

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

PETER J. HAMMER,

Plaintiff.

v

Case No. 04-241MK

BOARD OF REGENTS OF THE
UNIVERSITY OF MICHIGAN, a body
politic,

Hon. James R. Giddings

Defendant.

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**DEFENDANT'S BRIEF IN SUPPORT OF CROSS MOTION FOR PARTIAL
SUMMARY DISPOSITION AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY DISPOSITION**

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MILLER, CANFIELD, PADDOCK AND STONE, P.L.L.C.

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I. INTRODUCTION

This case arises out of the denial of Peter Hammer's application for tenure at the University of Michigan Law School in 2000 and again in 2002. In both instances, Hammer failed to receive favorable support from two-thirds of the tenured faculty participating in the decision which was needed for a tenure recommendation to the Board of Regents. In both reviews, Hammer did not receive tenure because his written scholarship did not satisfy the standards of the Law School. Plaintiff was given timely notice both orally and in writing that he had been denied tenure and that the 2002-03 academic year was his terminal year. Plaintiff nonetheless asks the Court to award him reinstatement to the University of Michigan Law School and to guarantee him lifetime employment with full tenure rights and privileges. In so doing, Plaintiff urges the Court to ignore the fact that he undisputedly had actual notice that his appointment would not be renewed and to disregard the academic judgment of the Law School that Plaintiff's scholarship did not meet its standards.

Hammer alleges in Count III (Breach of Contract) of his Complaint that he was not given notice of non-reappointment before his last year of employment and that because he was employed at Michigan for a total of eight years, he could not be terminated without being afforded a hearing under Regent Bylaw 5.09 (Complaint ¶ 54-56). Hammer asserts that his separation from employment without a hearing held pursuant to Bylaw 5.09 constitutes a breach of contract (Complaint ¶ 56). There is no genuine issue for trial that Hammer had actual notice of tenure denial and of non-reappointment that satisfied the University' own guidelines. Even without the notice he clearly received, Hammer was not entitled to a hearing under §5.09 of the Regents Bylaws until *after* he had completed eight years of employment in a tenure track position, i.e. in his ninth year. It is undisputed, however, that Hammer accepted employment with and contractually bound himself to teaching at Wayne State University before completing

the eight years. Even though Hammer's appointment at Wayne commenced before beginning a ninth year at Michigan, Hammer moves the Court to reverse the academic judgment of the Law School faculty regarding the quality of Hammer's scholarship and to award him the job protections of tenure. Courts have consistently recognized that in the academic setting courts have afforded universities broad discretion in the administration of their internal affairs and do not to substitute their judgment for that of academic decision-makers in tenure disputes. See *Dobbs-Weinstein v Vanderbilt University*, 185 F3d 542, 545 (CA 6, 1999); *Gutzwiller v Fenik*, 860 F2d 1317, 1331 (CA 6, 1988); *Frumkin v Board of Trustees, Kent State University*, 626 F2d 19, 21-22 (CA 6, 1980).

Plaintiff's breach of contract claim fails for multiple reasons. First, the Standard Practice Guides (SPG's) do not, as a matter of law, constitute a contract enforceable in court. The Faculty Handbook which Hammer received makes clear that the SPG's are not a contract. Even if the Standard Practice Guides could be construed as a contractual promise, there is no genuine dispute that Hammer had written notice and knew that he had been considered for and denied tenure and that his appointment would not be renewed. It is also undisputed that following notification of his tenure denial in 2002, Hammer began searching for and accepted a teaching position at another university precisely because he had been denied tenure at Michigan and had received notice that his appointment would not be renewed. Hammer accepted employment and signed a contract with Wayne State University before he completed eight full years of service at Michigan. Hammer's employment at Michigan never extended into the ninth year thereby negating any right to or need for a hearing.

On the basis of undisputed facts, Hammer's breach of contract claim cannot survive. The Court of Claims should grant Defendant's Cross Motion for Summary Disposition as to Count III

consistent with this Court's earlier ruling and deny Plaintiff's Motion for Partial Summary Disposition.

II. STATEMENT OF FACTS

A. Plaintiff's Hire At the University Of Michigan Law School.

Peter Hammer was hired by the University of Michigan in May, 1995. He was initially appointed a lecturer from May 1, through August 31, 1995, and then appointed assistant professor at the Law School on September 1, 1995 (Ex. G, N). Dean Jeffrey Lehman approved and issued the employment offer which stated:

Here is a rough summary of the terms of the appointment. You would have the title of Assistant Professor of Law, with an initial appointment of three years. During your third year, there is a modest review, and if you are making "satisfactory progress toward tenure," you will receive a second three year contract. Our current rules regarding tenure provide for consideration in the fifth or sixth year of teaching, a favorable tenure decision carries with it promotion to Professor of Law. (Ex. A)

Hammer received the University of Michigan Faculty Handbook for Instructional and Primary Staff, which set forth the criteria for achieving tenure: teaching, service and academic research (27-29)¹. The Handbook also states:

The policies referred to in this handbook and the related *Regents' Bylaws*, *Standard Practice Guide*, and executive officer policy directives may be changed or terminated at any time by the University. Neither this handbook, the *Regents' Bylaws*, the policy directives, nor the SPGs establish or imply contractual obligations to any faculty group or individual faculty member that cannot be changed or terminated.

