

STATE OF IDAHO } ss
COUNTY OF KOOTENAI
FILED: 3-3-23
AT 4:30 O'CLOCK P.M.
CLERK, DISTRICT COURT
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

DOMINIC SWAYNE, an individual, <i>Plaintiff,</i> v. NORTH IDAHO COLLEGE, a community college in the State of Idaho, <i>Defendant.</i>	CASE NO. CV28-22-7712 MEMORANDUM DECISION AND ORDER GRANTING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION
---	---

This case concerns the authority of a college board of trustees to place an acting president, under a negotiated contract authorizing termination only by a supermajority vote for cause, on paid, indefinite administrative leave without cause. On February 24, 2023, Dominic Swayne's ("Plaintiff" or "Dr. Swayne") Motion for Preliminary Injunction came on for hearing before the Honorable Cynthia K.C. Meyer. Plaintiff was represented by Tara Malek, of SMITH + MALEK, PLLC. North Idaho College ("Defendant" or "NIC") was represented by Bret A. Walther, of ANDERSON, JULIAN & HULL LLP. For the reasons stated within this memorandum decision, Plaintiffs' Motion for Preliminary Injunction is granted.

I. FINDINGS OF FACT AND PROCEDURAL BACKGROUND

1. North Idaho College is a community college in Coeur d'Alene, Idaho. NIC's Board of Trustees ("the Board") consists Greg McKenzie ("Trustee McKenzie"), Todd Banducci ("Trustee Banducci"), Mike Waggoner ("Trustee Waggoner"), Brad Corkhill ("Trustee Corkhill") and Tarie Zimmerman ("Trustee Zimmerman").

2. The Northwest Commission on Colleges and Universities ("NWCCU") is the commission which provides NIC with its accreditation.

3. Dr. Dominic Swayne has been employed as the President of NIC since July 2022. *Complaint for Declaratory Relief* ("Complaint"), ¶ 5; *Answer to Complaint for Declaratory Relief* ("Answer"), ¶ 2. Dr. Swayne received a Master's Degree in Public Administration in 1994 and Ph.D in Post-Secondary Strategic Leadership in 2020.

4. On July 15, 2022, Dr. Swayne signed an employment agreement with NIC to serve as President of North Idaho College. *Plaintiff's Exhibit 1* ("Swayne Employment Agreement" or "the Agreement"). Several provisions of this Agreement are relevant.

5. "Section 2 Responsibilities" of the Swayne Employment Agreement states:

The President is appointed by the Board as the Chief Executive Officer of NIC, [and] reports directly to the Board. The President is authorized and responsible for the administration of NIC and has authority over all matters affecting NIC at the operational level, in accordance with applicable laws as well as the policies, rules and regulations approved and/or sanctioned by the Board. In addition to the foregoing, the President shall also be responsible for carrying out all duties requested by the Board. In carrying out these duties, the President recognizes the need for effective communication with the Board.

Plaintiff's Exhibit 1.

6. "Section 3. Term" provides that "the term of this Agreement will commence on

August 1, 2022 and will continue until June 30, 2025, unless terminated consistent with Section 12.” *Plaintiff’s Exhibit 1.*

7. “Section 11. Performance Review” provides:

The Board shall review the President’s performance annually in accordance with NIC policy. The Board may also elect to have more frequent reviews (for example, semiannual or quarterly reviews) as determined by the Board in its discretion.

Plaintiff’s Exhibit 1.

8. “Section 12. Termination” provides:

12.1 This Agreement may be terminated by mutual agreement of the parties, by the President without cause, or by the Board for cause. Notice of termination must be in writing and delivered to the non-terminating party.

12.2 If, during its term, this Agreement is terminated by the President without cause, the termination shall become effective 60 days after receipt of written notice of termination. The obligations of both parties under this Agreement cease when the termination is effective. *The Board may, in its discretion, place the President on administrative leave during part or all of the 60-day notice period.*

12.3 This Agreement may be terminated for cause, if a supermajority of the Board (defined as 4 or more Trustees) in its sole and reasonable discretion, determines that: (1) the President has significantly failed or refused to act in accordance with a material provision of this Agreement or any directive or order of the Board; (2) the President has exhibited gross misconduct or dishonesty in regard to his employment; (3) the President is (or has been) convicted of a crime, involving dishonesty, breach of trust, or physical or emotional harm to any person; (4) the President is unable to perform the essential function of the position; or (5) the President has acted in bad faith to the detriment of NIC.

Plaintiff’s Exhibit 1 (emphasis added).

9. The last sentence of Subsection 12.2 is the only provision of the Swayne

Employment Contract that addresses administrative leave.

10. “Section 18. Entire Agreement” provides:

This Agreement constitutes the entire understanding of the parties hereto and supersedes all prior or contemporaneous representations, understandings or agreements, whether written or oral, between the parties, and cannot be changed or modified unless in a writing signed by the parties hereto.

Swayne Employment Agreement at 5.

11. According to the “North Idaho College Presidential Evaluation Survey 2022 Q1 Performance Review” form, Dr. Swayne is subject to evaluations in the following areas: (1) Leadership, (2) Finance and Accountability, (3) Academic and Student Affairs, (4) Student Success, (5) Capital Development/Facilities, (6) Human Resources, and (7) Relations with the Board of Trustees. *Plaintiff’s Exhibit 2*.

August 1, 2022 – December 4, 2022

12. During his time as acting president, Dr. Swayne spent 30% of his time rebuilding goodwill both in the community and within NIC.

13. Dr. Swayne worked toward restoring dual credit enrollment opportunities between school divisions in north Idaho high schools and NIC. Dual credit offerings increase income streams to NIC and is one of the primary recruitment tools for NIC.

14. In September 2022, Dr. Swayne received an email from NIC Trustee Todd Banducci, which referenced Swayne being done or gone in “52 days.” Dr. Swayne interpreted this email as “communicating a threat” to his position as president following the November elections for the vacant positions on the NIC Board of Trustees. *02/24/2024 Preliminary Injunction Hearing* (the “Hearing”) at 11:38-40.

Administrative Leave

15. On December 5, 2022, the Board held a regular meeting. *Complaint*, ¶ 11; *Answer*, ¶ 6. During this meeting, Trustee Banducci introduced North Idaho College Resolution 2022-03, which proposed (1) the immediate suspension of NIC policy 7.01.04 (the Policy for Awarding Continuous Professional Service Contracts); and (2) to immediately hire Art Macomber, an attorney, as NIC's new legal counsel. *Complaint*, ¶ 12; *Answer*, ¶ 6.

16. Resolution 2022-03 was not released to the public prior to the meeting.¹

17. Dr. Swayne warned the Board that passing the Resolution would likely violate Idaho's Open Meeting Laws.

18. Resolution 2022-03 states in relevant part:

5. That NIC Policy # 7.01.04 is hereby suspended indefinitely, or until NWCCU Standards of Accreditation compliance are achieved, or until a date certain to be determined by the Board of Trustees at a later meeting;

6. That the Law Office of Arthur B. Macomber shall be hired immediately to provide legal services to the Board of Trustees and NIC under the Fee Agreement enclosed herewith, exercising all fiduciary duty in the highest esteem for the Trustees and the College to meet the overall goals of the accreditation schedule given the capabilities of North Idaho College;

7. That the President and Board chair shall immediately hire the Law Office of Arthur B. Macomber as evidenced by the President's and Board chair's signatures on the enclosed Fee Agreement prior to the end of the meeting during which this Resolution is presented and passed by the Board of Trustees; and

8. That the President shall take such other actions as may be

¹ Idaho Code §§ 74-201 through -208 make up Idaho's "Open Meeting Law," which imposes procedural requirements (e.g., notices of meetings, agendas, etc.) on public agencies. Under § 74-201, Idaho's Legislature "declar[ed] that it is the policy of this state that the formation of public policy is public business and shall not be conducted in secret." I.C. § 74-201. Under Idaho's Open Meeting Law, "[n]o less than a five (5) calendar day meeting notice and a forty-eight (48) hour agenda notice shall be given" and "[a]n agenda item that requires a vote shall be identified on the agenda as an "action item" to provide notice that action may be taken on that item." I.C. § 74-204.

necessary in connection with that hiring, including notification to third parties and College personnel as needed, and the taking of prompt steps to personally establish a relationship with Mr. Macomber to facilitate the effectual pursuit of the schedule for gaining NWCCU accreditation compliance by NIC.

Plaintiff's Exhibit 3.

19. Trustees McKenzie, Banducci, and Waggoner voted in favor of the resolution while Trustees Zimmerman and Corkill voted against it. *Complaint*, ¶ 13; *Answer*, ¶ 6. Mr. Macomber then sat with the Board of Trustees after the conclusion of the vote. *Complaint*, ¶ 14; *Answer*, ¶ 6.

