

ORIGINAL

IN THE SUPREME COURT OF OHIO  
CASE NO. 2014-0164

ADAM STEWART

Plaintiff-Appellant,

vs.

BOARD OF EDUCATION OF  
LOCKLAND LOCAL SCHOOL  
DISTRICT

Defendant-Appellee.

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ON APPEAL FROM THE  
HAMILTON COUNTY COURT  
OF APPEALS

FIRST APPELLATE DISTRICT

COURT OF APPEALS CASE  
NO. C-130263

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MERIT BRIEF OF APPELLANT

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## **APPENDICES**

- A. Notice of Appeal to the Supreme Court of Ohio, January 30, 2014.
- B. Opinion of the First Appellate District, December 18, 2013.
- C. First Appellate District Judgment Entry, December 18, 2013.
- D. Entry Overruling Objection to Magistrate's Decision, March 28, 2013.
- E. Magistrate's Decision, January 30, 2013.

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

On August 21, 2012, Plaintiff/Appellant, Adam Stewart, (hereinafter “Stewart”) received a letter from Defendant/Appellee Board of Education of Lockland Local School District’s (hereinafter the “Board” or “Lockland”) Interim Superintendent indicating that the Board would be holding a Special Meeting on August 23, 2012 to assess his continued employment as a non-teaching employee of Lockland. (*Plaintiff’s Motion for Summary Judgment*, October 24, 2012, at Exhibit A). In this letter, the Interim Superintendent indicated that the Board might consider a resolution to terminate Stewart’s contract at the Special Meeting. (*Id.*). The letter further stated that Stewart would be afforded an opportunity to speak against the recommendation and to present evidence in support of his position. (*Id.*).

Shortly after the Special Meeting was convened on August 23, 2012, the Board 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). (*Id.* at Ex. B at Admission 6 & Ex. C at p. 1). Counsel for Stewart objected to the executive session and indicated that Stewart intended to exercise his right, pursuant to R.C. 121.22(G)(1), to have his continued employment discussed and deliberated in public. (*Id.* at Ex. B at Admission 8). The Board nevertheless adjourned into executive session. (*Id.* at Admission 9). During this executive session, the Board discussed Stewart’s continued employment and then emerged back into open session. (*Id.* at Admission 10).

Following a presentation by Stewart and his counsel in open session, the Board again moved to enter into executive session. (*Id.* at Admission 12 & Ex. C at pp. 1-2). Counsel for Stewart objected to the executive session indicating that Stewart was again exercising his right, pursuant to R.C. 121.22(G)(1), to have the deliberations concerning his continued employment

conducted in public. (*Id.* at Exh. B at Admission 14). The Board ignored counsel's objection and again adjourned into executive session. (*Id.* at Admission 12). During this executive session, the Board deliberated Stewart's continued employment. (*Id.* at Admission 15). When it emerged from executive session, the Board passed a resolution terminating Stewart's contract. (*Id.* at Ex. C at pp. 5-7).

On August 24, 2012, Stewart received a letter from Lockland's Treasurer, notifying him that the Board passed a resolution to terminate his non-teaching employment contract at the August 23, 2012 meeting. (*Id.* at Ex. D). It further advised that he had ten days from receipt of the letter to file a written appeal of the Board's decision with the Hamilton County Court of Common Pleas. (*Id.*). Stewart timely appealed on August 28, 2012 and also asserted a cause of action for violation of the Open Meetings Act under R.C. 121.22(G)(1). (*Complaint* at ¶ 3).

Both Stewart and the Board filed motions for summary judgment related to the cause of action for violation of the Open Meetings Act. The Magistrate granted the Board's motion and denied Stewart's motion. (*Appendix E*, Magistrate's Decision, January 30, 2013). The trial court overruled Stewart's timely objection to the Magistrate's Decision on the grounds that Stewart did not have a statutory right to a public hearing. (*Appendix D*, Entry Overruling Objection to Magistrate's Decision, March 28, 2013).