Should any provision of this handbook, *Regents' Bylaws*, executive officer policy directive, or the *Standard Practice Guide* require interpretation, the University, through the appropriate issuing unit, shall issue the interpretation. No one can rely on an oral statement or direction that is inconsistent with these written materials. [Ex. B].

¹ Unless otherwise specified by name, page references are to the deposition testimony of Peter Hammer. Other citations are to exhibits attached unless otherwise noted.

Hammer does not dispute that the University retained the right to unilaterally modify its Standard Practice Guides and the Regent Bylaws.

B. Plaintiff's Tenure Review in 2000.

According to written policies of the Law School, faculty typically are considered for tenure in the fifth year of their employment (Ex. C). The candidate must meet the standards of the Law School for teaching, service and scholarship (Howse II, 20-21). The most difficult to satisfy is the scholarship (Lehman 16; Payton 21). The candidate's work must be a significant contribution to legal scholarship, reflecting high intelligence, care and perception (Howse II, 45).

Hammer was considered for tenure in February, 2000 (36-37, 41). A tenure committee reviewed and assessed his teaching, service and scholarship. In a written report, the committee voted 3-2 against recommending Hammer for tenure (59). The tenured faculty then met twice in February, 2000, to deliberate and vote on Hammer's case (Lehman 6). Hammer did not receive the support of two-thirds of the tenured faculty participating in the decision, a requirement for tenure under the policies of the Law School (49). The faculty voted, however, to afford him a second tenure review in two years (45, 47, 49-50).

C. Hammer Is Notified Of A Terminal Appointment.

Following the faculty vote in 2000, Dean Lehman issued Plaintiff a letter confirming that the faculty had concluded that Plaintiff's research did not support a decision to grant tenure but was willing to take the then-unprecedented step of deferring the tenure decision for two years to allow Plaintiff more time to do significant additional writing (Ex. D). The Dean's February 28, 2000 letter stated:

Your current employment contract expires May 31, 2001. Because the faculty has deferred consideration of your tenure, your contract will be extended to May 31, 2002. If you are awarded tenure, you will receive a new contract; **if not, the academic year 2001-2002 will be your terminal year** (emphasis added) (Ex. D)

The letter further advised Plaintiff that the tenure evaluation committee would consider his tenure case again during the 2001-2002 academic year, that internal and external reviews would again be requested, and that an evaluation of his teaching and service would be prepared. The letter relieved Hammer of administrative and service obligations for the fall 2000 semester so that he could concentrate on his writing (Ex. D).

In an email dated July 21, 2000, Plaintiff requested a two-year (rather than the originally offered one-year) extension of what was left in his existing employment agreement, which, according to Hammer, would reestablish the "safety net" of enabling him to make plans if he was not awarded tenure in the second review (Ex. E). Hammer's email to Dean Lehman states:

... My existing contractual relationship with the University makes it impossible to separate the tenure issue from the need to make plans for serious and substantial life changes in the event of an adverse outcome. If not the actual intent of the original six year commitment with tenure consideration in your fifth year, then *one of the primary virtues of the arrangement is the safety net it provides, which permits one to mentally compartmentalize what you need to do to get tenure, from the issue of what plans you need to make if things do not work out.*

* * *

My request is two-fold. First, I would ask that you interpret the faculty's decision to defer my tenure decision for two years as authorizing you to provide a two year extension of what was left on my existing contract. In effect, this would reestablish the pre-existing safety net. If the faculty votes to extend tenure, then it becomes a non-issue. *If tenure is denied, then it gives me a year to orchestrate what could be a very complicated family departure from Ann Arbor.* Second, I would ask that you extend the loan period [for a Law School funded housing loan] in the same fashion, so the decision whether to refinance can be based on the knowledge of whether or not we will be staying (Emphasis added). (Ex. E)

When Hammer sent this email, he was requesting an additional year for time to find another job (209; Courant 84). Hammer testified to this fact in deposition:

Q. So the question is, when you sent the e-mail requesting the additional year of Jeff Lehman, was one of the reasons for that request for the additional year of time for you to find another job; was that reason for the request?

A. That would be a reason.

Q. And the dean responded affirmatively to that, correct?

A. That is correct.

(Hammer 208, 209). Dean Lehman agreed with both of Hammer's requests in a reply email sent August 14, 2000 (Lehman 20; Ex. F).

Hammer was also relieved of teaching, administrative and service responsibilities in the fall, 2000, so that he could devote full time to his research (162-164; Lehman 9, 27). In addition, based upon Dean Lehman's recommendation, a research support committee consisting of five faculty members was established to advise Plaintiff on his research, review drafts of his work and provide feedback (165; Lehman 8-9). Hammer was afforded a sabbatical leave during the Fall, 2001 term and was assigned to teach only one course (rather than two) in the winter, 2001 term (Lehman 9-10).

Consistent with his July 21, 2000, email to Dean Lehman, Hammer received a two-year appointment through May 31, 2002, and a final one-year appointment through May 31, 2003 (Ex. F, G).²

D. Plaintiff's 2002 Tenure Review.

An entirely new Tenure Committee assessed Plaintiff's renewed candidacy for tenure in 2002. In their final report, three committee members recommended tenure, one member recommended tenure in a separate opinion, and one member dissented.

