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INTRODUCTION

This case revisits the Court's decision in *Matheny v. Frontier Local Board of Education*, 62 Ohio St.2d 362 (1980) following the United States Supreme Court's ruling in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487 (1985). The *Matheny* Court correctly noted that R.C. 121.22(G)(1) was not intended to grant a public employee the right to a public hearing on matters relating to his/her employment, unless such right was elsewhere provided by law. The Court's reasoning was clear, namely "that, in enacting R.C. 121.22(G)(1), the General Assembly intended to leave undisturbed the provisions of R.C. Chapter 3319 relating to teacher employment." *Id.* at 366. Under *Matheny's* facts, R.C. 121.22(G)(1) was not to conflict with R.C. 3319.16, which provides public school teachers the statutory right to demand a public hearing prior to a board of education resolving to terminate their employment contracts. *Id.* at 366-367. The impact of *Matheny* proves fatal to Plaintiff-Appellant, Adam Stewart's Open Meetings Act claim since R.C. 3319.081 (which governs the termination of nonteaching employees' contracts) provides no right for nonteaching employees to demand a public hearing prior to a board of education terminating their employment contracts.

Understanding that *Matheny* and its progeny clearly side against his position, Stewart argues that his right to a *Loudermill* due process hearing must constitute a "hearing elsewhere provided by law." This argument is flawed for several reasons. First, *Loudermill* only mandates that a public employee be given some kind of notice of the charges against him and at least a limited opportunity to "tell his side of the story." *Loudermill, supra* at 543. These duties can be accomplished through (as in the instant case) written notice served upon the employee detailing the charges against him. Furthermore, the public employer can satisfy its obligation to provide the employee with an opportunity to "tell his side of the story" through an informal meeting with

the employee's supervisor or other responsible administrator. Accordingly, *Loudermill* does not require a public body, itself, to provide an employee with notice of the charges against him and an opportunity to speak against his discipline during an open meeting. *Loudermill's* failure to require a public body to provide its employees with this requisite due process while in an open meeting compels this Court to reject Stewart's argument.

Second, even if this Court were to expand *Loudermill* to require a public body, upon demand, to provide its employee with a due process hearing during an open meeting, Defendant-Appellee, Lockland Local School District Board of Education provided Stewart with this requisite due process during a public meeting. Stewart has taken exception to the Board deliberating in executive session both prior to and following him presenting directly to the Board, while in open session, on the reasons why his employment contract should not be terminated. However, nothing in *Loudermill* mandates that the governing body of a public employer discuss or deliberate upon an employee's termination prior to taking action. As such, Stewart cannot rely upon *Loudermill* to provide him the right to demand the Board hold its deliberations on his pending termination in open session.

Since this Court decided *Matheny*, the General Assembly has amended R.C. 121.22 no less than 30 times over the span of 34 years. A significant number of these amendments followed the *Loudermill* ruling. In the wake of these rulings, the General Assembly has not acted to expand the right of a public employee to demand a public hearing on matters relating to his/her employment under R.C. 121.22(G)(1). This is clear sign from the General Assembly that the *Matheny* Court correctly interpreted the Open Meetings Act, and that the *Loudermill* decision did not endow public employees with the right to demand public hearings on their discipline or

discharge. The lower courts understood the inherent flaws in Stewart's arguments, and the Board respectfully requests this Court AFFIRM the appellate court's decision.

STATEMENT OF FACTS

On July 25, 2012, the Board received written notice from the Ohio Department of Education ("ODE") that Lockland School District employees had improperly reported false student attendance data in order to improve the District's State Report Card ranking for the 2010-2011 school year. (*Defendant's Motion for Summary Judgment*, November 5, 2012, Affidavit of Terry Gibson at ¶ 7, Exhibit 2). As a result of this data falsification, ODE exercised its statutory authority to recalculate and reissue corrected 2010-2011 District and school building report cards to lower the District's ratings in numerous areas of Ohio's accountability system. (*Id.*).

Following receipt of ODE's notice, the Board sought to determine who was responsible for the above-referenced falsification of student attendance data. The Board's investigation focused on Superintendent, Donna Hubbard and her son, Plaintiff-Appellant Adam Stewart. Stewart was employed at all relevant times as the District's Data Coordinator. (*Id.*, Affidavit of Dan Lawler at ¶ 2, Exhibit 1).

On August 1, 2012, the Board held a special meeting. During this meeting, the Board adjourned into executive session pursuant to R.C. 121.22 to consider the appointment, employment, dismissal, discipline, promotion or compensation of a public employee or official, and to discuss pending or imminent court action. Counsel for Stewart was invited into this executive session. While in executive session, counsel for Stewart engaged the Board in a comprehensive discussion concerning the matters referenced in the aforementioned July 25, 2012 letter from ODE. He also discussed Stewart's and Superintendent Hubbard's involvement in the

reporting of student attendance data to ODE for the 2010-2011 school year. This discussion with the Board lasted approximately two hours. (*Id.*, Gibson Affidavit at ¶ 14, Exhibit 4).

