

STATE OF MAINE
KENNEBEC, ss.

SUPERIOR COURT
Civil Action,
Docket No. _____

ALBERT TEMPESTA

Plaintiff

v.

TOWN OF BENTON, MAINE

Defendant
_____ /

Motion to Dismiss M.R.Civ.P 80B
Complaint and Associated Counts

NOW COMES the Defendant, by and through counsel, Richardson, Whitman, Large & Badger, and moves to dismiss Plaintiff's Complaint as follows:

COUNTS I AND II

Defendant first addresses Plaintiff's 80B appeal and the 42 USC Section 1983 claim based upon procedural due process. The Plaintiff has alleged in paragraph 12 that under the Town's personnel policy, a regular part-time employee is subject to all rules and regulations. See Complaint, paragraph 12. The Town's personnel policy is attached hereto as Exhibit A. Leaving aside whether Plaintiff was a regular part-time or temporary employee, for a regular part-time employee it states "he/she is subject to the rules and regulations." Under those rules and regulations is Article 8 which is captioned "Grievance Procedures." This provides that if an employee is aggrieved by the application of any of the Town's personnel rules, regulations or policy or terms of employment, that individual has five working days from the incident to submit the details of a grievance in writing to the Board of Selectmen. A review of the Plaintiff's

Complaint states that he received a call on March 8th from the Chairman of the Selectmen and was told that he would not be reappointed to the CEO position. (See Plaintiff's Complaint, paragraph 27.)

In Paragraph 15 of the Complaint, the reappointment if there was to be one was scheduled to take place on March 15th. Paragraph 41 of Plaintiff's Complaint, it states that Mr. Tempesta made a request by letter dated March 25, 2016 to have the decision to reappoint him rescinded. Even if one assumes this is the institution of the grievance process, the five day period of time for filing a grievance would have expired on March 13th (5 days after the notice he was not going to be reappointed).

Article 9 is not optional. It uses the word "shall" to submit the details of such grievance in writing to the Board of Selectmen. The Plaintiff has failed to state a claim upon which relief can be granted as to procedural due process. It is important to note that if a Town must afford the opportunity for a pre-termination hearing, the terms of the employee policy which Plaintiff claims apply to him provide a pre-termination remedy. As the Court will note, the decision on whether or not he was going to be reappointed was to occur on March 15th. Therefore, he had full opportunity to submit the grievance prior to the March 15th expiration of Plaintiff's term.

The Town of Benton appointed the code enforcement officer by certificate. Attached as Exhibit B is that certificate. As the Court will note, it is crystal clear that the term of office is to expire on March 15, 2016. The statute cited by Plaintiff alleging "a for cause" requirement for termination is not even relevant to the present case as the job expired on March 15, 2016. This document categorically eliminates any inference that

this was “continuing” or “indefinite” employment or that anyone could possibly have a reasonable expectation of continuing employment because the job had a specific expiration date. Selectmen change, so do city councils. No person can have an expectation that the town’s needs and/or individuals making decisions would in fact continue to be the same indefinitely.

Plaintiff also cites 30-A M.R.S.A. Section 2601A for the proposition that municipal officers appoint code enforcement officers, but they may only remove them for cause after notice and hearing. The flaw in that interpretation is that the statute applies to fixed terms of one year or more. Plaintiff was not removed during his fixed employment term. The statute makes sense because someone being removed during a fixed term of one year may be entitled to something very different than someone who is just not reappointed at the end of the fixed term. In any case, the statute is not applicable to the present action because 1) the Plaintiff was not “removed”; and 2) there was no removal in a fixed term.

Plaintiff states that Article 4 renders him a regular part-time employee. Plaintiff quotes the definition that an employee who works less than the normal work week, but on a continuing basis, is a part-time employee and subject to the personnel rules and regulations. The personnel policy does not, however, stop at that point. Most importantly, it states “This classification shall only be assigned at the discretion of the Board of Selectmen. Additional benefits may be granted by the Board of Selectmen.” Plaintiff has not alleged he had that assignment. A “temporary employee” under the same personnel policy works on a non-permanent basis, usually within a limited

timeframe. An appointment at the beginning of the year for one year is surely non-permanent and occurred within a limited timeframe. Temporary employees are “not entitled to” benefits. Plaintiff does not assert he received any benefits. Therefore, the Plaintiff is a “temporary employee.” More importantly, the temporary employment status may be terminated for any reason at any time.