The Law School tenured faculty met twice in February, 2002, to discuss and deliberate on Hammer's tenure application (Caminker 18; Lehman 18, 41). The second meeting on February 28 lasted nearly six hours and deliberations focused on the quality of individual pieces of Plaintiff's scholarship (182; Howse I, 13-14, 20; see also Ex. 1 to Plaintiff's Brief in Support of

² Hammer admits receiving these appointment notices (210-211; Ex. G).

Motion for Partial Summary Disposition (notes of February, 11, 2002 faculty meetings)). The discussions were marked by "penetrating criticism" of Hammer's work (Green 35). Of the 32 members present, only 18 voted in favor of tenure, while 14 were not favorable (Complaint ¶ 27; Caminker 43-44). Hammer therefore failed to receive the favorable vote of two-thirds of the participating faculty which is a prerequisite for the Law School to recommend him for tenure (182). After the meeting, Dean Lehman telephoned Hammer at his home to tell him that he had not received the two-thirds faculty support to justify an affirmative recommendation of tenure (182). Shortly after learning that he had been denied tenure, Hammer told his secretary: "I was fired . . . I didn't get tenure. They denied me tenure." (192)

E. Plaintiff Interviews At Other Law Schools, Receives Three Offers And Accepts Employment At Wayne State University.

Consistent with his July 21, 2000 email to Dean Lehman, Hammer testified in deposition that "after learning of the tenure decision at Michigan was when I committed to teach an overload course at Toledo and was also engaging in the other active job search" (129). Hammer's plan was to obtain a full time tenure position starting in September, 2003 (115, 117, 120, 131-133, 143). Hammer also interviewed for teaching positions at the University of Maryland and Wayne State University. Hammer received offers from all three schools (118, 120, 122, 125, 157, 310, 342-343). At an interview dinner with faculty from Wayne State held on October 30, 2002, Hammer described his intentions:

I explained that it was my belief that the decision [to deny tenure] was not justified, but it was my immediate objective to find a different professional employment where I anticipated to be productive and successful (148).

On January 2, 2003, Hammer sent an email to the Dean of the University of Toledo and to the Dean of the University of Maryland informing both of them that he had accepted Wayne State's offer (151, 154, 335-336; Ex. J).

In a letter dated January 17, 2003, to the Michigan Law School faculty, Hammer wanted to share with them "before leaving" his scholarly efforts over the past two years. Hammer introduced the letter as follows:

As most of you know, after eight years, this is my final semester at the Law School. Last year I was considered for tenure. On a 4-1 vote, the Standing Tenure Committee recommended the granting of tenure. Thirty-two of the forty-two members of the tenured faculty met last February to decide the question. After ten hours of deliberation over two evenings, the faculty voted 18-to-14 in favor of granting tenure, short of the required two-thirds majority. (Ex. L).

In describing this letter, Hammer testified:

Q. When you say this is your final semester at the law school, is that because you had accepted employment at Wayne?

A. That is correct.

(Hammer 349).

Hammer did not select any classes to teach for the 2003-2004 academic year, knowing that he would not be teaching for that year (293). He did not approach anyone to discuss selection of classes for the 2003-2004 year, nor did he request a teaching assignment for that year (293-294; Caminker 136). Hammer had conversations with Dean Lehman and Associate Dean Caminker that made clear that the 2002-2003 academic year would be his final year with the University (Lehman 21; Caminker 37, 134-136).

On March 13, 2003, Hammer signed a written employment agreement with Wayne State University, which committed him to teach at Wayne State for the 2003-2004 academic year (Ex. M). From May 3 through August 23, 2003, Hammer had a part-time faculty assignment at Wayne State (Ex. H). His regular appointment at Wayne commenced on August 19, 2003 (Ex. I). Hammer received tenure at Wayne in May 2004 (106-107).

F. University Bylaw 5.09 and Standard Practice Guide 201.88.

Bylaw 5.09 provides:

Applicability. The procedures prescribed in this section shall be followed (a) before recommendation is made to the Board of Regents of dismissal or demotion of a tenured member of the University teaching staff or of any member of the teaching staff during the term for which any member of the teaching staff is appointed; or (b) before recommendation is made to the Board of Regents of dismissal, demotion, or terminal appointment of a teaching staff member holding appointments with the University for a total of eight years in the rank of full-time instructor or higher. Subject to pursuing these procedures, a recommendation of dismissal, demotion, or terminal appointment may be made for causes accepted by University usage, properly connected with the improvement and efficiency of the faculty, and consistent with the character of the tenure involved (Ex. R).

Standard Practice Guide ("SPG") 201.88 sets forth the general procedures for notice of non-reappointment. The Guide first explains the purpose of providing such notice:

Instructional activities by their nature require planning and commitments for a reasonable period of time into the future. Neither the interests of the University nor those of the individual instructional staff member are well served by unplanned abrupt changes in the mutual commitment implicit in an instructional appointment. To this end, the University provides the following commitments as to the Notice of Non-reappointment that it will provide to instructional appointees, and would expect that individuals deciding to end their instructional relationship with the University would provide their department or unit appropriate notice (Ex. O).

