

ORIGINAL

IN THE SUPREME COURT OF OHIO

CASE NO. 14-0164

ADAM STEWART  
:  
:  
Plaintiff-Appellant, :  
:  
vs. :  
:  
BOARD OF EDUCATION OF :  
LOCKLAND LOCAL SCHOOL :  
DISTRICT :  
:  
Defendant-Appellee. :

ON APPEAL FROM THE  
HAMILTON COUNTY COURT  
OF APPEALS  
  
FIRST APPELLATE DISTRICT  
  
COURT OF APPEALS CASE  
NO. C-130263

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT

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SUPREME COURT OF OHIO

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**Proposition of Law No. 1:** A public employee has the right to a hearing before being disciplined or terminated by a public body. *Cleveland Bd. of Edn. v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985); *Local 4501, Communications Workers of America v. Ohio State Univ.*, 49 Ohio St.3d 1, 550 N.E.2d 164 (1990).

**Proposition of Law No. 2:** A public employee’s pre-termination hearing, commonly referred to as a *Loudermill* hearing, is a hearing elsewhere provided by law. *Matheny v. Frontier Local Bd. of Edn.*, 62 Ohio St.2d 362, 405 N.E.2d 1041 (1980).

**Proposition of Law No. 3:** Because a public employee’s *Loudermill* hearing is a hearing elsewhere provided by law, the employee is entitled to demand that a public body conduct deliberations regarding his continued employment in public rather than in executive session. R.C. 121.22(G)(1); *Matheny v. Frontier Local Bd. of Edn.*, 62 Ohio St.2d 362, 405 N.E.2d 1041 (1980).

**Proposition of Law No. 4:** A public body’s failure to honor a public employee’s demand for public deliberations at his *Loudermill* hearing is a violation of the Open Meetings Act. *Matheny v. Frontier Local Bd. of Edn.*, 62 Ohio St.2d 362, 405 N.E.2d 1041 (1980); R.C. 121.22(H)–(I).

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**EXPLANATION OF WHY THIS CASE IS OF PUBLIC OR GREAT GENERAL  
INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL  
QUESTION**

Since this Court's decision in *Matheny v. Frontier Local Bd. of Edn*, 62 Ohio St.2d 362, 405 N.E.2d 1041 (1980), courts across Ohio have been narrowly construing its holding to deny public employees the right to public hearings and deliberations in violation of the Open Meetings Act. In doing so, they have empowered public bodies across the state to avoid criticism and accountability for themselves by choosing secrecy instead of openness thereby depriving voters of information they are intended to learn.

In *Matheny*, the Court held that a provision of the Open Meetings Act, R.C. 121.22(G)(1), authorized a school board to conduct private deliberations upon the renewal of a limited contract because a non-tenured teacher had no expectancy of continued employment past the expiration of the contract. The Court further determined that R.C. 121.22(G)(1) did not provide an independent basis for a public hearing, but that where one was "elsewhere provided by law," an employee could insist on a public hearing and public deliberations.

Five years after *Matheny*, the U.S. Supreme Court recognized that a public employee has a property interest in his continued employment and that his property interest could not be deprived absent constitutionally adequate procedures. In *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487 (1985), the Court held that prior to being disciplined or terminated, a public employee was entitled to a hearing to ensure the accuracy of the public institution's

decision and as a recognition of the severity that depriving someone of his livelihood entailed.

No Ohio court has recognized the profound impact that *Loudermill* had on *Matheny*. This Court must. A *Loudermill* hearing is a hearing “elsewhere provided by law.” Because this hearing is elsewhere provided by law, *Matheny* permits a public employee to demand a public body conduct deliberations regarding his continued employment in public rather than during executive session pursuant to R.C. 121.22(G)(1).