Stewart appealed the trial court's adoption of the Magistrate's Decision to the First District Court of Appeals arguing that his right to a pre-termination due process hearing, commonly referred to as a *Loudermill* hearing, entitled him to demand that deliberations be conducted in public rather than during executive session because this hearing was "elsewhere provided by law." The Court of Appeals affirmed the trial court's adoption of the Magistrate's decision concluding that "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 Stewart the right to require that [his] entire pretermination hearing be held publically.” (*Appendix B*, First District Court of Appeals Opinion, December 18, 2013 at ¶¶ 15-16).

While concurring in the judgment, Judge DeWine wrote separately and explained his discomfort with the result reached by the court of appeals because it “[was] 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.” (*Id.* 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 policymakers to shield their discussions from the public ear.” (*Id.*).

## **II. 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.

In *Cleveland Bd. of Education v. 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. 532, 535-536, 105 S.Ct. 1487 (1985). 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 any decision terminating their employment. *Id.* Both exercised their right to administrative review of their termination and challenged 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. Pursuant to the Due Process Clause of the U.S. Constitution, the Court determined that each was entitled 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, 70 S.Ct. 652 (1950), *Boddie v. Connecticut*, 401 U.S. 371, 379, 91 S.Ct. 780 (1971)). According to the Court, “affording the employee an opportunity to respond prior to termination would impose neither a significant administrative burden, nor intolerable delays” and would reflect the severity of a decision to deprive someone of his livelihood. *Id.* at 543-544.

Ultimately in *Loudermill*, the Court held that when post-termination administrative procedures are available to a public employee, in addition to judicial review of the termination, a pre-termination hearing need not be elaborate and the employee need just be given notice of the charges against him, an explanation of the evidence, and an opportunity to present his side of the story. *Id.* at 547-548. This Court interpreted *Loudermill* in this exact way 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, Stewart 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. And while both the U.S. Supreme Court and this Court have held that Stewart was not entitled to an elaborate hearing in front of the Board at the Special Meeting, both have unquestionably concluded that he was entitled to a hearing prior to the Board 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).

**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.”

**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.

**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.

This Court must recognize the impact the U.S. Supreme Court's decision in *Loudermill* had on Ohio's Open Meetings Act, commonly referred to as the "Sunshine Law." Found at R.C. 121.22, these laws are to be "liberally construed to require public officials to take official action and to conduct all deliberations upon official business only in open meetings." R.C. 121.22(A). These laws are further 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 362, 405 N.E.2d 1041 (1980). 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 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 Stewart, 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, 2012-Ohio-890, ¶ 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 majority below similarly declined to extend the public hearing exception to include Stewart's *Loudermill* hearing on the grounds that "an employee can only prohibit a public body from holding an executive session when the employee is statutorily entitled to a hearing." (*Appendix B* at ¶ 15). Such a ruling, though, takes a very narrow view of *Matheny* and fails to account for the fact that *Matheny* was decided five years before *Loudermill* recognized the property interest inherent in a public employee's position. It further fails to account for the fact that, unlike the teachers in *Matheny*, Stewart had an expectation of continued employment until the expiration of his contract. 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, explicitly extends to hearings "elsewhere provided by law," not strictly statutory hearings. Stewart had a constitutional right to a *Loudermill* due process hearing prior to the Board passing a resolution to terminate his contract. This hearing is elsewhere provided by law. Therefore, under *Matheny*, Stewart can require the Board 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. The Board failed to honor both of his requests.

Even if this Court were to interpret *Matheny* as only applicable to instances in which an employee has a statutory right to a hearing, though, Judge DeWine's concurring opinion below makes clear that it is time for this Court to broaden the public hearing exception to include instances in which an employee has either a statutory or constitutional right to a hearing. As Judge DeWine correctly notes, a plain reading of the statute makes clear that an employee such as Stewart has a right to prevent the Board from discussing his termination in executive session and to require that such discussion take place in public. (*Appendix B* at ¶ 20, Dewine, J., concurring). Again, if an employee is not concerned about a public airing – which Stewart was not – there is little justification to allow policymakers to shield their discussions from the public ear. *Id.* Further, continuing to adhere to the belief that the General Assembly intended a law, which it explicitly stated was to be “liberally construed,” to apply in only two limited circumstances would run entirely counter to the purpose of the Open Meetings Act and to Ohio's policy of open government.