The Standard Practice Guide further provides, in relevant part:

All term appointments are considered terminal upon the completion of the terms and conditions of the appointment. However since for tenure track appointments, there is an expectation of possible reappointment, it is the *intent* of the University to notify individuals who are not to be reappointed, except as noted in paragraph 4 below [concerning Supplemental Instructional Staff], in accordance with the following *guidelines* (emphasis added).

A. Individuals who have held non-tenured regular full or part-time instructional staff appointments for more than two academic or fiscal years, expiring at the end of Term II, will be notified of non-reappointment no later than September 15 of that academic year. If the appointment expires at a time other than the end of Term II, notice will be given no later than a date which would provide nine (9) months advance notice of the termination date ...

* * *

E. Notice of non-reappointment should be explicitly stated in writing from the appropriate Department Chairman or Dean. The letter should not be conditional, nor state reasons for the non-reappointment. (Ex. O).

Standing alone, Bylaw 5.09 contains no notice provision for Defendant to have violated. Bylaw 5.09 applies where an employee has completed eight years of "service" (as defined by the SPG's) and has not been notified of a negative tenure decision. Hammer had such notice and accepted employment at another University before completing eight years of service.

III. ARGUMENT

Regents' Bylaw 5.09 is designed to ensure that academic units do not keep tenure-track professors in entry level positions for more than eight years and benefit from their teaching and service without considering them for promotion to tenure. But once the tenure-track candidate has actually been reviewed for tenure and notified of the tenure denial, then the candidate no longer has a reasonable expectation of possible reappointment, much less a contractual right to one. In this case, Peter Hammer's tenure application was reviewed and denied, not once but twice, and he was notified of non-reappointment before the end of his seventh year. This case is therefore 180 degrees opposite from the situation contemplated by the Bylaw. Plaintiff has no breach of contract claim.

A. The University's Standard Practice Guides Do Not Constitute A Contract Of Employment.

Hammer claims that because he was employed by the University for eight years without sufficient notice of non-reappointment, he was entitled to the procedural protections of Regent Bylaw 5.09, which apply to dismissal of tenured faculty (Ex. O, P). Hammer's breach of contract claim fails because the Faculty Handbook which he received explicitly disclaims that

the Standard Practice Guides constitute a contract (Ex. B).³ The Faculty Handbook states that the SPGs "may be changed or terminated at any time by the University" and do not "establish or imply contractual obligations to any faculty group or individual faculty member that cannot be changed or terminated." Hammer also received clear notice that if the SPGs required interpretation, "the University, through its appropriate issuing unit, shall issue the interpretation."

The Michigan Supreme Court has made it clear that there is no binding contract where the employer states that its policies do not create an employment or personal contract and provides that the policies can be modified at any time. *Heurtebise v Reliable Business Computers, Inc.*, 452 Mich 405; 550 NW2d 243 (1996). See also, *Stewart v Fairlane Community Mental Health Centre*, 225 Mich App 410, 420; 571 NW2d 542 (1997) (agreement to arbitrate is not mutual and not binding where employer could unilaterally amend at any time the policies contained in the employee manual, relying on *Heurtebise, supra*). The *Stewart* court specifically held "We cannot conclude that an agreement or provision is mutual or binding where, as between a private employer and a nonunion employee, an employer may unilaterally amend at any time every policy contained in its employee manual." *Id.*, 225 Mich App, at 420. Accordingly, Hammer cannot establish an express or implied contract based on SPG 201.88.⁴

That the guidelines of the SPGs do not provide Plaintiff with a cause of action is further supported by *Bankey v Storer Broadcasting Co.*, 432 Mich 438, 455-456; 443 N.W.2d 112 (1989), in which the Michigan Supreme Court stated:

³ Unlike Hammer's discrimination claim in Count I, which is premised on the legitimate expectations theory of *Toussaint v Blue Cross Blue Shield*, 408 Mich 579, 292 NW2d 880 (1980), Count III alleges breach of contract.

⁴ Moreover, there is no mutuality to support a contract theory of recovery because Hammer was free to leave the University at any time, in fact accepted an offer of employment with Wayne State University by January 2, 2003, executed a written contract of employment with Wayne State on March 13, 2003, and commenced his regular appointment there in August, 2003.

The very definition of 'policy' negates a legitimate expectation of performance. . . . In other words, a 'policy' is commonly understood to be a flexible framework for operational guidance, not a perpetually binding contractual obligation. 432 Mich, at 455-456.

Indeed, the very title of the SPGs – “Standard Practice Guides” – makes clear that the policies are intended to be “guides” for good “practice” and do not provide Plaintiff with judicially enforceable rules. *Carr v Board of Trustees of University of Akron*, 465 FSupp 886, 897 (N.D. Ohio 1979) (“Guidelines for Promotion, Tenure, Retention and Initial Appointment” were general recommendations and not mandatory).