The Open Meetings Act, commonly referred to as the “Sunshine Law,” is codified at R.C. 121.22 *et seq.* The purpose of the Act is to ensure that “public officials . . . take official action and . . . conduct all deliberations upon official business only in open meetings” so that “elected officials do not meet secretly to deliberate on public issues without accountability to the public.” R.C. 121.22(A); *Cincinnati Enquirer v. Cincinnati Bd. of Edn.*, 192 Ohio App.3d 566, 2011-Ohio-703, 949 N.E.2d 1032, ¶ 9 (1st Dist.). An exception to this requirement exists, however, which permits a public body to hold an executive session “to consider the appointment, employment, dismissals, discipline, promotion, demotion, or compensation of a public employee or official.” R.C. 121.22(G)(1). The public body’s ability to hold an executive session for these purposes exists “unless the public employee . . . requests a public hearing.” *Id.*

Plaintiff/Appellant (hereinafter “Plaintiff”) possessed a property interest in his continued employment and was entitled to a *Loudermill* hearing before

Defendant/Appellee (hereinafter “Defendant”) passed the resolution terminating his non-teaching employment contract. His hearing was elsewhere provided by law and he could require Defendant to deliberate on his continued employment in public rather than during an executive session. Unfortunately, the majority opinion below ignored *Loudermill’s* impact on *Matheny* and concluded that Plaintiff’s right to a *Loudermill* hearing did not enable him to require the public body deliberate in public pursuant to R.C. 121.22(G)(1). According to the majority, “an employee can only prohibit a public body from holding an executive session when the employee is statutorily entitled to a hearing [because] the *Loudermill* court certainly did not accord [Plaintiff] the right to require that [his] entire preterminaiton hearing be held publically.” (Opinion at ¶¶ 15-16).

While concurring in the judgment, Judge DeWine wrote separately and explained his discomfort with the result reached because it “is not only [inconsistent] with the plain language of the [public meeting] exception, but also with the introductory section of the Open Meetings Act, which provides that the section is to be ‘liberally construed’ to require that public business be conducted in public unless specifically excepted by law.” (Opinion at ¶ 20, DeWine, J., concurring). He further expressed discomfort with the decision reached because the evident purpose behind this exception to the open meeting requirement is to allow “employee matters to be discussed in private ‘to protect the [employee’s] reputation and privacy.” *Id.* (citing *Gannett Satellite Information Network v. Chillicothe City School Dist. Bd. of Edn.*, 41 Ohio App.3d 218, 220, 534 N.E.2d 1239 (4th Dist.1988)).

According to Judge DeWine, “[i]f the employee is not concerned about a public airing, there is little justification to allow policy makers to shield their discussions from the public ear.” *Id.*

Plaintiff sought no privacy at the August 23, 2012 Special Meeting and twice requested that Defendant conduct its deliberations in public. Defendant denied both of Plaintiff’s requests choosing instead to protect and insulate itself from the public’s criticism and questioning. Defendant’s actions violate the spirit and letter of the Open Meetings Act, and absent a ruling from this Court, public bodies across the state will continue to deprive the public of information it is lawfully entitled to know to protect its reputation and the reputation of its members.

#### **STATEMENT OF THE CASE AND FACTS**

On August 21, 2012, Plaintiff received a letter from Defendant’s Interim Superintendent indicating that Defendant would be holding a Special Meeting on August 23, 2012 to assess his continued employment as a non-teaching employee of Lockland Local School District. In this letter, the Interim Superintendent indicated that Defendant might consider a resolution to terminate Plaintiff’s contract at the Special Meeting. The letter further stated that Plaintiff would be afforded an opportunity to speak against the recommendation and to present evidence in support of his position.

Shortly after the Special Meeting was convened on August 23, 2012, Defendant made a motion to adjourn into executive session to “consider the appointment, employment, dismissal, promotion or compensation of a public

employee” pursuant to R.C. 121.22(G)(1). Counsel for Plaintiff objected to the executive session and indicated that Plaintiff intended to exercise his right, pursuant to R.C. 121.22(G)(1), to have his continued employment discussed and deliberated in public. Defendant nevertheless adjourned into executive session. During this executive session, Defendant discussed Plaintiff’s continued employment and then emerged back into open session.

Following a presentation by Plaintiff and his counsel in open session, Defendant again moved to enter into executive session. Counsel for Plaintiff objected to the executive session indicating that Plaintiff was again exercising his right, pursuant to R.C. 121.22(G)(1), to have the deliberations concerning his continued employment conducted in public. Defendant ignored counsel’s objection and again adjourned into executive session. During this executive session, Defendant deliberated on Plaintiff’s continued employment. When it emerged from executive session, Defendant passed a prepared resolution terminating Plaintiff’s contract.

