DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO 1437 Bannock Street Denver, Colorado 80202	
PLAINTIFFS: EUGENE W. SAXE, *et al.* v. **DEFENDANT:** BOARD OF TRUSTEES OF METROPOLITAN STATE COLLEGE OF DENVER	Case No. 04cv3017 COURTROOM: 19

ORDER

THIS MATTER comes before the Court on the Remand Mandate issued by the Colorado Court of Appeals on March 25, 2008. Plaintiffs Eugene W. Saxe, Thomas Lanson Altherr, Cindy L. Carlson, Norman E. Pence, David Sullivan, and Colorado Federation of Teachers ("Professors") filed a Post Trial Brief on Remand on August 4, 2008, Defendant Board of Trustees of Metropolitan State College of Denver ("Board") filed a Response brief on September 19, 2008, and Professors filed a Reply Brief on October 13, 2008. Oral Argument was presented to the Court on May 27, 2009. The Court, being fully advised in the premises herein, Finds and Orders as follows:

FACTUAL BACKGROUND

The facts of this matter are sufficiently summarized by the Colorado Court of Appeals in *Saxe v. Board of Trustees*, 179 P.3d 67 (Colo. App. 2007) and need not be restated here. The court of appeals remanded this matter to the Denver District Court for findings based on the existing record on whether changes to the Metro State employment handbook in 2003 are retrospective in nature, and therefore, unconstitutional under Article

II, Section 11 of the Colorado Constitution. *Id.* at 80-81. Specifically, the court of appeals remands this matter for factual findings based on the existing record of whether the 1994 Handbook provisions regarding faculty priority and relocation created vested rights for Professors. *Id.* at 80.

LEGAL BACKGROUND

The governing board of a Colorado university or community college may modify its employment handbook under statutory authority. *Id.* at 74 (internal citations omitted). Such boards may promulgate bylaws and regulations for the benefit of the college or university in a manner not repugnant to the constitution and laws of Colorado. *Id.* (citing C.R.S. § 23-54-102(1)(b)). However, the Colorado Constitution prohibits such action impairing vested substantive rights if the action is retrospective in nature. Colo. Const. art. II, § 11.

Legislation is presumed to operate prospectively unless there is a clear legislative intent to the contrary. *Id.* (citing *In Re Estate of DeWitt*, 54 P.3d 854 (Colo. 2002)). Here, the court of appeals determined that the 2003 Handbook changes regarding priority and relocation were intended to act retroactively and were substantive in nature. Accordingly, the court of appeals remands this matter to this Court for a determination based on the existing record whether the 1994 Handbook created vested rights for priority and relocation for tenured faculty. *Id.* If this Court finds the 1994 Handbook tenure provisions regarding faculty priority and relocation created vested rights for Professors, the 2003 Handbook changes regarding priority and relocation are unconstitutional. *See id.* at 81.

ANALYSIS

A vested right must be a contract or property right, or a right arising from a transaction in the nature of a contract which has become perfected to the degree that it is not dependent on the continued existent of a statute or common law. *Id.* at 77 (citing *City of Golden v. Parker*, 138 P.3d 285, 293 (Colo. 2006) (internal citations and quotations omitted)). The tenure rights involving faculty priority and relocation were provided by the 1994 Handbook. Determination of whether these rights were vested is made by application of a three-factor test to the 2003 Handbook modifications of these rights: (1) whether the public interest is advanced or retarded by the modifications; (2) whether modification of the rights as embodied in the 1994 Handbook gives effect to or defeats the bona fide intentions or reasonable expectations of the affected individuals; and (3) whether the 2003 Handbook surprises individuals who have relied on contrary provisions of the 1994 Handbook. *Saxe*, 179 P.3d at 77-78 (citing *City of Golden*, 138 P.3d at 290 (quoting *In re Estate of DeWitt*, 54 P.3d at 855)). The Court will address these three factors in turn.