The Plaintiff was hired on a non-permanent basis and with a limited timeframe. See Exhibit B. As the statute requiring a “for cause” hearing does not apply, the personnel policy makes it clear there is no expectation of continuing employment. In addition, Article 1, Paragraph B states “The provisions set forth are not contractual, but rather are for general guidance of the Town in its relationship with its employees.” Therefore, the employee cannot state that he in fact has a contract or an expectation that this personnel policy was in fact a contract. It clearly states otherwise on its face.

Generally in Maine, it has long been the rule that a contract of employment for an indefinite length of time is terminable at the will of either party. See *Larrabee v. Penobscot Frozen Foods, Inc.*, 486 A.2d 97, 99 (Me. 1984). Here, there is no contract because the employer’s right to discharge only for cause is not clearly stated. In *Libby v. Calais Regional Hospital*, 554 A.2d 1181, 1183 (Me. 1998), the Court found that a disclaimer in the employee manual was not a contract. In *Libby*, the employee received and read the handbook which stated that it did not constitute a contract of employment. The Court went on to reiterate that a contract of employment for an indefinite period is terminable at the will of either party citing *Rowell v. Jones and Vining, Inc.*, 524 A.2d 1208, 1211 (Me. 1987). The law requires that the policy must use clear and express

language to restrict the employer's ability to discharge employees. The court found that language in a manual merely implying for cause limitation will not bind the employer. The court found the language that permits dismissal based only on an employee's ability to do his job constitutes a "for cause" limitation. There is no such limitation in the Defendant's personnel policy. In fact, the only provision is in Article 5, Section 4 where the document talks about examples of infraction of rules of conduct that "may result in dismissal action up to and including termination." These are simply examples. It does not state that the employer must find one of these actions to change its right to terminate at will. Most importantly, Plaintiff was not terminated just not re-hired. Here, there was also an opportunity for a pre-termination hearing upon the filing of a grievance. The employee waived that by failure to file within the timeframe. Pre-hearing terminations are not required to be elaborate. What he would have been entitled to under the Article of grievance procedures was notification by the Board of Selectmen, a meeting with the Board of Selectmen for the purpose of discussing the grievance. The employee would have received notice of the grievance hearing and presumably would have been free to submit whatever evidence he chose at the hearing. In *West v. Grand County* 967 F.2d 362, 367 (10th Cir. 1992), the Court specifically found that a face to face meeting with supervisors and a conversation between the employee and their supervisor prior to the term expiration were sufficient to satisfy the constitutional requirements. There was no right to confront or cross-examine witness and no right for legal counsel. This is exactly the opportunity that would have been provided to the employee had he filed a grievance. He may have received much more rights in that hearing. In addition, he would have filed

that grievance prior to not being reappointed which essentially occurred when he was not renewed on March 15, 2016.

What is absent in this case is that removal need not have been based solely on merit or performance as there is nothing in the employee manual to suggest that an employer's ability to terminate at will was in any way restricted.

In Maine, a property interest in continued employment may be established by contract. Here, there is no contract which establishes that. The second option is by statute. As Defendant has pointed out, the statute only applies for termination during a fixed term which this was not. Here, there is no objectively reasonable expectation of continued employment. The employee was first appointed in 2013. See Plaintiff's Complaint, paragraph 4. That would mean his first reappointment was in 2014 and he was reappointed in 2015. The expectation must be objectively reasonable. Extending the contract on only two occasions for a 12-month fixed term hardly meets with an objectively reasonable expectation. The Plaintiff was given a new term of one year on only two occasions. This last factor has to be looked at in light of the employment. As there is no clearly stated employment policy that states an employee must be discharged for cause, there is no basis for an objective belief of continued employment. It may be that Plaintiff had long tenures at other towns, but that is irrelevant to the present action. Wherefore, the 80B Complaint should be dismissed by his failure to exhaust his administrative remedies and that neither the statute nor a reasonable expectation of continued employment exist.

