

UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

PAMELA LOWE,

Plaintiff

vs.

IDAHO TRANSPORTATION
DEPARTMENT, et al.,

Defendants.

Case No.: 09-CV-653-REB

**REQUEST FOR ADDITIONAL
BRIEFING**

Within the contemporaneous Proposed Memorandum Decision and Order appended to this Request for Additional Briefing, the Court discusses its understanding of the circumstances leading up to the enactment of Idaho Code section 40-503 as part of the basis for the Court's tentative ruling upon the meaning of section 40-503. Relative to this discussed legislative intent, the parties have not directly addressed such broad or particular details in their briefing to date, and, in fairness, the Court wants to give the parties an opportunity to do just that. The "proposed" decision is just that. It has not been entered, is not the Court's final decision upon these issues, and has not been entered as a decision and order in this case.

Accordingly, the Court will allow the parties an opportunity to present the Court with additional briefing upon Idaho Code section 40-503's legislative history, as that history may relate to the legislative intent behind the language adopted in that statute pertaining to the removal of the ITD Director.

REQUEST FOR ADDITIONAL BRIEFING - 1

In addition, the parties are also on notice of the undersigned's relative uneasiness with trying to reconcile its findings here with other statutes detailing the composition of various state agencies vis à vis the reorganization of Idaho state government. This Court has, on its own, undertaken a comparison of these various Code sections to determine whether its interpretation of Idaho Code section 40-503 is consistent or inconsistent with the personnel mandates of similar executive departments of state government. While not entirely conclusive, the Court finds that its interpretation of section 40-503 is, at least, not in conflict with these other statutes. Therefore, in addition to developing Idaho Code section 40-503's legislative history, the Court also invites the parties to focus their analyses on the compatibility of their respective interpretations of that statute with the Code sections discussing other executive departments' hiring and firing procedures, again insofar as such information is relevant and helpful the Court's decision upon the meaning of Idaho Code section 40-503.

Therefore, on or before January 14, 2011, each party may submit a 10-page supplemental brief in support of their respective positions, addressing these discrete points, along with relevant supporting materials. After the Court considers such additional materials, the Court will issue its final ruling on Plaintiff's pending motion. There will be no further oral argument.



DATED: December 15, 2010

A handwritten signature in black ink, appearing to read "Ronald E. Bush".

Honorable Ronald E. Bush
U. S. Magistrate Judge

UNITED STATES DISTRICT COURT
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vs.

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Case No.: 09-CV-653-REB

**[PROPOSED] MEMORANDUM
DECISION AND ORDER RE:
PLAINTIFF'S MOTION FOR
PARTIAL JUDGMENT ON THE
PLEADINGS**

(Docket No. 21)

Currently pending before the Court is Plaintiff Pamela Lowe's Motion for Partial Judgment on the Pleadings (Docket No. 21). Having carefully reviewed the record, considered oral argument, and otherwise being fully advised, the Court proposes to enter the following Memorandum Decision and Order:¹

BACKGROUND

At the time of her termination in July 2009, Plaintiff had been serving as the Defendant Idaho Transportation Department's ("ITD") Director for two-and-a-half years. Through this action, Plaintiff claims that she had a property interest in her continued employment with ITD and that, by not providing her with an opportunity to challenge the reasons given for her dismissal, she was denied her due process rights.

¹ The Court issues this [Proposed] Memorandum Decision and Order to assist the parties in understanding the Court's current position on Plaintiff's Motion for Partial Judgment on the Pleadings. Following the parties' additional briefing on certain subjects identified herein and the corresponding Request for Additional Briefing, the Court will issue a Final Memorandum Decision and Order.

ITD disagrees, arguing that Plaintiff was an at-will employee at the time of her firing. As an at-will employee, ITD further argues that Plaintiff was not entitled to procedural protections and, thus, did not have a property interest in continued employment with ITD.

Whether Plaintiff had a property interest in her continued employment as ITD Director turns on the application of Idaho Code section 40-503. Under Idaho Code section 40-503:

The [ITD] 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.

See I.C. § 40-503(1). Through her Motion for Partial Judgment on the Pleadings, Plaintiff argues that section 40-503's inclusion of specified reasons for removal in the statute reflects, as a matter of law, the Idaho Legislature's intent to provide ITD's Director with an expectation of continued employment after initial appointment – terminable only for cause after due process. In contrast, but also relying on the statute's own wording, ITD counters that section 40-503's reference to the Director serving "at the pleasure" of the Board, and the absence of any fixed term of employment, demonstrate the at-will nature of the ITD Director's employ - one that carries no corresponding expectation of continued employment.