20. Trustee Banducci then introduced North Idaho College Resolution 2022-04 titled “Resolution to Delay Hiring of President’s Cabinet Members.” *Plaintiff's Exhibit 3.*

21. Resolution 2022-04 was not released to the public prior to the meeting.

22. Resolution 2022-04 states in relevant part:

[T]he hiring process for members of the President’s Cabinet shall be immediately halted and frozen until the President can bring the potential new hires for that Cabinet before the Board at a Special or Regular Meeting in executive session for confidential review of their qualifications to meet the needs of the NWCCU accreditation schedule, and the business and academic needs of NIC;

Plaintiff's Exhibit 3.

23. Prior to this resolution, Dr. Swayne had vetted and prepared to hire new members of the President’s Cabinet.

24. On December 8, 2022, the NIC Board of Trustees held a special meeting. *Complaint*, ¶ 15; *Answer*, ¶ 6. Trustees McKenzie, Banducci, Waggoner and Zimmerman were present. *Complaint*, ¶ 16; *Answer*, ¶ 6.

25. Mr. Macomber sat with the Board at the front table.

26. During this meeting, Mr. Macomber presented a resolution to the Board. Mr. Macomber advised the Board of Trustees to place Dr. Swayne on administrative leave immediately pending an investigation into the contract negotiations between NIC, the Board of Trustees, and Dr. Swayne. *Complaint*, ¶ 18; *Answer*, ¶ 6.

27. While presenting this resolution, Mr. Macomber conveyed that the purpose of the administrative leave was to investigate potential Open Meeting Law violations that may have occurred when the Board approved Dr. Swayne's contract.

28. At this time, at least five months had passed since the signing of Dr. Swayne's agreement.²

29. Based upon Mr. Macomber's advice, the Board of Trustees voted to immediately place Dr. Swayne on administrative leave. *Complaint*, ¶ 19; *Answer*, ¶ 6. Trustees McKenzie, Banducci and Waggoner voted in favor of the motion. Trustee Zimmerman voted against it. *Complaint*, ¶ 20-21; *Answer*, ¶ 6.

30. On December 9, 2022, Mr. Macomber wrote a letter to Dr. Swayne advising him that he was being placed on leave but not for any "disciplinary process." *Complaint*, ¶ 22; *Answer*, ¶ 6. This letter stated in relevant part:

² Idaho Code § 74-208 addresses the enforcement mechanisms and remedies available when there has been a violation of the Open Meeting Law. Pursuant to § 74-208(6):

Any suit brought for the purpose of having an action declared or determined to be null and void pursuant to subsection (1) of this section shall be commenced within thirty (30) days of the time of the decision or action that results, in whole or in part, from a meeting that failed to comply with the provisions of this act. Any other suit brought under the provisions of this section shall be commenced within one hundred eighty (180) days of the time of the violation or alleged violation of the provisions of this act.

(Emphasis added).

As you know due to your attendance at the meeting, on December 8, 2022 the Board of Trustees put you on immediate paid administrative leave *to facilitate my investigation of certain governance concerns, and or missteps made by others, either of which may impact your position and contract.* The Trustees initiated the NIC administrative leave process. Today, I contacted Human Resources and requested information on that process. *There is no written process to cover this specific situation, so I am using the Procedure # 3.02.31 for a template to guide the College.*

There are provisions that do not apply, and others that are merely helpful. Working with what is available, the Trustees would like me to convey the following. For the duration of my investigation and your leave, which will roughly coincide, you are not to come onto campus to discuss or conduct College business, use computer access or other College facilities in your role as President. *You are not being put on leave due to any disciplinary process, but the Trustees want to isolate you from the investigative process, so that our findings will be fact-based and not seen as under any influence by you, whether it be good or bad . . .* Such isolation is required to safeguard you and the investigative process on behalf of the College. *Conversely, you are currently not under any disciplinary process or accusation, so if you want to attend Christmas events at NIC or attend basketball or other sports games, you should feel free to do so. The Trustees are taking this action to protect you and the College until my investigation is completed.*

Plaintiff's Exhibit 4 (emphasis added).

31. North Idaho College Procedure # 3.02.31 states in relevant part:
 - A. For cause, the vice president for Instruction (VPI) may immediately *suspend a Tenured Faculty member* from assigned duties with pay, for up to three (3) months, *to conduct an investigation into allegations of improper conduct or behavior.*
 - B. Cause for suspension is defined as an allegation of any conduct or behavior that may damage or may be detrimental to the college, its students, faculty, or employees as determined by the VPI. *Examples include, but are not limited to, criminality, dishonesty, unprofessional or unethical conduct, violation of policy(ies) or abandonment of the responsibilities or inability to perform the essential functions of the position.* This policy will not be interpreted so as to interfere with the NIC Academic Freedom policy.

Plaintiff's Exhibit 9 (emphasis added).

32. Dr. Swayne is not a Tenured Faculty Member, nor had the Board claimed that Mr. Swayne engaged in any of the conduct listed under Procedure # 3.02.31(B).

33. On December 16, 2022, Dr. Swayne filed his Complaint against North Idaho College, seeking a declaratory judgment from the court that states:

- a. The Employment Agreement does not contain a provision allowing Dr. Swayne to be placed on administrative leave;
- b. That Section 12.2 of Employment Agreement provides that Dr. Swayne may only be placed on administrative leave if the employment agreement is terminated by Dr. Swayne without cause, and during the 60 days proceeding notice to the Board of Trustees;
- c. Dr. Swayne has not given notice of resignation to the Board of Trustees; and
- d. Because Dr. Swayne has not given notice of his resignation, NIC cannot place him on administrative leave and Dr. Swayne should be allowed to return to his employment.

Complaint at pg. 4-5.

Accreditation Warning

34. Per NWCCU Accreditation Policy:

NWCCU may require an accredited or candidate institution to show cause and note its accreditation is in jeopardy, when it does not appear to be in compliance with Standards for Accreditation, Eligibility Requirements, Policies, or applicable federal regulations, and there is evidence the noncompliance is sufficiently egregious such that it raises concerns the institution: has not made sufficient progress toward achieving compliance; does not appear to demonstrate capacity to comply with Standards for Accreditation, Eligibility Requirements, Policies, or applicable federal regulations under a timeframe set by the Commission pursuant to 34 CFR § 602.20(a)(2); is in imminent danger of closing; has demonstrated a lack of integrity, truthfulness, or responsibility, and the Commission determines students may be harmed; or information from monitoring activities suggests serious concerns related to student achievement, viability and capacity, or financial health.

Plaintiff's Exhibit 12.

35. On December 17, 2022, the NWCCU sent a letter to NIC. *See Plaintiff's Exhibit 12.* The letter stated in relevant part:

In its letter dated April 1, 2022, the Northwest Commission on Colleges and Universities (NWCCU) informed North Idaho College (NIC) that it had placed the institution on a Sanction of Warning and a Status of Monitoring. While NIC has submitted monitoring reports as required since that time, hired a new president, and has a fully constituted Board with five Trustees, *recent and subsequent public actions of the NIC Board of Trustees appear to place the institution at significant risk of being out of compliance with a number of NWCCU Eligibility Requirements and Standards.* The NWCCU Executive Committee met on December 16, 2022 to discuss recent actions of NIC's Board of Trustees.

Plaintiff's Exhibit 12 (emphasis added). NWCCU then listed thirteen NWCCU "Eligibility Requirements" and "Standards for Accreditation" that "NIC is, or appears to be, out of compliance with[.]" *Plaintiff's Exhibit 12.* NWCCU's warning largely concerned the erratic behavior of the Board. NWCCU directed NIC to respond to these concerns by January 4, 2023, warning that a "[f]ailure to adequately respond in the timeline identified may result in further actions by NWCCU . . . that will place the accreditation status of North Idaho College at risk." *Plaintiff's Exhibit 12.*

December 21, 2022, Board of Trustee meeting

36. On December 21, 2022, the Board held a regular meeting. During the meeting, the Board of Trustees voted to rescind NIC resolutions 2022-03 and 2022-04 in order to "cure" Open Meeting Law violations that occurred at the December 5, 2022 Board of Trustees meeting. The motion to rescind these resolutions passed unanimously.

37. The Board then reintroduced NIC Resolution 2022-03 for consideration. Trustee Corkhill expressed concerns regarding the hiring of Art Macomber as legal counsel for NIC, noting a pending investigation into Mr. Macomber by the Idaho State Bar Association. *Plaintiff's Exhibit*

5 (December 21, 2022 Meeting) at 2:02-03. Trustee Zimmerman also expressed concerns regarding the hiring of Art Macomber, stating that she did not believe that he was competent to act as a collegiate attorney. *Plaintiff's Exhibit 5* (December 21, 2022 Meeting) at 2:05.

38. Trustee McKenzie then forced a vote. The motion passed with Trustees McKenzie, Waggoner, and Banducci voting in favor and trustees Corkell and Zimmerman voting against it.

39. The Board further voted on a motion to remove Dr. Swayne from administrative leave in order to cure Open Meeting Law violations that occurred on December 8, 2022. *Plaintiff's Exhibit 5* (December 21, 2022) at 2:20-21. The motion passed unanimously.

