

Van Heerden is not entitled to a lifetime of employment with LSU. When his current contract expires on May 21, 2010, he has no further rights to continued employment with LSU. Similarly, he is a free agent and entitled to seek employment elsewhere, and LSU has no further rights to his services.

Although Van Heerden claims that he needs and is entitled to emergency injunctive relief, the glaring fact is that Van Heerden has been aware for one year that his current contract would not be renewed by LSU, but he has waited until the last minute to file his motion for TRO and/or other injunctive relief. He admits in his Petition that he was advised by LSU on April 9, 2009, that his contract would expire on May 21, 2010. He waited exactly one year from being notified that his contract would not be renewed to file his motion on April 9, 2010. After waiting a full year to take any action, Van Heerden now asks the Court for the immediate and extraordinary remedy of a TRO and/or other injunctive relief. As discussed below, Van Heerden does not meet any of the required legal elements for injunctive relief, and his motion should be denied.

I. FACTUAL BACKGROUND

Van Heerden was hired by LSU in 1992. Throughout his employment with LSU, and specifically since joining the College of Engineering (“COE”) in the Department of Civil and Environmental Engineering (“CEE”), Van Heerden has always been denominated as an Associated Professor-Research, a non-tenure track position. As Van Heerden was well aware, his annual

reviews by the Chair of the CEE since March 2001 have reflected that 100% of his evaluation was based upon research. Van Heerden is not, and has never been, a tenure track professor at LSU.

As an Associate Professor-Research, Van Heerden's employment is governed by LSU Policy Memorandum ("PM-23"), paragraph 16. PM-23 expressly states that "[i]ndividuals in these ranks [i.e. Associate Professor-Research] do not acquire tenure through the passage of time and may become tenured only by specific individual recommendation through appropriate channels and approval by the President. As an Associate Professor-Research, Van Heerden was a term appointed contract employee of LSU, not a tenure track professor. Just like other term appointed contract employees, when the contract expires, Van Heerden has no further legal right to continued employment at LSU.

Van Heerden admits in his Petition that he has been employed by LSU under a series of contract appointments. In recent years he has been employed by LSU under several one-year appointments, the most recent of which will expire on May 21, 2010. Although not mentioned in this lawsuit against four LSU Administrators, Van Heerden's past reappointments have been far from unanimous. In fact, in 2008, Van Heerden's faculty peers in the CEE (not LSU Administrators) were evenly divided (7 for, 7 against and 1 abstention) on whether Van Heerden should be reappointed for the 2008-2009 academic year. Interestingly, CEE Chair Voyiadjis (who is now being sued by Van Heerden in this case) made the decision to reappoint Van Heerden for another year despite the

fact that Van Heerden did not even receive the majority approval of his own faculty peers. The decision to reappoint Van Heerden for 2008-2009 was ultimately approved by the LSU Administration. The 2008-2009 contract expired on May 15, 2009.

In April 2009, Van Heerden's annual contract again came up for consideration. Then Interim Dean David Constant made the decision that Van Heerden's contract with LSU would not be renewed. Constant's non-renewal of Van Heerden's contract was made without cause and was not performance based. Dean Constant's decision was authorized pursuant to the Bylaws and Regulations of the LSU Board of Supervisors¹ and other applicable LSU regulations.² Chapter II, Section 2-7 of LSU's regulations specifically states that "[u]pon expiration of a term appointment, the employee becomes a free agent to whom the University System has no obligation." This section further states that "[n]on- reappointment carries no implication whatsoever as to the quality of the employee's work, conduct, or professional competence." Contrary to Van Heerden's apparent belief, he was not singled out for non-renewal. Several other term appointed contract employees were also not renewed by the COE both before and after Van Heerden.

Van Heerden was not immediately released, but was instead given one full "terminal year"

¹ See LSU Regulations Chapter II, Section 2-7, attached as Exhibit."A".

² See LSU Policy Statement (PS - 36), Section V.A.1, which expressly provides that reappointment is solely at the initiative of the University, attached as Exhibit."B".

of employment following the non-renewal decision. Thus, even though he was notified in early April 2009, that his contract was not going to be renewed, he was allowed to continue his employment in the COE for the full 2009-2010 academic year. As reflected in the letter provided to Van Heerden by Dean Constant dated April 3, 2009, Van Heerden's contract would not expire until May 21, 2010. The obvious purpose of giving Van Heerden one full terminal year of employment was to provide him ample opportunity to seek other employment opportunities both on and off campus. If Van Heerden has failed to use this one year opportunity to find other employment, he should not be permitted to use his own failure as an excuse to compel LSU to continue to employ him beyond the expiration of his contract.

Faced with LSU's proper non-renewal of his contract, Van Heerden tells a story of the purported impairment of his free speech and retaliation for alleged "whistle-blowing" on the U. S. Army Corps of Engineers ("Corps of Engineers") following Hurricane Katrina. His affidavit is riddled with factual inaccuracies and self-supporting conclusory statements and opinions to "support" his allegations. However, many of the statements made in Van Heerden's Affidavit are not even based on his own personal knowledge. For example, he alleges in his Affidavit that then Chancellor O'Keefe "told the plaintiffs' lawyer that I would be fired if I testified against the Corps." He thereafter alleges that LSU "prohibited me from testifying as an expert witness ..." Van Heerden fails to mention that LSU did not, in fact, make any decision to prohibit Van Heerden from

testifying. In reality, LSU sent a Memorandum to Van Heerden in August, 2007, asking for additional information in order to properly analyze and respond to Van Heerden's request to LSU to engage in "outside employment" and Van Heerden failed to even respond to LSU's request for additional information.³ This is just one of the many inaccurate statements by Van Heerden which he claims somehow entitle him to injunctive relief.

Van Heerden also contends that the non-renewal of his contract which expires in May 2010, is somehow linked to negative statements that he made about the Corps of Engineers many years ago following Hurricane Katrina. Van Heerden complains that LSU tried to impair his free speech in 2005 and/or 2006 and that these purported actions somehow relate to the decision made in 2009 not to renew his contract in 2010. Van Heerden does not bother to advise the Court that his contract came up for annual renewal multiple times during the interim between 2005 and 2010 and was in fact renewed during prior periods. Van Heerden complains about purported statements by then Chancellor Sean O'Keefe, Michael Ruffner and Harold Silverman. All of these individuals are former administrators who were not even employed by LSU in April 2009 and had no involvement in the decision not to renew Van Heerden's recent contract. Putting aside the lack of relevance of many of the allegations, and even if the allegations are accepted as true (which is denied), the

³ See Memorandum from Doris Carver to Ivor Van Heerden letter dated August 10, 2007, attached as Exhibit "C".

purported statements of these former LSU administrators have no nexus in either time or identity of the decision maker with respect to the action for which he seeks injunctive relief - - - i.e. non-renewal of Van Heerden's contract which expires in May 2010. As attested by Dean Constant, the decision not to renew Van Heerden's contract had nothing to do with his criticisms of the Corps of Engineers.⁴

Van Heerden's other major complaint is that he was subjected to retaliation as a so-called "whistle blower" because of his criticisms of the Corps of Engineers. He alleges in his Affidavit that LSU was so concerned about losing funding from the Corps of Engineers that he was threatened and warned about his speech. Once again, Van Heerden's allegations are not supported by the facts. LSU gets only a very small amount of funding from the Corps of Engineers. During the period from 2005 to the present, LSU has received project funding from the Corps of Engineers which totals less than \$100,000 for the entire five year period. This amount is not significant when compared to total funding from other outside sources of between \$130 million and \$150 million per year during this

⁴See David Constant Affidavit, attached as Exhibit "D". Defendants submit this Affidavit for purposes of this TRO application without waiving any right to expand upon the information therein or to provide additional Affidavits or testimony in any subsequent proceedings in this matter.

same time period.⁵ As Dean Constant attests, the non-renewal decision had nothing to do with the purported loss of any funding from the Corps of Engineers.⁶ Van Heerden's motion for TRO and/or other injunctive relief should be denied by this Court. As discussed below, he cannot and does not meet any of the legal elements necessary to be granted the extraordinary relief that he now seeks, one full year after being advised that his current contract, which expires on May 21, 2010, would not be renewed.

II. LAW AND ARGUMENT

A. Issuance Of An Ex Parte Temporary Restraining Order Is Improper

Van Heerden is seeking an immediate temporary restraining order, and in due course a preliminary and permanent injunction which would prohibit LSU from "terminating and/or otherwise terminating plaintiff's employment, alternatively, ordering the immediate reinstatement of [plaintiff] to his position in the faculty ranks of LSU..." Motion, Pg. 5-6. In other words, he is seeking a court order requiring LSU to renew his contract once it expires on May 21, 2010. Rule 65(b) of the Federal Rules of Civil Procedure requires that in order to obtain an ex parte restraining order the

⁵See Chuck Wilson Affidavit, attached as Exhibit "E". Defendants submit this Affidavit for purposes of this TRO application without waiving any right to expand upon the information therein or to provide additional Affidavits or testimony in any subsequent proceedings in this matter.