Count 2, the violation of procedural due process should be dismissed as well. The Plaintiff had a right to pre-termination through the grievance. He waived that right and was not reappointed. It is unknown how the grievance proceeding would have ended. The Court cannot be in a position to speculate whether or not his grievance procedure would have been successful in retaining his employment or not. I would also note that the grievance procedure applied to an employee and did not distinguish between full-time, part-time or temporary. All employees even the temporary position of the Plaintiff had the right to file a grievance, however the time limitations are clearly set forth.

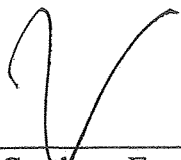
Counts 3 and 4, Age Discrimination/Whistleblower. Defendant acknowledges that an employer cannot use age as the basis for termination. Plaintiff admits in Paragraph 44 that he has "begun the process of exhausting his administrative remedies by preparing a charge of discrimination to be filed with the Maine Human Rights Commission." This is an acknowledgement that he has failed to exhaust his administrative remedies.

Defendant acknowledges that an employee who reports to an employer something they have reasonable cause to believe is a violation of law is covered under the provisions of Title 26, Section 833. Section 833 has a second section which is applicable to the instant action. It states as follows: "Subsection 1 does not apply to an employee who has reported or caused to be reported a violation or practice to a public body unless the employee has first brought the alleged condition to the attention of a person having supervisory authority with the employer and has allowed the employer a reasonable opportunity to correct that violation, condition or practices." Here, what the employee alleges is that there was a discussion. There is no allegation that this was anything other

than an isolated single incident. In fact, on January 26, 2016, the permit application for the telecommunication facility was cancelled.

Count 5 is a violation of the Maine Freedom of Access Act. Plaintiff asserts the Town of Benton produced no written record of its decision not to reappoint Mr. Tempesta to the position of CEO. The statute cited by Plaintiff's counsel is Title 26, Section 631 which provides the employee an opportunity to review a personnel file. In this odd allegation, Plaintiff alleges that the town failed to make any written record. As is clear from the certificate of hire, the Plaintiff's job ended. The Plaintiff cites no authority for the proposition that a written record of something the town didn't do is statutorily required. The statute only applies to the government and a requirement to allow review of a document, not failing to create one. Once Mr. Tempesta's job ended as per the certificate of employment, the Town has no requirements to tell him why he was not selected. The statute cited in the Complaint states only that an employer is required to give an employee an opportunity to review his personnel file if the employer has a personnel file for that employee. There is no allegation that Plaintiff was denied an opportunity to see his personnel file. The allegation is that something was not created by the town that Plaintiff thinks should be in the personnel file. This is no basis for a claim under Title 26, Section 631.

Dated: May 5, 2016



Frederick F. Costlow, Esq. - Bar No. 3823
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NOTICE

Matter in opposition to this motion must be filed within 21 days of the filing of the motion unless a different time is provided for in the Maine Rules of Civil Procedure or set by the Court. Failure to file timely opposition may be deemed a waiver of all objections to the motion, which may be granted without further notice or hearing.

**TOWN OF BENTON
PERSONNEL POLICY**

Adopted by the Selectmen, June 13, 2005

*Revised, March, 2007, and this revision adopted by vote of the Selectmen, April 9, 2007
Revised August 2010 and adopted by vote of the Selectmen September 13, 2010*

INTRODUCTORY STATEMENT. This policy is designed to acquaint you with the Benton Town Office and provide you with information about working conditions, employee benefits, and some of the policies affecting your employment. You shall read, understand, and comply with all the provisions of this policy and sign an "Employee Acknowledgement Form" to that effect. This policy describes many of your responsibilities as an employee and outlines the programs developed by the Town to benefit employees. One of our objectives is to provide a work environment that is conducive to both personal and professional growth.