Expansion of the public hearing exception of the Open Meetings Act would also bring Ohio in line with a large number of other jurisdictions across the country which prohibit a hearing, or in some cases even discussion, concerning a particular employee in executive session when that employee requests that the hearing or discussions take place in public. *See e.g. Alaska* (AS 44.62.310(c)(2) (subjects that tend to prejudice the reputation and character of any person may be discussed in executive session, provided the person may request a public discussion) and *Revelle v. Marston*, 898 P.2d 917, 923 (Alaska 1995) (“those who will be affected by a public

body's decision have the right to appear and be heard in a public forum"); *Arizona* (A.R.S. § 38-431.03(A)(1) (twenty-four hour notice required to be given to appointee or employee about executive session concerning their employment so that appointee or employee may demand that discussion or consideration of employment occur at public meeting) and *Arizona Agency Handbook, Chapter 7 Open Meetings, 7-18*, <https://www.azag.gov/sites/default/files/sites/all/docs/agency-handbook/ch07.pdf> (accessed July 25, 2014) (Discussion or consideration of employment must be conducted in a public meeting and not in an executive session if the employee so requests)); *Colorado* (C.R.S. §24-6-402(4)(f)(I) (executive session for personnel matter prohibited when the employee who is the subject of the session has requested an open meeting) and *Gumina v. City of Sterling*, 119 P.3d 527, 531 (Colo.App. 2004) (personnel exception not applicable if the subject employee has requested an open meeting)); *Connecticut* (Conn. Gen. Stat. § 1-200(6)(A) (executive session permitted to discuss the employment of public employee provided that such individual may require that discussion be held at an open meeting)); *Delaware* (29 Del. C. § 10004(b)(8)-(9) (executive session prohibited for hearing of employee disciplinary or dismissal cases if the employee requests a public hearing and for personnel matter in which name of individual employee is discussed if the employee requests such a meeting be open) and *Siss v. County of Passaic*, 75 F.Supp.2d 325, 334 (D. Del. 1999) (public body required to give employees reasonable notice of the intention to consider personnel matters related to them so that they can exercise their statutory right to make a decision on whether they desire a public discussion and prepare and present an appropriate request in writing) (internal citations omitted)); *Hawaii* (Haw. Rev. Stat. 92-5(a)(2) (executive session prohibited to consider the dismissal or discipline of employee where individual concerned requests an open meeting) and 1994 Haw.Atty.Gen.Ops.

94-01 (while Hawaii Sunshine Laws permit deliberations and discussions in executive session concerning the public employment, the deliberations and decisions must be made in a meeting open to the public if the individual so requests)); *Iowa* (Iowa Code § 21.5(i) (executive session for employment purposes only permitted when necessary to prevent needless and irreparable injury to that individual's reputation and individual requests a closed session) and Iowa Freedom of Information Counsel, *Open Meeting, Open Records Handbook*, p. 15, [http://www.drakejournalism.com/newsite\\_ifoic/\\_documents/omorh.pdf](http://www.drakejournalism.com/newsite_ifoic/_documents/omorh.pdf) (accessed July 25, 2014) (the potential breadth of the personnel exception to the open meeting requirement is offset by the two conditions that must be met before a meeting may be closed)); *Louisiana* (La. Rev. Stat. Ann. § 42:17(a)(1) (executive session to discuss person only permitted if such person is notified in writing at least twenty-four hours before the meeting and that such person does not demand that such discussion be held at an open meeting) and Office of the Attorney General of the State of Louisiana, *Open Meetings Law*, <http://www.ag.state.la.us/Article.aspx?articleID=21&catID=10#ExecutiveSessions> (accessed July 25, 2014) (for purposes of open meetings laws, public body can discuss certain matters in executive session unless right to privacy is waived)); *Maine* (1 M.R.S.A. §405(6)(A) (discussion or consideration of employment of individual in executive session not permitted if person requests in writing that the investigation or hearing of charges or complaints against that person be conducted in open; if request for open meeting is made, it must be honored.)); *Massachusetts* (M.G.L. c. 30A, 21(a)(1) (discussion of discipline or dismissal of employee not permitted in executive session when the individual involved requests that the session be open) and Massachusetts Attorney General's Office, *Attorney General's Open Meeting Law Guide*, <http://www.mass.gov/ago/government-resources/open-meeting-law/attorney-generals-open->