On August 24, 2012, Plaintiff received a letter from Defendant’s Treasurer notifying him that Defendant passed a resolution to terminate his non-teaching employment contract at the August 23, 2012 Special Meeting. It further advised that he had ten days from receipt of the letter to file a written appeal of Defendant’s decision with the Hamilton County Court of Common Pleas. Plaintiff timely appealed the administrative action on August 28, 2012, but also asserted a cause of action for violation of the Open Meetings Act under R.C. 121.22(G)(1).

Both Plaintiff and Defendant filed motions for summary judgment on the cause of action for violation of the Open Meetings Act. The Magistrate granted the motion filed by Defendant and denied Plaintiff's motion. The trial court overruled Plaintiff's timely objection to the Magistrate's Decision.

Plaintiff appealed the trial court's adoption of the Magistrate's Decision to the First District Court of Appeals. The First District, in a divided opinion, affirmed the granting of summary judgment in favor of Defendant.

### **ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW**

**Proposition of Law No. 1:** A public employee has the right to a hearing before being disciplined or terminated by a public body. *Cleveland Bd. of Edn. v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985); *Local 4501, Communications Workers of America v. Ohio State Univ.*, 49 Ohio St.3d 1, 550 N.E.2d 164 (1990).

**Proposition of Law No. 2:** A public employee's pre-termination hearing, commonly referred to as a *Loudermill* hearing, is a hearing elsewhere provided by law. *Matheny v. Frontier Local Bd. of Edn*, 62 Ohio St.2d 362, 405 N.E.2d 1041 (1980).

**Proposition of Law No. 3:** Because a public employee's *Loudermill* hearing is a hearing elsewhere provided by law, the employee is entitled to demand that a public body conduct deliberations regarding his continued employment in public rather than in executive session. R.C. 121.22(G)(1); *Matheny v. Frontier Local Bd. of Edn*, 62 Ohio St.2d 362, 405 N.E.2d 1041 (1980).

**Proposition of Law No. 4:** A public body's failure to honor a public employee's demand for public deliberations at his *Loudermill* hearing is a violation of the Open Meetings Act. *Matheny v. Frontier Local Bd. of Edn*, 62 Ohio St.2d 362, 405 N.E.2d 1041 (1980); R.C. 121.22(H)-(I).

The Open Meetings Act is designed to ensure openness and accountability in government and "to afford to citizens the maximum opportunity to observe and participate in the conduct of the public business." 2011 Ohio Atty.Gen.Ops. No.

2011-038. The very purpose of the open meeting requirement is to ensure that elected officials do not meet secretly to deliberate on public issues without accountability to the public. *Cincinnati Enquirer v. Cincinnati Bd. of Edn.*, 192 Ohio App.3d 566, 2011-Ohio-703, 949 N.E.2d 1032, ¶ 9 (1st Dist.). The rationale supporting this requirement is that “the public has a right to know everything that happens at the meetings of governmental bodies in order to ensure the accountability of public officials.” 2011 Ohio Atty.Gen.Ops. No. 2011-038

In seeking transparency in government, the General Assembly did carve out several exceptions to the open meeting and deliberation requirement which permits a public body to hold an executive session at any regular or special meeting to consider particularly sensitive information. Specifically, an executive session can be held “to consider the appointment, employment, dismissal, discipline, promotion, demotion, or compensation of a public employee or official.” R.C. 121.22(G)(1). Because an individual public employee may not want his employment status discussed with the community at large, by holding an executive session, the public body is permitted to give an individual the privacy he desires. *Gannett Satellite Information Network*, 41 Ohio App.3d at 220. When the public employee requests public deliberation as to his employment status, however, the public body must comply with his request. Specifically, R.C. 121.22(G)(1) allows for the executive session “unless the public employee, official, licensee, or regulated individual requests a public hearing.” R.C. 121.22(G)(1).

