

ORIGINAL

IN THE SUPREME COURT OF OHIO

ADAM STEWART,

Plaintiff-Appellant,

vs.

BOARD OF EDUCATION OF LOCKLAND
LOCAL SCHOOL DISTRICT

Defendants-Appellants.

CASE NO. 2014-0164

On Appeal from the Hamilton
County Court of Appeals,
First Appellate District

Case No. A1206854

**BRIEF OF AMICUS CURIAE
OHIO EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF
APPELLANT ADAM STEWART**

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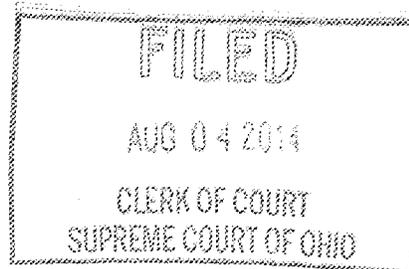


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I. STATEMENT OF INTEREST

The Ohio Employment Lawyers Association, whose members regularly represent public sector employees facing employment issues of all kinds, has a strong interest in ensuring that public employees are not subjected to discipline or termination based on considerations that their employers are unwilling to discuss in public. Subject to the employee's own interest in protecting his or her privacy or reputation, it is important for the public to be aware of the reasons and justifications for a public body's employment decisions. OELA also recognizes that it is important in many cases involving the termination or discipline of a public employee for the employee to have an opportunity to clear his or her name in a public forum. OELA files this amicus brief to urge this Court to protect the rights of public employees and members of the general public to open meetings concerning important public employment issues.

OELA is the state-wide professional membership organization in Ohio comprised of lawyers who represent employees in labor, employment and civil rights disputes. OELA is the only state-wide affiliate of the National Employment Lawyers Association (NELA) in Ohio. NELA and its 68 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been treated illegally in the workplace. NELA and OELA strive to protect the rights of their members' clients, and regularly support precedent-setting litigation affecting the rights of individuals in the workplace. OELA advocates for employee rights and workplace fairness while promoting the highest standards of professionalism, ethics, and judicial integrity.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents an opportunity for this Court to reconsider and clarify a decision, *Matheny v. Frontier Local Board of Education* (1980), 62 Ohio St. 2d 362, 405 N.E.2d 1041, that has undermined the core purpose of Ohio's Open Meetings Act by transforming what was intended to be a limited right to privacy for public employees facing termination or discipline into a broad right of public bodies to conceal important personnel matters from public view.

The Open Meetings Act states that its provisions "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). Under the Act, executive sessions are reserved for the specific, narrow purposes described in division (G) of Section 121.22. Subdivision (G)(1) provides that a public body may convene an executive session "[t]o consider the appointment, employment, dismissal, discipline, promotion, demotion, or compensation of a public employee or official, or the investigation of charges or complaints against a public employee, official, licensee, or regulated individual, unless the public employee, official, licensee, or regulated individual requests a public hearing."

In 1980, in the midst of a discussion of public employees' entitlement to full evidentiary hearings regarding their contractual status, this Court, in *Matheny*, held that subdivision (G)(1) did not provide an independent basis for an evidentiary hearing to consider an employee's contract. The Court then went further, holding that a school board could consider an employee's contract in executive session even if the employee requested that the deliberations be public.

There are two reasons not to apply *Matheny* to allow an executive session here. The first is that *Matheny* was wrongly decided and should be overruled. The *Matheny* Court openly acknowledged that the purpose of subdivision (G)(1) was to protect the privacy and reputation of

the employee whose contract was at issue, and failed to explain why the General Assembly would permit private deliberations even in cases where an employee chose to waive the right to privacy. See *Stewart v. Bd. of Educ. of Lockland Local Sch. Dist.* (1st Dist.), 2013-Ohio-5513, ¶ 20 (DeWine, J., concurring) (“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.”).

The *Matheny* Court seems to have relied entirely on its concern that the Open Meetings Act would otherwise be used as a basis for requiring evidentiary hearings in situations beyond those the General Assembly intended. This fear of a surge of unintended evidentiary proceedings led the Court to overlook the simple fact that a public body can deliberate in public without conducting a full, formal hearing. Worse, it led the Court to disregard the core purpose of Section 121.22, to require public business to be conducted in public, and the important policy interest in permitting public employees an opportunity to clear their names when they are publicly accused of misconduct. As Judge DeWine’s concurrence below states, allowing closed deliberations over an employee’s objection “finds little support in the language of the Open Meetings Law,” but it will continue to be permitted unless this Court reconsiders *Matheny*’s departure from the language and purpose of Section 121.22. *Stewart*, 2013-Ohio-5513, at ¶ 22.

