

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.

GREEN, GREEN & ADAMS, P.C.
Philip Green (P14316)
Attorneys for Plaintiff
900 Victors Way, Suite 240
Ann Arbor, MI 48108

MILLER, CANFIELD, PADDOCK AND
STONE, P.L.C.
Richard J. Seryak (P26152)
Michael J. Hodge (P25146)
Charles T. Oxender (P57440)
Attorneys for Defendant
150 W. Jefferson Avenue, Ste. 2500
Detroit, MI 48226

**DEFENDANT'S REPLY BRIEF IN SUPPORT OF CROSS MOTION FOR PARTIAL
SUMMARY DISPOSITION ON COUNT III (BREACH OF CONTRACT) OF
PLAINTIFF'S COMPLAINT**

**I. Hammer Received Notice of Non-Reappointment Consistent With The University's
Standard Practice Guides.**

In response to the University's cross-motion for summary disposition, Hammer does not dispute that *after* he was considered for and not granted tenure in 2000, the Law School notified him in writing that the 2001-2002 academic year would be his final year were he again not granted tenure after a second evaluation in 2002. Hammer does not dispute that Dean Lehman gave him this notice in writing *after* Hammer failed to earn tenure in the regular course at the

Law School, which was five years. Because SPG 201.88 provides that notice of non-reappointment "should" be given before September 15 of the terminal year, there is no genuine issue for trial that Hammer had actual and timely notice which satisfied University guidelines. Hammer has identified no requirement, and there is none, that entitled him to a *second* notice of non-reappointment.

Nor does Hammer dispute that it was precisely because of the notice of non-reappointment he received from Dean Lehman that Hammer requested a one-year extension to enable him to locate other teaching employment. When he again failed to earn tenure in February, 2002, Hammer knew "that he had been denied tenure" (Plaintiff's Brief In Opposition, p. 12). It is undisputed that Hammer requested and used the additional year to obtain three offers of employment and a full-time teaching position at Wayne State University. Hammer's claim that he did not receive a second notice of non-reappointment after his ultimate tenure denial in February, 2002, does not erase the fact that Hammer received notice of non-reappointment after he was evaluated for tenure and before September 15 of his terminal year and that he had adequate notice to secure other employment.

Hammer's actual knowledge that he had been evaluated for and denied tenure after two attempts and that the 2002-03 academic year was his terminal year confirms that the notice of non-reappointment satisfied Standard Practice Guide 201.88, which deals specifically with the manner and timing of such notice. The validity and efficacy of the notice are manifest in Hammer's successful efforts at securing three teaching offers. By January 2, 2003, Hammer accepted an offer to join the faculty of Wayne State University, nearly five months before completing eight years (or 16 semesters) at Michigan. Indeed, he began teaching at Wayne even before his appointment at Michigan ended.

Nor does Hammer dispute that pursuant to the provisions of the Faculty Handbook, he is bound by the University's interpretation of the notice provisions of Standard Practice Guides by University officials. Both the Provost and the Assistant Provost testified in deposition that Hammer was sufficiently notified of non-reappointment by the exchange of correspondence between Hammer and Dean Lehman. The testimony of Paul Courant and Jeff Frumkin is uncontroverted that Hammer received notice contemplated by SPG 201.88. Plaintiff tries to confuse the Court in suggesting that Frumkin would not have told the associate dean to send Hammer a notice of non-reappointment if Frumkin had been satisfied with Lehman's 2000 non-reappointment letter. But the undisputed evidence is that Frumkin became aware of the Lehman letter only *after* Frumkin's conversation with the associate dean (Frumkin 26-27).

