" in *Edwards*. *Id*. at 1075-77.

tenure of office is for a fixed term, *or* for life, *or* during good behavior then due process must be provided).[7]

In other words, having a statute that fixes a term and requires cause for removal is one way to vest a public employee with a property interest; however, having a specific term is not mandatory. There are myriad examples where employees unquestionably have property interests in their employment without serving for a fixed term. *See e.g.*, I.C. § 67-5303 (classified employees under the Personnel Systems Act have a property interest and yet, do not serve fixed terms); *Hansen v. White*, 762 P.2d 820, 821, 27 (Idaho 1988) (held County employees became "permanent" after serving a probationary period thus had a property interest in their employment although no "fixed" term of employment.)[8]

Likewise, the U.S. Supreme Court's decision in *Humphrey's*, 295 U.S. 602, that the Commissioners could only be removed for cause did not derive solely because those Commissioners were appointed to serve a 7 year term.[9] As set forth above, the statute also provided that "Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office" which the Court held meant Commissioners could only be

[7] *Buckalew v. City of Grangeville*, 540 P.2d 1347, 1349 (Idaho 1975) found that because police chief was appointed for specified term his removal required due process, but did not hold that due process is only required when there is specified term as Defendants assert.

[8] After arguing that the determinative issue is whether there is a fixed term, Defendants turn around and assert that even in cases where there is a fixed term, an employee may still only be considered at-will. *See* Opp., p. 17. While Plaintiff does not argue that a fixed term alone mandates just cause for termination, Defendants' contrary positions demonstrate that the fixity of the term cannot be the dispositive test.

[9] In distinguishing *Shurtleff v. United States*, 189 U.S. 311 (1903), the Supreme Court recognized that due to separation of powers issues, if Congress meant to restrict the President's power to remove life-time tenured executive officers to "just cause" situations, it should have been more explicit in its intent. 295 U.S. at 622-23. There was not the same level of separation of powers concerns in dealing with the statute in *Humphrey's* since the Commissioners held their positions for a specific term. However, the Court's decision in *Humphrey's* cannot be read to mean that in order to create a property interest, the legislature must also fix a finite term.

removed for cause. *Id.* at 623-24; 5 U.S.C. § 41.[10] That is the situation present in § 40-503, which limits the grounds for removal of the Director evidencing the legislature's intent that the Director be removed only for stated cause.

IV. THE FACT THAT NO PARTICULAR PROCESS IS OUTLINED IN THE STATUTE IS INSIGNIFICANT

With no supportive authorities, Defendants also contend that because in § 40-503 the legislature did not specifically outline a notice and hearing procedure it intended no process need be provided (*i.e.*, no property interest). *See* Opp., p. 9. It is well established that procedure does not determine whether or not one has a property interest in her employment. *See, e.g., Buckalew v. City of Grangeville*, 540 P.2d 1347, 1349-50 (Idaho 1975).

In finding that the police chief was entitled to due process, the Idaho Supreme Court specifically noted that procedural due process is:

> conferred not by legislative grace but by constitutional guarantee. While the legislature may elect not to confer a property interest . . . it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.

Id. at 1350. In other words, "While the state may define what is and what is not property, once having defined those rights the Constitution defines due process. . . ." *Id*. at 1349. Thus, the fact that the legislature did not outline a particular procedure to provide notice and the opportunity to be heard does not dictate a finding of intent not to confer a property interest. Indeed, even if the legislature had outlined a specific process, the issue would still remain whether such procedures were constitutionally adequate.

[10] Defendants are thus incorrect in their assertion that the statue did not "in any other way vest the President with the power to remove a commissioner." Opp., p. 12.

V. BEING EXEMPT FROM THE PERSONNEL SYSTEM IS NOT DISPOSITIVE ON WHETHER MS. LOWE HAD A PROPERTY INTEREST IN HER JOB

Defendants argue, without any support, that because Ms. Lowe was a nonclassified employee under the Idaho personnel system she had no property interest in her employment. Opp., p. 4. This argument implies that the only way for a state employee to have a legitimate expectation of continued employment is as a classified employee under the Personnel System Act ("PSA"). As already established, such expectation may be created in a variety of ways. As in this case, where the statute "limits the reasons for which the employee may be discharged [the employee] is not an employee 'at-will.'" *Harkness, supra* 715 P.2d at 1286 (Idaho 1986) (internal quotations omitted). Section 40-503 limits the grounds for removal creating an expectation of continued employment, notwithstanding that she was not a classified employee under the PSA. [11]

VI. BOARD CANNOT EXCEED ITS STATUTORY AUTHORITY BY CONTRACT

Defendants also argue that Ms. Lowe's offer letter, stating that the position is "non-classified by Idaho Code § 67-5303 and, therefore, is an 'at will' position" strips her of her constitutional rights. Essentially, the ITD Board has attempted to give itself the power to create an at-will position and deny the ITD Director protections in violation of statute and in excess of the power granted to it by the Legislature under § 40-503.

However, administrative agencies have only the authority that is given to it by state statute and may not substitute its judgment for that of the legislature or "exercise its sub-legislative powers to modify, alter, enlarge or diminish the provisions of a legislative act which

[11] Defendants also take issue with Plaintiff's cases she cites, asserting they are not helpful because they dealt with employees covered by civil service statutes. Opp., p. 4. While in her opening brief, Lowe may cite to cases brought by employees that are covered under a similar civil service system, this is only to illustrate the principle that a public employee who can only be fired "for cause" has a property interest in her job. Opening Br., p. 4. She does not rely, as Defendants assert, on her membership or lack thereof in the personnel system nor does she need to in order to have a property interest under Idaho law.

is being administered." *Roberts v. Transportation Dep't*, 827 P.2d 1178, 1183 (Idaho Ct. App. 1991), *aff'd* 827 P.2d 1174 (1992); *See also Brigham v. Dep't of Health and Welfare*, 679 P. 2d 147, 149 (Idaho 1984), *rev'd on other* grounds ("An employee's statutory rights are implicitly included in his or her contract of employment.").

Here, ITD attempts to give itself an expanded power to designate the Director as an at-will position by a unilateral offer letter and in violation of § 40-503. However, agencies cannot exceed statutory restrictions on their powers by using contracts. ITD cannot circumvent state law by contract because such contracts exceed ITD's authority and are void and unenforceable. *Roeder Holdings, LLC v. Bd. of Equalization*, 41 P.3d 237, 241 (Idaho 2001), *rev'd on other grounds* (when agency acting outside expression of statute and in excess of its authority, action must be set aside to extent of conflict). The fact that Ms. Lowe signed her offer letter does not dictate a different result. ITD cannot circumvent the limitations on its powers or violate the mandates of Idaho Code by asking for Ms. Lowe's agreement. The statute controls Ms. Lowe's employment rights and ITD's obligations, not the unauthorized "at-will" offer letter.

CONCLUSION

For the reasons set forth in Ms. Lowe's original Memorandum and those reasons outlined herein, she respectfully requests the Court enter Judgment in her favor as previously outlined.

DATED this 7th day of June, 2010

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/s/ Erika Birch
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CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2010 a true and correct copy of the foregoing pleading was served on the following electronically via the CMECF system:

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