This Court first addressed the public hearing exception of R.C. 121.22(G)(1) in *Matheny v. Frontier Local Bd. of Edn.* In *Matheny*, two non-tenured teachers' contracts were up for renewal before the board of education and they requested in writing that any discussion concerning their renewals be conducted in open session. *Matheny*, 62 Ohio St.2d at 362. In rejecting the teachers' ability to require the board to deliberate in public, this Court held that R.C. 121.22(G)(1) authorized a school board to conduct private deliberations upon the renewal of a limited contract because a non-tenured teacher has no expectancy of continued employment past the expiration of their contract. *Id.* at 364, 368. This Court further determined that while the Open Meetings Act did not provide an independent basis for a public hearing, where one was elsewhere provided by law, an employee could insist on a public hearing and public deliberations. *Id.* at 367.

Guided by *Matheny*, several appellate courts across Ohio have examined the public hearing exception of R.C. 121.22(G)(1) in the public employee discipline and termination context. While none has extended the public hearing exception to situations in which a public employee did not have a statutory right to a hearing, it is critical to note that none involved an employee who, like Plaintiff, possessed *Loudermill* rights. See *Floyd v. Rock Hill Local Sch. Bd. of Edn.*, 4th Dist. Lawrence No. 1862, 1988 Ohio App. LEXIS 471, \* 12-13 (Feb. 10, 1988) (where non-tenured principal had no right to continued employment with the school district, he had no right under R.C. 121.22(G)(1) to demand deliberations on his renewal be held in public); *Conner v. Village of Lakemore*, 48 Ohio App.3d 52, 54, 547 N.E.2d

1230 (9th Dist.1988) (concluding that where a hearing was statutorily authorized, deliberations during an executive session were not permitted); *Davidson v. Sheffield-Sheffield Lake Bd. of Edn.*, 9th Dist. Lorain No. 89CA004624, 1990 Ohio App. LEXIS 2190, \* 12-13 (May 23, 1990) (unclassified civil servant not entitled to public deliberations on employment because she had no right to continued employment or procedural safeguards); *Harris v. Industrial Comm. of Ohio*, 10th Dist. Franklin No. 95APE07-891, 1995 Ohio App. LEXIS 5491, \* 7 (Dec. 14, 1995) (no independent legal basis for administrative assistant to demand public hearing or deliberations before any disciplinary action was taken against him); *Schmidt v. Village of Newtown*, 1st. Dist. Hamilton No. C-110471, ¶ 27 (Village permitted to enter into executive session to discuss termination of at-will employee where he had no statutory right to a hearing).

The Court of Appeals below is the first appellate court to consider the public meeting exception of R.C. 121.22(G)(1) as applied to an employee who had the right to a *Loudermill* hearing. Therefore, it is important to examine the *Loudermill* decision because this Court did not have the benefit of it when it announced *Matheny*. Upon consideration of *Loudermill*, it is clear that *Matheny* encompasses instances in which a public employee has either a statutory or constitutional right to a hearing. Therefore, Plaintiff could demand that Defendant conduct deliberations at the Special Meeting in public rather than during executive session pursuant to R.C. 121.22(G)(1) and the First District's decision must be reversed.

In *Loudermill*, the U.S. Supreme Court consolidated for appeal the cases of two Ohio classified civil servants who had been dismissed by boards of education, one for failing to report that he had been convicted of a felony, the other for failing to take an eye examination. *Loudermill*, 470 U.S. at 535-536. As classified civil servants, both individuals could only be dismissed for cause and were entitled to an administrative review of their discharge as well as judicial review of the decision to terminate them. *Id.* Both exercised their right to administrative review of their termination, but then proceeded to challenge the constitutionality of the dismissal procedures in federal court arguing that they were not afforded an adequate opportunity to respond to the allegations against them prior to termination. *Id.* at 536-537.

In analyzing what process was due prior to the termination of a public employee, the *Loudermill* Court stressed that those individuals who could only be discharged for cause possessed a property right in their continued employment. *Id.* at 538-539. This property right, pursuant to the Due Process Clause, entitled each to constitutionally adequate procedures, namely notice and an opportunity for a hearing appropriate to the nature of the case, before they could be deprived of such a right. *Id.* at 541-542 (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950), *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)).