The second, much simpler reason to prohibit an executive session here is that, while the plaintiffs in *Matheny* were deemed not to be otherwise entitled to a hearing by law—given that the contract nonrenewals they were contesting did not implicate a constitutional or statutory property or reputational interest—Plaintiff-Appellant Adam Stewart *was* otherwise entitled to a hearing, under the constitutional principles of due process recognized by the U.S. Supreme Court in *Cleveland Board of Education v. Loudermill* (1985), 470 U.S. 532. The position advocated by Defendant-Appellee Board of Education of Lockland Local School District (“the Board”) would

thus extend *Matheny* and distort the meaning of Section 121.22(G)(1) even further, requiring boards to deliberate in public on employment matters only if some separate Ohio statute specifically requires them to conduct open hearings.

Such an extension of *Matheny* would render the provision at issue here entirely superfluous: the clause in subdivision (G)(1) stating “unless the public employee, official, licensee, or regulated individual requests a public hearing” would be applicable only where another source of law already provides a right to an open hearing, in which case there would be no need to consider whether this clause *also* grants the employee the right to request an open hearing. Such an extension of *Matheny* would judicially revoke the right provided in subdivision (G)(1) for an employee to request public deliberations, without any textual or policy justification.

III. STATEMENT OF FACTS AND THE CASE

Amicus curiae OELA adopts the Appellant’s Statement of Facts and the Case.

IV. LAW AND ARGUMENT

PROPOSITION OF LAW: Consistent with the plain language of Section 121.22(G)(1) of the Ohio Revised Code, a public body may not conduct an executive session to consider the termination of an employee when the employee requests that the deliberations remain public.

A. Neither the Plain Language of Section 121.22(G)(1) Nor Its Clear Purpose to Protect Employee Privacy Justifies an Executive Session to Consider an Employee Termination When the Employee Has Requested the Deliberations to Be Held in Public.

In *Matheny v. Frontier Local Board of Education* (1980), 62 Ohio St. 2d 362, 405 N.E.2d 1041, this Court examined the meaning and intent of Section 121.22(G)(1) of the Revised Code. Subdivision (G)(1) is one of a few narrow exceptions to the general requirement of the Open Meetings Act that all deliberations of a public body must be held in public. The exception provides that an executive session may be held “[t]o consider the appointment, employment,

dismissal, discipline, promotion, demotion, or compensation of a public employee or official, or the investigation of charges or complaints against a public employee, official, licensee, or regulated individual, *unless the public employee, official, licensee, or regulated individual requests a public hearing.*” R.C. 121.22(G)(1) (emphasis added).

The employees in *Matheny* made several arguments that the school board’s private, summary consideration of their contract nonrenewals violated their rights, two of which are pertinent here: first, that they were entitled to pre-termination hearings based on constitutional principles of due process.; and second, that because they requested public deliberations, it was a violation of the Open Meetings Act to consider their terminations in executive session. The *Matheny* Court rejected both of these propositions, holding that a non-tenured teacher has no property interest in continued employment for due process purposes, and that the language of Section 121.22(G)(1) permits an executive session unless an employee is otherwise entitled to a public hearing under the right to a hearing is “elsewhere provided by law.” 62 Ohio St. 2d at 368.

As discussed below, subsequent U.S. Supreme Court precedent, in *Cleveland Board of Education v. Loudermill* (1985), 470 U.S. 532, has transformed the legal landscape with respect to the right of public employees to pre-termination hearings, and this alone would justify a holding in Mr. Stewart’s favor in this case. But this Court should go further and overrule *Matheny* to the extent it grants public bodies a right to convene an executive session to consider the termination or discipline of an employee when the employee requests otherwise.

Ironically, the *Matheny* Court examined the purpose of Section 121.22(G) in a manner that would seemingly support an employee’s right to request public deliberations. After analyzing Section 3319.16, which provides for teacher termination proceedings to be held in private or in public, at the teacher’s option, the Court stated, “It is evident that R. C. 3319.16 is

aimed at protecting the privacy of a teacher against whom charges of misconduct have been preferred. R. C. 121.22(C), standing alone, would erode this protection by requiring that all termination hearings be public. For this reason, the General Assembly, in R. C. 121.22(G)(1), enacted the following exception to the public meeting requirement which closely parallels the above-quoted language of R. C. 3319.16.” 62 Ohio St. 2d at 366-67.