⁶See David Constant Affidavit, attached as Exhibit "D".

applicant must show that “immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition” (Emphasis Added). The issuance of an ex parte temporary restraining order is an emergency procedure and is appropriate only when the applicant is in need of immediate relief. 11A Federal Practice and Procedure §2951. In this instance, there is certainly no emergency. Further, Plaintiff will not suffer any irreparable harm in connection with the non-renewal of his contract. Van Heerden’s urgency in seeking a temporary restraining order is belied by the fact that LSU advised him that it would not renew his contract on April 9, 2009 and yet he failed to seek this drastic emergency relief for one full year. If this matter merited a TRO, plaintiff would have and should have sought such relief much earlier. *See Nickerson-Malpher v. Baldacci*, 560 F. Supp. 2d 72 (D. Me. 2008)(plaintiff would not suffer irreparable harm in the absence of a TRO against state officials, pursuant to the owner's § 1983 suit for allegedly unlawful seizure, given that the seizure occurred over one and one-half years prior to plaintiff’s motion for a TRO); *RCM Technologies, Inc. v. RCM Technologies, Inc. v. Beacon Hill Staffing Group, LLC*, 502 F. Supp. 2d 70 (D.D.C. 2007)(Plaintiff company was not likely to suffer irreparable harm in the absence of a TRO against defendant company and three former employees of plaintiff, enjoining alleged violations of non-competition agreements, when plaintiff had waited eight months after the first employee went to work for defendant, and almost four months after the action was filed, to seek a TRO).

B. Neither A TRO Nor Other Injunctive Relief Is Appropriate

Temporary restraining orders and preliminary injunctions are extraordinary relief and rarely issued. *Albright v. City of New Orleans*, 46 F.Supp.2d 523 (E.D.La.,1999). The primary justification for granting such extraordinary relief is to preserve the Court's ability to render a meaningful decision on the merits. *Canal Authority of State of Florida*, 489 F.2d 567, 572 (5th Cir.1974). The Fifth Circuit has held that relief in the form of a temporary restraining order or a preliminary injunction is available only where the mover shows: 1) a substantial likelihood of success on the merits; 2) a substantial threat that failure to grant the injunction will result in irreparable injury; 3) that the threatened injury outweighs any damage that the injunction may cause the opposing party; and 4) that the injunction will not disserve the public interest. *Anderson v. Jackson*, 556 F.3d 351, 360 (5th Cir.2009); *Allied Marketing Group, Inc. v. CDL Marketing, Inc.*, 878 F.2d 806 (5th Cir.1989); *Conlay v. Baylor College of Medicine*, 2010 WL 774162 (S.D. Tex. March 3, 2010). The decision to grant a preliminary injunction is to be treated as the exception rather than the rule. *Mississippi Power & Light Co. v. United Gas Pipe Co.*, 760 F.2d 618, 621 (5th Cir. 1985). A preliminary injunction should be denied if it appears that the applicant has an adequate alternative remedy in the form of money damages or other relief. 11A Fed. Prac. & Proc. § 2948.1, pp. 149-151 (1995).

A preliminary injunction “is an extraordinary and drastic remedy, not to be granted routinely,

current contract on May 21, 2010. As this Court is well aware, claims of defacto tenure have been routinely and summarily rejected by this Court and others. See, *Huang v. Louisiana State Board of Trustees for State Colleges and Universities*, 1999-2805 (La. App. 1 Cir. 12/22/00), 781 So.2d 1; *Spuler v. Pickar*, 958 F.2d 103 (5th Cir. 1992); *Scott v. Ouachita Parish School Board*, 33,964 (La. App. 2 Cir. 2000), 768 So.2d 702; *Jones v. Southern University and A&M College*, 96-1430 (La. App. 1 Cir. 1997), 693 So.2d 1265; *McKenzie v. Webster Parish School Board*, 609 So. 2d 1028 (La. App. 2 Cir. 1992); *Wilhelm v. Vermillion Parish School Board*, 598 So. 2d 699 (La. App. 2 Cir. 1992); *Staheli v. University of Mississippi*, 854 F.2d 121 (5th Cir. 1988); *Levi v. University of Texas at San Antonio*, 840 F.2d 277 (5th Cir. 1988); and *Wells v. Dolland*, 711 F.2d 670 (5th Cir. 1983). Van Heerden certainly cannot show any likelihood of success on the merits with respect to his defacto tenure claim.

Also as discussed above, Van Heerden's self-serving claims of impingement of his free speech and/or retaliation by former LSU administrators for his criticism for the Corps of Engineers are not sufficient to support injunctive relief. Despite the fact that these allegations are vehemently disputed (as evidenced by Defendants' 42 page Answer and Affirmative Defenses), Van Heerden cannot begin to show a connection (in time or actor) between (1) the purported statements by the former LSU administrators allegedly made years ago, and (2) the non-renewal of his current contract which expires on May 21, 2010. As demonstrated by the Affidavit of Interim Dean Constant, his

decision not to renew Van Heerden's one year contract was wholly unrelated to the alleged actions which purportedly took place years before the non-renewal decision by persons who had long departed the LSU administration. Van Heerden has not and cannot begin to show a likelihood of success on the merits.

2. Irreparable Injury

Irreparable injury is not presumed. It must be proven. Van Heerden cannot establish that he will suffer irreparable injury in this case and, therefore, he is not entitled to injunctive relief.

i. Plaintiff Must Establish Irreparable Injury

Plaintiff claims that he is not required to establish irreparable harm because it is "presumed from violations of the civil rights statutes...", citing *U.S. v. Hayes International Corp.*, 415 F.2d 1038, 1045 (5th Cir. 1969); *EEOC v. Cosmair*, at 1090; *Murry v. American Standard, Inc.* 488 F.2d 529, 531 (5th Cir. 1973 and *Middleton-Keirn v. Stone*, 655 F.2d 609 (5th Cir. 1981). However, the EEOC is not a party to this case and the cases by Van Heerden are inapplicable.⁷ Both *United States v. Hayes Int'l Corp.*, 415 F.2d 1038, 1045 (5th Cir.1969), and *EEOC v. Cosmair, Inc.*, 821 F.2d

⁷In *Hayes*, the Fifth Circuit held that irreparable harm is presumed whenever the EEOC is seeking preliminary relief for Title VII complainants pending final disposition of a charge since the fact that the EEOC is authorized to seek the injunction by statute satisfies the irreparable injury requirement. In *Cosmair*, the Fifth Circuit extended the *Hayes* presumption to the EEOC's enforcement of ADEA cases, since the public interest protected by EEOC's enforcement of the ADEA is sufficient to dispense with the requirement of proving irreparable harm.

1085, 1090 (5th Cir.1987), held only that irreparable harm need not be proven if (1) the injunctive relief is sought pursuant to statute by the appropriate government officer or agency and (2) all of the statutory prerequisites are met. There is no way to read these cases as eliminating generally the irreparable harm requirement for all civil rights plaintiffs. These cases have absolutely no application to the instant case. Despite earlier case law suggesting otherwise (*e.g. Middleton-Keirn v. Stone*, 655 F.2d 609 (5th Cir. 1981)), the Fifth Circuit made clear in *White v. Carlucci* that there is no Fifth Circuit precedent “eliminating generally the irreparable harm requirement for all Title VII plaintiffs.” 862 F.2d 1209, 1211 (5th Cir. 1989). *See also, Conlay v. Baylor*, 2010 WL 774162 (S.D. Tex. March 3, 2010). Because Van Heerden is not seeking relief under a statute which expressly authorizes a presumption of irreparable injury for private litigants, he is not excused from the irreparable harm requirement.

Van Heerden also incorrectly attempts to classify his request for injunctive relief as a request seeking relief from a First Amendment violation in an effort to fall within the narrow line of cases which recognize that a loss of First Amendment freedoms creates the presumption of irreparable injury.⁸ This argument is without merit. The cases relied upon by Plaintiff for this proposition involve matters where a plaintiff is seeking injunctive relief from an ongoing First Amendment or

⁸LSU Bylaws Article VIII, Section 1, specifically recognizes the principle of academic freedom, but properly states that “[w]hen a member of the academic staff is not officially designated to represent the University System, the staff member must indicate clearly that he or she is speaking as an individual citizen.” See attached Exhibit. “F”.

privacy violation. Van Heerden cites *Deerfield Medical Center v. City of Deerfield Beach*, 661 F.2d 328 (5th Cir. 1981), wherein the court held that a finding of irreparable injury is mandated when the privacy rights of pregnant women seeking an abortion were either threatened or in fact being impaired. The other case cited by Van Heerden, *Ingebresten v. Jackson Public School District*, 88 F.3d 274, 281 (5th Cir. 1996), is also inopposite. In *Ingebresten*, students, parents, and a civil liberties organization brought suit against a school district, school officials, and a state Attorney General challenging a state statute permitting public school students to initiate prayer at school events as violative of the establishment clause. The district court granted a preliminary injunction to enjoin enforcement of the statute. The Fifth Circuit found that the plaintiffs established that the statute is constitutionally unsound and that it represents a substantial threat to plaintiffs' First Amendment rights and that therefore, plaintiffs are not required to make an additional showing of irreparable harm.