This conclusion is particularly apt with respect to a guideline that by its own terms describes best practices rather than rigid rules. SPG 201.88 states that the notice of non-reappointment “should” rather than “shall” or “must” be done in a certain manner. Courts have recognized that use of the word “should” in policy statements or manuals does not require strict adherence. See, e.g. *People v Fosnaugh*, 248 Mich App 444, 450 (2002) (court was not persuaded that the term “should” had an obligatory effect where the words “shall” and “should” were used in the Michigan Breath Test Operating Training Manual); *Bowen v Income Producing Management of Oklahoma*, 202 F3d 1282 (CA 10, 2000) (provision in an employee manual that “under all conditions, proper documentation *should be completed* prior to the date of termination....” deemed permissive rather than mandatory); *Carr v Board of Trustees of University of Akron*, 465 FSupp 886 (ND Ohio 1979) (where terminated nontenured professor brought breach of contract claim relying upon a portion of a faculty manual entitled “Guidelines for Promotion, Tenure, Retention and Initial Appointment,” court found that manual provisions using the words “should,” “will,” and “shall” were not mandatory). Thus, it is clear from its very terms that *this* SPG in particular does not create a judicially enforceable obligation with respect to the detailed form of notice.

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Finally and definitively, the Faculty Handbook also expressly reserved to the University the authority to interpret the Bylaws and SPGs upon which Hammer relies. Defendant therefore had the right to determine that (1) Hammer received notice of non-reappointment sufficient to satisfy SPG 201.88, and (2) Hammer did not qualify for a termination hearing at the time he requested it in January, 2003, because Hammer had already received notice of non-reappointment, had not yet completed a total of eight years in the rank of full-time instructor or higher, and had already accepted a full time faculty appointment at Wayne State University for the following academic year. *Thomas v John Deere Corp*, 205 Mich App 91; 517 NW2d 265, (1994) (an employer may negate an employee's ability to seek judicial review of its decision to terminate by placing a provision in the employment contract reserving unto itself the sole authority to decide whether termination is justified). By virtue of the Faculty Handbook and as a matter of law, Hammer is bound by the University's interpretation of the SPGs and the Bylaws.

B. Hammer Received Sufficient Notice Of His Non-Reappointment Prior To His Last Year of Employment And Partial Summary Judgment On Count III Should Again Be Entered In Favor Of Defendant.

SPG 201.88 states that for individuals who are in tenure-track positions with an expectation of possible reappointment "it is the intent of the University to notify individuals who are not to be reappointed ...no later than a date which would provide nine (9) months advance notice of the termination date." (Ex. O). Notice to the non-reappointed faculty member is designed to give him time to pursue a teaching position at another institution. It is undisputed that Hammer was sufficiently put on notice that he needed to look for another academic position for the 2003-04 academic year, which of course is precisely what he did. Where, as here, both oral and written communications of tenure denial provided the faculty member with actual notice of non-reappointment and enabled the faculty member to complete his appointment and plan for new employment elsewhere, the objectives of the SPG were more than satisfied.

Under the policies of the Law School, tenure track faculty can expect to receive only one tenure review. Hammer received the highly favorable treatment of two tenure reviews and was promptly notified both in February, 2000, and again in February, 2002, that he had been denied tenure. It is likewise undisputed that after the 2000 review, the Law School Dean notified Hammer in writing that the 2001-2002 academic year would be his terminal year of employment were his second tenure review unsuccessful. In response to this letter, Hammer explicitly requested the Dean to extend the terminal appointment by one year so that Hammer would have the "safety net" of added time to find another job if he was denied tenure (Ex. E). Hammer requested one and only one additional year. Hammer's request for the added year undisputedly evidences that he had notice of non-reappointment well in advance of nine months prior to his terminal year of employment, as stated in the guidelines of SPG 201.88. After Dean Lehman agreed to Hammer's request, Hammer received nothing orally or in writing which in any way altered or negated the notice of non-reappointment he received before his terminal year.

The combination of Dean Lehman's February 28, 2000 letter notifying Hammer that 2001-2002 would be his terminal year if denied tenure and Hammer's request for an additional one-year appointment to locate other employment satisfied SPG 201.88 for non-reappointment (Frumkin 26-27, 42-44, 48-49; Courant 82-83, 87, 92-93). This written exchange with the Dean shattered any expectation Hammer might have that he would remain employed by the University beyond eight years if he were denied tenure a second time. Jeff Frumkin, the Assistant Provost and Senior Director of Academic Human Services, found that Dean Lehman's February 28, 2000 letter to Hammer satisfied the notice provisions of SPG 201.88 (Frumkin 48-49). Then-Provost Paul Courant reached the same conclusion (Courant 82, 84, 93). Frumkin and Courant are the

appropriate officers authoritatively to interpret the SPGs.⁵ It was undisputed from University officials Courant and Frumkin and Hammer's July 21, 2000 request to Dean Lehman that Hammer had proper notice of non-reappointment *before* his terminal year. This Court likewise correctly held that there was no genuine issue for trial that Hammer had timely notice of non-reappointment.

Plaintiff also received an appointment notice reflecting a two-year appointment through May 31, 2002; his last appointment notice dated August 30, 2002, was for one year consistent with his July 21, 2000 email to Dean Lehman (Ex. G). These notices are clear and unequivocal. Hammer also received a letter from Dean Lehman dated September 5, 2002, stating: "As you explore possible opportunities for next academic year, Peter, I hope you will let me know how I can best help." (Ex. Q). These additional notices confirm that Hammer had no legitimate expectation, contractual or otherwise, for employment at the Law School beyond 2002-2003.