40. Following this vote, Trustee McKenzie moved to place Dr. Swayne back on immediate administrative leave. *Plaintiff's Exhibit 5* (December 21, 2022) at 2:21. The motion was seconded by Trustee Banducci. The follow exchange occurred:

Trustee McKenzie: It has been moved and seconded and I shall repeat it: that the Board place Dr. Swayne on administrative leave effective immediately to protect him from charges of interference with the college attorney's investigations into President Swayne's employment contract, which investigation are to be immediately implemented . . . It is under discussion.

Trustee Corkhill: Could somebody please give me the exact, specific reason he is going on administrative leave, please?

Trustee McKenzie: It is stated in the motion, sir.

Trustee Corkhill: Well, to interfere with what, I mean. There's an investigation, an investigation into what?

Trustee McKenzie: If you read the board conduct policy, basically –

Trustee Banducci: Mr. Chair, you need to be very careful with

this discussion outside of executive session

Trustee McKenzie: That is very true.

Trustee Banducci: This is a personnel matter.

...

Trustee Corkhill: So there is no answer to it.

Trustee McKenzie: We can go into executive session, it is agenda-ed for this meeting if you would like to sir.

Trustee Zimmerman: I understand this is regarding the contract, not the personnel, so I don't understand why we can't have a clearer understanding of what is it about the contract that's going to be investigated, why does it need to be investigated, how long is this investigation going to take place.

Trustee McKenzie: So, again –

Trustee Zimmerman: It's a contract, we are not talking about the person we are talking about the contract.

Trustee Banducci: Mr. Chair. I think that's as far as you can go in open session, sir.

Trustee McKenzie: Ok, I'm going to call for the question. So we are going to take a roll call vote –

Trustee Zimmerman: Wait, so there is no discussion? We are just going to call the question?

Trustee Banducci: You had your discussion Trustee Zimmerman and some things cannot be discussed –

Trustee Zimmerman: Well, I asked a question –

Trustee McKenzie: We have an agenda item to go into the executive session to discuss personnel matters.

Trustee Zimmerman: It's not a personnel matter, it's a contract issue and I asked a question about a

contract issue.

Trustee McKenzie: Well, Trustee Zimmerman, I am the Chair,
I am calling for the vote.³

Plaintiff's Exhibit 5 (December 21, 2022 Meeting) at 2:21-25.

41. Trustee McKenzie then forced a vote. The motion passed with Trustees McKenzie, Waggoner, and Banducci voting in favor and Trustees Corkell and Zimmerman voting against it.

42. Trustee McKenzie then moved for the Board to accept an employment contract for an interim president position between NIC and Dr. Gregory South. *Plaintiff's Exhibit 5* (December 21, 2022) at 2:28; *see Plaintiff's Exhibit 10* ("South Employment Agreement"). Trustee Banducci seconded the motion. The following exchange occurred:

Trustee Corkhill: I've read the contract. I believe that it is a
\$235,000 dollars, I think there is a \$35,000
dollar signing bonus, I think there is a
\$27,000 moving allowance, I think there is a

³ As an aside: here and in multiple other instances, a single trustee's "call of the question" immediately ended debate and forced the trustees to vote. However, North Idaho College Policy # 2.01.03 "RULES OF ORDER" states that "the rules contained in the current edition of Robert's Rules of Order Newly Revised shall be used as a guideline in all cases to which they are applicable and in which they are not inconsistent with board policies and any special rules of order the board may adopted." Absent some pre-existing modification of NIC's special rules, a board member's "call of the question" does not immediately force a vote by the trustees:

16:6 Equal Application of Rules to Nonstandard Forms Such as "Call for the Question." A motion such as "I call for [or "call"] the question," "I demand the previous question," "I move to close [or "end"] debate," or "I move we vote now" is simply a motion for the Previous Question made in nonstandard form, and it is subject to all of the rules in this section. Care should be taken that failure to understand this fact does not lead to violation of members' rights of debate.

16:7 Sometimes the mere making of a motion for the Previous Question or "call for the question" may motivate unanimous consent to ending debate. Before or after such a motion has been seconded, the chair may ask if there is any objection to closing debate. If member(s) object or try to get the floor, he must ask if there is a second to the motion or call; or, if it has already been seconded, he must immediately take a vote on *whether to order* the Previous Question. But *regardless of the wording of a motion or "call" seeking to close debate, it always requires a second and a two-thirds vote, taken separately from and before the vote(s) on the motion(s) to which it is applied, to shut off debate against the will of even one member who wishes to speak and has not exhausted his right to debate* (see 4:32, 43:8-13).

Robert, Henry M., *Robert's Rules of Order Newly Revised* at 290-91, PublicAffairs; 12th edition (2020) (emphasis in original).

\$3,000 dollar a month housing allowance, on this.

Trustee McKenzie: Yes.

Trustee Corkhill: We already have a president. Why are we hiring another one? And furthermore, we have two acting presidents that are doing the job, there is no reason we are paying the salary, this high, for two presidents. This is an irresponsible use of the taxpayer dollar.

...

Trustee McKenzie: The situation that we have right now with the two co-leads was blessed by the Accreditation Agency . . . but only in the temporary basis sir. If you look at the accreditation requirement recommendations, it is to have a president at the helm, and that is the Board's main point of contact, main interface, only interface, so this is essential for NIC that we have a candidate for president.

Plaintiff's Exhibit 5 (December 21, 2022) at 2:28-29.

43. Further conversation took place before Trustee McKenzie "called for the vote" and ended discussion. *Plaintiff's Exhibit 5* (December 21, 2022) at 2:32. The motion passed with Trustees McKenzie, Waggoner, and Banducci voting for the motion and Trustees Corkell and Zimmerman voting against it.

44. Several provisions of the South Employment Contract are relevant. "Section 3. Term," provides that: "[t]he term of this Agreement will commence on December 21, 2022 and will continue at least until June 30th, 2024, unless terminated consistent with Section 4.2 or 12."

Plaintiff's Exhibit 10.

45. "Section 2. Responsibilities" provides:

The Interim President is appointed by the Board as the Chief Executive Officer of NIC and reports directly to the Board. The

Interim President is authorized and responsible for the administration of NIC and has authority over all matters affecting NIC at the operational level, in accordance with applicable laws as well as the policies, rules and regulations approved and/or sanctioned by the Board, subject to the Board's guidance under Idaho law as passed by Motions at Board Meetings. In addition to the foregoing, the Interim President shall also be responsible for carrying out all duties requested by the Board. In carrying out these duties, the Interim President recognizes the need for effective and consistent communication with the entire Board.

South Employment Agreement at 1.

46. "Section 12. Termination of Agreement" provides in relevant part:

12.1 This Agreement may be terminated by mutual agreement, for no cause by either party with conditions, *or for cause* by NIC. If the termination is for cause and initiated by the Board, the parties agree that a buyout will be paid to the interim president as set forth in paragraph 12.5. If for cause, such cause shall be stated in the notice of termination, which must be delivered to the non-terminating party at least thirty (30) days prior to taking effect.

12.2 If, during its term, this Agreement is terminated by the Interim President without cause, the termination shall become effective thirty (30) days after receipt by NIC of the written notice of termination. If, during its term, this Agreement is terminated without cause by NIC, the Interim President will be paid an amount equal to twelve (12) months of his base pay. The obligations of both parties under this Agreement cease on the termination date, except for payments due the Interim President from NIC under Sections 5, 6, 7, 8, 9, and the buyout provisions contained in this paragraph 12.2 and in paragraph 12.5. The Board may, in its discretion, place the Interim President on administrative leave during part or all of such a 30-day notice period. *The Board's power to impose administrative leave for other purposes is not limited to the employment termination circumstances outlined in this paragraph.*

South Employment Agreement at 4 (emphasis added).

47. The South Employment Contract does not contain a provision that explicitly addresses an event in which Dr. Swayne is taken off administrative leave.

48. “Section 2. Responsibilities” of the South Employment Contract is nearly identical to “Section 2. Responsibilities” of Dr. Swayne’s Employment agreement.

December 22, 2022 – February 24, 2023

49. On December 24, 2022, Mr. Macomber wrote a second letter to Dr. Swayne, “confirming [his] administrative leave from NIC President’s position[.]” *Plaintiff’s Exhibit 7*. In the letter, Mr. Macomber reiterated (1) that the purpose of the leave was “to facilitate [his] investigation of certain governance concerns, and or missteps made by others, either of which may impact his position and contract[.]” and (2) that “Dr. Swayne [was] currently not under any disciplinary process or accusation.” *Plaintiff’s Exhibit 7*.

50. On January 4, 2023, NIC sent a letter to NWCCU in response to the December 17, 2022 letter. The letter outlined steps NIC had taken to address NWCCU’s accreditation concerns and specific governance concerns from members of the President’s Cabinet.