In addition, nowhere in his response to Defendant's motion does Hammer dispute that a faculty member must be employed *beyond 8 years* in order for the hearing procedures of University Bylaw 5.09 to apply. It is undisputed that Hammer was not employed in a tenure-track position beyond eight years (or 16 semesters). Indeed, in his brief, Hammer retreats from his earlier claim that he was employed in a tenure track position at Michigan for more than eight years. He now asserts that he need only have worked 16 semesters to qualify for a Bylaw 5.09 hearing. Even if this were true, Hammer does not dispute that before he completed the 16 semesters, he knew he had been denied tenure, he received timely notice that the 2002-03 academic year was his final year, and he committed himself to teaching full-time at Wayne State University.¹ Hammer has adduced no evidence that under these circumstances, Defendant was required to give him a discharge hearing under Bylaw 5.09.

¹ The fact that Hammer signed a contract to teach at Wayne State University on March 13, 2003, coupled with his January 17, 2003 email to the Michigan Law School faculty announcing that "this is my final semester at the Law School," explains why the University of Michigan's Law School understood Hammer as intending to resign his position.

The Court of Claims should grant Defendant's Cross Motion for the same reasons the Court did so more than a year ago. There is no genuine issue for trial that Hammer received adequate notice and knew that he had been denied tenure and that as a consequence of this denial, the 2002-2003 academic year was his final year.

II. Contrary to Plaintiff's Assertions, There Is No Requirement That Notice of Non-reappointment Be Given Only After Tenure Denial.

Hammer now argues for the first time that SPG 201.13 requires that notice of non-reappointment be given *after, not before*, the candidate is evaluated and denied tenure. Hammer appears to rely on the statement in SPG 201.13 that "Each [school and college] may establish its own probationary period after which candidates for tenure are evaluated and either given notice of non-reappointment or recommended for tenure." At most the text says that notice of non-reappointment must come after the post-probationary period tenure *evaluation*, not after *denial*. Here, of course, Hammer was given notice of non-reappointment after he was evaluated for and failed to earn tenure in the regular course -- after the standard probationary period established by the Law School -- in 2000. Hammer essentially claims that he should have been given a second notice of non-reappointment despite his admission that he knew in the summer of 2000 that the 2002-03 academic year would be his terminal year if he again failed to earn tenure in his second attempt. Hammer's own emails clearly and unequivocally establish such knowledge. SPG 201.13 contains no requirement that a candidate be give a second notice of non-reappointment. Instead, this SPG states generally that academic units can establish their own probationary periods and that after the tenure evaluation, the candidate either must be on notice of non-reappointment or be recommended for tenure. SPG 201.13 specifically cross references SPG 201.88 for guidance on the timing and issuance of notices of non-reappointment. The timing and manner of the notice of non-reappointment are set forth in SPG 201.88, not SPG 201.13. SPG

201.88 provides only that the notice be given before September 15 of the terminal year.²

Hammer does not dispute that the University gave him notice of non-reappointment in February, 2000, when he was first considered for and not granted tenure, and that he subsequently requested and Dean Lehman agreed that the 2002-03 year would be his terminal year. Hammer's claim that he could only be given notice after the second review is unsupported and has no merit.

The University was under no obligation to give Hammer a "second bite at the apple" by affording him a second tenure review. Moreover, there was no obligation to extend Hammer's appointment beyond six years (the two three-year appointments which Hammer received), and Hammer points the Court to no provision which required Dean Lehman to grant Hammer's request for an extension of the terminal year from 2001-02 to 2002-03. Indeed, if, as Hammer claims, the SPGs automatically entitled him to another year of employment after the 2002 review, then there would have been no need for Hammer to request the extension from Dean Lehman. Hammer's July 21 email is clear, uncontroverted evidence that Hammer knew that he would not be reappointed if he again failed to receive tenure.