ARTICLE I - PREAMBLE

A. The Board of Selectmen hereby adopts the following Policy for utilization by the Town of Benton in the administration of the personnel activities of the employees of the Town of Benton. These rules and subsequent modifications shall supersede any policy and rules made previously by the Board of Selectmen.

B. No policy can anticipate every circumstance or foresee every employee question. The Selectmen reserve the right to delete, amend, modify or change any or all of the provisions contained in this Policy without prior notice. The provisions set forth are not contractual, but rather, are for the general guidance of the Town in its relationship with its employees. Employees will be notified of changes as they occur.

ARTICLE II - EMPLOYMENT

A. The employment of all personnel shall be the responsibility of the Board of Selectmen.

B. All applicants must submit a written application for employment. To ensure that individuals who work for the Town are well-qualified and have a strong potential to be productive and successful, the Town's policy is to request employment references of all applicants.

C. All employees are considered probationary for the first six (6) months of employment. The probationary period is intended to give new employees the opportunity to demonstrate their ability to achieve a satisfactory level of performance and to determine whether the new position meets their expectations. The Town uses this period to evaluate employee capabilities, work habits, and overall performance. Probationary periods may be extended by mutual consent of the First Selectman and the employee. The probationary period and any extension shall be considered an extension of the selection process. Probationary employees may be removed at any time during the probationary period without cause and without right to file a grievance.

Exhibit A

D. All employees will be familiar with and follow the Town's Emergency Action Plan.

ARTICLE III - EQUAL OPPORTUNITY EMPLOYER

The policy of the Town of Benton is to provide equal opportunity to all employees and applicants without regard to religion, age, sex, marital status, orientation, race, color, ancestry, and national origin, physical or mental handicap, except as a bona fide occupational qualification.

ARTICLE IV - TYPES OF APPOINTMENTS

The following types of appointments may be made to the Town's service in conformity with the rules established:

A. Full Time. A full time employee works full time (30 hours per week) and on a continuing basis (indefinite). He/she is subject to all personnel rules and regulations and receives all benefits and rights as provided by these rules.

B. Regular Part-Time. An employee in this classification works less than the normal work week, but on a continuing basis. He/She is subject to all personnel rules and regulations. Vacation and holiday benefits shall be in proportion to the hours worked. This classification shall only be assigned at the discretion of Board of Selectmen. Additional benefits may be granted by the Board of Selectmen.

C. Temporary Employees. Temporary employees work on a non-permanent basis, usually within a limited time frame. They are not entitled to benefits such as holiday pay, accrual of vacation time, or seniority, and may be terminated for any reason at any time.

ARTICLE V - PUBLIC AND EMPLOYEE RELATIONS

A. To ensure orderly operations and provide the best possible work environment, the Town expects employees to follow rules of conduct that will protect the interests and safety of all employees and the organization. Employees are prohibited from engaging in any conduct which could reflect unfavorably upon the Town or disrupt the efficient operation of the administration of the Town. Town employees must avoid any action which might result in or create the impression of using public employment for private gain, giving preferential treatment to any person, or losing complete impartiality in conducting Town business.

B. Cooperation of all employees is essential to efficiency. Our taxpayers are entitled to the best service we can give them. Cooperation, courtesy and responsibility are the key elements of good service.

C. These policies and regulations are provided to assist the employees and Town administration in functioning at peak efficiency with minimal cost to the taxpayers.

1. Receipt of gifts.

A town employee is prohibited from soliciting or accepting any gift, gratuity, favor, entertainment, loans, or any other item of monetary value from any person, within or outside Town employment, whose interests may be affected by the employee's performance or nonperformance of his/her official duties.

Acceptance of nominal gifts, such as food and refreshments in the ordinary course of business meetings, or unsolicited advertising or promotional materials such as pens, note pads, calendars, etc., is permitted.

2. Business Activities and Solicitations.

No employee shall engage in any business other than his/her regular duties during work hours.

3. Confidentiality.

Many Town employees have access to confidential information pertaining to persons or property in the Town. Employees must not use this privileged information to their private advantage or to provide friends or acquaintances with private advantages. Each employee is charged with the responsibility of releasing only information which is required under the "right to know" law, 1 MRSA Sections 401-410.