51. On January 19, 2023, Dr. Swayne filed his Motion for Preliminary Injunction against NIC, seeking an order “enjoining Defendant, and all persons acting at Defendant’s direction, including its officers, agents, servants, contractors and employees, from taking any action which changes the organizational structure, employment status, athletic conference or any other action which would be within the purview of Dr. Swayne’s authority to operate NIC, until such time as the Court decides this action. Alternatively, Dr. Swayne should be allowed to operate NIC during the pendency of this matter.” *Plaintiff’s Motion for Preliminary Injunction* at 1.

52. On January 26, 2023, Art Macomber sent a letter to Dr. Swayne “confirming [his] continued administrative leave” *Plaintiff’s Exhibit 8*. The letter states in relevant part:

On December 21, 2022, I reiterated my letter of December 8, in which I stated, “For the duration of my investigation and your leave, which will roughly coincide, **you are not to come onto campus to discuss or conduct College business**, use computer access or other

College facilities in your role as President.” I should have been clearer, because now it appears Dr. Swayne believes he may discuss or conduct College business while off campus. I should have said “Dr. Swayne is not to ‘discuss or conduct college business’ on or off campus . . . To be completely clear: Dr. Swayne is not authorized to do any College business while on Administrative leave.

(emphasis in original).

...
On Saturday, February 21, 2023 (sic)⁴ the enclosed CdA Press news article states: “Swayne said Coeur d’Alene School District Superintendent Shon Hocker informed him that the District will decided on its dual-credit relationship with NIC before the fall 2023 semester.” Dr. Swayne should have told Mr. Hocker to call Dr. South about his concerns, but the article has no evidence of Dr. Swayne’s direction to Mr. Hocker.

Dr. Swayne was not authorized to talk to Shon Hocker, or anyone else about college business on behalf of the College while he is on administrative leave. Dr. Swayne is not authorized to act or speak on behalf of the College while on Administrative leave.

Further, the Board forbids Dr. Swayne to speak to the media about NIC business. Of course, Dr. Swayne has freedom of speech, but such freedom has costs, and Dr. Swayne would do well to consider the effects of his speech on College business. The design of the leave is to protect him and the College, but it depends on his cloistering himself.

(emphasis added).

53. On February 9, 2023, the NWCCU sent a letter to NIC, which informed NIC that it had issued a “Sanction of Show Cause.” *Plaintiff’s Exhibit 6.*

54. A “Show Cause” sanction is the final step before a college loses its accreditation.

55. The letter states in relevant part:

In the view of the Commission, NIC’s revised January 4, 2023 response, which was received on January 12, 2023, combined with recent and continuing public actions of the NIC Board of Trustees, fail to adequately demonstrate that the institution is in compliance with a number of NWCCU Eligibility Requirements and Standards

⁴ The date of the article was January 21, 2023.

for Accreditation.

Plaintiff's Exhibit 6. The NWCCU determination was based upon:

Numerous complaints from members of the NIC and Coeur d'Alene communities have continued to be received by NWCCU; ongoing actions of the NIC Board – some documented in the press – continue to place the institution at risk for viability, including but not limited to:

- Three lawsuits, one settled and two active.
- Frequent changes in leadership with little to no input from relevant stakeholders, without following institutional policies and procedures.
- Uncertainty as to who is the Chief Executive Officer at North Idaho College, with a regular president placed on administrative leave (Swayne) and an interim president (South) appointed concurrent with the regular president.
- Declining enrollments, including termination of partnership with STEM Charter Academy, with concomitant reduction in tuition revenue.
- Continued exodus of faculty, staff, and senior administrators.
- Decision with little to no input to expand athletics program and to change athletics conference with potential added costs.
- Multiple No Confidence Resolutions from the Associated Students of NIC, NIC Faculty Assembly, and NIC Staff Assembly.
- Risk of significant financial stress, including but not limited to:
 - Expanded payroll for two presidents, interim provost, and special assistant to the interim president, along with moving expenses, and other contracted charges and/or obligations.
 - Significantly increased insurance costs with higher deductibles.
 - Moody's Bond Rating review for potential downgrade.
 - Declining donor support.

Plaintiff's Exhibit 6. The NWCCU directed North Idaho College to respond with a "Show Cause Report," due March 13, 2023, which addresses NIC's Eligibility Requirements and Standards for Accreditation.

56. While Dr. Swayne has been on leave, NIC has made, and is contemplating, further

significant changes to the organizational structure, administration and operation of NIC.

57. Despite barring Dr. Swayne from hiring any staff, NIC has permitted Dr. South to fill the President's cabinet and fill senior administrative positions, including hiring "Interim Provost," Peggy Bradford.

58. NIC has charged Dr. South with conducting research on changing NIC's athletic conference, transitioning athletic coaches from part-time to full-time positions and raising salaries for coaches. These changes in the athletic program will likely result in a \$1 to \$2 million dollar cost increase, or up to a 4% increase in NIC's budget of \$50 million.

59. NIC removed Dr. Swayne's biography and picture from the "President's Page" of the NIC website. Now, it lists Dr. South as interim president and provides his picture and biography.

60. Art Macomber's investigation into Swayne's employment contract concerns purported Open Meeting Law violations and "certain governance concerns, and or missteps made by others[.]" *Plaintiff's Exhibit 4*. Dr. Swayne has not been disciplined by NIC nor has Dr. Swayne tendered his resignation to NIC. *Complaint*, ¶ 22; *Answer*, ¶ 6.

61. Dr. Swayne has not received any update concerning Art Macomber's investigation.

62. The court does not find, nor has NIC claimed, that Dr. Swayne committed any acts of criminality, dishonesty, unprofessional or unethical conduct, violation of policies or abandonment of the responsibilities or inability to perform the essential functions of the position.

63. On February 24, 2023, Plaintiff's Motion for Preliminary Injunction came on for hearing.

64. Defendant did not offer evidence at the hearing.

65. Dr. Swayne testified the he would suffer irreparable harm if NIC continues to make

operational and organizational changes that would ordinarily be within his purview as president:

[I]t goes back to the -- all these relationships and the prioritization and the planning. I have to come back into an organization basically starting over. And so all of the time and effort that has gone into building those relationships, establishing needs, building programs, starting programs, doing the planning process, making investments, you know, expending -- expenditure of tax dollars to make those plans come into place, I now have to go back and reset and restart all of those processes. So it is a significant amount of work and time that I have to reinvest. Instead of executing plans, I'm now reinvesting that time because it was essentially shutdown.

02/24/23 Preliminary Injunction Hearing ("Hearing") at 11:07-8.

66. Dr. Swayne testified that he would suffer irreparable harm during his future evaluations by the Board due to changes that would ordinarily be within his purview as president. Dr. Swayne testified that he was concerned that the Board would not properly take his absence into account when performing his evaluations based on the Board's performance in the past.

67. Dr. Swayne testified that he would suffer irreparable harm as a result of the proposed changes to the traditional expenditures of the college while he was on administrative leave:

We've discussed already the evaluation process and now I have to figure out how to balance a budget that's at least four percent greater expenses if they make these changes that they've talked about during the December 21st board meeting. And so how do you figure out how to balance that? We have limited revenue, which might actually decline, and greater expenses. I've got to figure out how to make those decisions. Potentially looking people in the eye and saying, you're fired, because we've -- you know, we don't have the money to cover your expenses.

...
This [harm] is intrinsic. The operations here, this is me. Everything that is happening to the college now that I have to fix is a cost to me personally. My integrity, the trust and confidence that I have built and then lost, those are all costs directly to me. Maybe hard to put a dollar value on, but those are all costs to me in terms of my reputation and the workload going forward.

Hearing at 11:09.

68. The court finds Dr. Swayne's testimony to be credible.

69. Based on this testimony, Plaintiff's exhibits, and the arguments before the court, the court finds that Dr. Swayne will suffer irreparable harm absent preliminary relief.

II. STANDARD OF REVIEW

The decision whether to grant or deny injunctive relief is left to the district court's discretion. *Munden v. Bannock Cnty.*, 169 Idaho 818, 829, 504 P.3d 354, 365 (2022). When reviewing a discretionary decision of the trial court, the relevant inquiry is "[w]hether the trial court: (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason." *Lunneborg v. My Fun Life*, 163 Idaho 856, 863, 421 P.3d 187, 194 (2018). On appeal, "[w]hen findings of fact are challenged, the appellant has the burden of showing error, and the reviewing court will review the evidence in a light most favorable to the respondent." *Gem State Roofing, Inc. v. United Components, Inc.*, 168 Idaho 820, 828–29, 488 P.3d 488, 496–97 (2021) (quoting *Higginson v. Westergard*, 100 Idaho 687, 689, 604 P.2d 51, 53 (1979).)