III. Hammer Identifies No Mandatory Provisions Of The Standard Practice Guides Which The University Breached.

Because SPG 201.88 uses the word "should" to describe how notice of non-reappointment is to be communicated to an unsuccessful tenure candidate, Hammer's breach of contract claim fails as a matter of law. Courts have routinely recognized that "should" constitutes hortatory language rather than a mandatory command. This is particularly true where the same statute or instrument uses both the word "should" and the more binding "shall." *Qwest Corp. v. F.C.C.*, 258 F.3d 1191, 1200 (10th Cir.2001) (finding that where "should" and "shall" are used in the same statute, "the term 'should' indicates a recommended course of action, but

² Moreover, the very first sentence of SPG 201.88 informs academic units that they can provide for *earlier* notice than is stated in the guide.

does not itself imply the obligation associated with 'shall.'"). This principle of construction is especially applicable in the employment context. Personnel manuals or guidelines stating that something "should" occur merely establish an aspirational "policy" and not a substantive right. *Johnson v. Merit Systems Protection Bd.*, 812 F.2d 705, 711 (Fed. Cir. 1987)(language in Federal Personnel Manual stating that employing agency "should" do something "does not create any rights . . . but merely establishes a 'policy' for agencies to follow."); *Griessenauer v. Department of Energy*, 754 F.2d 361, 364 (Fed. Cir. 1985) (Federal Personnel Manual provisions stating that an employee who submits a resignation "should" be asked to submit a detailed written resignation are precatory and merely "are intended to aid government officials in handling resignations by suggesting procedures to be followed."). See also, *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 599-600 (1999) (comparing the hortatory "should" language of the Developmentally Disabled Assistance and Bill of Rights Act with the mandatory "shall" language in the Americans with Disabilities Act); *Barnhardt v. Peabody Coal Co.*, 537 U.S. 149, 184-85 (2000)(Scalia, J. dissenting)(observing that "Congress is perfectly free to signify the hortatory nature of its wishes by choosing among a wide array of words that do, in fact, carry such meaning; "should," "preferably," and "if possible" readily come to mind.").

Hammer does not dispute that SPG 201.88 is the Practice Guide which addresses how notice of non-reappointment should be given. It uses the hortatory word "should." SPG 201.88 also makes clear that it is setting forth "guidelines" for the provision of notice of non-reappointment. It cannot serve as the basis for a breach of contract claim, and Plaintiff cites no authority to support his claim that a policy guide using the word "should" constitutes a contract.³

³ Plaintiff's claim that *People v Fosnaugh*, 248 Mich App 444, 455 (2002) is cited for the wrong proposition in Defendant's brief in support of the cross motion is simply incorrect. At page 455 of its opinion, the Michigan Court of Appeals clearly stated that it 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.

IV. The Teacher Tenure Act Is Inapposite.

The Michigan Teacher Tenure Act does not support Hammer's tenure claim for a number of reasons. To the extent that Hammer suggests that the Teacher Tenure Act actually applies of its own force to the University's notice practices, that is of course erroneous. The Teacher Tenure Act by its terms applies only to Michigan K-12 school districts, not to constitutionally-created universities. In any event, reliance on the Teacher Tenure Act would only defeat Hammer's tenure claim because under that Act leave time does not count toward fulfillment of a teacher's probationary period. In *In The Matter of Skiba*, 1991 State Tenure Comm 91-1 (attached as Ex. A), the State Tenure Commission issued a declaratory ruling that "an extended leave of absence, paid or unpaid, constitutes a break in service for purposes of completing the probationary period."⁴ Hammer does not dispute that he took semester-long research leaves in the falls of 1998 and 2000 and was relieved of all teaching and administrative obligations during these leaves (Lehman 9-10). If anything, the Teacher Tenure Act serves to defeat rather than support Hammer's claim to *de facto* tenure.

To the extent Hammer suggests that the SPG's notice provisions ought to be construed analogously to the Teacher Tenure Act's notice provision, that suggestion has no merit. First, unlike SPG 201.88, the Tenure Act states that a controlling board of education "shall" (not "should") provide the probationary teacher with a definite written statement as to whether or not his work has been satisfactory at least 60 days before the close of each school year. M.C.L.

