

IN THE SUPREME COURT OF OHIO

Adam Stewart,	:	
	:	
Plaintiff-Appellant,	:	Case No. 2014-0164
	:	
vs.	:	
	:	On Appeal from the Hamilton County Court
Board of Education of Lockland Local	:	of Appeals, First Appellate District
School District	:	
	:	Court of Appeals Case No. A1206854
Defendant-Appellee.	:	

BRIEF OF AMICUS CURIAE OHIO SCHOOL BOARDS ASSOCIATION IN SUPPORT OF DEFENDANT-APPELLEE BOARD OF EDUCATION OF LOCKLAND LOCAL SCHOOL DISTRICT

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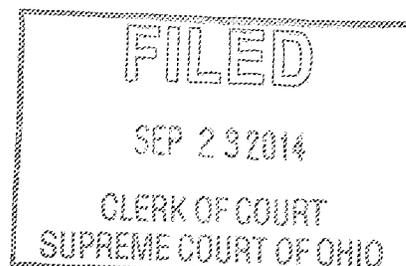


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I. INTRODUCTION AND STATEMENT OF INTEREST OF AMICUS CURIAE

The Ohio School Boards Association (“OSBA”) is grateful for the opportunity to appear as amicus curiae to assist the Court in finding a solution to the vexing problems posed by this litigation. OSBA is the largest statewide organization representing the concerns of public elementary and secondary schools leaders in Ohio. OSBA is a nonprofit 501(c)(4) corporation dedicated to assisting its members to more effectively serve the needs of students and the larger society they are preparing to enter. Nearly 100% of the 719 district boards in all of the city, local, exempted village, career technical school districts, and educational service center governing boards throughout the State of Ohio are members of the OSBA, whose activities include extensive informational support, advocacy, and consulting activities, such as board development and training, legal information, labor relations representation, and policy service and analysis.

Through its appearance as amicus curiae, OSBA seeks to direct this Court’s attention to certain issues affecting school boards throughout the State of Ohio nearly every single time that a personnel decision gets made. As the Ohio General Assembly made clear, certain circumstances justify deliberations in executive session by members of public boards, which is why some exceptions exist to the general requirement for open meetings. *See* R.C. 121.22(G). Now, Plaintiff-Appellant Adam Stewart (“Stewart”) wants this Court to modify a statutory exception that Courts have interpreted consistently for decades. The Court would create a statutory hearing right where one does not otherwise exist if it accepts Stewart’s legal propositions, not to mention the difficulties created with public boards’ personnel deliberations if nearly *all* of them must be

made in public. Stewart simply glosses over the legitimate reasons why a Board would want to act in executive session during its deliberations.

Notwithstanding, this Court's decision would have even further, widespread effects on the handling of personnel decisions for a wide range of public employment beyond just schools. Just to name a few examples, local law enforcement, county departments of jobs and family services, or even the dog warden could demand a *public* hearing under the premise of due process. Such an approach requires more than what the United States Supreme Court mandated for due process. The better approach is to allow Lockland and other public offices to maintain their right to executive session deliberations even if a non-statutory proceeding goes forward in public. Such an approach allows for the most openness without undermining the statutory design of the General Assembly.

II. STATEMENT OF THE FACTS

For purposes of this brief, amicus curiae OSBA incorporates, in its entirety, the Statement of the Case and Facts set forth by Defendant-Appellee Lockland Local School District.

III. ARGUMENT

Proposition of Law No. 1: Even when a public employee is entitled to notice and an opportunity to be heard under *Loudermill*, such a proceeding is not a statutorily-authorized "public hearing" intended by the General Assembly in R.C. 121.22(G)(1).

Notice and an opportunity to be heard under *Loudermill* fails to qualify as a "public hearing" for purposes of R.C. 121.22(G)(1) so that a public body must deliberate outside of executive session. As the United States Supreme Court recognized, due process requires "that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed. 2d 494 (1985) (emphasis in original). A *Loudermill* proceeding may come in many forms but must

contain crucial elements such as oral or written notices of charges, explanation of evidence, and an opportunity for the employee to respond to the charges. *Id.* at 547-48; *Local 4501, Communications Workers of Am. v. Ohio State Univ.*, 49 Ohio St.3d 1, syllabus ¶1, 550 N.E.2d 164 (1990). The parties appear to agree on at least one thing—whether Stewart is entitled to a *Loudermill* proceeding and actually received one is not at issue. Nonetheless, the dispute remains over the effect of the particular *Loudermill* proceeding afforded by the Lockland Local School District (“Lockland”).