In other words, the default rule of Chapter 121.22 is to require public deliberations. Without Division (G)(1), there would be no basis at all for an executive session to consider an employee’s termination, but the General Assembly enacted Division (G)(1) to protect the employee’s privacy and reputation. And, as in Section 3319.16, it recognized that an employee, instead of privacy, could desire a public opportunity to clear his or her name, so it provided for the proceedings to be either open or closed at the employee’s option.

The plain language of the Division (G)(1) places no limitations on an employee’s ability to request a hearing. The General Assembly provided that no executive session can be held if an employee requests a public hearing. It did not provide that such requests should be weighed, and potentially rejected, by the public body or a reviewing court. According to the language of the statute, the employee’s *request* alone defeats the public body’s ability to convene an executive session, without reference to any particular purpose or separate legal basis for this request.

This reading of the plain text is entirely consistent with the goal the *Matheny* Court and others have attributed to provision: “protecting the privacy of a teacher.” 62 Ohio St. 2d at 366-67; see also *Gannett Satellite Info. Network, Inc. v. Chillicothe City Sch. Dist. Bd. of Educ.* (4th Dist. 1988), 41 Ohio App. 3d 218, 220, 534 N.E.2d 1239 (“Clearly, the purpose of [subdivision (G)(1)] is to protect the individual’s reputation and privacy.”); *Stewart v. Bd. of Educ. of Lockland Local Sch. Dist.* (1st Dist.), 2013-Ohio-5513, ¶ 20-22 (DeWine, J., concurring) (stating,

“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” and noting that the result below, while premised on *Matheny*, “finds little support in the language of the Open Meetings Law”).

With no ambiguity in the text and no doubt about the legislature’s intent, there was no reason for the *Matheny* Court to conduct any further weighing of policy interests for and against public deliberations. But the Court did go further, stating, “We believe 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.” 62 Ohio St. 2d at 367. It then held that the word “hearing” must have been intended to refer to the formal hearings referenced in Section 3319.16 and other statutes independently granting hearings. *Id.* at 368. The Court did not explain how this conclusion could be reconciled with the fact that the statute requires only a “request” for a hearing, not a separate statutory entitlement to a full evidentiary hearing.

Matheny’s conclusion may have been driven by its context. The employees there were demanding not only public deliberations, but also the constitutional right to notice and an opportunity to be heard. The constitutional question was whether board members could simply discuss the employment actions among themselves or were required to permit the employees to participate and present evidence—i.e., where there should have been a full evidentiary hearing instead of an informal, one-sided discussion. The question under the Open Meetings Act was whether, regardless of how the deliberations were conducted, they should have been conducted in an open session. These two questions were separate, but the Court considered them together.

The Court's ultimate holding that an open hearing was required only when a hearing was otherwise required by law seems to have been premised on the fear that employees would otherwise use Section 121.22(G)(1) as an independent basis for a full evidentiary hearing in every case, when the General Assembly intended to provide such hearings only in particular situations. This ignored a much more obvious solution: that Section 121.22 does not provide an independent basis for a formal evidentiary hearing, but it does provide employees with the more limited right to request that all deliberations regarding their terminations be held in public.

There is no way to reach *Matheny's* holding while still honoring the language and clear intent of the Open Meetings Act. The Court avoided the outcome it feared, in which every nonrenewed employee would be entitled to a full evidentiary hearing, but it did so at the expense of the core policy concerns of the Open Meetings Act. The Act explicitly provides that it is to be construed liberally in favor of openness. R.C. 121.22(A) ("This 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."). Conversely, the exceptions in Division (G) permitting executive sessions are construed narrowly. *Gannett*, 41 Ohio App. 3d 218, syll. para. 1. The Court reversed these presumptions, looking behind the words and obvious purpose of subdivision (G)(1) to reach a conclusion contrary to both. The effect was to transform a statute intended to balance the public interest in open deliberations with the right of public employees to protect their privacy and reputations into a provision granting public bodies an absolute right to shield their discussions from public view.

This Court should overrule *Matheny* to the extent required to clarify that, while Section 121.22(G)(1) does not independently require a full evidentiary hearing in all employment matters, it does require a public body to hold deliberations in public at the employee's request.

B. There Is No Possible Justification for Permitting an Employee's *Loudermill* Hearing to Be Held in Executive Session Against the Employee's Wishes.