A. The Public Interest Is Not Advanced By A Tenure System That Favors Flexibility in Hiring or Firing over The Academic Freedom of Faculty.

Countervailing public interests are at stake in the present case. As described by the court of appeals, this factor forces a court to weigh the public interest in academic freedom against the public interest in allowing a college which serves a diverse student body to have flexibility in its staffing decisions. The Court finds that, on balance, and under the record presented, the public interest is advanced more by tenure systems that favor academic freedom over tenure systems that favor flexibility in hiring or firing.

By its very nature, tenure promotes a system in which academic freedom is protected. *See Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). Further, by definition

and according to testimony presented at trial, inherent in a tenure system is inflexibility in firing decisions; if the College wanted a more flexible system of employment, the College should not have utilized a tenure-based system. This weighs the public interest strongly in factor of academic freedom. The Court recognizes that the public interest is served by a public college with flexible hiring and firing policies. However, such policies are in direct conflict with the fundamental tenets of a tenure system. Indeed, a tenure system that allows flexibility in firing is oxymoronic. Accordingly, the Court finds that the public interest is advanced more by a tenure system that favors the academic freedom of faculty than a tenure system that promotes flexibility in the hiring or firing of tenured faculty.

B. The 1994 Handbook Gives Effect To The Bona Fide Intentions and Reasonable Expectations of the Affected Individuals.

The court of appeals remands this matter to this Court to make factual findings based on the existing record regarding the intentions and reasonable expectations of both the College and the Professors. A review of the existing record reveals no direct evidence regarding the intentions of the affected individuals. Even the evidence offered by Plaintiffs' expert, Professor Finkin does not attest to the affected individuals' expectations. Rather, the Finkin testimony describes industry-wide expectations of academic institutions and tenured faculty.[1]

The Board maintains that because there is no direct testimony regarding specific individual Professors' intentions, expectations, or reliance on the 1994 handbook, Plaintiffs

[1] The Finkin testimony was subject to contemporaneous objection. Judge Gilman allowed Professor Finkin to testify; however, Judge Gilman, as the finder of fact, "ferret[ed] out any testimony that isn't relevant or in the nature of a pure legal opinion." (Tr. P. 11 at 20-25.) In her May 5, 2005 Findings and Conclusions, p.3 at fn. 1, Judge Gilman clearly articulated that she accepted and considered the Finkin testimony concerning custom and usage, and industry standards, to be relevant to demonstrating the individual plaintiffs' intent and reasonable expectations at issue.

cannot establish the second or third *City of Golden* factors. In support, Board maintains that the handbooks were sufficiently specific in defining the nature and scope of tenure that evidence outside the handbooks is irrelevant. The Board argues that because the College did not explicitly or implicitly adopt American Association of University Professor ("AAUP") standards, Professor Finkin's testimony regarding the industry standards falls outside the scope of both the 1994 and 2003 Handbooks. *See Ahmadieh v. State Board of Agriculture*, 767 P.2d 746, 749-750 (Colo. App. 1988) (holding that extrinsic evidence of professors' intent is admissible only if the terms of the contract or handbook are ambiguous). The Court is not so persuaded. *See Employment Television Enterp's., LLC v. Barocas*, 100 P.3d 37, 42-43 (Colo. App. 2004) ("trade usage evidence is admissible even if the language [of an agreement] is plain and unambiguous on its face, as long as the evidence is sufficient to suggest an alternative meaning"); *Amtel Corp. v. Vitesse Semiconductor Corp*, 30 P.2d 789, 792-93 (Colo. App. 2001) (evidence of industry standards may be used to demonstrate intent even if a contract is not ambiguous); *Greene v. Howard University*, 412 F.2d 1128, 1135 (D.C. Cir. 1969) (contracts in and among a community of scholars, "which is what a university is[,]" are written and should be read by reference to the norms of conduct and expectations founded thereupon).