DISCUSSION

A. Judgment on the Pleadings: Standard of Review

A judgment on the pleadings is proper when there are no issues of material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 12(c). To this end, "the allegations of the non-moving party must be accepted as true, while the allegations of the moving party which have been denied are assumed to be false." *See Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1550 (9th Cir. 1989). Furthermore, all allegations of

fact by the non-moving party must be construed in the light most favorable to that party. *See General Conference Corp. of Seventh-Day Adventists v. Seventh-Day Adventist Cong. Church*, 887 F.2d 228, 230 (9th Cir. 1989) (citing *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988)). Therefore, “a plaintiff is not entitled to judgment on the pleadings when the answer raises issues of fact that, if proved, would defeat recovery.” *See General Conference Corp. of Seventh-Day Adventists*, 887 F.2d at 230. “Similarly, 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)).

B. Statutory Construction

The meaning of Idaho Code section 40-503 is a matter of statutory construction. This Court, in *Johnson v. N. Idaho Coll.*, 2008 WL 4000128 (D. Idaho 2008) (unpublished) (reversed on other grounds), outlined the protocol for construing statutes in Idaho and, finding no reason to depart from its rationale (the parties supply no contrasting authority), will be applied here. In *Johnson*, U.S. District Judge Edward J. Lodge, stated:

In Idaho, when construing a statute, the focus of the Court is to give effect to the intent of the Legislature. The goal is “to give effect to the purpose of the statute and the legislative intent enacting it, which may be implied from the language used or inferred on grounds of policy or reasonableness.” Statutory interpretation begins by examining the plain language in the statute. Where the language is unambiguous, it must be given its plain, obvious, and rational meaning. However, where the language of the statute is ambiguous, absurd, incomplete, or arguably in conflict with other laws, the Court looks to rules of construction for guidance. To ascertain the intent of the Legislature, not only must the literal words of the statute be examined, but also the context of those words, the public policy behind the statute, and its legislative history. Constructions that would lead to absurd or unreasonably harsh results are disfavored.

See id. at *11 (internal citations omitted).

Recognizing that the interpretation of Idaho Code section 40-503 is a question of law, this Court is thus tasked with, initially, examining the statute's literal words; if plain and not ambiguous, effect is given to the statute as-written, without engaging in further statutory construction. *See Twin Falls Cnty. v. Cities of Twin Falls and Filer*, 146 P.3d 664, 668 (Idaho 2006) (dissent) ("Where a statute is unambiguous, statutory construction is unnecessary and courts are free to apply the plain meaning." (citing *Martin v. State Farm Mut. Auto. Ins. Co.*, 61 P.3d 601, 603 (Idaho 2002))). Importantly, parties' differing interpretations do not operate as a *de facto* finding of ambiguity. *See Twin Falls Cnty.*, 146 P.3d at 668 (citing *Rim View Trout Co. v. Higginson*, 828 P.2d 848, 852 (Idaho 1992)). If ambiguous, however, the Court next engages in statutory construction to ascertain the legislative intent and, in turn, defer to that intent, including the statute's literal words, its context, the public policy behind the statute, and its legislative history. *See Twin Falls Cnty.*, 146 P.3d at 668 (citing *State v. Rhode*, 988 P.2d 685, 688 (Idaho 1999)).

C. Idaho Code Section 40-503's Meaning

1. Step One: Idaho Code Section 40-503's Plain Meaning

Because "the best guide to legislative intent is the words of the statute itself," the interpretation of a statute must begin with the literal words of the statute. *See In re Permit No. 36-7200*, 828 P.2d 848, 853 (Idaho 1992). Both Plaintiff and ITD argue that section 40-503's plain meaning coincides with their respective statutory interpretations. Of course, when taking outright opposing positions, both cannot be right.

According to Plaintiff, "the plain meaning of the words in the statute make clear that the Director can only be removed for cause." *See Pl.'s Mem.*, pp. 5-6 (Docket No. 22) ("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.’”). However, in making her argument, Plaintiff (1) reads into section 40-503 a non-existent term (“only”) that would clearly encapsulate and, thus, limit the reasons for a Director’s removal; and (2) gives no meaning to the section’s provision that the Director “shall serve at the pleasure of board.” As a result, while Plaintiff advocates that import be lent to *all* of the statute’s provisions (*see id.* at p. 5), she fails to do so when arguing in favor of her exclusive interpretation of Idaho Code section 40-503’s plain meaning. Plaintiff’s argument in this respect is therefore compromised.