In the instant case, Van Heerden is seeking to force LSU to renew a contract which will properly expire on May 21, 2010. Van Heerden cites no case where the court presumed irreparable harm and required the defendant employer to renew a contract and continue to employ an employee during the pendency of similar litigation. In fact, similar cases have reached the exact opposite result. See *Holcomb v. City of Tupelo*, 2009 WL 87420 (N.D. Miss. 2009) and *Keating v. Univ. of South Dakota*, 386 F.Supp.2d 1096, wherein courts required the plaintiff to establish the element of

irreparable injury when seeking a preliminary injunction related to retaliation in employment for asserting First Amendment rights. Moreover, even if this Court were to consider a presumption of irreparable harm in this case, Van Heerden's delay in seeking injunctive relief rebuts any presumption of irreparable harm. The law is well settled that undue delay demonstrates that there is no urgency and is "of itself sufficient to rebut the presumption of irreparable harm." *Polymer Techs. Inc. v. Birdwell*, 103 F.3d 970, 973 (Fed. Cir. 1996). As discussed below, Van Heerden cannot establish irreparable harm.

ii. Plaintiff Cannot Establish Irreparable Injury

The "threat of irreparable injury is 'perhaps the single most important prerequisite for the issuance of a preliminary injunction.'" 11A Federal Practice and Procedure Civil 2d § 2948.1 (1995). Indeed, the Supreme Court has stated "that the basis of injunctive relief in the federal courts has always been irreparable harm and **inadequacy of legal remedies**[" (Emphasis added). *Sampson v. Murray*, 415 U.S. 61, 88, 94 S.Ct. 937, 39 L.Ed.2d 166 (1974). Irreparable harm requires a showing that: (a) harm to the plaintiff is imminent; (b) the injury would be irreparable; and (c) **the plaintiff has no other adequate legal remedy**. See *Chacon v. Granata*, 515 F.2d 922, 925 (5th Cir.1975).

Van Heerden cannot allege irreparable harm because he has sought relief under §1983 and under that statute a broad range of relief, including monetary damages, is available. Temporary loss

of income, ultimately to be recovered, does not normally constitute irreparable harm. *Sampson v. Murray*, 415 U.S. 61 (1974); *DFW Metro Line Services v. Southwestern Bell Tele. Co.*, 901 F.2d 1267, 1269 (5th Cir. 1990). Damages are normally an adequate remedy for loss of employment and would compensate the plaintiff fully for any harm should the Court ultimately find in his favor. *Holcomb v. City of Tupelo*, 2009 WL 87420 (N.D. Miss. 2009); *See also Weathers v. University of North Carolina at Chapel Hill*, 2008 WL 5110952 (MD N.C. 2008)(professor's alleged loss of earnings was temporary following a university's failure to renew her contract of employment since she would recover monetary damages if successful on her claims and therefore did not justify preliminary injunctive relief).

Van Heerden claims, without any facts to support his assertion, that the “termination” of employment from LSU, renders him unable to “serve as an expert in his field”, impacts his ability to obtain replacement employment and harms his reputation. Motion at ¶ 15. First, he was not “terminated.” His one year contract was not renewed, and as LSU Regulations make abundantly clear, “non-reappointment carries no implication whatsoever as to the quality of the employee’s work, conduct, or professional competence.”⁹ Second, irreparable harm is not established in employment cases by an inability to find other employment, unless truly extraordinary circumstances exist. *See Sampson* at 92; *Morgan v. Fletcher*, 519 F.2d 236, 239 (5th Cir. 1975). A plaintiff’s

⁹See LSU Regulations Chapter II, Section 2-7, attached as Exhibit. “A”.

financial situation or difficulties in obtaining other income generally will not support a finding of irreparable injury, regardless of how severely they may affect a particular individual. *Id.* Moreover, Van Heerden does not allege what efforts, if any, he has made to seek other employment during the now one year since being notified that his contract would not be renewed.

With regard to his reputation, Plaintiff has not established that the non-renewal of his term appointment contract has damaged his reputation. The non-renewal of Van Heerden's one year contract had no affect on his reputation, just as the non-renewal of the term appointments of other LSU employees before and after Van Heerden had no affect on their reputations. The case of *Nedder v. Rivier College*, 908 F.Supp. 66 (D.N.H. 1995) is anlogous to the present case. In *Nedder*, a professor sought a preliminary injunction seeking reinstatement pending resolution of her claim under the ADA, and other state law tort claims she filed subsequent to the school's decision to not renew her contract. The plaintiff alleged that because of the non-renewal her reputation was "shredded" in "academic circles" and that she was unable to get another job. In denying the request for preliminary injunction, the court held that the plaintiff's unemployment and inability to earn a living in her chosen profession did not constitute irreparable injury. Importantly, the court distinguished the plaintiff's situation from one in which a decision is made against a tenured professor or one in which a tenure application is denied. As such, the court found that the reputational injury under these circumstances falls far short of the type which is necessary to grant

make a showing of irreparable injury.

Given the wide range of remedies available to Van Heerden under Section 1983 (in the unlikely event that he somehow could establish a constitutional violation), he simply cannot establish irreparable harm. See *Keating v. University of South Dakota*, 386 F.Supp.2d 1096 (D.S.D. 2005)(a nontenured professor failed to establish irreparable harm because he had requested money damages as well as injunctive relief.) Van Heerden's largely conclusory allegations that separation from his employment will cause irreparable damage to his reputation and career are "simply not of a magnitude to justify a preliminary injunction." *Howard v. Town of Jonesville*, 935 F.Supp. 855 (W.D.La. 1996).

3. Injunctive Relief Will Harm LSU

In considering the harm element, this Court should recognize the difficulty in forcing LSU to employ Van Heerden after his contract expires. Such action may create disruption among COE personnel. Courts are cognizant that forced reemployments are difficult, and are often extremely disruptive to Universities. See *Keating v. University of South Dakota*, 386 F.Supp.2d 1096 (D.S.D. 2005). This harm is of particular importance in the instant case where Van Heerden is clearly dissatisfied with the environment at LSU and his state of mind would likely negatively affect LSU and the research programs.

Additionally, forcing a school to rehire an associate professor-research would require the

school to “surrender the university’s academic autonomy to the federal court” and the school would not be able to recover compensation for the loss of freedom to conduct its affairs while the injunction was in effect. *Nedder v. Rivier College*, 908 F.Supp. 66 (D.N.H. 1995)

Finally, LSU would suffer harm in that the decision to not renew Van Heerden’s contract was made in April, 2009. Budget allocations were made in accordance with that decision at that time and to force LSU to find funding or sacrifice other employees in the future would cause harm. This is particularly relevant today in light of pending drastic funding cuts which may affect employees who are still under contract through declarations of financial exigency. Forcing LSU into a continued contract with Van Heerden’s for some undetermined amount of time is, in fact, a far better arrangement than he had under his one year contract. Van Heerden cannot properly prove that his alleged injury would outweigh the damage to LSU if it is ordered to employ him after his contract expires. Moreover, if this Court should decide that injunctive relief is somehow warranted, it should properly consider the wide ranging impact such relief will have the CEE department, the University and potentially fellow employees and should require Plaintiff to post substantial security pursuant to Federal Rule 65(c).

4. Public Interest

With regard to the element of public interest, “it is not in the public interest to force an institution of higher learning to unwillingly accept a faculty member back for the duration of litigation by that person against his colleagues where [he] is quite likely to ultimately lose the litigation.” *Keating v. University of South Dakota*, 386 F.Supp.2d 1096 (D.S.D. 2005). Likewise, it is not in the public interest to require LSU to continue to employ Van Heerden after the expiration of his contract on May 21, 2010.

III. CONCLUSION

Emphasizing the extraordinary character of injunctive relief, much less a temporary restraining order, the Fifth Circuit has cautioned that an injunction “should not be granted unless the party seeking it has clearly carried the burden of persuasion on all four requirements.” *PCI Transportation Inc. v. Fort Worth & Western Railroad Co.*, 418 F.3d 535, 545 (5th Cir.2005). In the instant case, Van Heerden has failed to clearly carry the burden of persuasion on any of the four requirements. For this reason and multiple others expressed herein, his motion for a TRO and/or

other injunctive relief should be denied.

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CERTIFICATE

I hereby certify that a copy of the above and foregoing Memorandum in Opposition to Van Heerden's Motion for TRO and/or other Injunctive Relief was served on Jill L. Craft, 721 North Street, Baton Rouge, Louisiana 70802, by placing same in the United States mail, postage prepaid and properly addressed and/or by facsimile and/or by PACER notice, this 12th day of April, 2010.

/s/Richard F. Zimmerman, Jr.