Evidence of industry standards may be used to demonstrate the parties' intent. *Saxe*, 179 P.2d at 77 (citing *Barocas*, 100 P.3d at 42). The court of appeals ruled it was appropriate for the trial court to consider industry-wide evidence of custom and usage to interpret whether the priority and relocation provisions were substantive or procedural in nature. Accordingly, this Court finds it appropriate to consider industry-wide evidence of

custom and usage to determine whether changes to the priority and relocation provisions affected vested rights.

Here, based on the existing record, the Court finds that the 1994 Handbook gives effect to the intentions and reasonable expectations of the parties, including the individual Professors, and the 2003 Handbook does not give effect to the intentions and reasonable expectations of these parties. Mr. Finkin testified that the core notion of tenure is that the tenured faculty member will be terminated only as a last resort after all other avenues of reductions in force are exhausted. Mr. Finkin testified that questions of reductions in force are central to the notion of tenure, and tenured faculty members should be retained in preference to probationary appointees. Mr. Finkin testified that if termination is unavoidable, relocation, if possible, is an inherent expectation. Finally, Mr. Finkin concluded by testifying that the 2003 Handbook provisions regarding priority and relocation did not give effect to the reasonable expectations of tenured faculty. To the contrary, Mr. Finkin concluded that the 1994 Handbook gave effect to the reasonable expectations of tenured faculty. No other evidence was produced at trial by Plaintiffs regarding Professors' reasonable expectations, and no evidence at all was produced by Defendant regarding such reasonable expectations. See *Saxe*, 179 P.3d at 78. Accordingly, the Court finds that the 1994 Handbook gives bona fide effect to the intentions of Professors, not the 2003 Handbook.

C. *The 2003 Handbook Surprises Individuals That Relied On the 1994 Handbook.*

As discussed in Section B, *supra*, it is appropriate for the Court to consider evidence of industry-wide standards to determine whether the changes to the priority and relocation provisions affected a vested right. Having conducted a thorough review of the

record, the Court finds no direct evidence that individual Professors were surprised by the changes in the 2003 Handbook. However, there is circumstantial evidence in the existing record for the Court to conclude that the 2003 Handbook surprised individuals that relied on the 1994 Handbook sufficient to conclude that this factor weighs in favor of Professors.

Dr. Kieft, the Chief Academic Officer at the College in 2003, testified that when he arrived at the College in the summer of 2003, a lot of attention was being paid to the issue of the handbook changes. The Court finds this increased attention is circumstantial evidence of the surprise of the 2003 Handbook changes. Moreover, given the Finken testimony concerning the reasonable expectations of the parties based on the 1994 Handbook and the significant departure from those expectations which the 2003 Handbook reflected, in the Court's view it is a reasonable inference, which the Court draws from the record before it, that the plaintiffs were surprised by the 2003 Handbook changes sufficient to satisfy this third prong of the vested rights analysis. See C.J.I –Civil (2009), 3:7 ("An inference is a deduction or conclusion which reason and common sense lead the [fact finder] to draw from other facts which have been proved.") Accordingly, the Court concludes that, although not overwhelming, the existing record contains sufficient evidence and inferences to be drawn therefrom that Professors were surprised by the 2003 Handbook changes, and the existing record contains no countervailing evidence that Professors were not surprised by the 2003 Handbook.

CONCLUSION

On balance, the Court concludes that the *City of Golden* factors weigh in favor of Professors. Therefore, Professors' rights of tenure under the 1994 handbook were vested rights. Accordingly, and in conjunction with the Colorado Court of Appeals' decision in

this matter, the changes made in the 2003 Handbook pertaining to priority and location, as specifically identified in the decision of the Court of Appeals, are retrospective changes of vested rights and are therefore invalid under Article II, Section 11 of the Colorado Constitution.

IT IS SO ORDERED.

Done this 1st day of June, 2009.

By the Court:

Judge Norman D. Haglund
Denver District Judge