[meeting-law-guide.html#Executive](#) (accessed July 25, 2014) (it is the individual's right to choose to have a discussion about their employment in an open meeting and this right takes precedence over the right of the public body to go into executive session)); *Michigan* (MCL § 15.268 (executive session to consider employment of public employee only permitted if the named person requests a closed hearing, and if closed hearing is requested, the request may be rescinded at any time in which case the matter shall be considered only in open session)); *Montana* (Mont. Code Ann. § 2-3-203 (executive session prohibited when individual subject to discussions waives right to privacy, and if individual waives right to privacy, the meeting must be open)); *Nebraska* (Neb. Rev. Stat. § 84-1410(1)(d) (executive session prohibited for evaluation of job performance of person when such person has requested a public meeting) and Op. Att'y Gen. No. 89063 (October 12, 1989), [http://www.ago.ne.gov/ag\\_opinion\\_view?oid=3284](http://www.ago.ne.gov/ag_opinion_view?oid=3284) (accessed July 25, 2014) (personnel exception is for the protection of individual employees and not governmental officials and there is no violation of the Open Meetings Law for executive session when employee did not request open session)); *Nevada* (NRS 241.030(2) (executive session where character or alleged misconduct of employee will be discussed prohibited where employee waives the closure of the meeting and requests that the meeting be open to the public provided the request is made at any time before or during the meeting) and *McKay v. Board of Sup'rs of Carson City*, 102 Nev. 644, 651, 730 P.2d 438 (1986) (allowing discussion of employee's alleged misconduct to be conducted in a closed session is for the protection of the person's need for confidentiality in some matters)); *New Hampshire* (N.H. Rev. Stat. Ann. § 91-A:3(II)(a) (executive session prohibited to discuss dismissal or discipline of public employee when the employee has the right to a meeting and requests that the meeting be open, in which case the request shall be granted) and New Hampshire Attorney General, *Attorney General's*

*Memorandum on New Hampshire's Right-to-Know Law, RSA Chapter 91-A*, p. 19, <http://doj.nh.gov/civil/documents/right-to-know.pdf> (accessed July 25, 2014) (“Where a right to a public hearing and notice exists, generally that right attaches when the public body is considering imposing discipline or discharging the employee.”); *New Jersey* (N.J.S.A. 10:4-12(b)(8) (executive session to discuss employment of public employee prohibited when all the individual employees whose rights could be adversely affected request in writing that the matter be discussed at a public meeting)); *New Mexico* (NMSA 1978 § 10-15-1(H)(2) (executive session not permitted to discuss employment status of individual public employee when aggrieved public employee demands a public hearing) and New Mexico Attorney General’s Office, *Open Meetings Act Compliance Guide*, p. 22, Example 43, <https://docs.google.com/viewer?a=v&pid=sites&srcid=bm1hZy5nb3Z8dGVzdC1ubWFnfGd4Ojc3ZDg4OGQyMGZiODIxNmI> (accessed July 25, 2014) (personnel exception “does not confer the right to a hearing, but when an employee has a statutory or constitutional right to a hearing . . . the public body cannot rely on the limited personnel matters exception to close the hearing if the employee wants it to be open. For example, the requirements of due process of law, a constitutional right, often mandate that before a right or privilege may be denied by a public body, the person possessing or seeking to acquire the right must be provided notice . . . and an opportunity to be heard prior to the final decision. If an employee of a public body is entitled to such a hearing before the public body can take disciplinary or other adverse action against the employee, the employee may demand and obtain an open hearing.”); *Oregon* (ORS § 192.660(2)(b) (executive session to consider dismissal or discipline of, or to hear complaints or charges brought against employee prohibited when employee requests an open hearing) and Oregon Attorney General, *Attorney General’s Public Records and Meetings Manual*, pp. 139-