4. Other Rules of Conduct.

The following are examples of infractions of rules-of-conduct that may result in disciplinary action, up to and including termination: theft or inappropriate removal or possession of property, falsification of timekeeping records, fighting or threatening violence in the workplace, negligence or improper conduct leading to damage of Town-owned property, smoking in prohibited areas, violation of personnel policies including sexual harassment, and any unsatisfactory performance or conduct.

ARTICLE VI - WORK WEEK/OVERTIME

A. Work Week. The regular work week for payroll purposes begins on Sunday and ends Saturday midnight. The actual hours for Town employees shall be set by the Board of Selectmen. Employees are paid every Friday. Each paycheck will include earnings for all work performed through the end of the workweek. Payroll is normally processed at 10:00 a.m. every Friday. All hours must be submitted no later than 10:00 a.m. on Friday paydays to receive pay for that week. All employees who work a full 7-hour day must take an unpaid 30-minute meal period daily.

B. Overtime. Employees not exempt from the Fair Labor Standards Act shall receive overtime pay after forty hours of actual work per week. All overtime shall be paid at the rate of one and one-half times the employee's normal rate of pay. At the discretion of the

Board of Selectmen, overtime may be compensated with compensatory time for hours worked beyond forty hours in a work week. Such compensatory time shall be granted on a time and one-half basis for hours worked beyond forty hours in a work week.

C. The Town will reimburse employees for mileage incurred on town business. Mileage is reimbursed at the current federal rate.

ARTICLE VII - ATTENDANCE

A. To maintain a safe and productive work environment, the Town expects employees to be reliable and punctual in reporting for scheduled work. Absenteeism and tardiness place a burden on other employees and on the Town. Employees shall be at their respective places of work at the appointed starting time. It is the responsibility of employees who may be absent from work to see that their immediate supervisor is advised of the reason for such absence, not previously arranged for, if possible, within two (2) hours of the beginning of the starting time of his/her work day. Poor attendance and excessive tardiness are disruptive and may lead to disciplinary action, up to and including termination.

B. Employees will be paid for partial or full snow days off. Snow days generally follow the State's lead although the First Selectman has the final say on any given snow day. The safety of employees is the primary concern for all.

ARTICLE VIII - HOLIDAYS

The following twelve holidays shall be paid holidays for regular Town employees:

New Year's Day	Martin Luther King, Jr. Day	President's Day
Patriot's Day	Memorial Day	Independence Day
Labor Day	Columbus Day	Veterans' Day
Thanksgiving	Friday after Thanksgiving	Christmas

ARTICLE IX - VACATION

A. Vacation privileges are available to full-time and part-time employees. Each full-time employee shall earn vacation with pay on the following basis: after an employee has completed one year of continuous service, he/she is entitled to receive two weeks of paid vacation; and after an employee has completed ten years of continuous service, he/she is entitled to receive three weeks of vacation. Part-time employees shall be entitled to half the above.

B. Vacations will be scheduled at such time or times as shall be mutually agreeable to the employees and their supervisors. Due consideration will be given to an employee's seniority in regard to scheduling vacations. Vacation leave will ordinarily be taken in blocks of one (1) or two (2) week periods, but vacations for a lesser period may be permitted by the Board of Selectmen for special reasons.

C. Employees must take the vacation due them within a year after the vacation time is earned. Employees will not be permitted to carry over vacation time from one year to the next. Vacation time not taken in that year shall be lost. Exceptions to this may be permitted for special reasons with prior approval of the Board of Selectmen.

D. Vacation leave shall accrue from the date of hire as a full-time or part-time employee; however, employees shall not receive vacation leave until they have completed their first year of employment by the Town as a full-time or part-time employee.

E. Employees may receive their vacation pay prior to the start of their vacation, but must advise the Town Treasurer in writing, at least ten (10) days in advance.