Plaintiff's conduct further demonstrates that he had actual notice of non-reappointment and understood that 2002-2003 was his final year. He told his secretary that he had been "fired" after learning of the tenure vote in 2002 (192). Hammer sought and received an offer from the University of Toledo at the beginning of the fall 2002 semester (132). He negotiated offers from the University of Maryland and from Wayne State University by early December, 2002 (122). On January 2, 2003, he accepted the Wayne State offer (Ex. J). Within a few days, Hammer wrote to all faculty at Michigan's Law School telling them that "this is my final semester" (Ex. L). He did not select classes for the 2003-2004 term at Michigan. Instead, he signed a contract

⁵ As stated above, the Faculty Handbook explicitly reserved to the University the right, through the appropriate academic unit to interpret the SPS and provides that such interpretation is binding on the faculty member. There is no genuine dispute that former Provost Paul Courant and Assistant Provost Jeff Frumkin were appropriate officials to interpret the SPGs. Indeed, even Plaintiff attempts to rely on a memorandum issued by Courant *after* Hammer left the University regarding the "Tenure Clock" (See Plaintiff's Brief, Ex. 9).

of employment with Wayne State on March 13, 2003. Hammer acted in accord with his July 21, 2000 email to Jeff Lehman that 2002-2003 would be his final year if not granted tenure.

Hammer's successful job search and his own documents preclude a claim that he was not notified that 2002-2003 was his final year. No genuine issue of fact remains for trial that Plaintiff had adequate notice that the 2002-2003 academic year would be his terminal year. Dean Lehman's February 28, 2000 letter contained all of the elements of notice which SPG 201.88 contemplates (Frumkin 48-49; Courant 82-83, 87, 92-93). This Court correctly ruled before that Hammer had sufficient notice and should so rule again.

C. Plaintiff's Arguments That He Received Insufficient Notice Have No Merit.

Hammer tries to confuse the notice issue by arguing that Dean Lehman's 2000 letter providing notice must be considered insufficient because otherwise there was no reason for Associate Dean Evan Caminker to have a conversation in the spring of 2002 with Frumkin in which Frumkin advised Caminker to provide notice of non-reappointment to Hammer before September 15 of his final year. But there is no evidence, and Hammer cites none, that at the time of their conversation either Frumkin or Caminker was even aware of the previous written communications between Dean Lehman and Hammer regarding Hammer's terminal year. It is undisputed that the non-reappointment notice came from Dean Lehman. Any conversation between Frumkin and Caminker is simply immaterial; moreover, no further notice to Hammer was needed once Frumkin and Caminker became aware of the previous written exchange between the Dean and Plaintiff (Frumkin 26-29, 42-43, 48-49).

Hammer also asserts, with no evidence, that Lehman's February 28, 2000 letter was "conditional" and therefore not compliant with SPG 201.88 because the notice of non-reappointment would become moot if Hammer were awarded tenure during his second review. This assertion is wrong for many reasons. First of all, part II of the SPG states "it is the intent"

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to notify appropriate individuals "in accordance with the following *guidelines*" (emphasis added). Subpart IIE states that the notice of non-reappointment "should" not be conditional; the guide does not say or suggest that the notice "must" be unconditional or else the notice of non-reappointment is defective. Second, the Faculty Handbook make clear that University officers have the authority to interpret provisions of the SPGs, and in this case both then-Provost Courant and Assistant Provost Jeffrey Frumkin provided uncontradicted testimony that Dean Lehman's letter to Hammer constituted adequate notice under the SPG (Frumkin 48-49; Courant 82, 84, 93). Third, the only "condition" contained in Lehman's letter is the second denial of tenure itself, which is not the kind of condition that undermines or qualifies the notice of non-reappointment (such as notice of nonreppointment unless enrollment increases or a vacancy through retirement occurs).⁶ The denial of tenure and the non-reappointment go hand and hand, which is precisely why Hammer requested that his terminal year be one year later. Hammer's July 21, 2000 email demonstrates his knowledge that for him a second denial of tenure meant non-reappointment after the 2002-03 academic year.

Lehman's and Hammer's subsequent course of dealing only confirmed the adequacy of notice, which was grounded not only in Dean Lehman's February 28, 2000 letter but also in Hammer's July 21, 2000 request. By requesting an additional terminal year beyond that stated in Dean Lehman's letter, Hammer clearly evidenced an understanding that a denial of tenure in 2002 would trigger a need for him to find alternative employment. Hammer thus confirmed that he had adequate notice of non-reappointment more than nine months before his termination to satisfy SPG 201.88. The fact that Hammer was afforded a second tenure review and negotiated

⁶ Similarly, if a notice of non-appointment informed the faculty member that his appointment was not being renewed and gave as the reason for denial that the faculty voted to deny tenure, the faculty member could hardly deny receiving adequate notice even though SPG 201.88 counsels administrators not to include the reasons for non reappointment.

with Dean Lehman a terminal year ending in 2003 does not vitiate the validity of the clear notice provided by Dean Lehman's 2000 letter and Hammer's July 21, 2000 response. Hammer presents no evidence to the contrary.