140, [http://www.doj.state.or.us/pdf/public\\_records\\_and\\_meetings\\_manual.pdf](http://www.doj.state.or.us/pdf/public_records_and_meetings_manual.pdf) (accessed July 25, 2014) (in order to permit the affected person to request an open hearing, that person must have sufficient advance notice of the purpose of the meeting and the right to choose whether he or she wants it to be in an open session)); *Pennsylvania* (65 Pa Cons. Stat. § 708(a)(1) (executive session prohibited to discuss employment of employee when employee whose rights could be adversely affected requests, in writing, that the matter be discussed at an open meeting) and *Mirror Printing Co., Inc. v. Altoona Area Sch. Bd.*, 609 A.2d 917, 920, 148 Pa.Cmwlth. 168 (Pa.Cmwlth. 1992) (executive sessions authorized when the individual seeks confidentiality to protect his or her reputation)); *Rhode Island* (R.I. Gen. Laws. § 42-46-5(a)(1) (executive session regarding job performance not permitted when employee receives advanced written notice and requires that the meeting be held in open session) and Rhode Island Attorney General's Office, *The Attorney General's Guide to Open Government in Rhode Island, 6th Edition*, p. 10, <http://www.riag.ri.gov/documents/opengov/guidetoopengovernmentbookletfullpagetext.pdf> (accessed July 26, 2014) (violation of the Open Meetings Act to discuss job performance in executive session after the affected person requested open session and open session can be requested with little or no notice)); *South Carolina* (S.C. Code Ann. § 30-4-70 (if an adversary hearing is held, discussion of employee discipline prohibited where employee demands public hearing)); *Texas* (Tex. Gov. Code Ann. § 551.074(b) (executive session for deliberations on employment of public employee or to hear a charge or complaint against said employee not permitted if the employee who is the subject of the deliberation or hearing requests public hearing) and *Carlisle v. Trudeau*, No. 4:04CV309, 2006 WL 722122 at \*3 (E.D.Texas 2006) (violation of Open Meetings Act for city council to refuse employees demand for public hearing and to enter into executive session to consider discipline against him)); *Washington* (RCW

42.30.110(1)(f) (executive session prohibited to receive and evaluate complaints brought against employee when the employee demands a public hearing or meeting) and Washington State Office of the Attorney General, *Open Government Internet Manual, Chapter 4, § 4.3(f)*, <http://www.atg.wa.gov/OpenGovernment/InternetManual/Chapter4.aspx#.U9OvLs90zIV> (accessed July 26, 2014) (bringing of the complaint or charge from within public agency or by public triggers the opportunity for the employee to request a public hearing or open meeting be held regarding the complaint or charge)); and *West Virginia* (W. Va. Code §6-9A-3(b)(2)(A)-(B) (executive session prohibited to consider employee discipline or discharge and for conducting hearing on a complaint or charge against employee when employee requests an open meeting) and West Virginia Ethics Commission Committee on Open Governmental Meetings, *Open Meetings Advisory Opinion No. 2002-08*, <http://www.ethics.wv.gov/SiteCollectionDocuments/PDF%20Open%20Meeting%20Opinions/O MAO%202002-08.pdf> (accessed July 26, 2014) (once an employee has requested that his matter be discussed in an open meeting, his subsequent misconduct does not relieve the governing body of the need to continue the discussion in open meeting)).