[An appellate court] will not disturb the district court's finding of fact unless the finding is clearly erroneous. *PacifiCorp v. Idaho State Tax Comm'n*, 153 Idaho 759, 767, 291 P.3d 442, 450 (2012). A finding is clearly erroneous if [it] is not supported by substantial and competent evidence. *Id.* "Substantial and competent evidence is relevant evidence that a reasonable mind might accept to support a conclusion." *Jarvis v. Rexburg Nursing Ctr.*, 136 Idaho 579, 583, 38 P.3d 617, 621 (2001).

Gem State Roofing, Inc. v. United Components, Inc., 168 Idaho 820, 829, 488 P.3d 488, 497 (2021).

III. DISCUSSION

Plaintiff seeks an order enjoining NIC “from taking any action which changes the organizational structure, employment status, athletic conference or any other action which would be within the purview of Dr. Swayne’s authority to operate NIC, until such time as the Court decides this action.” *Plaintiff’s Motion for Preliminary Injunction* at 1. Alternatively, Dr. Swayne claims he “should be allowed to operate NIC during the pendency of this matter.” *Plaintiff’s Motion for Preliminary Injunction* at 1.

A preliminary injunction is the “strong arm of equity” which, as an extraordinary remedy, must be exercised with great restraint. *Planned Parenthood Great Nw. v. State*, No. 49615, 2022 WL 3335696, at *4 (Idaho Aug. 12, 2022). A district court should grant a preliminary injunction “only in extreme cases” where the right to relief is “very clear and it appears that irreparable injury will flow from its refusal.” *Gordon v. U.S. Bank Nat’l Ass’n*, 166 Idaho 105, 115, 455 P.3d 374, 384 (2019) (quoting *Harris v. Cassia County*, 106 Idaho 513, 518, 681 P.2d 988, 993 (1984)). A party seeking a preliminary injunction bears “the burden of proving the right thereto” *Gordon*, 166 Idaho at 115, 455 P.3d at 384.

Idaho Rule of Civil Procedure “Rule 65(e) enumerates the grounds upon which a district court may grant a preliminary injunction.” *Id.* These grounds include:

- (1) when it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief or any part thereof, consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually;
- (2) when it appears by the complaint or affidavit that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury to the plaintiff;
- (3) when it appears during the litigation that the defendant is doing, threatening, procuring or allowing to be done, or is about to do,

some act in violation of the plaintiff's rights, respecting the subject of the action, and the action may make the requested judgment ineffectual;

I.R.C.P. 65(e) (1-3).

Under the Idaho Supreme Court decision in *Planned Parenthood Great Nw. v. State*, the court is to apply a “conjunctive standard” when an injunction is sought under subsections (1) and (2). *See Planned Parenthood Great Nw.*, 2022 WL 3335696, at *5 (2022). Specifically, when a preliminary injunction is sought under either subsections (1) or (2), the court may grant the motion only when a party establishes *both* that the party is entitled to the relief demanded “and it appears that irreparable injury will flow from its refusal.” *Munden*, 169 Idaho at 829, 504 P.3d at 365; *Planned Parenthood Great Nw.*, 2022 WL 3335696, at *5 (“To grant preliminary injunctive relief without applying a conjunctive standard would transform an extraordinary form of relief into an ordinary remedy.”).

The court determines that that complex issues of facts and law do not exist in this case, and that NIC did not have the authority to place Dr. Swayne on administrative leave without cause. The court further determines that the requirements of Idaho Rule of Civil Procedure 65(e)(1),(2), and (3) have been satisfied by the Plaintiff and that a preliminary injunction should be issued. Each subsection of Rule 65(e) is addressed in turn.

A. Rule 65(e)(1): Entitlement to the requested relief

When an argument for a preliminary injunction is based on entitlement to the requested relief, the moving party must demonstrate “a *substantial* likelihood of success on the merits or a ‘clear right’ to the ultimate relief requested.” *Planned Parenthood Great Nw.*, 2022 WL 3335696, at *6 (Idaho Aug. 12, 2022). The substantial likelihood of success necessary to demonstrate that the party seeking a preliminary injunction is entitled to the relief demanded cannot exist where

complex issues of law or fact exist which are not free from doubt. *Id.* Therefore, the court must first evaluate Plaintiff's single cause of action against Defendant for Declaratory Relief to determine whether Plaintiff has demonstrated a substantial likelihood of success.

The Idaho Declaratory Judgment Act ("IDJA") provides:

Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed . . . The declaration may be either affirmative or negative in form and effect, and such declarations shall have the force and effect of a final judgment or decree.

I.C. § 10-1201. The type of matters subject to determination under to IDJA are broadly defined:

Any person interested under a deed, will, written contract or other writings constituting a contract or any oral contract, or whose rights, status or other legal relations are affected by a statute, . . . may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

I.C. § 10-1202. The stated purpose of the IDJA is "... to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations." I.C. § 10-1212. "The Act expressly provides that it is remedial and is to be 'liberally construed and administered.'" *Sommer v. Misty Valley, LLC*, 170 Idaho 413, 511 P.3d 833, 840 (2021) (quoting I.C. § 10-1212).

1. The Employment Agreement does not permit NIC to place Dr. Swayne on administrative leave without cause.

Plaintiff contends:

No complex issues of law or fact exist. Dr. Swayne's Agreement has no provision allowing NIC to place him on leave. NIC has no policy allowing it to place the president on administrative leave. NIC does not have the statutory authority to hire two presidents or to place Dr. Swayne on administrative leave. As a result, Dr. Swayne can demonstrate that he has a substantial likelihood of success.

Memorandum in Support of Motion for Preliminary Injunction ("Plaintiff's Memo.") at 6. In

response, Defendant states:

In the underlying declaratory judgment action, Plaintiff claims the Board does not have the authority to ever place him on leave, for any reason, and as result, he is entitled to reinstatement. *Complaint*, ¶¶ 27-29. The Agreement attached at Exhibit 1 to the Complaint, however, does not in any way restrict or otherwise prevent the Board from placing the President on administrative leave. (*Agreement*, pp. 1-6) The Agreement does mention that the Board may place the President on leave if he *terminates* the Agreement, but does not in any way restrict or even discuss other instances or circumstances where the President may or may not be placed on leave with pay. (*Agreement*, ¶ 12.)

Defendant's Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction ("Defendant's Opposition") at 4 (emphasis in original). Next, Defendant contends that the "broad general power" of the Board under I.C. §§ 33-2107, 33-2109 implicitly permits the Board to place Dr. Swayne on leave:

[A]s a matter of law, it is the Board's responsibility to adopt policies, hire employees, elect a President, appoint officers and personnel it deems necessary, fix salaries, assign job duties, set admission requirements, issue certificates, prescribe textbooks, and provide suitable furniture and equipment to promote the College's work. I.C. §§ 33-2107, 33-2109. Such powers are neither the right nor the responsibility of the President, and such broad powers implicitly include the right to place the President on leave with pay. Placing the President on leave with pay is a subset of the general right of the Board to buy-out the existing President's contract, and to replace him with a new President. Again, nothing in the Agreement prohibits such action by the Board.

Defendant's Opposition at 5.

To begin, neither party has claimed that the contract is ambiguous. "When the language of a contract is clear and unambiguous, its interpretation and legal effect are questions of law. An unambiguous contract will be given its plain meaning." *Bakker v. Thunder Spring-Wareham, LLC*, 141 Idaho 185, 190, 108 P.3d 332, 337 (2005). "The purpose of interpreting a contract is to determine the intent of the contracting parties at the time the contract was formed. To accomplish

this, the contract is to be viewed as a whole. The interpretation of a contract begins with the language of the contract itself.” *Caldwell Land & Cattle, LLC v. Johnson Thermal Sys., Inc.*, 165 Idaho 787, 796, 452 P.3d 809, 818 (2019) (citations and quotations omitted).

Where a written agreement is integrated, questions of the parties' intent regarding the subject matter of the agreement may only be resolved by reference to the agreement's language.” *AED, Inc. v. KDC Invs., LLC*, 155 Idaho 159, 165, 307 P.3d 176, 182 (2013) (quoting *Steel Farms, Inc. v. Croft & Reed, Inc.*, 154 Idaho 259, 267, 297 P.3d 222, 230 (2012)). “Thus, extrinsic evidence may not be used to determine whether a written and integrated contract is based upon consideration other than what is contained in the text of the contract.” *Id.*

The Agreement, in relevant part, provides:

Section 12. Termination

- 12.2 If, during its term, this Agreement is terminated by the President without cause, the termination shall become effective 60 days after receipt of written notice of termination. The obligations of both parties under this Agreement cease when the termination is effective. *The Board may, in its discretion, place the President on administrative leave during part or all of the 60-day notice.*
- 12.3 This Agreement may be terminated for cause, if a super-majority of the Board (defined as 4 or more Trustees) in its sole and reasonable discretion, determines that: (1) the President has significantly failed or refused to act in accordance with a material provision of this Agreement or any directive or order of the Board; (2) the President has exhibited gross misconduct or dishonesty in regard to his employment; (3) the President is (or has been) convicted of a crime, involving dishonesty, breach of trust, or physical or emotional harm to any person; (4) the President is unable to perform the essential function of the position; or (5) the President has acted in bad faith to the detriment of NIC.