ITD’s turn at interpreting Idaho Code section 40-503 is similarly tenuous. For example, ITD primarily argues that the Director’s “servi[ce] at the pleasure of the board” unequivocally “creates an employment relationship that ‘is at the will of the authority which appointed the officer.’” *See Defs.’ Opp.*, pp. 5-6 (Docket No. 28). ITD then urges the Court to conclude that the word “may” is merely a “permissive and discretionary” directive (*see id.* at pp. 7-8). But, in making such an argument, there is a failure to adequately account for the purpose of the word “may” when attached to its following four reasons for an ITD Director’s removal, when considering section 40-503 in its entirety. That is, rhetorically speaking, why would the Legislature identify four circumstances where the ITD Board *may* remove an ITD Director if there is no corresponding reason for including the stated reasons (or any reason at all) for removal? *See, e.g., Shurtleff v. United States*, 189 U.S. 311, 317 (U.S. 1903) (“[I]f the power of removal is not limited to the causes specified in the statute, . . . then those words providing for a removal for inefficiency, neglect of duty, or malfeasance in office fulfil[1] no function, because

without them the President has unlimited power of removal, and with them he still has the same power.”). The Court is inclined to agree with ITD’s interpretation of Idaho Code section 40-503, *if* the Legislature simply said the ITD Director “shall serve at the pleasure of the board,” without the further proviso, made part of the same sentence, that the Director “may be removed by the board for inefficiency, neglect of duty, malfeasance or nonfeasance in office.” ITD’s argument in this respect is therefore compromised as well.

Nonetheless, the existence of different readings does not necessarily equate to ambiguity; otherwise, all statutes that are the subject of litigation could be considered ambiguous. *See supra* at p. 4. Consider that:

The plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover. Rule of construction to consider object and purpose has no place when words of act leave no doubt.

See John Hancock Mut. Life Ins. Co. v. Haworth, 191 P.2d 359, 362 (Idaho 1948) (internal citations omitted). Here, both parties understandably mine Idaho Code section 40-503 for language supporting their own arguments. Yet, each of the competing templates offered to the Court fails to give meaning to *all* the words of the statute as this Court must attempt to do.²

² Both Plaintiff and ITD cite to a number of cases as support for their particular interpretation of Idaho Code section 40-503. These cases are ultimately inapposite, as there are four interrelated components at play here, that, together, largely fall outside the facts of the proffered case law. Specifically, section 40-503 (1) states that the ITD Director “shall serve at the pleasure of the board,” (2) does not include a fixed term, (3) does not discuss notice or hearing requirements, yet (4) does reference four separate failures in performance upon which the ITD Director may be removed. The cited cases, while generally instructive on certain discrete components, do not speak to the melange of issues presented here. In short, Idaho Code section 40-503’s language is unique, and the absence of case law addressing the entirety of similar language reflects as much.

As pointed out above, it is difficult to accept, as a matter of law, Plaintiff's account of Idaho Code section 40-503's plain meaning. First, Plaintiff's argument disregards section 40-503's explicit reflection that the ITD Director "shall serve at the pleasure of the board" and, by doing so, fails to reconcile the arguable conflict within the statute's operative sentence. Second, notwithstanding the general understanding that the term "may" connotes discretion, throughout other portions of section 40-503, the Legislature made frequent use of the term "shall,"³ highlighting the possibility that the Legislature's reference to the term "may," instead of other, more concrete, limiting language, was a deliberate attempt to differentiate mandatory conduct from permissive conduct. *See Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 346 (U.S. 2005) ("The word "may" customarily connotes discretion. That connotation is particularly apt where, as here, "may" is used in contraposition to the word "shall" . . .").⁴ Third,

³ For example, Idaho Code section 40-503 states in part: "the board *shall* appoint a director having knowledge . . ."; "[t]he director *shall* serve at the pleasure of the board . . ."; "[t]he director *shall not* hold any other public office, nor any office in any political committee or organization, and *shall* devote full time . . ."; "[t]he director *shall* receive compensation as the board may determine and *shall* be reimbursed for all actual and necessary travel and expenses incurred by him" *See* I.C. § 40-503.