In the absence of a “public hearing” as referred to in R.C. 121.22(G)(1), no exception is triggered to preclude a public body from deliberating in executive session concerning specifically enumerated personnel issues. This Court has previously analyzed R.C. 121.22(G)(1) and what constitutes a public hearing in the context of non-tenured teachers. *See Matheny v. Frontier Loc. Bd. of Educ.*, 62 Ohio St.2d 362, 405 N.E.2d 1041 (1980). The following analysis guided the Court’s holding that the General Assembly intended to allow for deliberations to take place in executive session for non-tenured teachers:

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.

Matheny at 367. Thus, this Court has already made clear that any right to a public hearing for purposes of seeking open deliberations under R.C. 121.22(G)(1) must exist independently. In doing so, the Court acknowledged that it had no reason to disregard the terminology used by the General Assembly, even when trying to give the statute a liberal construction. *Id.* at 368.

Because *Matheny* properly analyzed the General Assembly’s plain language, this Court should refuse Stewart’s invitation to overturn *Matheny*. First, *Matheny* failed to suggest a

singular purpose to avoid “a surge of unintended evidentiary hearings,” but it instead based its decision on the specific language used by the General Assembly. The General Assembly specifically employed “public hearing” as a term of art, so it needed to determine exactly what should be included under its definition. The issue here is not whether a public body *can* deliberate in public without a full, formal hearing; instead, the issue is whether it *must* deliberate in public based solely upon the open meeting exception provided for by the General Assembly.

Matheny answered this question by requiring a specific, statutory “public hearing” before R.C. 121.22(G)(1) is triggered. This makes sense because R.C. 121.22 provides for openness of public meetings rather than specific hearing rights, so there is no reason to believe that the General Assembly would imbed a hearing right in R.C. 121.22(G)(1). And even if it intended otherwise, the General Assembly has not changed R.C. 121.22 in reaction to the *Matheny* case since its decision was issued over 34 years ago.

OELA also suggests that there is no need to consult the Open Meetings Act to determine whether a separate statute provides a hearing right, which is true. The Court should recognize that the General Assembly afforded public employees various appeal rights in other sections of the Ohio Revised Code, not within the Open Meetings Act. The Open Meetings Act is self-contained and designed to provide for the appropriate level of openness at meetings with certain, delineated exceptions. In other words, the Open Meetings Act amply answers the question of “when can I ask for public deliberations” but not “when can I have a public hearing.” It is not designed to answer the latter.

In addition, both OELA and the concurring opinion below suggest that an employee should be permitted to clear their name in public without acknowledging that R.C. 3319.081(C) actually provides such a mechanism. Under R.C. 3319.081(C), Stewart may file an appeal with

the court of common pleas where the board sits to challenge the ruling. This does not mean that he cannot exercise his right for pre-termination notice and an opportunity to be heard under *Loudermill*; rather, it suggests that he has the proper forum to clear his name if that is what he desires. As such, forcing deliberations outside executive session is not the only recourse for public employees like Stewart.

Proposition of Law No. 2: Even if rights under *Loudermill* are available, it is not the type of proceeding referenced in *Matheny* as one “elsewhere provided by law.”

A *Loudermill* proceeding fails to qualify for the exception in R.C. 121.22(G)(1) because it is not what *Matheny* referred to as a hearing “elsewhere provided by law.” Importantly, the Court in *Matheny* explicitly concluded that “[n]othing in this section [R.C. 121.22] grants a non-tenured teacher the right to demand that those deliberations be made in public.” *Matheny* at 367. No such pre-termination public hearing right exists under R.C. 3319.081. As observed by Stewart, the Court did not rule on a situation where a public employee enjoys as least some property right to employment; however, the Court did qualify that the “term ‘public hearing’ in subdivision (G)(1) . . . refers only to the *hearings elsewhere provided by law.*” *Id.* (emphasis added). Contrary to OELA’s assertion that Stewart’s hearing allows him to avail himself of R.C. 121.22(G)(1), its analysis fails to acknowledge the term “public” in the statute and the Court’s holding in *Matheny*. As a result, the nature of a *Loudermill* proceeding should determine whether a public employee entitled to one can demand public deliberations on personnel issues.

Nothing in the *Loudermill* decision requires that notice and an opportunity to be heard occur in public. The U.S. Supreme Court’s focus in *Loudermill* was the process and procedure that should be afforded to an employee who enjoyed at least some level of property interest in his employment. *Loudermill*, 470 U.S. at 542, 105 S.Ct. 1487, 84 L.Ed. 2d 494. As it held, the “need for some form of pretermination hearing . . . is evident from a balancing of the competing

interests at stake.” *Id.* The Court buttressed this statement with reasons in support, which included:

- 1) the significance of the private interest in retaining employment; and,
- 2) some opportunity for the employee to present his side of the case has value in reaching an accurate decision.