Section 18. Entire Agreement:

This Agreement constitutes the entire understanding of the parties hereto and supersedes all prior or contemporaneous representations, understandings or agreements, whether written or oral, between the parties, and cannot be changed or modified unless in a writing signed by the parties hereto.

Defendant argues that because the Agreement “does not in any way restrict or otherwise prevent the Board from placing the President on administrative leave,” the Board is free to do so:

Plaintiff’s interpretation of the Agreement is a classic example of “the tail wagging the dog.” Plaintiff argues that under the **Employment** Agreement, the employee President is apparently in charge of the College, and can defy his employer, the College Board of Trustees (“Board”), and prohibit the Board from placing him on leave with pay, or from buying out his contract and selecting a new President.³ Clearly, the Agreement contains no term that prevents the College from buying out the Agreement, or placing him on paid leave. The Agreement only includes terms restricting **termination** of the Agreement, which could result in a deprivation of his contractual right to receive pay and benefits under the Agreement – but he has no corresponding protected “right” to serve in a particular position at the College. See, *Board of Regents v. Roth*, 408 U.S. 564, 576-77 (1972); *Thompson v. City of Idaho Falls*, 126 Idaho 587, 592-93 (1994).

Defendant’s Opposition at 4.

Under footnote 3, Defendant further contends:

Plaintiff’s broad interpretation of the Agreement prohibits the College from **ever** placing him on leave for **any** reason. As a result, if there were allegations the President had misappropriated funds, engaged in inappropriate sexual conduct, or had violated employee or student rights, the College would, under Plaintiff’s interpretation, **be powerless** to place him on leave while an investigation is conducted to determine whether grounds exist to terminate the contract.

Defendant’s Opposition at 4, n. 3 (emphasis in original). These arguments are meritless.

First, this court has no authority under Idaho law to imply terms to this Agreement that would grant authority to the Board to place Dr. Swayne on administrative leave without cause.

“In every contract there exist not only the express promises set forth in the contract but all such implied provisions as are necessary to effectuate the intention of the parties, and as arise from the specific circumstances under which the contract was made.” *Davis v. Prof'l Bus. Servs., Inc.*, 109 Idaho 810, 813, 712 P.2d 511, 514 (1985). *Terms cannot be inferred into a contract merely because the court believes they are reasonable. Archer v. Mountain Fuel Supply Co.*, 102 Idaho 852, 857, 642 P.2d 943, 948–49 (1982). The terms can be implied only if they were “necessarily involved in the contractual relationship so that the parties must have intended them and have only failed to express them because of sheer inadvertence or because they are too obvious to need expression.” *Id.* at 857–58, 642 P.2d at 948–49 (quoting from 17 Am. Jur. 2d *Contracts* § 255 at 651 (2d ed. 1964)).

Med. Recovery Servs., LLC v. Olsen, 160 Idaho 836, 839–40, 379 P.3d 1106, 1109–10 (2016) (emphasis added). In this case, the Agreement is a written and integrated contract and “therefore, the parties’ intent must be determined solely from the language of the agreement.” *AED, Inc.*, 155 Idaho at 165, 307 P.3d at 182. Nothing within the language of this Agreement permits the court to infer terms authorizing the Board to place Dr. Swayne on leave *without cause*. Nothing within the language of this Agreement suggests that such terms are “necessarily involved in the contractual relationship so that the parties must have intended them and *have only failed to express them because of sheer inadvertence or because they are too obvious to need expression.*” Nor would the court find such terms reasonable, even if the reasonableness of such a term was relevant to the court’s consideration.

Next, *Board of Regents v. Roth*, 408 U.S. 564, 576-77 (1972) and *Thompson v. City of Idaho Falls*, 126 Idaho 587, 592-93 (1994) are factually distinct and irrelevant to this case. In *Roth*, a professor was employed by a public university for a fixed term of one year. *Id.* at 566–67, 92 S.Ct. 2701. After the term had expired, the university informed the professor that he would not be rehired; but the university gave no reason for the decision and no opportunity to challenge the decision. *Id.* at 568, 92 S.Ct. 2701. The professor had no tenure rights to continued employment,

and state law “clearly [left] the decision whether to rehire a nontenured teacher for another year to the unfettered discretion of university officials.” *Id.* at 566–67, 92 S.Ct. 2701. Based on these facts, the United States Supreme Court held that the professor's liberty interest was not implicated and he was not entitled to procedural due process. *Id.* at 575, 92 S.Ct. 2701.

In *Thompson*, the Idaho Supreme Court considered plaintiff employee's argument that sections of an employment Code of Conduct detailing “just cause for ‘issuing warning, suspension, or dismissal,’” limited the grounds for disciplinary action to those set forth in the Code. The Court disagreed, finding that “the Code unequivocally states that ‘[t]hese examples are set out for the purpose of illustration and do not pretend (sic) to be all-inclusive.’” *Id.* Therefore, the Court determined the reasons for discharge “were clearly not confined to those twenty enumerated in the Code of Conduct.” *Id.*

Roth is irrelevant because Plaintiff is not claiming a liberty interest in continuing his future employment with NIC after the term of his employment agreement ends. Instead, Plaintiff is claiming an interest under the provisions of an existing written contract, whose term expires on June 30, 2025. *Thompson* is irrelevant because Plaintiff is not arguing that *his conduct* fell outside of the scope of an employee code of conduct. NIC has admitted that Dr. Swayne has not been disciplined by NIC, *Complaint*, ¶ 22; *Answer*, ¶ 6, and that Dr. Swayne is not “under any disciplinary process or accusation.” *Plaintiff's Exhibit 4*. Instead, the investigation NIC is conducting appears to focus on alleged violations to Open Meeting Laws during the formation of his contract.

Lastly, the court need not address whether “the Agreement prohibits the College from *ever* placing him on leave for *any* reason . . .” even if “there were allegations the President had misappropriated funds, engaged in inappropriate sexual conduct, or had violated employee or

student rights.” *Defendant’s Opposition* at 4, n. 3 (emphasis in original).⁵ The issue before the court is whether terms could be inferred from the language of the Agreement which would permit the Board to place Plaintiff on leave so that college counsel could investigate past potential Open Meeting Law violations.

The analysis in this case is simple. The Agreement contains no provision permitting NIC to place Dr. Swayne on administrative leave, nor does the plain language permit the court to infer such provision. Therefore, as a matter of law, the court determines that NIC did not have the authority to place Dr. Swayne on administrative leave without cause under the plain language of the Agreement.

2. The general powers of the Board did not permit NIC to place Dr. Swayne on administrative leave without cause.

The “[g]eneral powers of the board of trustees,” are enumerated in Idaho Code § 33-2107, which states in part:

The board of trustees of each community college district shall have the power:

- (1) To adopt policies and regulations for its own government and the government of the college;
- (2) To employ legal counsel and other professional and nonprofessional persons, and to prescribe their duties...

I.C. § 33-2107 (1)-(2). Idaho Code § 33-2109, states in part that “[t]he board of trustees shall elect a president of the college and, upon his recommendation, appoint such officers, instructors, specialists, clerks and other personnel as it may deem necessary; fix their salaries, and prescribe their duties.”

⁵ That issue concerns whether a term could be inferred to the Agreement due to an allegation of Plaintiff’s misconduct; an issue that is not before the court. Further, NIC has policies that address those situations, See Plaintiff’s Reply at 5, n. 2, while NIC does not have policies that address placing the president on leave.

In this case, Defendant contends that placing Dr. Swayne on leave was a subset of the Board's general powers:

[A]s a matter of law, it is the Board's responsibility to adopt policies, hire employees, elect a President, appoint officers and personnel it deems necessary, fix salaries, assign job duties, set admission requirements, issue certificates, prescribe textbooks, and provide suitable furniture and equipment to promote the College's work. *I.C.* §§ 33-2107, 33-2109. Such powers are neither the right nor the responsibility of the President, and such broad powers implicitly include the right to place the President on leave with pay. Placing the President on leave with pay is a subset of the general right of the Board to buy-out the existing President's contract, and to replace him with a new President.⁶ Again, nothing in the Agreement prohibits such action by the Board.

Plaintiff implicitly argues the Agreement replaces contract law which allows a party to terminate a contract at any time, though it does require payment to compensate for amounts owed under the contract (said another way, contract law does not prohibit a breach of contract – the law merely requires compensation for the loss caused by the breach).

Defendant's Opposition at 5 (emphasis in original). Put another way, Defendant's argument contends: The Board has the general power to terminate a president's contract. Placing a president on administrative leave with pay is a subset of the Board's general power to terminate. Therefore, the Board had the authority to place the president (Dr. Swayne) on administrative leave with pay on December 5 and 21, 2022.