⁴ Still, it would be a mistake to presume that the words "may" and "shall" always have but one understood meaning. *See, e.g., Summers v. Dooley*, 481 P.2d 318, 320 (Idaho 1971) (concluding "may" in context of given statute to be mandatory in nature, finding "[w]hether a statute is mandatory or directory does not depend upon its form, but upon the intention of the legislature, to be ascertained from a consideration of the entire act, its nature, its object, and the consequences that would result from construing it one way or the other."); *Hollingsworth v. Koelsch*, 280 P.2d 415, 418 (Idaho 1955) ("In determining whether a statute mandatory in form should be construed as directory or permissive, the meaning and intention of the Legislature must govern as the same may be ascertained not only from the phraseology of the statute but also by considering its nature, design and the consequences which would follow from construing it one way or the other."); *Overland Co. v. Utter*, 257 P. 480, 483 (Idaho 1927) ("[A] statute may be mandatory in form, but, if it is not clear that it was the intention of the Legislature that it should be so construed, courts may construe the mandatory words to be directory only."); 82 C.J.S. *Statutes* § 491 (2010) ("The determination of whether a statute is mandatory or directory does not necessarily depend on the form of the statute. Words of a permissive character may be given a

there is no fixed statutory term for an ITD Director's employ, suggesting (as Plaintiff's counsel, in fact, stated during oral argument) that the ITD Director will remain in his or her position indefinitely, regardless of changes in the state's governing officials over time.⁵ Fourth, "statutes that are in *pari materia*, i.e., relating to the same subject, should be construed harmoniously, if possible, so as to further the legislative intent." *See State v. Gamino*, 230 P.3d 437, 438-39 (Idaho Ct. App. 2010). In that regard, the Court has discerned from its own research that, after the Legislature's early 1970's reorganization of Idaho's executive branch of government, no other enabling agency statute objectively creates an executive position with an expectation of continued employment without either providing for a fixed term for that position, restrictive

mandatory significance in order to effect the legislative intent where the clear intent of the statute, as shown by the context demands such a construction. Likewise, the language of a statute however mandatory in form may be deemed directory when necessary to carry out the legislative purpose.").

⁵ Ironically, a case Plaintiff cites - *Humphrey's Executor v. United States*, 295 U.S. 602 (U.S. 1935) - assists on this point when it discusses *Shurtleff v. United States*, 189 U.S. 311 (U.S. 1903) and the maxim *expressio unius est exclusio alterius*. In the context of the President's removal of a general appraiser of merchandise for causes other than those stated under the applicable Act, the Court held :

[The rule expressed in the maxim] "should not be accorded controlling weight when to do so would involve the alteration of the universal practice of the government for over a century, and the consequent curtailment of the powers of the Executive in such an unusual manner." . . . That opinion, after saying that no term of office was fixed by the [A]ct and that, with the exception of judicial officers provided for by the Constitution, no civil officer had ever held office by life tenure since the foundation of the government, points out that to construe the statute as contended for by Shurtleff would give the appraiser the right to hold office during his life or until found guilty of some act specified in the statute, the result of which would be a complete revolution in respect of the general tenure of office, effected by implication with regard to that particular office only.

See Humphrey's Executor, 295 U.S. at 622 (quoting *Shurtleff*, 189 U.S. at 316).

language for removal from that same position, and/or notice and hearing procedures prior to removal.⁶

Even though the Court has identified potential flaws in Plaintiff's argument as to the meaning of section 40-503, the Court is not ruling as a matter of law that ITD's reading of Idaho Code section 40-503 is correct. Particularly problematic is the inexact fit of ITD's argument that its Director is an at-will employee that may be dismissed at any time and for any reason, into section 40-503's explicit reference to four distinct reasons for removal of the Director. That is to say, ITD's interpretation implicitly disregards the Idaho Legislature's specific inclusion of particular types of unsatisfactory job performance into the statute. This Court, however, must give effect to those words if any reasonable reading of the statute allows it to do so.

The Court has carefully considered the respective arguments of the parties. The Court draws in part upon each party's argument, but necessarily departs from each as well, in reaching a ruling that allows the seemingly irreconcilable portions of the statute to be read together to give full meaning to the entire statute. *See Norton v. Dep't of Emp't*, 500 P.2d 825, 829 (Idaho 1972) (“[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

⁶ Put another way, no other executive department contains language similar to that used within Idaho Code section 40-503. In contrast, other (but, still, not all) related Code sections more clearly discuss the employment structure of department heads and boards, the fixed terms, removal for cause, and/or due process protocols. *See, e.g.*, I.C. §§ 67-5701 (Department of Administration), 22-101 (Department of Agriculture), 33-102, 102A, 103 (Board of Education), 20-201A, 202, 203 (Department of Correction), 39-104, 107 (Department of Environmental Quality), 67-2701 (Department of Finance), 36-102, 106 (Department of Fish and Game), 56-1002, 1005 (Department of Health and Welfare), 72-501 (Industrial Commission), 41-202 (Department of Insurance), 67-2901 (Idaho State Police), 63-101 (Department of Revenue and Taxation), 40-303, 305 (Idaho Transportation Board).

destroy another.”). The Court’s holding is also consistent with the legislative approach to restructuring the executive branch of government, including the Transportation Department, at the time of section 40-503’s enactment.