Finally, Plaintiff's attempted analogies in his motion between this case and *Slaughter v Smith*, 167 Mich App 400; 421 NW2d 702 (1988) regarding insurance law or the Michigan Teachers Tenure Act are completely inapt. In *Slaughter*, the court held that an insurance company was bound by a contractual obligation to provide notice of its intent not to renew plaintiff's insurance policy and that the policy therefore remained effective after its expiration date. The court in *Slaughter* was reviewing an express, binding insurance contract, rather than a set of employer policies that expressly were subject to unilateral change or termination. Moreover, in finding that the insurance company did not provide notice as required by the insurance contract, the *Slaughter* court applied general insurance law principles, including the policy of the State of Michigan that persons who suffer loss due to automobile accidents have a source and means of recovery and the rule of construction that provisions of an insurance policy are strictly construed against the insurer. *Slaughter* at 405. These principles do not apply here. But the principle that courts should be very deferential to university tenure decisions does, and public policy considerations disfavor tenure by default in the university setting. Accordingly, courts have declined to override university employment decisions on the basis of some procedural flaw. See, e.g. *Bates v Sponberg*, 547 F2d 325 (CA 6 1976) (Eastern Michigan University Board of Regents failure to review entire record of grievance committee, as provided in faculty handbook, did not entitle discharged faculty member to reinstatement); *Healy v Fairleigh Dickinson University*, 287 NJ Super 407, 671 A2d 182, (1996) (rejecting claim of *de facto* tenure even though faculty member was reappointed for a term extending beyond the probationary period).

The Teachers Tenure Act by its terms applies only to Michigan K-12 school districts, not to constitutionally-created universities. Hammer's tenure claim is based upon an alleged contract formed from employer policy statements, not upon binding statutory notice provisions.

D. No Post-Tenure-Denial Event Vitiates The Notice Of Non-Reappointment.

1. Hammer Cannot Disclaim Notice of Non-Reappointment Simply Because He Sought Employment At The University Of Michigan Outside The Law School.

Hammer argues that because he was looking for a teaching position elsewhere within the University after being denied tenure by the Law School, this fact somehow vitiates the notice of non-reappointment given him by Dean Lehman. Hammer's claim has no merit. First, implicit in this argument is the concession that Hammer in fact knew that he had been denied tenure by the Law School and that his appointment would not be renewed. Second, it is clear from the Standard Practice Guides that all that is required for adequate notice is that the faculty member be told that *his academic unit* will not be reappointing him. To begin with, the unit in which the faculty member has been teaching provides the notice of non-reappointment.⁷ See SPG 201.88 Example A. Second, the notice refers to non-reappointment, meaning continuation of the same appointment (same status in same academic unit); there is no suggestion that the notice should disclaim any potential *new* appointments in other units. Once this has been done, the notice provision is satisfied regardless of whether the non-renewed faculty member attempts to secure employment elsewhere at the University of Michigan. If Hammer's argument were accepted, then any faculty member denied tenure could claim the protections of tenure simply by waiting until he receives written notice and then looking for other employment anywhere on the University of Michigan campus. There is no evidence or reason to support a claim that efforts to find alternate employment can lead to lifetime job security despite actual notice of non-

⁷ Part IIE says the notice should come from the "appropriate department Chairman or Dean."

reappointment to the faculty member's home academic unit. Indeed, such a claim renders the entire tenure review process meaningless. More importantly, no SPG provision or Bylaw allows a job search to override notice of non-reappointment.

2. **Hammer Cannot Disclaim Notice of Non-Reappointment Simply Because He Filed A Grievance or Wrote the Provost a Letter.**

Hammer identifies no support in either the SPGs or the Bylaws for his claim that filing a grievance or requesting the Provost to review the Law School's denial of tenure somehow diminishes the notice of non-reappointment Hammer received from his academic unit. If such actions were enough to vitiate notice, then any unsuccessful tenure candidate could easily and always claim *de facto* tenure, even where the candidate was given textbook notice of non-reappointment, simply by waiting until September 14th and then filing a grievance or writing the Provost a letter.

Moreover, Hammer's letter to the Provost specifically stated that Hammer was not asking for a response, he simply wanted the Provost to "listen." (Ex. S). Hammer identifies no basis upon which he can claim his letter or grievance should reasonably be viewed as vitiating the prior notice that he needed to look for alternative employment outside the Law School.

3. **Hammer Cannot Disclaim Notice of Non-Reappointment Simply Because He Received a Salary Raise During His Final Year.**

Hammer asserts that because he received a salary increase during his terminal year of employment that he could disregard the written notice of non-reappointment he received from Jeff Lehman and assume that his employment with the University might continue beyond the 2002-03 academic year. This assertion has no merit. First, the Michigan courts have clearly held that pay increases do not alter an employee's at-will status. See *Bracco v Michigan Tech Univ*, 231 Mich App 578, 597, 588 NW2d 467 (1998) citing *Rood v General Dynamic Corp*, *supra* at 133-134 (Plaintiff's favorable evaluations and merit pay increases do not give raise to

just cause employment contract). Similarly, a positive performance evaluation does not, as a matter of law, create an expectation of continued employment absent just cause for termination. *Id.*; *Kay v United Technologies Corp.*, 757 F2d 100 (CA 6 1985).