Richard F. Zimmerman, Jr.

#239345

BYLAWS & REGULATIONS



BOARD OF SUPERVISORS

LOUISIANA STATE UNIVERSITY SYSTEM

October 2, 2008



CHAPTER II

APPOINTMENTS, PROMOTIONS, AND TENURE

Section 2-1. Classification of Employees, General.

Employees of the System are grouped as follows:

- a. **Nonstudent Employees.**
 - (1) **Academic Employees.**
 - (a) **Faculty.** Full-time members of the academic staff on the various campuses with the rank of Instructor or above and equivalent ranks.
 - (b) **Other Academic.** Part-time members of the academic staff; members of the academic staff below the rank of Instructor or equivalent; and other personnel with academic responsibilities not holding faculty rank.
 - (2) **Nonacademic Employees.**
 - (a) **Unclassified.**
 - (i) Administrative officers and professional staff, and positions specifically exempt from the classified service under Article X of the **Constitution** of the State of Louisiana.
 - (ii) Other positions exempt from the classified service by special action of the State of Louisiana, Department of Civil Service.
 - (b) **Classified.** All employees in positions covered by the provisions of the Civil Service System of the State of Louisiana.
- b. **Student Employees.**
 - (1) **Graduate Assistants.** Full-time graduate students who are employed part-time for services supportive of the graduate education experience.
 - (2) **Students.** Those full-time undergraduate, graduate, and professional students who are employed on a part-time basis on the various campuses of the System and not classified as graduate assistants.
 - (3) **Interns, Residents.** These and other such students employed in programs designed to fulfill professional and specialty requirements.

Section 2-2. Personnel Actions, Administrative Officers. The President shall recommend all personnel actions for System administrative officers and chief administrative officers of the several campuses to the Board. The chief administrative officers of the various campuses shall recommend all personnel actions for administrative officers on their respective campuses through the President to the Board.

Section 2-3. Personnel Actions, Nonacademic Staff.

- a. **Unclassified.** The President shall recommend to the Board personnel actions for System employees in unclassified positions, except for those System employees in unclassified positions for which the Board delegates final authority to the President. The chief administrative officers of the various campuses shall recommend to the President for approval by the Board personnel actions for campus employees in unclassified positions, except for those campus employees in unclassified positions for which final authority is delegated to the campus' chief administrative officer.

- b. **Classified.** All personnel actions relating to classified staff shall be recommended by the administrator concerned, through proper channels, to the chief administrative officer or to the administrator delegated final authority in classified personnel matters by the campus' chief administrative officer.

Section 2-4. Terms of Employment, Nonacademic Staff.

- a. **Classified Personnel.** Classified personnel hold their positions according to the terms of their appointment under the provisions of the Civil Service System of Louisiana and the classified procedures of the University System.
- b. **Unclassified Employees.** Unclassified employees hold their positions at the pleasure of the Board, except those in positions for which final authority is delegated to the President in accordance with Section 2-3.a. Services of unclassified employees may be terminated by giving such employees reasonable notice with the approval of the chief administrative officer of the campus and the President. "Reasonable notice" shall be interpreted to mean written notice given at the time the action is instituted by the employee's immediate supervisor and effective after a period of time equivalent in days to the usual payroll period of the employee.

Section 2-5. Personnel Actions, Academic Staff. In all personnel actions related to academic staff the principle of academic freedom shall be recognized. See **Bylaws**, Article VIII, Sections 1 and 5.

All personnel actions relating to faculty and other members of the academic staff shall be initiated by the employee's immediate supervisor after appropriate consultation with faculty, and shall be transmitted through channels to the President, subject to confirmation by the Board. If disagreements cannot be resolved by the chief administrative officer of the campus, the personnel transactions shall be referred to the President for consideration. If there be lack of agreement between the head of the department and the dean of a college or a director, or disagreement with either recommendation on the part of the chief academic officer, the recommendation shall so state.

Section 2-5.1 Uniform Personnel Policy of the LSU Board of Supervisors (adopted July 17, 2008). Except as otherwise provided in the Bylaws, and notwithstanding any other provisions of these *Regulations*, all personnel actions made by any campus or institution of the LSU System shall be made in accordance with the following provisions, as amplified by a Permanent Memorandum issued by the President.

A. Personnel Actions Requiring Board Approval

The following personnel actions shall require approval by the Board of Supervisors:

1. Appointment of and compensation for the President, System Vice Presidents, all chancellors or equivalents, and all positions of dean or equivalent and above, including amendments to or extensions of appointment agreements and increases or decreases in compensation.
2. Any action which would result in an employee having total annual compensation exceeding \$125,000 (from all sources, both public and authorized private), provided that the President may by Permanent Memorandum establish a higher Board-approval threshold not to exceed \$250,000 for specified categories of employees, taking into account the competitive salary range in particular fields or disciplines. Upon establishing a higher Board-approval threshold, the President shall not delegate approval authority for compensation exceeding \$125,000. Board approval shall not be required when the compensation funding from non-state sources exceeds 80% of total compensation and the compensation from state sources is less than \$125,000.
3. Educational leave and sabbatical leave in excess of three months during any twelve month period.
4. Termination of tenured faculty.
5. Head coach and athletic director contracts and amendments thereto, provided that the President shall have the authority to approve any non-substantial amendments.

6. Leave without pay for one year or more or special leave with any pay or benefits for thirty days or more within any twelve month period.
7. Retrospective compensation of any type, which will be authorized only (i) in exceptional circumstances (when justified by the campus or institution in writing or as incidental to an approved general pay plan) or (ii) when, due to excusable neglect, the effective date of the proposed appointment, pay increase, or other personnel action is no more than 60 days prior to the Board meeting or 30 days prior to the previous Board meeting, when more than one month has elapsed since such previous Board meeting.
8. Termination of the President, all chancellors or equivalents, and all positions of dean or equivalent or above, unless otherwise provided in the appointment documents.
9. Either appointment or making any change in status which would result in the employee gaining indeterminate tenure or "rolling tenure" (i.e., rolling term).
10. Promotion in faculty rank.
11. Appointment to any designated chair or professorship
12. Conferring *emeritus* status on any person with less than ten years of service to the university or with titles other than professor.
13. Awarding any honorary degree.
14. Paying any salary supplement to an LSU employee from Board-authorized affiliated foundation funds.

B. Personnel Actions Requiring Presidential Approval

The following personnel actions shall require approval by the President, which authority may not be further delegated:

1. Pay raises of any type in excess of 15% in any one year to any faculty or unclassified personnel.
2. The creation of any new position.
3. Filling any faculty position made vacant because of lay-off or furlough pursuant to a Board-approved plan addressing institutional change or exigency.
4. Any action which would allow for a delay in review for tenure beyond the period of time established by LSU policy or in the employee's appointment letter.
5. Conferring *emeritus* titles not required to be approved by the Board.
6. Appointment for more than one year of any person who is to receive during employment by LSU any retirement benefits from any Louisiana public employee retirement system or plan.
7. Converting a filled classified position to an unclassified position, approval of which will only be granted if justified by the following factors:
 - (i) The employee must have a baccalaureate degree or sufficient professional experience to substitute for the degree, and
 - (ii) The duties of the unclassified position must require advanced learning acquired by a prolonged course of specialized, intellectual training.
8. General pay plans, including across-the-board pay raises which are granted to all or substantially all of the employees of a campus or institution.
9. Any other personnel action which the President determines should be reviewed at the System level. Such determinations may be made individually or be established for the System as a whole, for individual campuses or institutions, or for classes of employees either across the System or at specific campuses or institutions.

C. Personnel Actions which may be delegated by the President

Authority to take all other personnel actions is hereby delegated by the Board to the President, who may further delegate such authority, by a Permanent Memorandum, as he deems to be in the best interests of LSU, provided such actions are taken in accordance with the requirements for form, and reporting set forth in sections D and E of this policy.

D. Form of Letters of Appointment and Similar Agreements

All letters of appointment, contracts of employment, or other written employment agreements between LSU and any of its employees containing any special provisions not provided for in written general policy, shall either (i) use only the language prescribed for such agreements by the President in a standardized template or form (which is encouraged); or (ii) be approved as to form and legal sufficiency by the System Office of General Counsel prior to being signed.

E. Reporting

All personnel actions shall be reported to the President and the Board in a format prescribed by the President after consultation with the Board.

F. Submission of Actions for Approval by the Board or President

Any submission for approval by the Board or President shall be made in accordance with the deadlines established in Art. VII, sec. 8.F of the Bylaws. All such submissions shall include the following information:

1. All sources of compensation;
2. The nature of the appointment;
3. All proposed letters of employment, contracts of employment, or other written employment agreements pertaining to compensation or benefits; and
4. Any additional information required by the President.

G. Emergency Action by President

When circumstances require action on a personnel matter that would otherwise require approval of the Board involving faculty or an academic administrator of the rank of Vice Chancellor or below and, through no neglect of the campus, the matter cannot timely be presented to the Board, the President may take such final action. A report of the action, along with justification and a description of the circumstances shall be sent to the Board within ten (10) calendar days of the President's approval.