The Court’s reading of the statute is this: the phrase “[t]he 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,” means that the ITD Board - the entity charged by the Legislature with the mandatory “shall” - maintains the authority to appoint the Director (as distinct from such other positions that are appointed by the Governor, or appointed by the Governor with the advice and consent of the Senate). The remainder of the statute provides that the ITD Board “may” remove the ITD Director, but is not required to do so in its discretion, *if* the ITD Board concludes that the Director’s job performance is unsatisfactory for one or more of the four enumerated reasons.⁷ Said another way, ITD’s Director can be removed for

⁷ The Court acknowledges that ITD contests such an interpretation, arguing that, “[e]ven 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.” *See* Defs.’ Opp., p. 10 (Docket No. 28). However, the cases ITD cites for this proposition do not neatly apply here. For instance, in *Edwards v. Brown*, 699 F.2d 1073 (11th Cir. 1983), the court found that the code section at issue authorized the commissioner to unilaterally decide whether Major Edwards “acted consistent with ‘good behavior and efficient service.’” *See id.* at 1077 (“Instead of providing for a discharge for cause, we equate this provision with a discharge ‘at the will’ of the commissioner.”). In *Dorr v. Butte Cnty.*, 795 F.2d 875 (9th Cir. 1986), the court similarly found that an employee’s probationary rejection “may be based on the appointing authority’s subjective evaluation of the employee’s performance when the applicable rules defined probationary rejection as “the termination . . . of an employee who in the opinion of the appointing authority fails to demonstrate satisfactory performance in [his] position.” *See id.* at 878 (“The power of the appointing authority to determine, on a purely subjective basis, whether a probationary employee has performed satisfactorily undercuts any expectation of continued employment that might otherwise arise by virtue of the requirement that disciplinary dismissal be grounded upon objectively reasonable cause.”). Here, however, there are boundaries - inefficiency, neglect of duty, malfeasance, or nonfeasance in office - that circumscribe the ITD

inefficiency, neglect of duty, malfeasance, or nonfeasance in office. If the ITD Director's performance falls within one or more of those categories, the ITD Board may choose to dismiss its Director, but is not required to do so. Conversely, the ITD Board may not remove the Director for any reason other than one or more of the four specified bases for removal.

Such a reading appropriately gives significance to each word of the statute, in a collectively reasonable manner. Even so, Idaho Code section 40-503 is not the model of clarity, but neither is it inescapably ambiguous. More insight into Idaho Code section 40-503's meaning, represented by Idaho's legislative intent, is useful to measure whether the Court's interpretation is the most sensible result.

2. Step Two: Idaho Code Section 40-503's Legislative Intent

Assuming Idaho Code section 40-503's ambiguity, an attempt to make sense of the underlying legislative intent is warranted. *See supra* at pp. 3-4. On this issue, Plaintiff references Senate Bill 1295 - the enabling legislation that created the Idaho Transportation Department as an executive department of the state - and its "Statement of Purpose" as evidence of the legislative history "support[ing] 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')." *See* Pl.'s Mem., p. 8 (Docket No. 22).⁸

Board's discretion when it determines whether the ITD Director is to be removed. These limits/reasons differentiate this case from *Edwards* and *Dorr*. *See Warren v. Crawford*, 927 F.2d 559, 563, n. 7 (11th Cir. 1991) ("In the instant case, the Personnel Handbook placed no limit on the Administrator's discretion to determine whether dismissal of a department head was in the best interest of the County. There are no guidelines, reasons, or 'causes' that the Administrator must find before determining that the dismissal of a department head is [in] the best interest of the County.").

⁸ ITD challenges Plaintiff's attached Statement of Purpose, arguing that, "[t]o the extent the Court considers this document, a full statutory construction analysis is required, including the

Relevant to the inquiry here, Senate Bill 1295's Statement of Purpose⁹ includes a reference to the ITD Director's appointment and removal, stating that the Director "shall serve at the pleasure of the board and may be removed *only for stated cause*." See Stmt. of Purpose (Docket No. 22, Att. 3) (emphasis added). Plaintiff predictably finds support in such language, arguing that "[t]his 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." See Pl.'s Mem., p. 9 (Docket No. 22). The Court, however, is not altogether convinced.