⁴ *Accord, Stakoe v Board of Education of the Mackinac Island Public Schools*, 1982 State Tenure Comm 81-65 (attached as Ex. B) ("the Legislature did not intend to protect potential tenure rights of probationary teachers by permitting leaves of absence to be included in the time required to complete the probationary period."); *Burke v School District of Troy Public Schools*, 1985 State Tenure Comm 85-23 (attached as Ex. C) (teacher's medical leave of absence with board paid disability insurance benefits and teacher's paid administrative leave could not be included as time served for purposes of the probationary period); *Ellis v Wakefield Township School Dist*, 79 Mich App 347; 261 NW2d 230 (1977) (statutory probationary period may not be shortened by permitting a leave of absence to be included in the period).

38.83. Unlike the Standard Practice Guide, the statutory provision of the Teacher Tenure Act is phrased in mandatory terms.

Second, in contrast to the Teacher Tenure Act, public policy considerations disfavor tenure by default in the university setting. Bates v Sponberg, 547 F2d 325 (CA 6 1976). See also, *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). Yet that is exactly what Hammer seeks – a grant of tenure protection not on the basis of his scholarship but rather on alleged lack of notice of non-reappointment.

V. The University Has Established the Elements of Estoppel.

The undisputed facts show that Hammer requested an extra year of employment from Dean Jeff Lehman, not from Jeff Frumkin or Evan Caminker. It was the Law School Dean who relied on Hammer's assurances that "if things did not work out," Hammer would use the extra year to find other employment. Hammer in fact used that year to apply to and interview at various law schools and to obtain a full-time teaching position at Wayne State. Hammer cannot now disavow notice and his clear representations to Dean Lehman. Only Hammer's commitment that if he again failed to receive tenure in 2002 he would leave the Law School the following year in an orderly fashion convinced Dean Lehman to give Hammer an extra year in which to do so. It is that extra year that now forms the basis of Hammer's claim that he taught long enough to secure Bylaw 5.09 protection. The Court should apply the doctrine of estoppel to preclude Hammer from parlaying his July 21, 2000 request for an additional year into a claim of life-time tenure. As much as Hammer would now try to distance himself from his own statements and assurances to Dean Lehman, the record is clear that Hammer made a promise for an immediate benefit of having the peace of mind in 2000 that he could devote the next 18

months exclusively to his research without having to simultaneously look for other employment, and the Dean relied on Hammer's representations in deciding to give him an extra year.⁵ The doctrine of estoppel should be applied to prevent the duplicity now advanced by Plaintiff.

CONCLUSION AND RELIEF REQUESTED

For all the foregoing reasons and the supporting brief, deposition testimony and exhibits filed in support of Defendant's Cross Motion, 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,

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

By: 

Richard J. Seryak (P26152)
Michael J. Hodge (P25146)
Charles T. Oxender (P57440)
Attorneys for Defendant
150 West Jefferson, Suite 2500
Detroit, MI 48226
(313) 963-6420
seryak@millercanfield.com

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⁵ Hammer claims that after his tenure denial in 2002 he might still have received an extra year, even if had not already negotiated the extension back in the summer of 2002, because the faculty urged the Dean to give him an extra year. But that is irrelevant to whether Dean Lehman relied on Hammer's promise in the summer of 2000. What Hammer wanted, as stated in his email exchange with the Dean, was to have the peace of mind *prior* to February, 2002, that he would have an extra year were he denied tenure then, so that for the balance of 2000 and all of 2001, he did not have to both prepare his tenure file *and also* look for another job. The faculty's recommendation in 2002 would have done nothing to relieve Hammer of such time pressure. The freedom to devote his full energies to scholarship rather than job hunting before the final decision is what Hammer sought from Dean Lehman, and Lehman acquiesced in the request only because Hammer promised that 2002-03 would be his final year to find other employment. Dean Lehman's reliance on Hammer's promise in the summer of 2000 is clear.