### III. 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 (7th Dist.1966)). The very purpose of the open meeting requirement is to ensure that elected officials do not meet secretly and engage in secret deliberations on public issues with no accountability to the public. *Id.* (citing *State ex rel. Cincinnati Post v. City of Cincinnati*, 76 Ohio St.3d 540, 668 N.E.2d 903 (1996); *Cincinnati Enquirer v. Cincinnati Bd. of Educ.*, 192

Ohio App. 3d 566, 2011-Ohio-703, 949 N.E.2d 1032 at ¶ 9 (1st Dist.); *State ex rel. Cincinnati Enquirer v. Hamilton County Comm'rs*, 1st Dist., Hamilton, No. C010605, 2002-Ohio-2038).

When elected leaders meet behind closed doors and engage in secret deliberations on public issues, the public is harmed. By entering into executive session not once, but twice, to deliberate Stewart's continued employment, the Board violated the Open Meetings Act. The resolution passed by the Board to terminate Stewart's non-teaching employment contract, which came as a result of the deliberations during the executive sessions, is therefore invalid and without legal effect. R.C. 121.22(H). As a result, the court of appeals erroneously affirmed the granting of the Board's motion for summary judgment and its decision must be reversed and summary judgment granted in favor of Stewart.

This Court must further issue an injunction, pursuant to R.C. 121.22(I)(1), compelling the Board to comply with the provisions of the Open Meeting Act and award Stewart a civil forfeiture of five hundred dollars, as well as attorney's fees and costs, pursuant to R.C. 121.22(I)(2).

Respectfully Submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing Merit Brief of Appellant was served upon David Lampe, Esq. and Kate V. Davis, Esq., Attorneys for Defendant by regular U.S. mail, 9277 Centre Point Drive, Suite 100, West Chester, Ohio 45069 sent this 1<sup>st</sup> day of August, 2014.

  
Ryan J. McGraw (0089436)

# **APPENDIX**

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

NOTICE OF APPEAL OF APPELLANT

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tabbles®  
EXHIBIT  
A

FILED  
JAN 30 2014  
CLERK OF COURT  
SUPREME COURT OF OHIO

NOTICE OF APPEAL OF APPELLANT

Appellant Adam Stewart hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Hamilton County Court of Appeals, First Appellate District, entered in Court of Appeals Case No. C-130263 on December 18, 2013.

This case raises issues of public or great general interest and a substantial constitutional question.

Respectfully submitted,



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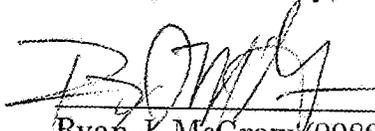
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CERTIFICATE OF SERVICE

This will certify that a true copy of the foregoing Notice of Appeal 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.



Ryan J. McGraw (0089436)

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DEC 18 2013

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

ADAM STEWART, : APPEAL NO. C-130263  
Plaintiff-Appellant, : TRIAL NO. A-1206854  
vs. : *OPINION.*  
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.

EXHIBIT  
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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.

{¶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).

{¶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

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

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.

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.

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DEC 18 2013

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

ADAM STEWART,  
Plaintiff-Appellant,

APPEAL NO. C-130263  
TRIAL NO. A-1206854

vs.

JUDGMENT ENTRY.

BOARD OF EDUCATION OF  
LOCKLAND SCHOOL DISTRICT,  
Defendant-Appellee.



D104640789

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.

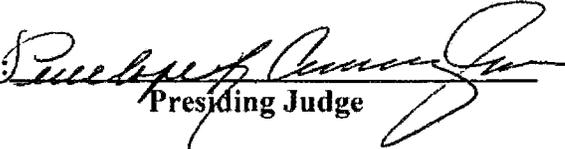
By:   
Presiding Judge

EXHIBIT  
C

COURT OF COMMON PLEAS



D101593013

HAMILTON COUNTY OHIO

ENTERED  
MAR 28 2013

ADAM STEWART,

PLAINTIFF

V.