Moreover, Hammer cannot reasonably claim an expectation of continued employment based upon the pay increase because the very letter from Jeff Lehman informing Hammer of the pay increase also offers the Dean's help "[a]s you explore possible opportunities for next academic year" (Ex. Q). Any different conclusion would penalize deans for assisting disappointed faculty members denied tenure, by offering an annual pay increase or extending the terms of housing loans, as Lehman had previously done.

E. Plaintiff Is Estopped From Asserting A Breach of Contract Claim.

After successfully requesting an additional year of employment to allow him time to find a new job if he was denied tenure in 2002, Hammer now uses the fact of an extra year to claim that he thereby acquired rights to a just-cause termination hearing. The principles of equitable estoppel, however, bar Hammer from asserting this claim.

Equitable estoppel arises where (1) a party, by representations, admissions or silence, intentionally or negligently induces another party to believe facts; (2) the other party justifiably relies and acts on that belief; and (3) the other party is prejudiced if the first party is allowed to deny the existence of those facts. See *Conagra, Inc v Farmers State Bank*, 237 Mich App 109, 141; 602 NW2d 390 (1999); *Lakeside Oakland Development, LC v H&J Beef Co*, 249 Mich App 517; 644 NW2d 765 (2002).

When Hammer received written notice in 2000 that the 2001-2002 academic year would be his terminal year, he asked for and represented to the University that an additional year through 2002-2003 would give him time to transition to new employment if he did not receive tenure in 2002. Plaintiff admits requesting the additional year to allow time to find another job

(209). It was under no obligation to do so but relying upon Plaintiff's representations, the University of Michigan Law School granted his request. Hammer then used the added one-year appointment to locate and accept employment elsewhere with Wayne State. He is equitably estopped from now claiming that the extra year of employment allowed him to obtain the same hearings rights as tenured faculty. See *Penny v ABA Pharmaceutical Co*, 203 Mich App 178; 511 NW2d 896 (1994) (reversing dismissal of plaintiff's claims for failure to serve a defendant where that defendant's attorney was aware of the pendency of the lawsuit and had attended hearings in the litigation). Finding otherwise would cause an inequity by permitting Plaintiff to deny his undisputed representation while causing great prejudice to Defendant, which understandably and reasonably believed that 2002-2003 had unequivocally been designated as Hammer's terminal year and that no further notice of non-reappointment was necessary.

F. Hammer Accepted Employment With Another University And Contractually Bound Himself To Teach Elsewhere Prior To The Completion Of Eight Years Of Service.

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Hammer was appointed as a Lecturer for the period of May 1, 1995, through the end of August, and then was appointed as an Assistant Professor starting September 1, 1995 (Ex. N). His service as a lecturer does not count as "Bylaw 5.09 time" (SPG 201.13 II. A, attached as Ex. P). Because Hammer began his regular appointment at Wayne State on August 19, 2003, he did not remain at the Michigan's Law School in a tenure-track position for a period of more than eight years. Moreover, by email dated January 2, 2003, Hammer accepted a full-time academic appointment at Wayne State University well before eight years of employment with the University of Michigan. Regent Bylaw 5.09 requires a hearing before the termination of a full-time faculty member who has completed eight years of service and whose employment continues because there was no notice of non-reappointment (Frumkin 23). Hammer claims that his attorney requested a hearing under Bylaw 5.09 by letter dated January 14, 2003, shortly after

Hammer accepted a faculty position at Wayne State and at the same time Hammer wrote to the Michigan Law School faculty stating that this was his last semester at Michigan. Even if Hammer had not received sufficient notice, Hammer still had not completed a total of eight years of service at the time he requested the hearing. Hammer's hearing rights never ripened even under his theory of the case.

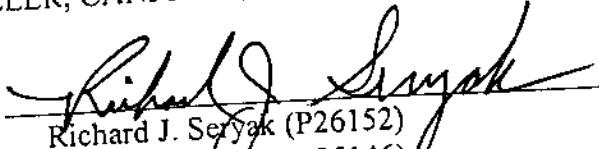
Hammer signed an employment contract with Wayne State on March 13, 2003, and his appointment with Defendant ended on May 31, 2003. Hammer was not eligible for a termination hearing in January, 2003, nor did he remain employed at Michigan beyond eight years because he left to pursue other employment. Because Hammer was not engaged in a full-time capacity beyond eight years, there was clearly no need for the University to initiate any termination proceedings against Hammer under the Bylaw. Hammer therefore had left Defendant before any alleged contract could be breached. The fact that minutes of Defendant's Board of Trustees' July, 2003 meeting reflect that Hammer resigned at the end of his appointment on May 31, 2003, is not only accurate but consistent with Hammer's finding employment elsewhere, his not selecting classes to teach at Michigan in 2003-2004, and his statements to colleagues about his future plans.

IV. CONCLUSION AND RELIEF REQUESTED

On the basis of all of the foregoing considerations, and the attached exhibits and deposition testimony filed herewith, Defendant respectfully requests that this Honorable Court grant Defendant's Cross motion for Partial Summary Disposition, deny Plaintiff's Motion for Partial Summary Judgment, and dismiss Count III of Plaintiff's complaint.

Respectfully submitted,

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