Ultimately, the *Loudermill* Court concluded that when post-termination administrative procedures are available to a public employee, in addition to judicial review of the termination, a pre-termination hearing is required, but need not be

elaborate. This Court adopted *Loudermill* in its entirety when it held in *Local 4501, Communications Workers of America v. Ohio State University*, 49 Ohio St.3d 1, 4-5 550 N.E.2d 164 (1990) that Ohio public employees had a property interest in their continued employment and could not be terminated absent a pre-termination hearing.

As a non-teaching employee, Plaintiff was employed under a contract pursuant to R.C. 3319.081. He possessed a property interest in his position because he could only be dismissed for “violation of written rules and regulations as set forth by the board of education or for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, or any other acts of misfeasance, malfeasance, or nonfeasance.” R.C. 3319.081(C). This property interest afforded him constitutional protections prior to being terminated. Specifically, he was entitled to receive notice of the allegations against him as well as an opportunity for a hearing concerning the merits of the allegations prior to being terminated by Defendant. And while both the U.S. Supreme Court and this Court have held that Plaintiff was not entitled to an elaborate hearing in front of Defendant at the Special Meeting, both have unquestionably concluded that he was entitled to a hearing prior to Defendant taking disciplinary action against him so that “a determination of whether there [were] reasonable grounds to believe that the charges against [him were] true and support[ed] the proposed action.” *Local 4501*, 49 Ohio St.3d at 3 (citing *Loudermill*, 470 U.S. at 545-546).

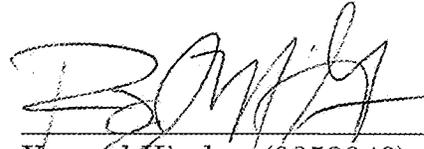
Certainly, where a hearing is statutorily authorized, a public employee can require public deliberations under the Open Meetings Act. *Matheny*, 62 Ohio St.2d at 367. *Matheny's* holding, though, extends to hearings "elsewhere provided by law," not strictly statutory hearings. Plaintiff had a constitutional right to a *Loudermill* due process hearing prior to Defendant passing a resolution to terminate his contract. This hearing is elsewhere provided by law. Therefore, under *Matheny*, Plaintiff can require Defendant to deliberate in public rather than during an executive session under the public meeting exception of the Open Meetings Act. He exercised that right not once, but twice at the August 23, 2012 Special Meeting. Defendant failed to honor both of his requests. Its failure is a violation of the letter and purpose of the Open Meetings Act and the First District's opinion must be reversed.

### CONCLUSION

"The public has a right to know everything that happens at the meetings of governmental bodies in order to ensure the accountability of public officials. 2011 Ohio Atty.Gen.Ops. No. 2011-038 (citing *Thomas v. Bd. of Trs. Of Liberty Twp.*, 5 Ohio App. 2d 265, 267, 215 N.E.2d 434 (Trumbull County 1966)). While R.C. 121.22(G)(1) does permit a public body to meet in executive session to discuss matters relating to the employment of a public employee, this exception applies "to protect the [employee's] reputation and privacy" not the reputation and privacy of the public body and its members. (Opinion at ¶ 20, DeWine, J., concurring) (citing *Gannett Satellite Information Network*, 41 Ohio App.3d at 220). "If the employee is

not concerned about a public airing, there is little justification to allow policy makers to shield their discussions from the public ear.” *Id.* For these reasons, Plaintiff respectfully requests that this Court accept this appeal to affirmatively ensure the public that its elected leaders will not be permitted to deprive them of information they are lawfully entitled to know.

Respectfully submitted,



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*Counsel for Plaintiff-Appellant*

### **CERTIFICATE OF SERVICE**

This will certify that a true copy of the foregoing Memorandum in Support of Jurisdiction of Appellant has been served upon David J. Lampe and Kate V. Davis, 9277 Centre Pointe Drive, Suite 100, West Chester, Ohio 45069, counsel for Defendant-Appellee, by ordinary U.S. mail, postage prepaid, this 30th day of January, 2014.