H. Miscellaneous

1. For purposes of this policy and the Permanent Memorandum to be issued by the President, "compensation" includes all income covered on any check issued (or electronic transmittal) by Louisiana State University for any compensation purposes as well as all income from other sources, including affiliated foundations, paid as compensation for work done on behalf of LSU or pursuant to the employment agreement with LSU. This includes any income paid pursuant to any faculty group practice plan or program. It does not include royalty, licensing, or other payments made pursuant to LSU's intellectual property policies.
2. Nothing herein shall be construed to alter, amend, or in any way affect PM-11 or the policies and procedures set forth therein, which are required by La. R.S. 42:1123(9)(b).
3. In the event of any conflict between the provisions of this Section 2-5.1 and any other provisions of the *Regulations* of the Board of Supervisors or any Permanent Memorandum, the provisions of this Section 2-5.1 shall control.
4. Nothing herein creates any rights, procedural or substantive, in employees, prospective employees, or other persons.

Section 2-6. Academic Ranks. The following academic ranks shall be recognized.

Instructional and Research Ranks-full-time (1,2,4)	Instructional and Research Ranks - Part-time(5)	Library/Museum(10) Ranks - Full-time	Cooperative Extension Service	AgCenter Communications
Boyd Professor Designated Professorships(3) Professor	Professor, part-time(6) Adjunct Professor(7) Consulting Professor(8)	Librarian Curator	Professor	Communications Specialist (12)
Associate Professor	Associate Professor, Part-time(6) Adjunct Associate Professor(7)	Associate Librarian Associate Curator	Associate Professor Agent (4)	Associate Communications Specialist (12)
Assistant Professor	Assistant Professor, Part-time(6) Adjunct Assistant Professor(7)	Assistant Librarian Assistant Curator	Assistant Professor Associate Agent (4)	Assistant Communications Specialist (12)
Instructor	Instructor, Part-time(6)	General Librarian	Instructor Assistant Agent (4)	
Associate	Associate, Part-time(6)	Library Associate	Extension Associate	
Assistant	Assistant, Part-time(6)			
	Cooperating Teacher(9)			
	Special Lecturer(5)			

FOOTNOTES:

(1) The titles "Visiting Professor," "Visiting Associate Professor," and "Visiting Assistant Professor" are courtesy titles given to holders of visiting full-time appointments at those respective ranks. No changes shall be made in the titles of regular members of the instructional and research staff holding part-time appointments during the summer term. The "Visiting" title may also be used for individuals who are not on leave from another institution but who meet the standards for the rank specified and who are hired for a limited period.

(2) The full-time faculty shall consist of the full-time University faculty and the members of the full-time staff at affiliated hospitals who have academic responsibilities equivalent to the full-time University faculty. The full-time affiliated faculty who are gratis or whose University contribution to salary is less than 25 percent shall be considered as volunteer faculty to the University insofar as employee benefits are concerned. However, if the University contributes 25 percent or more of their total salary, percentage of University contribution should be indicated and employee benefits appropriate to that percentage provided. Full-time faculty in the professions whose primary responsibility is in teaching or service programs associated with coordinating fieldwork and supervising students in the field are to be appointed as Assistant Professor-Professional Practice, Associate Professor-Professional Practice, or Professor-Professional Practice. Full-time affiliated faculty do not acquire tenure.

(3) The title of Professor may be modified to indicate particular distinction as approved by the Board in special instances.

(4) Full-time faculty whose primary responsibility is conducting research and who normally are paid from grant or contract funds are to be appointed as Assistant Professor-Research, Associate Professor-Research, or Professor-Research or Assistant Professor-Extension, Associate Professor-Extension, Professor-Extension. Full-time faculty in the clinical sciences with responsibility to teaching and service programs and who are essential for patient care are to be appointed as Assistant Professor of Clinical (discipline), Associate Professor of Clinical (discipline), or Professor of Clinical (discipline), Extension field faculty employed primarily to conduct educational programs are appointed as Assistant Agent, Associate Agent, and Agent. The faculty in these ranks do not acquire tenure.

Full-time faculty in the professions whose primary responsibility is in teaching or service programs associated with coordinating field work and supervising students in the field are to be appointed as Assistance Professor-Professional Practice, Associate Professor-Professional Practice, or Professor-Professional Practice.

(5) Part-time academic personnel in the Medical Center whose primary role is related to a clinical setting may be designated by the title "Clinical" preceding their academic rank, except department heads, who may be given their appropriate professorial rank without the designation "Clinical".

Part-time academic personnel in the Law Center whose primary role is related to a clinical setting in any internship program or other clinical or skills instructional program which has been or may be established by the Law Center may be designated by the title Adjunct Clinical Instructor, Part-time.

(6) The title 'Special Lecturer' is authorized and limited to part-time appointments without rank designation and is restricted to specialists and professional men and women whose primary occupation is practice of their profession.

(7) The designation "part-time" indicates that the appointee is to serve less than 100 percent basis.

(8) On the recommendation of appropriate campus officers, the ranks of Adjunct Professor, Adjunct Associate Professor, etc., may be conferred upon persons whose primary employment is outside the department. The basis of such recommendation shall be that the System can benefit from the talents, abilities, and experience of persons in various fields as consultants; for the conduct of formal courses, occasional lectures, or seminars; or for other similar activities. Recommendations for such appointments shall be made in the same manner as for other academic ranks. Individuals appointed as Adjunct Professors, Adjunct Associate Professors, or Adjunct Assistant Professors, are ineligible to participate in the University Retirement System or other University-funded employee benefits accorded other academic employees of the System.

(9) A person of exceptional distinction who performs the services of an Adjunct Professor may be designated a Consulting Professor.

(10) The title of Cooperating Teacher is used for off-campus public school teachers who supervise teachers in the teacher training program.

(11) The titles of 'Curator', 'Associate Curator' and 'Assistant Curator' are authorized and limited to those individuals holding full-time appointments on the museum staff. The ranks of Curator, Associate Curator and Assistant Curator shall be equivalent to those of Professor, Associate Professor and Assistant Professor, respectively. The rules and rights of appointment, promotion and tenure shall be the same as for the professorial ranks.

(12) The titles of Assistant Communications Specialist, Associate Communications Specialist and Communications Specialist are non-tenure track titles for LSU AgCenter Communications Department faculty who perform professional level research, education, and outreach responsibilities which are an integral part of the research and outreach programs of the LSU AgCenter.

Section 2-7. Tenured and Term Appointment, Academic Staff.

Faculty Ranks. Faculty members and other members of the academic staff of comparable rank, including librarians, may be appointed for a specific term ("term appointment") or indefinitely ("tenured appointment") depending on rank and experience. Appointment or tenure on one campus of the LSU System carries no implication of appointment or tenure on another campus. Academic employees are tenured only with respect to their academic ranks and not with respect to administrative titles or assignments.

Tenure is not a guarantee of lifetime employment, particularly in the face of institutional change or financial exigency. It does assure that the employee will not be dismissed without adequate justification and without due process.

Term employees are appointed for specified periods of time as indicated on the appointment form.

Professors and Associate Professors are tenured and are appointed for an indefinite period of time, except that the initial appointment and subsequent reappointments through not more than five years of total service to the LSU campus involved may be made for a stipulated term. Persons promoted to the rank of Professor or Associate Professor after less than five years of service on the campus may be continued to term appointment through no more than the fifth year. Persons holding a professorial rank (Professor, Associate Professor or Assistant Professor) while being paid by a grant or contract do not acquire tenure through the passage of time but may become tenured only by specific individual recommendation through appropriate channels and approval by the President.

Assistant Professors are appointed for terms no longer than three years. Upon reappointment after seven years of service in rank on a particular campus, Assistant Professors receive tenure. A thorough review will be made during the sixth year of service so that notice of termination may be given if necessary no later than the end of the sixth year of service. Individual campuses have the option of conducting the thorough review prior to the sixth year, provided that appropriate written notification is given to the faculty member. The University may, at its discretion, count prior service on the same campus toward the seven-year evaluation period for an Assistant Professor to achieve indeterminate tenure. The ultimate decision shall be left with the President, to be applied in each individual case for which the respective campus recommends granting indeterminate tenure counting prior service favorably.

Those who rank as Associate or Instructor shall be appointed for a specified term and shall not be considered for indeterminate tenure; provided, however, Associates and Instructors hired for an initial term greater than two years may be terminated at the end of the first year if given notice during the first nine months of that year. Otherwise, the provisions of Section 2-7(1)-(4) shall apply.