Id. at 543. The proceedings need not be “elaborate” but must involve “notice and an opportunity to respond.” *Id.* at 545-46. The Court never decided that such a proceeding must occur in public, especially considering that it opined that the opportunity to present could even be in writing. *Id.* at 546. None of these reasons support a mandatory public hearing right.

Although Stewart tries to distinguish this case from those already decided by appellate courts, the fact that *Loudermill* is implicated changes nothing. Courts in four appellate districts have strictly interpreted the “public hearing” exception to avoid expanding it without a corresponding statutory provision granting such a hearing. *See State ex rel. Floyd v. Rock Hill Loc. Sch. Bd. of Educ.*, 4th Dist. Lawrence No. 1862, 1988 WL 17190, *5 (Feb. 10, 1988); *Davidson v. Sheffield-Sheffield Lake Bd. of Educ.*, 9th Dist. Lorain No. 89CA004624, 1990 WL 72316, *5 (May 23, 1990); *Harris v. Indus. Comm’n of Ohio*, 10th Dist. Franklin No. 95APE07-891, 1995 WL 739689, *2-3 (Dec. 14, 1995); *Schmidt v. Vill. of Newtown*, 1st Dist. Hamilton No. C-110471, 2012-Ohio-890, ¶¶25-27. Based upon *Matheny*, these courts reasoned that the employees lacked a public hearing right because it was not found in statute. Likewise, any due process right to a *Loudermill* appears nowhere in statute. Any attempt to distinguish Stewart from *Matheny* and these cases based upon an expectation of continued employment disregards that these cases based their outcomes on the definition of public hearing, not the particular rights afforded to the employee.

In fact, the reality is that most *Loudermill* proceedings take place in private settings. Often, an appointing authority does not even oversee the *Loudermill* proceeding, but instead a “pre-disciplinary” officer reviews any submissions that the employee wants considered by the appointing authority. *See, e.g., Speiser v. Engle*, 107 Fed. Appx. 459, 461 (6th Cir. 2004) (due process satisfied when county commissioners met with public employee for pre-disciplinary hearing). As a result, nothing about being provided notice and an opportunity to be heard under *Loudermill* suggests that this Court envisioned¹ it as one of the “hearings elsewhere provided by law” that qualify as a “public hearing” under R.C. 121.22(G)(1).

But OELA misconstrues Lockland’s argument with regard to the manner in which *Loudermill* hearings are conducted. *See* Amicus Brief, p.10. Crucial to this analysis, the General Assembly made the ability to even request a “public hearing” a prerequisite to public deliberations under R.C. 121.22(G)(1). Contrary to OELA’s position, public bodies do possess the absolute right to conduct a *Loudermill* hearing outside the context of a public meeting, unless a statute provides otherwise.

Stewart and the concurring opinion below suggest that the only reason to hold executive sessions would be to protect the employee from embarrassment, which disregards any reasons why the public body is benefitted from going into executive session. For example, a board member may be inhibited from openly and honestly discussing the individual subject to the disciplinary action based upon a pre-existing relationship between decision maker and

¹ Even more so, this Court’s *Matheny* decision pre-dated the U.S. Supreme Court’s decision in *Loudermill* by 5 years. As such, it is impossible that this Court could have considered that a *Loudermill* hearing qualified as a public hearing when it decided the *Matheny* case.

employee.² Or the investigation may inevitably include information about other employee(s) still being investigated. If the decision maker speaks negatively about an employee then ultimately decides to not issue discipline, a hardship likely results that could have been avoided through executive session deliberations. All of these reasons could affect the productivity of a public body, such as a school board, in the manner it can conduct business going forward. The General Assembly has recognized specific instances where the right for an employee to obtain a public hearing outweighs any concerns to the individuals on the board, but this Court should not broaden those exceptions without clear, statutory mandate.

Proposition of Law No. 3: R.C. 121.22(G)(1) does not require a public body to deliberate in public merely because the body provided an employee their *Loudermill* rights in a public setting.

As this Court has held, the term “public hearing” envisions a statutorily-created right to a hearing in public, not a proceeding that happens to occur in public. Only a statutorily-created public hearing can invoke the public deliberation exception under R.C. 121.22(G)(1). *Matheny* at 367. Although Stewart enjoyed the right to receive his notice and opportunity to be heard in public, nothing changed what occurred into a “public hearing” for purposes of R.C. 121.22(G)(1).