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Ryan J. McGraw (0089436)

ENTERED  
DEC 18 2013

IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO

ADAM STEWART,  
Plaintiff-Appellant,

APPEAL NO. C-190263  
TRIAL NO. A-1206854

JUDGMENT ENTRY.

vs.

BOARD OF EDUCATION OF  
LOCKLAND SCHOOL DISTRICT,



Defendant-Appellee.

This cause was heard upon the appeal, the record, the briefs, and arguments.

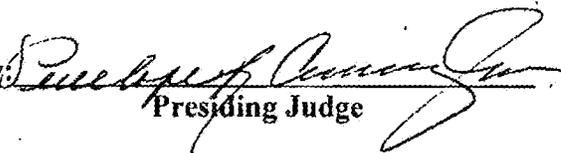
The judgment of the trial court is affirmed for the reasons set forth in the Opinion filed this date.

Further, the court holds that there were reasonable grounds for this appeal, allows no penalty and orders that costs are taxed under App. R. 24.

The court further orders that 1) a copy of this Judgment with a copy of the Opinion attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App. R. 27.

To The Clerk:

Enter upon the Journal of the Court on December 18, 2013 per Order of the Court.

By:   
Presiding Judge

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

ADAM STEWART,	:	APPEAL NO. C-130263
	:	TRIAL NO. A-1206854
Plaintiff-Appellant,	:	
vs.	:	<i>OPINION.</i>
BOARD OF EDUCATION OF	:	PRESENTED TO THE CLERK
LOCKLAND SCHOOL DISTRICT,	:	OF COURTS FOR FILING
Defendant-Appellee:	:	DEC 18 2013
		COURT OF APPEALS

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: December 18, 2013

*Kircher, Arnold & Dame, LLC, Konrad Kircher and Ryan J. McGraw, for Plaintiff-Appellant,*

*Bricker & Eckler, LLP, David J. Lampe and Kate V. Davis, for Defendant-Appellee.*

Please note: this case has been removed from the accelerated calendar.

**OHIO FIRST DISTRICT COURT OF APPEALS**

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**SYLVIA S. HENDON, Presiding Judge.**

{¶1} Plaintiff-appellant Adam Stewart has appealed from the trial court's entry adopting the magistrate's decision denying his motion for summary judgment and granting the motion for summary judgment filed by defendant-appellee the Board of Education of the Lockland School District ("the Board") on Stewart's claim alleging a violation of Ohio's Open Meetings Act under R.C. 121.22.

{¶2} Because we determine that the trial court properly granted summary judgment to the Board and denied the motion for summary judgment filed by Stewart, we affirm.

***Background***

{¶3} Stewart had been employed by Lockland as a data coordinator, a nonteaching employee. On August 21, 2012, Stewart received a letter notifying him that the Board would be holding a meeting on August 23, 2012, to consider terminating his employment, and that he would be accorded the opportunity to speak and present evidence at this meeting. The meeting was convened for the Board to consider Stewart's role in the false reporting of student attendance data to the Ohio Department of Education. At the outset of the August 23 meeting, the Board adjourned into executive session over the objection of Stewart and his counsel. When the Board reconvened into open session, Stewart presented evidence and argument in support of his continued employment. Following Stewart's presentation, the Board again adjourned into executive session over Stewart's objection. Upon resuming open session, the Board passed a resolution terminating Stewart's employment.

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{¶4} Stewart received a letter the following day officially notifying him that the Board had passed a resolution terminating his employment. The letter further notified him of his right to appeal, which Stewart timely acted upon by filing a complaint in the court of common pleas. Stewart's complaint contained two causes of action. The first alleged a violation of the Open Meetings Act under R.C. 121.22(G)(1). The second cause of action was Stewart's administrative appeal challenging his termination under R.C. 3319.081.

{¶5} Both parties filed motions for summary judgment on the first count of Stewart's complaint alleging a violation of the Open Meetings Act. The magistrate granted the motion filed by the Board and denied Stewart's motion. The trial court overruled Stewart's objections and adopted the magistrate's decision. In his sole assignment of error, Stewart now argues that the trial court erred in adopting the magistrate's decision granting summary judgment to the Board.