Exceptions: The rules pertaining to tenure and term appointments are subject to the following exceptions:

At the Pennington Biomedical Research Center, persons holding the rank of Professor, Associate Professor and Assistant Professor, while being paid by a grant or contract, do not acquire tenure through the passage of time. Upon individual recommendation and approval by the President, such persons at the rank of Professor and Associate Professor may receive rolling tenure, i.e., they may be appointed for terms of 5 years. Faculty with rolling tenure are reviewed annually and reappointments of Associate Professor and of Professor faculty are for 5-year terms. At such annual review, a recommendation not to reappoint the Associate Professor or Professor is with a 5-year terminal appointment. The faculty member will be notified of a decision not to renew the appointment at least 5 years before the end of the appointment. Faculty members with rolling tenure or on terminal appointments may be terminated for cause at any time with due process.

At the Paul M. Hebert Law Center, the rank of Associate Professor may or may not carry with it the status of tenure, depending upon the timing and circumstances of the individual appointment. Individuals receiving an initial three-year appointment as Assistant Professor will be reviewed in their third year for a second three-year appointment for promotion to Associate Professor without tenure. No later than their sixth year, they will be considered for tenure and for promotion to Professor of Law. Typically, successful candidates will both be tenured and promoted to Professor of Law, although there may be cases in which tenure will be granted but the promotion to Professor of Law deferred for later determination. In such cases, they will hold the rank of Associate Professor of Law (with tenure), pending subsequent procedures addressing their promotion to Professor of Law.

At those campuses employing full-time faculty members in the professions (e.g. Education) whose primary responsibility is in teaching or service programs associated with coordinating fieldwork and supervising students in the field, the ranks of Assistant Professor-Professional Practice, Associate Professor-Professional Practice or Professor-Professional Practice may be designated. Individuals with these academic ranks shall not be eligible for tenure and may be enfranchised to the degree deemed appropriate by the faculty unit (system, campus, college, division or department).

Expiration of Appointment. Upon expiration of a term appointment, the employee is a free agent to whom the University System has no obligation. The University System may reappoint the employee to the same or a different position. Non-reappointment carries no implication whatsoever as to the quality of the employee's work, conduct, or professional competence.

When an employee, other than an Associate, is not to be reappointed, written notice to the employee will ordinarily be provided in accordance with the following schedule:

1. Not later than March 1 of the first academic year of service, if the appointment expires at the end of the year; or, if an initial one-year appointment terminates during an academic year, at least three months in advance of its termination.
2. Not later than December 15 of the second academic year of service, if the appointment expires at the end of that year; or if an initial two-year appointment terminates during the academic year, at least six months in advance of its termination.
3. At least 12 months before the expiration of an appointment after two or more years service on that campus.
4. When an Associate is not reappointed, the Associate shall be given written notice of termination no less than ninety (90) days prior to the expiration of the employment contract.

Section 2-8. Terms of Employment - Part-Time Academic Staff. Members of the part-time academic staff on the various campuses shall be given term appointments only, not exceeding one academic or fiscal year.

Section 2-9. Terms of Employment - Academic Staff, General. The foregoing provisions shall not be construed to exclude existing contracts between the System and academic staff on mutually acceptable terms.

Section 2-10. Basis of Pay. System employees may be employees for the academic year, fiscal year, summer term, or other stipulated terms. Employees shall be paid in accordance with procedures established for their employment.

Section 2-11. Regular Appointment. An employee on "regular appointment" or one deemed to be "regular" is defined as (1) an employee whose appointment is for a period of more than 180 calendar days, or (2) one who has been employed for more than 180 consecutive calendar days by successive uninterrupted appointment.

Section 2-12. Holding of Political Office. A full-time employee of the System shall not accept any appointive political office nor seek or hold any elective remunerative political office, without the consent of the President.

Section 2-13. Nepotism.

- a. No member of the immediate family of an agency head shall be employed by that agency.

"Immediate family" as the term relates to a public employee means children, the spouses of the children, brothers, sisters, parents, spouse, and the parents of the spouse.

"Agency" means a department, office, division, agency, commission, board, committee, or other organizational unit of a government entity.

"Agency head" means the chief executive or administrative officer of any agency as defined above or any member of a board or commission who exercises supervision over the agency.

- b. The provisions of this policy shall not prohibit the continued employment of any public employee nor shall it be construed to hinder, alter, or in any way affect normal promotional advancements for such public employee where a member of the public employee's immediate family becomes the agency head of such public employee's agency, provided that such public employee has been employed in the agency for a period of at least one year prior to the member of the public employee's immediate family becoming the agency head.
- c. Any person serving as an LSU System employee on April 1, 1980, whose employment otherwise would have been in violation of this policy, may continue in such employment and the provisions of this section shall not be construed to hinder, alter, or in any way affect normal promotional advancement in public employment for such employees.
- d. This policy shall apply to all forms of employment; regular full-time employment, regular part-time employment, temporary full-time employment, temporary part-time employment, etc., and will apply to all employees, including student workers.
- e. Exceptions to the restrictions outlined in this policy are not permitted. However, employees of an agency who marry may continue to work in that agency even though one of the employees is the agency head, provided that the supervising spouse avoids participating in transactions in which the subordinate spouse has a substantial economic interest.
- f. Individual campuses may adopt more restrictive provisions to this policy provided that those provisions are approved by the President of the LSU System.

Section 2-14. Boyd Professorships.

- a. **Eligibility.** A faculty member on one of the various campuses of the University System who has attained national or international distinction for outstanding teaching, research, or other creative achievement may be designated a "Boyd Professor." The "Boyd Professorship" shall be regarded as the highest professorial rank awarded by the University. No Professor holding an administrative position of the rank of director or above shall be eligible for designation as a "Boyd Professor."

- b. **Procedure for Nomination.** Nomination of a Professor for designation as a "Boyd Professor" shall originate with a dean or deans (in the case of split appointments) or a director of a school, which is not a college, in which a nominee holds professorial status. The nomination shall be addressed to a review committee through the Chancellor of the campus on which the nominee is a faculty member. The nomination by deans or directors shall be reviewed by a committee comprised of the chief academic officer of the System staff, who shall serve as chair, two **emeriti** members, and three faculty members appointed by the President from throughout the University System.

Policy Statement Number: PS-36

Title/Topic: **Criteria for Evaluating Academic Performance, and Policy and Procedures on Faculty Appointment, Performance Evaluation, Reappointment/Non-reappointment, Promotion and Tenure, Appeal Procedures**

Effective Date: 07/01/1997

Revision Number: PS0036.R05

Criteria for Evaluating Academic Performance, and Policy and Procedures on Faculty Appointment, Performance Evaluation, Reappointment/Non-reappointment, Promotion and Tenure, Appeal Procedures

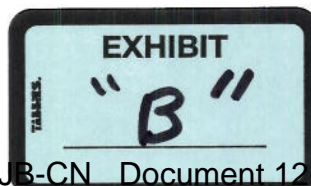
I. GENERAL POLICY

Personnel decisions described in this policy statement have the most serious long-term implications for the quality of the faculty, and therefore for the University. All such decisions, not based on financial exigency or change in departmental programs, shall be made solely on the basis of professional merit, quality of contribution to the University, and the competent and regular performance of assigned duties. Judgments may not be based on attributes of the candidate that are irrelevant to professional performance, such as age, disability, national origin, race, religion, or sex. In making these important personnel decisions, it shall be the general policy of the University to utilize peer judgment, with review by academic chairs, deans, the Provost, and the Chancellor. Faculty personnel decisions should be based on criteria for evaluating academic performance, discussed in Section IV of this policy statement. All faculty positions will be advertised according to PS-1 and PM-55.

It is the policy of the University to keep faculty who are being reviewed as fully informed as possible during processes covered by this document and to give the person under review access to all official written statements by reviewers produced as a part of the proceedings (unless designated as confidential in PS-40). When conferences are held as a part of the notification or annual review process, the candidate may invite a peer advisor. Conference attendees at the department level are the chair and the candidate (with peer advisor, if desired). The same group and the dean constitute the attendees at the college level.

Timely notification and understanding of appeal procedures are essential to the review processes. After recommendations have been finalized by any administrative officer, a candidate for reappointment, promotion, and/or tenure is notified in a timely manner, prior to submission of the review file to the next reviewer. Notification is through official university channels, either orally or in writing, and may be at a conference. Each administrative officer notifies the previous reviewer of action promptly until the process has been completed.

Candidates are entitled to submit for the official record letters of dissent with negative performance evaluations and negative recommendations on reappointment, promotion and/or tenure. These formal letters are included with files submitted for review beyond the department. Faculty are also entitled to appeal negative personnel decisions through the appeal procedures outlined in Section VII of this document.



The faculty member may submit a separate formal letter of dissent with reasons for the dissent to the dean through the chair. The dean will review the evaluation and respond to the dissent in a timely manner. A copy of the dean's response will be sent to the faculty member and the chair. The annual performance evaluation, with all resulting correspondence, will be forwarded through the dean to the Office of Human Resource Management for inclusion in the faculty member's official personnel file.

5. College Review

The dean will sign or initial the department report form and forward it to the Office of Human Resource Management for inclusion in the individual's official personnel file.

Those forms with formal letters of dissent will be forwarded by Human Resource Management to the Provost for review before inclusion in the individual's official personnel file.