On August 21, 2012, Interim Superintendent Dan Lawler sent Stewart written notice that the Board would consider, pursuant to R.C. 3319.081, passing a resolution at its August 23, 2012 meeting to terminate Stewart's non-teaching employment contract. Attached to the August 21, 2012 letter was a draft Resolution stating the grounds for Stewart's discharge in the event the Board took action. Stewart was notified that both he and his representative would be afforded an opportunity at the August 23, 2012 meeting to speak against this recommendation and to present evidence in support thereof. (*Id.*, Lawler Affidavit at ¶ 3, Exhibit 1).

The Board held a special meeting at 6:30 p.m. on August 23, 2012. One purpose of this meeting was to consider the Interim Superintendent's recommendation that the Board take action to terminate Stewart's non-teaching employment contract per R.C. 3319.081. On or around 6:32 p.m., the Board, over the objection of Stewart's counsel, passed a motion to adjourn into executive session pursuant to R.C. 121.22 to consider the appointment, employment, dismissal, discipline, promotion or compensation of a public employee or official. The Board met in executive session between 6:33 p.m. and 6:50 p.m. with its Interim Superintendent, Treasurer and legal counsel. During this executive session, the Board discussed the appointment of a new Board member to fill the recent vacancy left by the resignation of a former Board member. The Board also discussed certain matters pertaining to the employment, dismissal and discipline of Stewart and another Board employee. (*Id.*, Gibson Affidavit at ¶ 6; Lawler Affidavit at ¶ 6; Blum Affidavit at ¶ 5; Cromer Affidavit at ¶ 5; Carter Affidavit at ¶ 3; McDonough Affidavit at ¶ 7). The Board also received legal advice from its attorney regarding the employment,

discipline and discharge of Stewart and Superintendent Hubbard. (*Id.*, Affidavit of David Lampe at ¶4).

On or around 6:50 p.m., the Board reconvened into open session. At this time, the Board granted Stewart's demand to present evidence and to *publically speak against* the Interim Superintendent's recommendation that the Board pass a resolution to terminate Stewart's employment contract. Counsel for Stewart also spoke to the Board and presented evidence addressing ODE's July 25, 2012 findings that Lockland School District employees had improperly reported false student attendance data to ODE in order to inflate the District's State Report Card rankings. Stewart and his legal counsel made this presentation to the Board, *in open session*, between 6:50 p.m. and 7:23 p.m. (*Id.*, Gibson Affidavit at ¶ 7-8, Exhibit 3; Cromer Affidavit at ¶ 6; Blum Affidavit at ¶ 6; Carter Affidavit at ¶ 4; Lawler Affidavit at ¶ 7; McDonough Affidavit at ¶ 8, Exhibit 3).

At approximately 7:23 p.m., counsel for Stewart informed the Board that he had nothing further to present to the Board. Stewart also acknowledged that he had nothing further to present. In response, the Board, over the objection of Stewart's counsel, passed a motion to adjourn into executive session pursuant to R.C. 121.22 to consider the appointment, employment, dismissal, discipline, promotion or compensation of a public employee or official. At 7:23 p.m., the Board entered executive session with its Interim Superintendent, Treasurer and legal counsel. (*Id.*, Gibson Affidavit at ¶ 9-10, Exhibit 3; Lawler Affidavit at ¶ 8; Blum Affidavit at ¶ 7; Cromer Affidavit at ¶ 7-8; Carter Affidavit at ¶ 5-6; McDonough Affidavit at ¶ 9-10, Exhibit 3).

Between 7:23 p.m. and 9:07 p.m., the Board met in executive session. During this executive session, the Board discussed matters pertaining to the employment, discipline and

dismissal of Stewart. It discussed and deliberated over the matters presented to it by Stewart and his legal counsel immediately preceding this executive session. The Board received legal advice from its attorney on matters involving the employment, discipline and discharge of Stewart and Superintendent Hubbard. The Board also discussed certain matters pertaining to the employment, discipline and discharge of one other Board employee. (*Id.*, Gibson Affidavit at ¶ 10, Exhibit 3; Lawler Affidavit at ¶ 9; Blum Affidavit at ¶ 8; Cromer Affidavit at ¶ 8; Carter Affidavit at ¶ 6; McDonough Affidavit at ¶ 10, Exhibit 3; Lampe Affidavit at ¶ 5).

The Board reconvened into open session at 9:07 p.m. In open session, the Board passed a resolution to terminate the non-teaching employment contract of Stewart. (*Id.*, Gibson Affidavit at ¶ 11, Exhibit 3; Blum Affidavit at ¶ 9; Cromer Affidavit at ¶ 9; Carter Affidavit at ¶ 7; McDonough Affidavit at ¶ 11, Exhibit 3).

On or around August 24, 2012, Stewart received written notice that the Board took action to terminate his non-teaching employment contract. (*Id.*, McDonough Affidavit at ¶ 12, Exhibit 4).