***Standard of Review***

{¶6} We review a trial court's ruling on a motion for summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Summary judgment is appropriately granted when there exists no genuine issue of material fact, the movant is entitled to judgment as a matter of law, and the evidence, when viewed in favor of the nonmoving party, permits only one reasonable conclusion that is adverse to the nonmoving party. *State ex rel. Howard v. Ferreri*, 70 Ohio St.3d 587, 589, 639 N.E.2d 1189 (1994).

***Open Meetings Act***

{¶7} Stewart argues in his sole assignment of error that the trial court erred in granting summary judgment to the Board on his claim for a violation of the Open Meetings Act.

{¶8} As a nonteaching employee, Stewart's employment was governed by R.C. 3319.081. This statute provides, in relevant part, that Stewart's employment could be terminated by a majority vote of the Board, but that Stewart could only be terminated for cause. See R.C. 3319.081(C). Because Stewart could only be terminated for cause, he possessed a property right in his employment, and was entitled under due-process principles to a pretermination hearing before his employment was terminated. *Cleveland Bd. of Edn. v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). The United States Supreme Court has held that when an employee is also afforded posttermination administrative procedures, which Stewart was, the pretermination hearing need not be formal or elaborate, and does not require a full evidentiary hearing. *Id.* at 545-548. Stewart does not dispute that he was accorded the required pretermination hearing. But he contends that the Open Meetings Act dictated that the Board conduct his entire hearing in public.

{¶9} The Open Meetings Act is codified in R.C. 121.22, which provides that "[t]his section shall be liberally construed to require public officials to take official action and to conduct all deliberations upon official business only in open meetings unless the subject matter is specifically excepted by law." R.C. 121.22(A). As a public body, the Board was required to conduct its meetings in public and open such meetings to the public at all times. R.C. 121.22(C).

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{¶10} R.C. 121.22(G) contains several exceptions permitting a public body to hold an executive session when properly convened by a quorum of the body. Specifically, R.C. 121.22(G)(1) allows for a public body to adjourn into executive session to consider the employment or dismissal of a public employee, unless the employee requests a public hearing. The Board relied on this provision when adjourning into executive session to discuss terminating Stewart's employment. But Stewart argues that the Board was not justified in convening an executive session because he had objected and requested that his entire hearing be conducted publically, as permitted by R.C. 121.22(G)(1).

{¶11} We must determine whether R.C. 121.22(G)(1) allowed Stewart to mandate that his entire hearing be held publically and to prevent the board from adjourning into executive session. We hold that it did not.

{¶12} In *Matheny v. Frontier Local Bd. of Edn.*, 62 Ohio St.2d 362, 405 N.E.2d 1041 (1980), the Ohio Supreme Court considered whether R.C. 121.22(G)(1) granted the right to a public hearing to a nontenured teacher. The court ultimately held that a nontenured teacher had no expectancy of continued employment and was not entitled to any hearing, let alone a public hearing, before the teacher's contract was not renewed. *Id.* at 364. The court held that R.C. 121.22(G)(1) must be read to conform to existing statutes governing teacher employment. It specifically cited R.C. 3319.16, which governs the employment contracts of teachers who could only be terminated for cause, and provides that, unlike nontenured teachers, such teachers were entitled to a hearing before termination, which "shall be private unless the teacher requests a public hearing." *Id.* at 366. In reaching its determination, the court stated that

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R.C. 121.22(G)(1) was intended to bring the other provisions of that section into conformity with existing statutes, such as R.C. 3319.16, which prescribe the procedure applicable to public employee termination actions. We do not believe that the words 'unless the public employee \* \* \* requests a public hearing \* \* \*' were intended to grant the right to a hearing where none existed previously, as in the instance of contract considerations of non-tenured teachers.

*Id.* at 367.

{¶13} This court recently applied *Matheny* in *Schmidt v. Village of Newtown*, 1st Dist. Hamilton No. C-110470, 2012-Ohio-890. In determining that an at-will employee of the Village of Newtown had no right to a public hearing, we held that "[o]nly when a hearing is statutorily authorized, and a public hearing is requested, does R.C. 121.22(G) operate as a bar to holding an executive session to consider the dismissal of a public employee." *Id.* at ¶ 26.