The court notes that Defendant's argument is devoid of citations to legal authority. Further, the court determines that this argument is simplistic and in error. Specifically, Defendant's conclusion does not follow from its premises and Defendant's conduct contradicts its argument.

To begin, the court recognizes that the Board has the power to terminate a president's

⁶ These "general rights" to buy-out a president's contract or to replace a president appear to refer to the Board's general to terminate employment.

contract. Because Idaho Code § 33-2107 grants authority to a College Board of Trustees to elect a president and prescribe the president's duties, it would follow that the Board would likewise be able to terminate a president as an inherent power. In this case, the Board exercised its authority under § 33-2107 to hire a president when it entered into an employment contract with Dr. Swayne. By entering this employment contract, the parties undertook mutual "obligations that are enforceable or otherwise recognizable at law," *Black's Law Dictionary* 318 (7th ed. 1999). Under this Agreement, the Board was permitted to terminate Dr. Swayne "for cause" and only in the event that "a super-majority of the Board determine[d] that" Mr. Swayne committed some form of misconduct enumerated under subsection 12.3:

This Agreement may be terminated for cause, *if a super-majority of the Board* (defined as 4 or more Trustees) in its sole and reasonable discretion, determines that: (1) the President has significantly failed or refused to act in accordance with a material provision of this Agreement or any directive or order of the Board; (2) the President has exhibited gross misconduct or dishonesty in regard to his employment; (3) the President is (or has been) convicted of a crime, involving dishonesty, breach of trust, or physical or emotional harm to any person; (4) the President is unable to perform the essential function of the position; or (5) the President has acted in bad faith to the detriment of NIC.

Plaintiff's Exhibit A. By entering the Agreement NIC drafted and signed, the Board's general authority to terminate Dr. Swayne was limited by the contract's plain language. Consequently, when the Board now seeks to invoke *its termination powers* to justify conduct that is not permitted by the plain language of this Agreement, those same limitations NIC adopted must be considered.

Defendant's second premise *may* be true; Defendant has not provided legal authority to support its premise that placing a president on paid administrative leave is a subset of the Board's general power to terminate. Even if the court accepts Defendant's claim as true, Defendant's conclusion does not follow from these two claims. Specifically, the conclusion falsely suggests

that the Board could invoke this claimed power under the circumstances that were present during the December meetings.

Here, Defendant claims that it had the authority to place the Dr. Swayne on administrative leave with pay as a subset of its general power to terminate. To invoke this power under the terms of the Agreement, the Board needed to determine that Dr. Swayne committed some form of misconduct enumerated under subsection 12.3. Instead, the Board placed Dr. Swayne on an administrative leave without cause, by a simple majority vote, to investigate whether the Board violated Open Meeting Law months prior. This action exceeded the Board's authority.

Defendant's own actions further belie its premises and conclusion. To his credit, Art Macomber apparently searched for authority to place Dr. Swayne on leave under NIC's policies. After learning that the College lacked a written policy to place a president on leave, he invoked North Idaho College Procedure # 3.02.31 as a template to guide the College. Procedure # 3.02.31 permits NIC's Vice President for Instruction to immediately suspend a Tenured Faculty member, for cause and with pay, for up to three months in order to conduct an investigation into allegations of improper conduct or behavior.

Using Procedure # 3.02.31 as guideline is problematic, because it is largely irrelevant to circumstance in which the Board placed Dr. Swayne on leave. Dr. Swayne is the Chief Executive Officer of NIC and not a tenured faculty member, Dr. Swayne has not been accused of misconduct, *see Complaint*, ¶ 22; *Answer*, ¶ 6; *see also Plaintiff's Exhibit 4*, and the Board's claimed purpose for opening the investigation was to examine "certain governance concerns, and or missteps made by others[.]" *Plaintiff's Exhibit 4* (emphasis added). Of further concern to the court is that Dr. Swayne has now been on leave for nearly three months, without any updates concerning the status of the investigation, or how the potential "missteps made by others" could "impact [his] position

and contract.” *Plaintiff’s Exhibit 4*. It appears to the court that, notwithstanding the other concerns listed, the Board is on the cusp of violating an additional provision of its template by keeping Dr. Swayne on leave past three months.

In sum, the court determines that the Board did not have general or inherent powers to place Dr. Swayne on administrative leave without cause. Consequently, the court determines that Plaintiffs have demonstrated a substantial likelihood of success on the merits, Plaintiff is entitled to the relief requested, and Plaintiff has satisfied his burden under Rule 65(e)(1).

B. Rule 65(e)(2): Irreparable injury to the plaintiff.

Next, the court must consider whether Plaintiff has established that, in the absence of a preliminary injunction, “it appears that irreparable injury will flow from its refusal.” *Munden*, 169 Idaho at 829, 504 P.3d at 365. Idaho Rule of Civil Procedure 65(e)(2), states that a preliminary injunction may be granted

when it appears by the complaint or affidavit that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury to the plaintiff;

Rule 65(e)(2).

As a preliminary matter, Defendant claims that the Motion for a Preliminary Injunction should be denied because Plaintiff’s Complaint did not include a claim for damages:

The Complaint . . . does not request relief from any type of injury, harm or damages; instead it merely asks the Court to interpret his Employment Agreement with North Idaho College (“Agreement”), and reinstate him from paid administrative leave as President of North Idaho College (“College”). (*Complaint*, ¶¶ 27-29). Given the Complaint’s lack of any claim or allegation of future injury, harm or damage, the Motion clearly fails to satisfy the requirements of Rule 65(e) of the Idaho Rules of Civil Procedure.

Defendant’s Memorandum in Opposition to Plaintiff’s Motion for Preliminary Injunction

(“Defendant’s Opposition”) at 4. This argument is not supported by citation to legal authority. Rule 65 does not require a party to claim damages prior to seeking a preliminary injunction. In order to accept Defendant’s argument as true, the court would be required to ignore the language of Rule 65(e)(2), which states that a preliminary injunction may be granted “when it appears by the complaint *or affidavit* that the commission or continuance of some act *during the litigation* would produce waste, or great or irreparable injury to the plaintiff[.]” Further, Rule 65(e)(2) and (3) both address harms that occur “*during the litigation.*” See I.R.C.P 65(e)(2) and (3). Idaho law does not require a plaintiff to plead speculative, future harms in their Complaint that *may occur* as an essential element of their request for preliminary relief under Rule 65. In short, this argument is without merit.

Here, Plaintiff contends that “[w]ithout a preliminary injunction to preserve the status quo, Dr. Swayne will experience great or irreparable injury.” *Plaintiff’s Memo* at 11.

NIC’s actions are causing harm to Dr. Swayne for which there is no adequate legal remedy. Specifically, NIC is taking actions which place the goodwill, accreditation and financial future of NIC at risk, all of which are basis’ (sic) on which Dr. Swayne will be evaluated according to his Agreement.

Plaintiff’s Memo at 11-12.

Not only is Dr. Swayne being prevented from performing the duties outlined in the Agreement, but NIC is altering the future of the institution with which Dr. Swayne contracted. The loss of goodwill and the loss of accreditation will be a prominent stain on Dr. Swayne’s reputation and are factors which will affect his ability to perform pursuant to his Agreement.

Plaintiff’s Memo at 14.

“The object of injunctive relief is to prevent injury, threatened and probable to result, unless interrupted.” *Gem State Roofing, Inc. v. United Components, Inc.*, 168 Idaho 820, 834, 488 P.3d 488, 502 (2021) (quoting *Miller v. Ririe Joint Sch. Dist. No. 252*, 132 Idaho 385, 388, 973

P.2d 156, 159 (1999) (citation omitted). In the event that an Idaho rule is nearly identical to a federal rule, the Idaho Supreme Court prefers “to interpret the Idaho Rules of Civil Procedure in conformance with interpretations of the same language in the federal rules . . . thus, [the Court] may look not only to Idaho authority, but also to cases interpreting the federal rule to establish the legal standards applicable to the specific choices available to the district court.” *Nelsen v. Nelsen*, 170 Idaho 102, 508 P.3d 301 (2022). In *Munden v. Bannock Cnty.*, the Idaho Supreme Court stated that “Federal Rule of Civil Procedure 65 is virtually identical to IRCP 65. *See* F.R.C.P. 65. Therefore, commentary on the federal rules is instructive here.” 169 Idaho 818, 829, 504 P.3d 354, 365 (2022).

Irreparable harm is traditionally defined as “harm for which there is no adequate legal remedy, such as an award for damages.” *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 677 (9th Cir. 2021) (citing *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014)). Because intangible injuries generally lack an adequate legal remedy, “intangible injuries [may] qualify as irreparable harm.” *Arizona Dream Act Coal.*, 757 F.3d at 1068 (quoting *Rent –A–Center, Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir.1991)). The court finds this commentary instructive. Here, the court determines that the types of injuries alleged by Plaintiff qualify as “harm for which there is no adequate legal remedy.” The court further determines that Plaintiff has demonstrated that irreparable harm is threatened and probable to result, unless interrupted.