LOCKLAND LOCAL SCHOOL  
DISTRICT BOARD OF EDUCATION,

DEFENDANTS

CASE NO. A1206854

JUDGE RALPH E. WINKLER

ENTRY OVERRULING  
OBJECTION TO MAGISTRATE'S  
DECISION

The Plaintiff has objected to the Magistrate's Decision. After considering the written arguments of counsel, it is the finding of the court that the objection is not well taken. The Plaintiff did not have a statutory right to a public hearing. The Plaintiff's objection is overruled, but he will have his day in Court regarding his termination. Therefore, there being no just cause for delay, the objection shall be overruled and the decision of the magistrate confirmed. So ordered this twenty seventh day of March, 2013.

COURT OF COMMON PLEAS  
ENTER  
*R. Winkler*  
RALPH E. WINKLER, JUDGE  
THE COURT SHALL TAX COSTS TO PARTIES PURSUANT TO CIVIL  
RULE 53 WHICH SHALL BE TAXED  
AS COSTS HEREIN.

EXHIBIT  
D

COURT OF COMMON PLEAS  
HAMILTON COUNTY, OHIO

ADAM STEWART	:	CASE NO. A1206854
Plaintiff,	:	JUDGE WINKLER
v.	:	MAGISTRATE KOTHMANN
LOCKLAND LOCAL SCHOOL DISTRICT BOARD OF EDUCATION	:	<u>MAGISTRATE'S DECISION</u>
Defendant.	:	



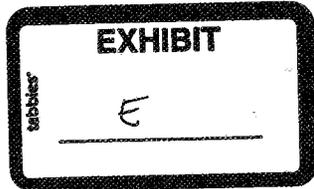
RENDERED THIS 30<sup>th</sup> DAY OF JANUARY, 2013.

WHEREAS, this matter came before the Court on cross Motions for Summary Judgment filed by Plaintiff, Adam Stewart, and Defendant, Lockland Local School District Board of Education, as to Count One of Plaintiff's Complaint alleging a violation of the Open Meetings Act. The Court finds Defendant's Motion for Summary Judgment well-taken and Plaintiff's Motion for Summary Judgment to not be well-taken, after considering all matters herein and the arguments of counsel;

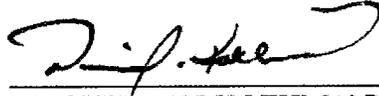
It is hereby ORDERED, ADJUDGED, and DECREED that summary judgment is **GRANTED** in favor of Defendant and against Plaintiff on Count I of Plaintiff's Complaint alleging a violation of the Open Meetings Act; and

It is further ORDERED, ADJUDGED, and DECREED that Plaintiff's motion for summary judgment on Count I of Plaintiff's Complaint alleging a violation of the Open Meetings Act is hereby **DENIED**.

TRACY WINKLER  
 CLERK OF COURTS  
 HAMILTON COUNTY, OH  
 2013 FEB 1 A 11:13  
**FILED**



**SO ORDERED.**



MAGISTRATE KOTHMANN  
COURT OF COMMON PLEAS

**NOTICE**

Objections to the Magistrate's Decision must be filed within fourteen days of the filing date of the Magistrate's Decision. A party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ. R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ. R. 53(D)(3)(b).

**PRAECIPE**

TO THE CLERK OF THE HAMILTON COUNTY COMMON PLEAS COURT:

Please issue service of the Magistrate's Decision to the following:

David J. Lampe, Kate V. Davis  
BRICKER & ECKLER LLP  
9277 Centre Point Drive, Suite 100  
West Chester, Ohio 45069  
*Attorneys for Defendant, Lockland  
Local School District Board of Education*

Konrad Kircher  
KIRCHER, ARNOLD & DAME, LLC  
4824 Socialville-Foster Road  
Mason, Ohio 45040  
*Attorney for Plaintiff, Adam Stewart*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY THAT COPIES OF THE FOREGOING DECISION HAVE BEEN SENT BY ORDINARY MAIL TO ALL PARTIES OR THEIR ATTORNEYS AS PROVIDED ABOVE.

Date: 1/30 Deputy Clerk: 