First, the Court is mindful that a snapshot Statement of Purpose is only one piece of legislative history. Other materials, such as study commission findings, the text of the introduced

'reasonableness of [the] proposed interpretations, the policy behind the statute, and its legislative history.'" See Defs.' Opp., p. 3, n. 1 (Docket No. 28) (quoting *Doe v. Boy Scouts of Am.*, 224 P.3d 494, 497 (Idaho 2009)). ITD then goes on to assert that, if Plaintiff's motion is converted to a motion for summary judgment, it should be given the opportunity to fully develop the record and brief the statutory construction of Idaho Code section 40-503. See Defs.' Opp., p. 3, n. 1 (Docket No. 28). However, a judgment on the merits can be achieved by focusing on, among other things, "any facts of which the district court will take judicial notice." See *Am. Gen. Life Inc. Co. v. Broughton*, 2008 WL 4977402 (D. Idaho 2008) (unpublished) (quoting Wright & Miller, FED. PRAC. & PROC. CIVIL 3D § 1367 ns. 4 & 5 (2004)). As Plaintiff points out, Idaho courts "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." See Pl.'s Reply, p. 2 (Docket No. 33) (citing *Idaho State Tax Comm'n v. Haener Bros., Inc.*, 828 P.2d 304, 306 (Idaho 1992)). This Court will therefore consider Plaintiff's referenced "Statement of Purpose" here.

⁹ Attached to Plaintiff's briefing, Senate Bill 1295's Statement of Purpose contains the additional titles: "Proposal Number 12" and "Idaho Transportation Department." See Stmt. of Purpose (Docket No. 22, Att. 3). Although nowhere else referenced, a handwritten "S1295" is also included in the lower, right-hand corner of the Statement of Purpose. See *id.* For the purposes of this Proposed Memorandum Decision, based upon the record at this time, the Court will consider the Statement of Purpose as corresponding, at some point, to Senate Bill 1295.

bill, amendments, procedural history, Journals, committee/interim committee hearing materials, etc. may or may not be available. *See also infra* at p. 13, n. 11.¹⁰

Second, the Court has reviewed, and takes judicial notice of, a November 1973 tentative legislative proposal to establish an “Idaho Transportation Department” that states “[t]he Transportation Board will appoint the director of the department” and that “[t]he director will serve at the pleasure of the board.” *See A TENTATIVE PROPOSAL FOR THE REORGANIZATION OF IDAHO STATE GOVERNMENT* (Legislative Executive Reorganization Commission, November, 1973). Although presumably created independently from the relied-upon Statement of Purpose, this additional material - with no reference to any reasons for a Director’s dismissal at all - injects further uncertainty into the Legislature’s intended meaning of Idaho Code section 40-503.¹¹

Third, the language of Senate Bill 1295's Statement of Purpose concerning the ITD Director’s removal is different from section 40-503's ultimate language, raising the possibility that the Statement of Purpose was not modified if/when Senate Bill 1295 was ever altered during passage. Reasons - beyond mere oversight - may have existed to substitute out the words “may be removed by the board only for stated cause” in the Statement of Purpose, and replace them with “may be removed by the board for inefficiency, neglect of duty, malfeasance or nonfeasance in office” in the statute itself. Based upon the current record, those reasons, if any, are unknown, but, if discovered, might affect this Court’s consideration of this issue.

¹⁰ The Court is aware that the Idaho Legislature has not always kept a consistent or detailed record of its deliberative proceedings as bills move through the legislative process.

¹¹ Additionally, the “Foreword” to the tentative proposal also states that “[p]ublic comment and suggestions will be received at the public hearings which the [Legislative Executive Reorganization] Commission will hold at convenient locations around the state” *See A TENTATIVE PROPOSAL FOR THE REORGANIZATION OF IDAHO STATE GOVERNMENT* (Legislative Executive Reorganization Commission, November, 1973). However, the record is devoid of any public comment/consideration period materials.

Despite these shortcomings, based upon the limited record at this time, what the record does contain of legislative materials is consistent with the Court's interpretation of the statute that the ITD Director can be removed from office when at least one of the enumerated conditions exists and, if so, the ITD Board is authorized - but not required - to carry out that removal. *See supra* at pp. 10-11. Such an interpretation would seem to support Plaintiff's basic position that she has a property interest in her continued employment as ITD Director.