Instead of reversing or clarifying *Matheny*, the Board asks this Court to extend it dramatically. *Matheny*, despite providing an overly broad interpretation of the executive session exception in subdivision (G)(1), at least acknowledged that where an employee is already entitled to a hearing, the public body cannot convene an executive session over the employee's objection. *Matheny* used Section 3319.16 as an example of one of many provisions entitling an employee to a hearing, and defined the word "hearing" in subdivision (G)(1) to include only those hearings "elsewhere provided by law." 62 Ohio St. 2d at 368.

While the employees in *Matheny* were held not to have such an independent hearing right, that is not true of employees, such as Mr. Stewart, who have a constitutional property interest in continued employment, pursuant to *Loudermill*, *supra*, 470 U.S. 532, or whose reputation has been placed at risk by public allegations of misconduct. See, e.g., *State ex rel. Kilburn v. Guard* (1983), 5 Ohio St. 3d 21, 22, 448 N.E.2d 1153 ("Procedural due process requires notice and an opportunity to be heard '[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him.' " (quoting *Wisconsin v. Constantineau* (1971), 400 U.S. 433, 437)).

A hearing pursuant to the U.S. Supreme Court's landmark due process decision in *Loudermill* is plainly a hearing "elsewhere provided by law," even under the constraints of *Matheny*. The Board and the First District Court of Appeals reject this conclusion because *Loudermill*, while providing the right to a hearing, did not guarantee the right to an *open* hearing. See *Stewart*, 2013-Ohio-5513, at ¶ 16 ("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.").

This reasoning takes *Matheny* further than it was intended. The *Matheny* Court’s primary goal was to prevent employees from claiming that the Open Meetings Act gave them an independent hearing right when there was no other legal basis for a hearing. The Board advances the proposition that unless there is an independent legal basis for an *open* hearing, the Act gives public bodies an absolute right to conduct the hearing in private. In other words, instead of “unless the public employee *** requests a public hearing,” the Board asks this Court to construe the applicable clause in subdivision (G)(1) to mean “unless a hearing is otherwise required by law to be held in public.” Such a dramatic revision is inconsistent with the purpose of Section 121.22 to require open deliberations, the specific intent of subdivision (G)(1) to protect the privacy of employees at their own option, and, of course, the statutory text, which permits an executive session only in the absence of an employee’s request for a public hearing.

If *Matheny* had held that an employee must identify a separate legal basis for opening a hearing to the public, the “unless” clause in subdivision (G)(1) would have no purpose at all. Under such an interpretation, a public employee would have a right to request open, public deliberations only if a separate statute already provided such a right, meaning there would be no need to consult the Open Meetings Act to answer this question. Subdivision (G)(1) would grant a general right for public bodies to hold executive sessions for personnel matters, subject to the more specific requirements of particular public employee tenure statutes—just as would be the case if the words “unless the public employee *** requests a public hearing” were simply absent altogether. See, e.g., *Minster Farmers Coop. Exch. Co. v. Meyer*, 117 Ohio St. 3d 459, 2008-Ohio-1259, 884 N.E.2d 1056, at ¶ 25 (“When statutes conflict, the more specific provision controls over the more general provision.”). Rather than adopt an interpretation of subdivision (G)(1) that renders it mere surplusage, the Court should give meaning to the words “unless the

public employee *** requests a public hearing” and use those words to accomplish their obvious purpose. See *State ex rel. Maurer v. Sheward* (1994), 71 Ohio St. 3d 513, 521, 644 N.E.2d 369 (citing principle that courts should avoid interpretations of statutes that render their provisions “useless,” and should instead “give meaning to every word in a provision.”).

The parties agree that Mr. Stewart was entitled to a hearing. Where this is so, even *Matheny*—despite providing for executive sessions in the absence of any plausible justification for public bodies to cloak their deliberations in secrecy—gives the employee the option of having the hearing in public. This Court should refrain from extending *Matheny* so far as to conceal a constitutionally mandated hearing from public view over an employee’s objection.

V. Conclusion

For the reasons stated above, *amicus curiae* OELA urges this Court to reverse the decision of the First District Court of Appeals permitting the Defendant to convene an executive session to consider an employee’s termination despite the employee’s constitutionally supported request for a hearing.

Respectfully submitted,



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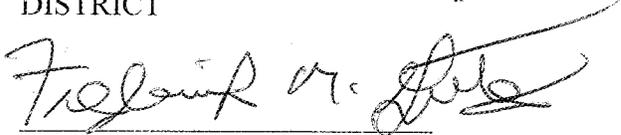
Ohio Employment Lawyers Association

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of August 2014, a copy of the Brief of Amicus Curiae the Ohio Employment Lawyers Association in Support of Appellant Adam Stewart was served by postage-paid U.S. Mail upon the following:

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