V. REAPPOINTMENT/NON-REAPPOINTMENT (NON-TENURE DECISIONS)

A. POLICIES

1. General

A term appointment or a series of term appointments carries no assurance of reappointment, promotion or tenure. Reappointment is made solely at the initiative of the University. Although most probationary tenure-track appointments are made with the expectation that renewal as well as eventual promotion and/or tenure will be justified, reappointment recommendations and decisions should be made deliberately and carefully. Reappointment does not guarantee tenure, but it is expected that tenure-track candidates who are recommended for reappointment will have demonstrated reasonable progress toward meeting the criteria for the award of tenure.

2. Candidate Eligibility

Reviews are normally conducted in a time frame which allows for timely notice of non-reappointment to be given in accordance with Section V.B.5. in the event of a negative review.

a. Instructor (and equivalents): Reappointed for renewable terms of one year or less.

Before a third consecutive renewal, the chair must provide each instructor with a written statement of the conditions of further reappointment. The chair will forward a copy of this statement, signed by the instructor, with the appropriate personnel form to the dean. If the dean recommends approval of the reappointment under the conditions outlined, she/he will sign the personnel form and forward it with the written statement of conditions to the Office of Human Resource Management to be placed in her/his official personnel file.

b. Assistant Professor (and equivalents): Reappointed for no more than three years and not beyond the maximum total years of term appointments allowable (as stipulated in Section 2-7 of the *By-Laws and Regulations* of the LSU Board of Supervisors). There will be no reappointment reviews during the fifth year. Employment must end on completion of the fifth year or automatically be extended through the sixth year and mandatory review.

c. Associate Professor and Professor (and equivalents): Reappointed on a term basis, though not for more than four years of total service at LSU.

3. Voting Eligibility

The chair submits a recommendation independent of the faculty recommendation, and consequently, does not vote as a faculty member.

Voting eligibility of the faculty varies according to the rank of the candidate under consideration for reappointment as follows:

a. Instructor (and equivalents): All tenure-track and tenured faculty or a committee designated by the tenure-track and tenured faculty.

b. Tenure-track Assistant Professor, Associate Professor, and Professor (and equivalents): All tenured faculty equal to or senior in rank to the candidate.

Faculty without tenure and/or at a rank lower than the candidate may be consulted but do not have a vote in recommendations for reappointment/non-reappointment.

Faculty holding joint appointment shall have voting rights in the primary department, and when enfranchised by the eligible voting faculty of a secondary unit, may also vote in that unit. However, faculty may not vote regarding the same candidate in more than one unit.

Recusals:

a. A faculty member who must make a formal recommendation at an official stage in the review process must recuse herself/himself at the departmental level.

b. A faculty member serving in an advisory capacity at the college level may vote at the department level but must recuse himself/herself from voting on recommendations made at a subsequent stage in the official review of candidates from their departments.

B. PROCEDURES

i. Nomination

The dean notifies all chairs of the submission timetable for reappointment/non-reappointment recommendations. The timetable is announced annually by the Office of Human Resource Management.

The chair notifies each candidate of eligibility for reappointment and lists the documentation the candidate must prepare for the review. (Section V.B.2.)

The candidate is responsible for providing accurate Documentation and Supporting Material for the reappointment file. The chair will ensure that the candidate has opportunity to submit all relevant information and material for judgment by the eligible voting faculty and that these materials are conveyed to the appropriate persons.

2. Department Review and Recommendation

Responsibility for departmental actions concerning reappointment/non-reappointment lies with the chair, who ensures that all pertinent material is included in the reappointment file and verifies the accuracy of the material.

The chair may appoint one or more review committees annually. The review committee will evaluate the Documentation and Supporting Material and make recommendations that will provide the background for departmental discussion by the eligible voting faculty.

Prior to the meeting, the eligible voting faculty must have access to material relevant to the decision. Reappointment files are maintained in a central location within the department. Access to the reappointment file is limited to the candidate, the eligible voting faculty, the chair, and the staff involved in processing personnel forms.

A meeting of the eligible voting faculty will be held in order to vote on reappointment. The chair convenes the meeting. It may be valuable for the chair to hear faculty discussion, however, she/he plays no active role other than providing factual information requested by the eligible voting faculty.

Separate tallies of the tenure-track and tenured faculty votes must be recorded, but the official vote of the faculty is based on the total vote of eligible voting faculty. The chair does not vote as a faculty member but submits a separate recommendation.

As a result of the review, a written advisory and evaluative faculty report regarding each candidate will be provided to the chair. The report should reflect the majority as well as the minority views of the eligible voting faculty. In the case of strong disagreement, separate majority and minority reports may also be submitted. The report, signed by a faculty representative, will accompany the recommendation submitted by the chair to the dean.

Joint Appointments: The reviews of faculty holding joint appointments will be conducted by the primary department. Written statements of evaluation must be submitted by the faculty and the chair in secondary units in which the faculty member is jointly appointed. These statements become part of the official reappointment file.

Prior to submission of reappointment/non-reappointment recommendations to the dean, the candidate will receive copies of all official written statements generated by faculty and chair(s) regarding her/his reappointment/non-reappointment.

Candidate Response: The candidate may prepare a formal letter of response for inclusion with the reappointment file submitted for review beyond the department. In order to be considered in the college review process, such a letter must be sent to the chair and to the dean no later than five working days after the deadline for forwarding departmental recommendations to the dean.

The chair will submit the reappointment file to the dean. The reappointment file shall include:

- * Biographical information.
- * Employment information.
- * Evidence of candidate's performance as provided by the candidate in her/his Documentation and Supporting Material (Appendix B).
- * Faculty report signed by a representative of the faculty.
- * Faculty recommendation regarding term of reappointment (when appropriate).
- * Faculty vote tallies.
- * All annual performance evaluations.
- * Chair's recommendation.
- * Majority and minority reports from the faculty when such reports exist.
- * Report from faculty and chair in secondary unit, when appropriate.
- * Candidate's formal letter of response (when such a letter exists).
- * Personnel Action Form (PAF) signed by the chair.

In the case when non-reappointment is recommended, or if the candidate requests it, a conference with the chair will be held.

3. College Review and Recommendation

The dean may appoint a faculty committee(s) to review and advise her/him regarding reappointment/non-reappointment recommendations. The procedure for appointing these committees varies by college, but in all cases they are advisory only. The recommendations of the advisory committees are not part of the reappointment file. The dean has the ultimate responsibility for her/his recommendation.

The dean will review and make reappointment recommendations according to the rank of the candidate, as follows:

Instructor/assistant professor: Recommendations for reappointments/non-reappointments from the faculty and the chair are submitted to the dean for final approval. The dean shall provide written notification of her/his decision to the candidate and the chair.

In the case when non-reappointment is the decision, or if the candidate requests it, a conference with the dean will be held in a timely manner. At the conference, the candidate will receive a written statement from the dean supporting her/his decision. The statement becomes part of the candidate's official personnel file.

Associate professor/professor: If the dean recommends approval, she/he will sign and forward the Personnel Action Form to the Provost for review. The dean shall provide written notification of her/his recommendation to the candidate and the chair at the time of submission to the Provost.

In the case when non-reappointment is the recommendation, or if the candidate requests it, a conference with the dean will be held in a timely manner. At the conference, the candidate will receive a written statement outlining reasons for her/his recommendation. The statement becomes part of the candidate's official personnel file.

4. University Review (associate professor and professor ranks only)

The Provost will review, take action on and return the Personnel Action Form to Human Resource Management for inclusion in the official personnel file.

The chair will inform in writing the eligible voting faculty of the results of all reappointment reviews, including the term of the reappointment.

5. Timetable for Notice of Non-renewal

Employment under a term appointment ends unconditionally on the date indicated in the appointment form and reappointment is solely at the initiative of the University. Ordinarily, written notice of a decision not to reappoint will be given according to the following schedule:

- For faculty on initial one-year appointment, at least 90 days before the end of the appointment,

For faculty whose term appointment is ending in the second year of service, at least six months before the end of the appointment,

For faculty whose term appointment is ending after two or more years of service, at least 12 months before the end of the appointment.

Once a faculty member is notified of a final decision not to reappoint, that decision shall normally be irrevocable, and the decision is not suspended pending an appeal. The decision does not require administrative or Board of Supervisors' approval except as specifically set forth in this policy statement.


VI. PROMOTION AND TENURE

6319



COPY

Office of Research and Economic Development

From: Doris Carver 
To: Ivor Van Heerden
Date: August 10, 2007
Re: PM-11 Documents

Pursuant to the requirements of PM-11 Section V(3), you will need to submit the following additional information/ documents to the Office of the Associate Vice Chancellor of Research and Economic Development:

1. A written agreement between you and Bruno & Bruno Attorneys containing the following information:
 - a. General technical area of endeavor.
 - b. Specific employment or consulting activities.
 - c. Duration of employment agreement
 - d. Estimated time in hours per week or days per month required for the employment
 - e. Your compensation rate and method of payment.
 - f. Statement that agreement is between you and Bruno & Bruno Attorneys, that you are not acting as an agent of the University, and that the University bears no liability in the relationship.
 - g. Statement that the use of the University name in connection with the employment activities shall be only upon written authorization of the University.
 - h. Statement that the rights to any intellectual property, i.e., inventions, materials subject to copyright, etc. resulting from the employment activity, to the extent that they would vest in you in the absence of any other agreement, will be assigned to the University and disposed of in the manner prescribed by Chapter 7.2 and 7.3 of the By-Laws and Regulations of the LSU Board of Supervisors and such other University policy as may be applicable.
 - i.