1. Plaintiff has establish a clear showing that he will suffer irreparable harm in the absence of preliminary relief.

In August 2022, Dr. Swayne accepted the responsibility to act “as the Chief Executive Officer of NIC . . . authorized and responsible for the administration of NIC,” and was granted “authority over all matters affecting NIC at the operational level” until June 30, 2025. *Plaintiff’s*

Exhibit 1. By September 2022, Dr. Swayne received an email from NIC Trustee Todd Banducci, which referenced Swayne being done or gone in “52 days,” or following the November elections for the vacant positions on the NIC Board of Trustees. Trustee Banducci’s prediction proved to be accurate.

Following these elections, the new majority of the Board stripped all authority from Dr. Swayne and hired an attorney who immediately stated his intention to review Dr. Swayne’s contract. A mere three days passed before the Board’s majority stated it was initiating an investigation into Open Meeting Law violations that NIC allegedly committed and placed Dr. Swayne on administrative leave without cause. The Board’s majority claimed that placing Dr. Swayne on leave was necessary to protect him and “to facilitate [Mr. Macomber’s] investigation of certain governance concerns, and or missteps made by others, either of which may impact his position and contract.”

However, any action the Board may have taken due to its prior alleged violations of Idaho’s Open Meeting Laws are now time barred. Idaho Code § 74–208 addresses the enforcement mechanisms and remedies available when there has been a violation of the Open Meeting Law. Pursuant to § 74–208(6):

Any suit brought for the purpose of having an action declared or determined to be null and void pursuant to subsection (1) of this section shall be commenced within thirty (30) days of the time of the decision or action that results, in whole or in part, from a meeting that failed to comply with the provisions of this act. Any other suit brought under the provisions of this section shall be commenced within one hundred eighty (180) days of the time of the violation or alleged violation of the provisions of this act.

(emphasis added). Under § 74–208(6), a cause of action arising under Idaho’s Open Meeting Laws to void the Agreement with Dr. Swayne needed to be commenced thirty days after NIC entered into the employment contract. “Any other suit” needed to commence within 180 days after NIC

entered into the employment contract (before the end of January, 2023). Defendant failed to file a suit. Despite this fact, Dr. Swayne remains on administrative leave and has still not received any updates on this investigation, which apparently commenced three months ago.

Next, the Board's majority then hired a new "Interim" President for a term that "will continue at least until June 30th, 2024" unless terminated "by mutual agreement, for no cause by either party with conditions,⁷ or for cause by NIC." *South Employment Agreement*. Despite conveying the title of "Interim" President, nothing in this agreement explicitly contemplates an event in which Dr. Swayne is reinstated. In other words, nothing in this contract demonstrates that the hiring of Dr. South was intended to be an interim placement. While NIC may certainly hire someone to fill a temporary vacancy, Idaho Code § 33-2107 does not permit NIC to hire a second, permanent president with responsibilities that are virtually identical to the first president's responsibilities.

Since Dr. Swayne's absence in December 5, 2022, NIC now faces the loss of its accreditation and significant threats to its overall institution due to the Board's conduct, including:

- Frequent changes in leadership with little to no input from relevant stakeholders, without following institutional policies and procedures.
- Uncertainty as to who is the Chief Executive Officer at North Idaho College, with a regular president placed on administrative leave (Swayne) and an interim president (South) appointed concurrent with the regular president.
- Declining enrollments, including termination of partnership with STEM Charter Academy, with concomitant reduction in tuition revenue.
- Continued exodus of faculty, staff, and senior administrators.
- Decision with little to no input to expand athletics program and to change athletics conference with potential added costs.
- Multiple No Confidence Resolutions from the Associated Students of NIC, NIC Faculty Assembly, and NIC Staff

⁷ Subsection 12.2 of the South Employment Agreement states that "[i]f, during its term, this Agreement is terminated without cause by NIC, the Interim President will be paid an amount equal to twelve (12) months of his base pay."

Assembly.

- Risk of significant financial stress, including but not limited to:
 - Expanded payroll for two presidents, interim provost, and special assistant to the interim president, along with moving expenses, and other contracted charges and/or obligations.
 - Significantly increased insurance costs with higher deductibles.
 - Moody's Bond Rating review for potential downgrade.
 - Declining donor support.

Plaintiff's Exhibit 6, NWCCU letter dated February 9, 2023.

"The duty of good faith and fair dealing is implied in every contract." *Indep. Sch. Dist. of Boise City v. Harris Fam. Ltd. P'ship*, 150 Idaho 583, 589, 249 P.3d 382, 388 (2011). It "is an objective determination of whether the parties have acted in good faith in terms of enforcing the contractual provisions." *Id.* (quoting *Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 243, 108 P.3d 380, 390 (2005)). "An action by one party that violates, qualifies or significantly impairs any benefit or right of the other party ... violates the covenant." *Id.*

In the most charitable light, the Board's initial decision to place Dr. Swayne on leave without cause can be characterized as misguided. However, the Board's decision to keep him on leave without cause is hostile and arbitrary. The court notes that, when Open Meeting Law violations occurred in the December 5, 2022, and December 8, 2022, Board of Trustee meetings, the Board corrected those errors within weeks, not months, and without the Board placing Mr. Macomber on leave. To the court, it appears that the investigation is a sham and a pretext for Dr. Swayne's removal from his position as President. This conduct violates the covenant of good faith and fair dealing and constitutes a sustained harm against Dr. Swayne by the Board.

In this case, the Board's majority has wrongfully locked its captain in the brig while steering NIC toward an iceberg. Through this Preliminary Injunction, Plaintiff seeks the

opportunity to steer NIC to safety and protect himself from the Board majority's wrongful actions. The court will grant Dr. Swayne this opportunity. The court finds that, as the Chief Executive Officer of NIC, Dr. Swayne has a unique interest in the overall well-being of the institution. He is contractually "authorized and responsible for the administration . . . and has authority over all matters affecting NIC at the operational level." Plaintiff will likely suffer irreparable harm to this interest due to the continuous and unjustified interference with his authority as Chief Executive Officer during a time when NIC faces significant institutional threats. Plaintiff will likely suffer irreparable harm by being bound to the decisions being made in his absence by the Interim President the Board's majority has installed. The court further finds that Plaintiff will likely suffer irreparable harm to his reputation and future evaluations. Each of these separate, irreparable harms will likely occur absent preliminary injunctive relief.

In short, the court determines that Plaintiff has met his burden under Rule 65(e)(2).

C. Rule 65(e)(3): Requested judgment ineffectual

Rule 65(e)(3) states that a preliminary injunction may be granted:

- (3) when it appears during the litigation that the defendant is doing, threatening, procuring or allowing to be done, or is about to do, some act in violation of the plaintiff's rights, respecting the subject of the action, and the action may make the requested judgment ineffectual;

As discussed above, the Board's decision to keep Dr. Swayne on leave without cause violates his contractual rights. By keeping Dr. Swayne on leave, the Board is permitting its Interim President to make discretionary decisions that should be made by Dr. Swayne. These decisions include: hiring and firing administrative positions, filling the President's Cabinet, potential changes to the college's athletic conference and evaluating the pay and employment status of the coaches. These decisions, for better or worse, will likely be binding, and will likely be viewed in connection with

his future evaluations. By delaying injunctive relief, the decisions made in Dr. Swayne's absence would likely render the requested future judgment ineffectual. Therefore, the court further finds that the requirements of Rule 65(e)(3) have been met, and that an injunction should be issued upon that ground as well.

IV. CONCLUSION AND ORDER

The court determines that Plaintiff has met his burden under Idaho Rule of Civil Procedure 65(e)(1),(2), and (3). Thus, Plaintiff's Motion for Preliminary Injunction is granted.

ORDER:

Based on the foregoing and good cause appearing therefore,

IT IS HEREBY ORDERED,

Plaintiff's Motion for Preliminary Injunction is granted.

Defendant is ordered to immediately take Plaintiff off administrative leave and to reinstate Plaintiff as the active President of North Idaho College for the duration of this litigation.

DATED this 3rd day of March 2023.

BY THE COURT:


Cynthia K.C. Meyer
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on the 3 day of March 2023, I caused, to be served, a true and correct copy of the foregoing document as addressed to:

Tara Malek,
Katie L. Daniel,
Kyle A. Engels,
Smith + Malek,
601 E. Front Street, Suite 304
Coeur d'Alene, ID 83814
(208) 215-2411
service@smithmalek.com

☒ Email

Bret A. Walther
ANDERSON, JULIAN & HULL
C.W. Moore Plaza
250 S. 5th Street, Ste. 700 / POB 7426
Boise, ID 83707-7426
bwalther@ajhlaw.com
service@ajhlaw.com

☒ Email

Kelly M. Drew
Brittney C. Adams
GORDON REES SCULLY MANSUKHANI
999 W. Main Street, Ste. 100
Boise, ID 83702
kdrew@grsm.com
badams@grsm.com

☒ Email



Deputy Clerk