ARTICLE X – OTHER PAID LEAVE

A. Full-time employees will be allowed up to ten (10) non-cumulative sick days per year, and up to three (3) non-cumulative bereavement days per year for immediate family, and one (1) paid bereavement day per year for non-family. Part-time employees shall be entitled to half the above.

B. Sick leave may be used for personal illness which renders the employee unable to perform his/her duties. After the employee has completed one year of service, the employee is able to receive sick time which may not be accrued from year to year. Employees must notify their supervisor as early as possible, but in any case no less than one hour prior to starting time, in order to draw sick leave benefits. Employees may be granted a leave of absence with or without pay for illness of a dependant child. Before returning to work from a sick leave of 3 consecutive work days or more, an employee must provide a physician's verification that he/she may return to work. Sick leave is not an entitlement which an employee may use at his/her discretion. No pay will be given for unused sick days upon termination or resignation of the employee.

C. Bereavement leave is available to employees who wish to take time off due to the death of an immediate family member or a non-family member. "Immediate family member" is an employee's spouse, parent, son, daughter, grandmother, grandfather, aunt, uncle, sister, brother or first cousin.

ARTICLE XI - LEAVES OF ABSENCE

Leave Without Pay – A full-time employee may be granted a leave of absence without pay by the Board of Selectmen for a period deemed necessary by the employee for the purpose of the leave, but not in excess of sixty (60) calendar days. The employee is expected to return to work upon the expiration of a granted leave or to have arranged an extension of a leave, granted at the discretion of the Board of Selectmen. Continued absence without having arranged for an extension of leave may be deemed a resignation from the service. Vacation and sick leave will not continue to accrue during the leave.

ARTICLE XII - JURY DUTY

The Town shall pay to an employee called for jury duty the difference between his/her regular pay and juror's pay provided the employee presents an official statement of jury pay received.

ARTICLE XIII - GRIEVANCE PROCEDURES

Should an employee feel aggrieved concerning the interpretation, meaning, or application by the Town of any provisions of the Town's personnel rules, regulations and policies or the terms of employment, within five (5) working days from the incident, he/she shall submit the details of such grievance in writing to the Board of Selectmen. Within thirty (30) calendar days thereafter, the Board of Selectmen shall meet with the employee for the purpose of discussing the grievance and the Board of Selectmen shall render their final written decision within thirty (30) working days after said meeting.

ARTICLE XIV - POLITICAL ACTIVITY

While performing their normal work duties, employees shall refrain from using their influence publicly in any way for or against any candidate for elective office in the Town government. This rule is not to be construed to prevent Town employees from becoming, or continuing to be, members of any political organization, from attending political meetings, from expressing their views on political matters, or from voting with complete freedom in any election.

ARTICLE XV - RESIGNATION

Resignation is a voluntary act initiated by the employee to terminate employment with the town. All employees resigning from service of the Town shall give a written two week notice.

ARTICLE XVI - POLICY ON HARASSMENT

It is the policy of the Town that all our employees should be able to work in an environment free from all forms of harassment. Harassment, both sexual and verbal, is prohibited. This policy refers not only to supervisor-subordinate actions but also to actions between co-workers. Any employee with questions or concerns about any type of discrimination in the workplace is encouraged to bring these issues to the attention of their immediate supervisor and/or the First Selectman. Any complaints of harassment will be investigated promptly. There will be no intimidation, discrimination or retaliation against any employee who makes a report of harassment. Anyone found to be engaging in any type of unlawful discrimination will be subject to disciplinary action up to and including termination of employment. The Town's Harassment and Sexual Harassment Policy (adopted April 10, 2006) shall be posted in the Town Office.



Town of Benton
CERTIFICATE OF APPOINTMENT BY MUNICIPAL OFFICERS

To: **Albert Tempesta**

Pursuant to Title 30-A MRSA §2526, the undersigned municipal officers of the Town of Benton do hereby vote to appoint and confirm you as **Code Enforcement Officer/Plumbing Inspector/Health Officer** for the Town Of Benton. Your term of office is to expire on March 15, 2016. Given under our hands on this 14th day of **March 2015**.


Daniel Chamberlain


Melissa Patterson


Antoine Morin

Exhibit B