

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

PETER J. HAMMER,

Plaintiff,

Case No. 04- 241 MK

Hon. James R. Giddings

v.

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

Defendant.

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

A brief reply to Defendant's reply brief dealing with issues raised in its cross motion for summary disposition is warranted by the clear misuse of authority cited in that brief. While defendant has demonstrated its ability to use Roget's Thesaurus with some proficiency, it has also demonstrated a lack of ability to use legal research tools with equal ease, citing cases which in some instances have nothing to do with the proposition for which they are cited. Insofar as Hammer's arguments are concerned, they are as described in

Hammer's brief, not in defendant's. Defendant's methodology has been to distort Hammer's arguments and then argue against the distorted version. This has been defendant's habit throughout the briefing and arguments posed in this case.

In footnote 3 of its brief, defendant complains that Hammer has somehow misargued the decision in *People v. Fosnaugh*. Hammer's argument does in fact contain the holding of the case. Defendant tries to divert the court's attention by virtue of the fact that the court in *dicta* briefly discussed the fact that when "should" and "shall" are used in the same statute, presumably the legislature meant different things by their use. (A provision containing both "should" and "shall" presumes lawmakers intended to distinguish between the terms. "Should" is permissible and expresses a desire or request. "Shall" is clearly unambiguous and presumptively creates an imperative obligation. [*Garrett, supra* at 653 (citations omitted).] *Id.* at 455) In the case at bar, there is no use of the two terms in the affected SPG's and so the argument is simply a "red herring."

Defendant cites the court to *Bates v. Sponberg*, 547 F2d 325 (CA 6, 1976) for the proposition that ". . . public policy considerations disfavor tenure by default in the university setting." (Defendant's brief at page 8.) Not only is this not the holding of the court, this was not discussed by the court. In *Bates*, the Plaintiff was a tenured professor who claimed that his right to due process was violated by the manner in which he was terminated. It was not a case that discussed or dealt with whether or not the Plaintiff should have been awarded tenure. There was no discussion of public policy as it applied to tenure by default. A copy of the decision is attached for the court's convenience. Perhaps even more egregious is the

misuse of *Healy v. Farleigh Dickinson University*, cited for the same proposition, a copy of which is also attached. Defendant argues that this case applies to the principles in the case at bar. In the case at bar, UM has a By-Law (5.09) and Standard Practice Guide provisions, as well as Provostial guidelines all of which provide for the manner in which *de facto* tenure is acquired. Hammer's claim is premised on those contractual obligations. In *Healy*, no such by-laws, guidelines or policies existed. Rather the Plaintiff there asserted a claim that after teaching for so many years he should be entitled to tenure as a matter of public policy. It was in the absence of all of those contractual provisions existent in the case at bar that the court refused to award such tenure.

Similarly, *Johnson v. Merit Systems Protection Board and Greissenauer v. Department of Energy*, found on page 6 of defendant's brief and attached hereto, are misused. Johnson is cited for the proposition that when "should" is used in an Personnel Manual stating that the employer should "do something" (the words defendant used) it does not have a mandatory meaning – i.e. it does not create a policy. The provision in question was one that indicated the employing department or agency "should make every effort to take back an employee" under the circumstances described. (Id. at 11) The court viewed the provision as one which did not create any rights in the affected individuals, indicating that many provisions in the manual but merely established policies for the agencies to follow. Moreover, the court found that even if it did bestow a right in the employee, the latter had no right to judicial review. In *Greissenauer*, the parties agreed in argument before the court that the provisions at issue in that case were precatory and not mandatory.

Finally, the use of 3 inapposite Tenure Commission rulings and the construct of an argument around them are the best examples of the defendant's duplicitous briefing. Hammer cited this court to *Weckerly v. Mona Shores Board of Education*, 388 Mich 731, 202 NW2d 777 (1972), a case under the Teacher's Tenure Act dealing with the consequences of failing to conform to the notice requirements for tenure involving a probationary employee. None of the Tenure Commission cases appended to defendant's brief deal with that issue. Instead, defendant attempts to distort Hammer's argument by asserting that since these cases hold that a break in service vitiates the entitlement to tenure, Hammer's break in service must also result in defeat. In doing so it ignores the very holdings of the cases it has appended.

In *Skiba* the commission found that there was no provision in the Teacher's Tenure Act dealing with the issue of how time off during an extended leave (while *Skiba* was fighting criminal sexual misconduct charges) should impact the probationary period. It held that the time off could not count toward the probationary period and therefore *Skiba* was not entitled to tenure. Unlike *Skiba*, Hammer relies on a rule that provides that leave time does apply toward the award of *de facto* tenure unless the law school absent a request by the law school to the Provost to stop the tenure clock – something it admittedly did not do. This is simply not an issue in the Hammer case and is a gross distortion of Hammer's arguments contained in his prior briefings. The *Stakoe* case cited by defendant is the same, although the leaves of absence were for different reasons. The *Burke* case cited by defendant is likewise infirm, turning on the fact that Burke had not completed the requisite probationary period.

It is uncontested that Hammer was appointed for the required 8 academic years and worked throughout the appointment. To the extent he was granted leaves, they were in accordance with University practice and were not to be used to reduce his time served because the law school had not requested the same at the time the leaves were granted.

To the extent Hammer relies on analogous case law under the Teachers Tenure Act it is for the application of the notice of non-renewal provisions contained in By-Law 5.09 and its SPG counterparts as compared to the Teachers Tenure Act notice provisions, both being nearly identical in form and structure. This argument has yet to be met by the defendant and Hammer submits that in light of the repeated briefings ignoring this analogous case law that the court should accept Hammer's position as unrebutted.

For those reasons set forth in Hammer's previous brief as well as those above Hammer respectfully requests that summary disposition in his favor be granted on his *de facto* tenure claim.

Respectfully submitted,

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Dated: October 30, 2007