{¶14} Unlike R.C. 3319.16, R.C. 3319.081, which governs Stewart's employment, does not authorize a nonteaching employee to request a public pretermination hearing. Nor was Stewart otherwise statutorily entitled to a pretermination hearing. Consequently, he could not prevent the Board from holding an executive session under R.C. 121.22(G)(1). Stewart contends that we interpreted *Matheny* too narrowly in *Schmidt*, and that an employee can require a public hearing any time a hearing is authorized by law, rather than only when statutorily authorized. And he maintains that, because due-process considerations entitled him to a *Loudermill* pretermination hearing, he was entitled to a hearing authorized by

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law and could require a public hearing under R.C. 121.22(G)(1). We are not persuaded.

{¶15} The *Matheny* court held that R.C. 121.22(G)(1) was intended to bring the Open Meetings Act into conformity with existing statutes. It followed by stating that R.C. 121.22(G)(1) could not provide the right to a hearing where none had existed previously. *Matheny*, 62 Ohio St.2d at 367, 405 N.E.2d 1041. Reading these statements in conjunction, we are convinced that our interpretation in *Schmidt* was correct, and that an employee can only prohibit a public body from holding an executive session when the employee is statutorily entitled to a hearing.

{¶16} Stewart cannot rely on his entitlement to a *Loudermill* pretermination hearing to prevent the Board from entering into executive session. Our decision comports with the basic principles guiding the *Loudermill* court's decision. *Loudermill* sought to provide persons who possessed a property interest in continued employment with the basic due-process protections of notice and an opportunity to be heard prior to termination of employment. Considering its statement that a required hearing need not be formal or elaborate, the *Loudermill* court certainly did not accord such persons the right to require that the entire pretermination hearing be held publically.

{¶17} The trial court did not err in granting the Board's motion for summary judgment or in denying Stewart's motion for summary judgment on his claim alleging a violation of the Open Meetings Act. Stewart's assignment of error is overruled, and the judgment of the trial court is affirmed.

Judgment affirmed.

**HILDEBRANDT, J.** concurs.

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DEWINE, J., concurs separately.

DEWINE, J., concurring separately.

{¶18} I concur in the judgment because I agree with the lead opinion that this case is controlled by the Ohio Supreme Court's decision in *Matheny v. Frontier Local Bd. of Edn.*, 62 Ohio St.2d 362, 405 N.E.2d 1041 (1980). I write separately to explain my discomfort with that result.

{¶19} If we were to decide this case on "a blank slate," it would seem evident that Mr. Stewart is entitled to a hearing. Such a conclusion follows from the plain language of the statute: a public body may move into executive session "to consider the \* \* \* dismissal of \* \* \* a public employee \* \* \* unless the public employee \* \* \* requests a public hearing." As I read this language, it seems clear that an employee such as Mr. Stewart had a right to prevent the Board from discussing his termination in executive session and require that such a discussion take place in public.

{¶20} Such a result is not only consistent with the plain language of the exception, but also with the introductory section of the Open Meetings Act, which provides that the section is to be "liberally construed" to require that public business be conducted in public unless specifically excepted by law. It is also consistent with the evident purpose behind the section of allowing employee matters to be discussed in private "to protect the [employee's] reputation and privacy." See *Gannett Satellite Information Network v. Chillicothe City School Dist. Bd. of Edn.*, 41 Ohio App.3d 218, 220, 534 N.E.2d 1239 (4th Dist.1988). If the employee is not concerned about a public airing, there is little justification to allow policymakers to shield their discussions from the public ear.

{¶21} Nevertheless, the Supreme Court in *Matheny* limited the right of an employee to require the discussion to be held in public to cases where the employee

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already had a right to a public hearing. And as the majority correctly holds, the clear implication of *Matheny* is that this only applies when an existing right to a hearing comes from statute.

{¶22} The result we reach today finds little support in the language of the Open Meetings Law. But unless the Supreme Court revisits *Matheny* or the legislature takes action, it is the decision we are required to reach.

Please note:

The court has recorded its own entry on the date of the release of this opinion.