When we receive this information, we will continue processing your PM-11 form.

Thank you.



UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

IVOR VAN HEERDEN

* CIVIL ACTION NO. 3:10-CV-00155

*

VERSUS

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BOARD OF SUPERVISORS OF
LOUISIANA STATE UNIVERSITY AND
AGRICULTURAL AND MECHANICAL
COLLEGE, BROOKS KEEL, ROBERT
TWILLEY, GEORGE VOYIADJIS, AND
DAVID CONSTANT

* JUDGE JAMES J. BRADY

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* MAGISTRATE CHRISTINE NOLAND

AFFIDAVIT

STATE OF LOUISIANA

PARISH OF EAST BATON ROUGE

BEFORE ME, the undersigned authority personally came and appeared:

DAVID CONSTANT, PhD, PE, DEE

who, after being duly sworn, did depose and state that he is employed by Louisiana State University ("LSU") and has served during the period of 2008 and 2009 as Interim Dean of the College of Engineering, and that in said capacity has personal knowledge of the following facts:

1. As Interim Dean of the College of Engineering, Affiant met with Ivor Van Heerden ("Van Heerden") on April 9, 2009 regarding Van Heerden's term appointment



contract as Associate Professor-Research which was scheduled to expire on May 15, 2009.

2. During the April 9, 2009, meeting, Affiant informed Van Heerden that his contract would not be renewed beyond May 21, 2010, and that his employment with LSU would end at the close of business on May 21, 2010.
3. During the April 9, 2009, meeting, Affiant provided Van Heerden with the attached letter dated April 3, 2009, giving written confirmation of non-renewal of Van Heerden's contract after May 21, 2010.
4. Affiant was the LSU administrator who was responsible for the decision not to renew Van Heerden's contract beyond May 21, 2010.
5. Affiant's decision regarding non-renewal was made without cause and was not performance based as authorized pursuant to the Bylaws and Regulations of the LSU Board of Supervisors and other applicable LSU regulations.
6. Affiant states that Van Heerden was not the only term appointed contract employee in the College of Engineering whose contract was not renewed. Several other term appointed contract employees were also not renewed by the College of Engineering both before and after Van Heerden.
7. Affiant's decision not to renew Van Heerden's contract beyond May 21, 2010, had nothing to do with Van Heerden's criticisms of the U.S. Army Corps of Engineers,

any purported loss of any funding from the Corps of Engineers, or any of the other matters claimed by Van Heerden in the above captioned suit.

WITNESSES:

Marie Hamilton

MARIE HAMILTON

(print name)

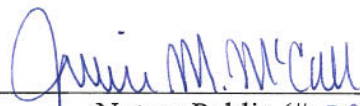
Chantelle Collier

Chantelle Collier

(print name)


David Constant, PhD, PE, DEE

SWORN TO AND SUBSCRIBED before me this 12th day of April, 2010.


Notary Public (# 29992)

(print name) Julie M. McCall

#239346



LSU COLLEGE OF
ENGINEERING

LOUISIANA STATE UNIVERSITY

April 3, 2009

Ivor van Heerden, Ph.D.
Associate Professor – Research
Civil and Environmental Engineering
3418 Patrick F. Taylor Hall
Baton Rouge, LA 70803

*Given to Ivor w/
witnesses 4/9/09
Charles Delzell
Warren Waggenpack*

Dear Ivor,

This is to advise you that your current appointment expires May 15, 2009. In accordance with Board Regulations this provides you with proper notice that your contract will not be renewed beyond May 21, 2010. Accordingly, your employment will end effective May 21, 2010, close of business.

Any questions you may have regarding your benefits should be referred to our Benefits Section, Office of Human Resource Management, 110 Thomas Boyd Hall, phone number 578-8200.

Sincerely,

David Constant, Interim Dean
College of Engineering

Cc: George Voyiadjis
Brooks Keel

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

IVOR VAN HEERDEN

* CIVIL ACTION NO. 3:10-CV-00155

*

VERSUS

*

*

BOARD OF SUPERVISORS OF
LOUISIANA STATE UNIVERSITY AND
AGRICULTURAL AND MECHANICAL
COLLEGE, BROOKS KEEL, ROBERT
TWILLEY, GEORGE VOYIADJIS, AND
DAVID CONSTANT

* JUDGE JAMES J. BRADY

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* MAGISTRATE CHRISTINE NOLAND

AFFIDAVIT

STATE OF LOUISIANA

PARISH OF EAST BATON ROUGE

BEFORE ME, the undersigned authority personally came and appeared:

CHUCK WILSON

who, after being duly sworn, did depose and state that he is employed by Louisiana State University ("LSU") as Vice Provost of Academic Affairs, Executive Director of the Louisiana Sea Grant College Program and Professor of Oceanography and Coastal Sciences, and that in said capacity he has personal knowledge and/or has reviewed the books and records of LSU and can attest to the following facts:

1



1. During the period of 2005 to the present, LSU has received project funding from the U.S. Army Corps of Engineers which totals less than \$100,000 for this entire time period.
2. This amount is less than 2/100ths of 1% of the total funding from other outside sources which LSU has received during this time period. Funding from outside sources has ranged between approximately \$130 million and \$150 million per year during the period of 2005 thru the present.

WITNESSES:

Patricia W. Hawkins
Patrice W. Hawkins
(print name)

Peggy S. Miller
Peggy S. Miller
(print name)

Chuck Wilson
Chuck Wilson

SWORN TO AND SUBSCRIBED before me this 12th day of April, 2010.

Janie M. McCall
Notary Public (# 29992)
(print name) Janie M. McCall

BYLAWS & REGULATIONS



BOARD OF SUPERVISORS
LOUISIANA STATE UNIVERSITY SYSTEM

October 2, 2008



ARTICLE VIII
RIGHTS, DUTIES, AND RESPONSIBILITIES OF
THE ACADEMIC STAFF

Section 1. Academic Freedom. The University System is committed to the principle of academic freedom. This principle acknowledges the right of a teacher to explore fully within the field of assignment and to give in the classroom and elsewhere such exposition of the subject as the teacher believes to represent the truth. This principle also includes the right of a member of the academic staff of the University System to exercise in speaking, writing, and action outside the University the ordinary rights of a citizen, but it does not decrease the responsibility which the member of the academic staff bears to the University System, the State, and the Nation. When a member of the academic staff is not officially designated to represent the University System, the staff member must indicate clearly that he or she is speaking as an individual citizen.

Among the many implicit responsibilities which must be assumed by those enjoying the privileges of academic freedom shall be that of refraining from insisting upon the adoption by students or others of any particular point of view as authoritative in controversial issues.

Section 2. Duties of Academic Staff. Each member of the academic staff is expected to be devoted to the accomplishment of the purposes for which the University System exists: instruction, research, and public service. Those members of the academic staff who comprise the faculty of the University System are charged to determine the educational policy of the System through deliberative action in their respective units and divisions.

Section 3. Appointment and Promotion of Academic Staff. Each appointment or promotion of a member of the academic staff shall be made upon the basis of merit and the special fitness of the individual for the work demanded by the position. All appointments, reappointments, promotions, and dismissals of members of the academic staff shall be made upon the authority of the President, subject to the approval of the Board.

The terms of the appointment of each member of the academic staff shall be reduced to writing and a copy thereof furnished to each of the contracting parties.

Section 4. Tenure of Academic Staff. Members of the academic staff may be appointed for specified terms (term appointments) or for indeterminate terms (tenured appointments). Term appointments are utilized at the lower academic ranks and ordinarily for initial appointments at all levels. Associate Professors and Professors and those holding equivalent ranks are tenured except as noted in System regulations. Under certain circumstances tenure may be awarded to those holding lower ranks.

The provisions of tenure apply to full-time faculty members with respect to their academic rank and not to administrative titles or assignments. Tenure applies only on the campus on which the tenure is earned.

The foregoing shall not be construed to exclude contracts between the Board and members of the academic staff on mutually acceptable terms other than those stated herein.

Any appointment, whether tenured or term, may be terminated for cause.

Section 5. Responsibilities of Academic Staff. It is a basic principle that every member of the academic staff of whatever rank shall at all times be held responsible for competent and effective performance of appropriate duties. No principle of tenure shall be permitted to protect any person from removal from a position after full and careful investigation, according to procedures of due process, has revealed that the person has not met and does not give promise of meeting the responsibilities of the position.