This interpretation is also consistent with the Court's own conclusion as to the Legislature's intent. The Court has considered the context of the role of the Transportation Department in state government and the competing pressures of politics and policy upon the work of that agency. In doing so, the Court concludes that the Legislature intended to create a director's position that emphasized professional judgment, encouraged a historical institutional knowledge, and was insulated from political pressures so as to be able to direct the work of the Department and advise and receive policy direction from the ITD Board regarding decisions affecting Idaho's transportation system statewide, without fear of reprisal or political influence.

The Court makes such a statement for these reasons. Idaho's history always has been marked by regional interests competing for transportation project dollars. Our state is divided by geography and culture into distinct regions, where business and economic decisions do not always honor or value political boundaries. Although any decision made upon transportation projects can have *statewide* impacts,¹² the *regional* impacts are potentially greater - both in the immediate infusion of huge construction dollars into a local economy, as well as the longer-

¹² Compare the time needed to travel from the Treasure Valley to the Idaho Panhandle today compared to 30 years ago, shortened dramatically by improvements to our north/south highway system at such places as Horseshoe Bend Hill, Whitebird Hill, Lawyer's Canyon, Lewiston Hill, and so on.

lasting economic benefits from highway improvements, new freeway and divided highway interchanges, shortened travel times, and so forth.

The competition for such projects has always been fierce; the dollars for such projects limited. Our Legislature, particularly in the executive branch reorganization that took place in the early 1970's, must have been mindful that if decisions upon such projects were left solely to election results and political deal-making, there might be a few haves, with lots of have-nots, and broader state-wide interests could suffer. Hence, the Legislature created an ITD Board that would contain representatives from specific regions of the state, thus ensuring that each region's interests would be represented. *See, e.g.*, I.C. § 40-303. The direct political influence of the Governor was thereby constrained, but not eliminated, as the Governor was given the responsibility to appoint the board members. *See* I.C. § 40-302. However, the Legislature also set specific time periods upon the term to be served by these board members (the chairman, however, "serve[d] at the pleasure of the governor for an indefinite period"), and specifically outlined the procedures to remove members. *See* I.C. §§ 40-303, 40-305. A political balance was required of the Board, with a prescribed equilibrium imposed between the two predominant political parties in the state. *See* I.C. § 40-302. The Legislature prohibited any board member from serving in a separate elective, appointed, or political party position. *See id.* In so doing, the Legislature unmistakably was seeking to create a decision-making body that would reflect the regional interests competing for transportation projects, but would be a layer removed from the direct political influences that might seek to affect such decisions.

The Legislature then created a professional position in the form of the ITD Director that emphasized the need to operate the engineering, oversight, and public fisc responsibilities of the

ITD in a professional manner. *See, e.g.*, I.C. § 40-505. The person filling that position was to both advise the Board and manage the Department as the “technical and administrative officer of the Board,” and, under the Board, was to have “general supervision and control of...the department.” *See id.*

As with other of the many “citizen” boards of Idaho state government, the part-time ITD board members (although “well informed and interested in the construction and maintenance of public highways and highway systems (*see* I.C. § 40-302)) have neither the time nor the expertise to manage the operations of the agencies on a daily basis. Their responsibility is to set policy and to make decisions upon the major directions of the agency. Such boards, by design and by circumstance, change in composition from year to year. Each time a board member departs, that board member’s collective institutional knowledge gained from his or her tenure on the Board, is lost, and the new member must begin anew to gain such knowledge. More often than not, the board member does not have technical or specialized training in the particular work of the agency, even though they may gain a working understanding of such things in the course of their service. Necessarily, however, in such a setting, the institutional knowledge and expertise of the agency employees, particularly the Director, is critical to assisting the Board in making sound and informed decisions.

Hence, the Legislature, it seems, structured the ITD Director’s position to meet that need. Unlike the board members, who can come from entirely unrelated professional or educational backgrounds, Idaho Code section 40-503 requires the ITD Board to “appoint a director having knowledge and experience in transportation matters.” *See* I.C. § 40-503. The Legislature additionally required that “[t]he director *shall not* hold any other public office, nor any office in

any political committee or organization, and *shall* devote full time to the performance of his official duties. *See id.* Furthermore, it is the ITD Director who is charged with “appoint[ing] a chief engineer of the department” with “actual experience in highway engineering . . . in an administrative capacity involving the direction of a substantial technical engineering staff.” *See id.*; *see also* I.C. § 40-503(2).