Although Stewart argues that his *Loudermill* proceeding is all that is needed, the Court should require a hearing based upon statute to retain clarity on what kind of hearing qualifies for the exception under R.C. 121.22(G)(1). The beauty of the Court’s ruling in *Matheny* lies in its simplicity—a statutory public hearing alone right triggers the exception to the exception. If a statute gives an employee a right to a public hearing, it clearly says as much. The General

² Considering that many school board members serve for little or no compensation, the mere potential of facing public scrutiny from friends and members of their community could very easily dissuade otherwise capable and qualified individuals from serving. For example, public school board members make a statutory maximum of \$125/meeting. *See* R.C. 3313.12.

Assembly knew and understood that such statutes existed, and this Court should recognize the benefit of consistency in this terminology.

Respectfully, the concurring opinion in the First District's decision ignores the crucial element of defining what a "public hearing" is for purposes of R.C. 121.22(G)(1). It assumes that a public hearing occurred merely because the Lockland Board provided Stewart his notice and opportunity to be heard under *Loudermill* during its public meeting. Although the concurrence continues to encourage liberal construction of the open meetings law, this Court already tackled such concerns in *Matheny* when it held it cannot disregard the language chose by the General Assembly. *Matheny*, 62 Ohio St.2d at 368, 405 N.E.2d 1041. Rather than have the coincidence that this *Loudermill* hearing occurred in public dictate the result, this Court wisely chose to follow the General Assembly's statutory framework by finding particular meaning in the term public hearing.

If this Court strikes down *Matheny* or chooses to blur the line, then public bodies must then weigh whether to hold individual hearings in public or face the consequences that Stewart proposes. If a public body allows a public *Loudermill* or any other non-statutory proceeding and wishes to ultimately deliberate in executive session, it would risk violating open meetings laws. On the other hand, clearly delineated statutory hearings allow for certainty when a process begins on whether the deliberations may occur in executive session or must occur in public.

Public policy supports the General Assembly's language because any contrary result will only have the effect of discouraging any personnel actions in a public setting. If this Court concludes that Lockland cannot deliberate in executive session because Stewart received notice and an opportunity to be heard in public, then public bodies across the state will tailor their own actions to likely avoid being forced into difficult, messy deliberations often involving personal

information in public. Instead of ever allowing a public *Loudermill* proceeding like Stewart wanted here, public entities will simply refrain from them altogether. Consequently, the Court's decision applying *Loudermill* in an overly broad manner will actually have the effect of discouraging openness.

Similarly, any holding against Lockland here makes little sense given that Lockland would be losing its ability to go into executive session to make its decision merely because it allowed more openness than what it had to afford Stewart. If the Court sides with Stewart, then Lockland would have been better off to refuse Stewart's request to even address the Board in a public setting. If that had occurred, Stewart could not even argue that he had a "public" *Loudermill* hearing. On the other hand, such a conclusion makes little sense because it has the effect of again discouraging any openness in Stewart's proceedings.

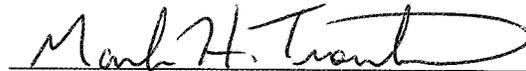
Finally, the Court should refuse to expand the rights afforded to public employees under *Loudermill*. Taken to its logical extension, Stewart's position invites the Court to mandate that public employers afford public *Loudermill* rights to employees if they so request. Such a holding is not limited to non-teachers whose rights are governed under R.C. 3319.081. Indeed, such a conclusion would apply to any public employee who is entitled to rights under *Loudermill*. Neither the United States Supreme Court nor the General Assembly have imposed such a requirement on public offices, so this Court should refuse to re-invent *Loudermill* and re-write R.C. 121.22(G)(1).

IV. CONCLUSION

Stewart and his amicus curiae have asked for this Court to issue an opinion to alter the General Assembly's intent in R.C. 121.22(G)(1) and reverse decades of precedent. In addition, such changes affect not only non-teaching personnel under R.C. 3319.081, but school boards and

any public employee entitled to notice and an opportunity to be heard under *Loudermill*. Instead of accepting the invitation for these widespread changes, the Court should remain consistent with its prior precedent and avoid a decision that alters the effect of the U.S. Supreme Court's decision in *Loudermill*. For these reasons, amicus curiae OSBA respectfully requests that this Court affirm the decision of the First District Court of Appeals.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing Amicus Memorandum in Support of Jurisdiction has been sent on September 23, 2014, by regular U.S. Mail, postage prepaid, to the following:

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