In emphasizing the importance of the professional qualifications of the ITD Director position, the Legislature also understood that even in that position, the Director needed to be able to professionally manage ITD and candidly advise the Board without the fear of political reprisal, much as a tenured university faculty member is given protection to engage in academic pursuits. Yet, such a position cannot have been intended to create a taxpayer-funded sinecure for the incompetent or irresponsible; hence, the Legislature identified four specific points of unsatisfactory performance upon which the Board could, in the exercise of its discretion, choose to discharge the Director.

With all this in mind, the Court concludes that its reading of the statute is consistent with this above-referenced legislative backdrop. Accordingly, the Court finds that the statute’s meaning supports Plaintiff’s position that she had a property interest as ITD’s Director.

D. Plaintiff’s December 14, 2006 Offer Letter is Not Dispositive of Plaintiff’s Claims

The December 14, 2006 correspondence between (and signed by) Plaintiff and ITD’s then-Chairman, Frank Bruneel, states in part: “This position is non-classified by Idaho Code 67-5303 and, therefore, is an ‘at-will’ position. *See* Ex. A to Defs.’ Answer to Second Am. Compl. (Docket No. 9, Att. 1). Plaintiff argues that this letter’s content does not operate to overcome the requirements of Idaho Code section 40-503 concerning removal of the ITD Director. *See* Pl.’s

Mem., p. 10 (Docket No. 22) (“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.’”) (citing *Boudreau v. City of Wendell*, 213 P.3d 394 (Idaho 2009)).

In *Boudreau*, the appellant was appointed to the position of Wendell City Clerk and, at the time of her appointment, was provided with a Personnel Manual, outlining “the right to notice and a hearing for employees in the event of discharge or demotion.” See *Boudreau*, 213 P.3d at 395. Following her August 29, 2007 dismissal, the appellant brought a claim, asserting that the defendants/respondents “wrongfully terminated her employment when she was not provided with notice and a hearing as provided for in the Personnel Manual.” See *id.* At 396. The district court granted summary judgment, holding that, “while portions of [the appellant’s] employment may have been governed by the employment handbook, the Idaho Legislature determined that the means by which a city clerk is removed is to be exclusively governed by the terms of I.C. § 50-206.” See *id.* The Idaho Supreme Court agreed, concluding:

Moreover, in Idaho[,] local governments cannot override statutes enacted by the legislature. Thus, once the legislature determined that a municipal appointive officer is at-will and provided for the removal of such an officer without notice or a hearing, the municipality could not alter that status by adopting a Personnel Manual.

See *id.* at 397.

ITD argues that *Boudreau* does not support Plaintiff’s cause because “Lowe did not attempt to contract for additional procedural rights” but, instead, “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.” See Defs.’ Opp., p. 18 (Docket No. 28). While not

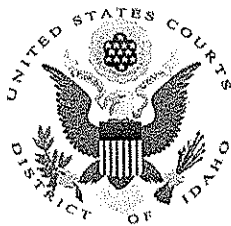
taking issue with ITD's factual distinction from *Boudreau*, the Court disagrees with ITD's application of *Boudreau* to Plaintiff's circumstance here.

The take-away from *Boudreau* (and the other cases cited by ITD) is that Idaho Code prevails over a conflicting contract, manual, or, even letter. Therefore, regardless of what the December 14, 2006 letter said with respect to the nature of Plaintiff's employ as ITD's Director, Idaho Code section 40-503 nonetheless controls. So long as Idaho Code section 40-503 provides a property interest in the ITD Director's continued employment, statements to the contrary via any employment agreement like the December 14, 2006 correspondence do not apply to marginalize the Legislature's mandate.¹³ Therefore, Plaintiff's December 14, 2006 Offer Letter is not dispositive of Plaintiff's Claims.

CONCLUSION

Based upon the foregoing, IT IS HEREBY ORDERED that Plaintiff Pamela Lowe's Motion for Partial Judgment on the Pleadings (Docket No. 21) is GRANTED.

DATED: **December 15, 2010**



Honorable Ronald E. Bush
U. S. Magistrate Judge

¹³ Even when adopting ITD's argument that Plaintiff cannot "contract for additional procedural rights" the same reasoning could be applied against ITD. That is, where Idaho Code section 40-503 indicates a property interest in the ITD Director's continued employment, ITD cannot enjoy arguably "additional procedural rights" (and, therefore, permit it to fire the ITD Director at its will) through the December 15, 2006 letter between Plaintiff and Frank Bruneel.