On August 28, 2012, Stewart filed a complaint and administrative appeal of the Board's action to terminate his employment contract in the Hamilton County Court of Common Pleas including two causes of action: (1) a violation of R.C. 121.22, and (2) an R.C. 3319.081 appeal of his termination. Stewart dismissed the second cause of action without prejudice on January 3, 2014. Stewart and the Board filed respective motions for summary judgment with respect to Count 1. Both the trial court and the First District Court of Appeals ruled in favor of the Board with respect to Stewart's Open Meetings Act claim. The Appellate Court affirmed the trial court's adoption of the Magistrate's decision concluding that Stewart did not have the right to demand a public hearing because "an employee can only prohibit a public body from holding an

executive session when the employee is statutorily entitled to a hearing...The *Loudermill* Court certainly did not accord Stewart the right to require that the entire pretermination hearing be held publically.” (See *Appellant’s Merit Brief*, Appendix B, First District Court of Appeals Opinion, December 18, 2013, at ¶¶ 15-16).

ARGUMENT

Proposition of Law No. 1: In *Matheny v. Frontier Local Board of Education*, 62 Ohio St.2d 362, 405 N.E.2d 1041 (1980), the Court correctly determined that a public employee is only entitled to demand a public hearing under R.C. 121.22(G)(1) if the employee has a statutory right to a public hearing.

Stewart argues he had the right to demand that the Board deliberate in open session based on R.C. 121.22(G)(1). However, in analyzing a public employee’s right under the Open Meetings Act (“OMA”) to request a public hearing on the issue of his/her employment, discipline or discharge, several Ohio courts and the Ohio Attorney General have opined that R.C. 121.22(G)(1) “does not grant a substantive right to a public hearing. Such a right [to a public hearing] must exist elsewhere in Ohio or federal law before a person may demand a public hearing under this exception.” Ohio Sunshine Laws, An Open Government Resource Manual: The Ohio Open Meetings Act, Chapter Three: Executive Session, p. 96, at <http://www.ohioattorneygeneral.gov/getattachment/bc3c1628-4278-46db-9a17-18b1152dad80/2014-Sunshine-Laws-Manual.aspx> (accessed September 5, 2014). This means an employee’s right to a public hearing on the matter contemplated by R.C. 121.22(G)(1) does not originate through the OMA, but instead must be provided independently through some other statute. Neither R.C. 3319.081,¹ which governed the termination of Stewart’s non-teaching

¹ R.C. 3319.081 only requires that the Board serve upon the non-teaching employee a written notice, after the fact, of the Board’s action to terminate. The employee then has 10 days following receipt of such notice to appeal his termination to the court of common pleas.

employment contract, nor his rights under *Loudermill*, provided Stewart with a substantive right to demand a public hearing on the matter of his discharge.

In *Matheny*, two non-tenured teachers were notified that the board of education would consider the nonrenewal of their employment contracts at an upcoming board meeting. Prior to board action on the nonrenewal of their contracts, both teachers requested that all discussions and deliberations pertaining to the nonrenewal of their contracts be held in open session. Despite their request, the school board met in executive session to nonrenew both teachers' employment contracts. In reaching its decision that the teachers were not entitled to a public hearing under R.C. 121.22(G)(1), this Court reasoned the OMA did not require the school board to hold its discussions about appellants' employment in open session because the statute governing the nonrenewal of a teacher's contract did not provide appellants with the right to be heard at a board meeting where their nonrenewal was being considered. *Id.* at 366. The Court rejected the appellants' argument that R.C. 121.22(G)(1) afforded them a right to demand that the school board conduct all of its deliberations on the issue of their contract nonrenewal in open session. *Id.* at 367. In reaching this holding, the Court reasoned,

matters relating to public employment are excepted from the open meeting requirements of R.C. 121.22(C), unless the public employee 'requests a public hearing.' Appellants ask this Court to equate 'public hearing' with 'meetings open to the public,' and hold that the school board may not meet in executive session to discuss the renewal of a limited contract, if the affected teacher demands that the deliberations be conducted in open session. While we are required, pursuant to R.C. 121.22(A), to give this statute a liberal construction, we are not required to disregard the terminology utilized by the General Assembly.

Id. at 368.

Stewart references Judge DeWine's concurrence in which he stated the First District majority's opinion was inconsistent with the plain language of the statute. (*See* Appellant's

Merit Brief, p. 3.) However, the *Matheny* Court examined the plain language of the statute, and expressly found the term “public hearing” meant something specific when the various provisions of the Open Meetings Act are read in *pari materia*. In explaining the difference between a “hearing” and a “meeting” in the OMA, the *Matheny* Court reasoned:

[t]hroughout R.C. 121.22, the legislature employed the term ‘meeting’ to designate, ‘any prearranged discussion of the public business of the public body by a majority of its members.’ R.C. 121.22(B)(2). Since the General Assembly specifically defined, and extensively employed, the term ‘meeting’ in drafting this statute, and since the term ‘hearing’ appears only twice in the statute, both times in reference to situations where a *formal* hearing is *statutorily* mandated, we must assume that these terms were intended to have altogether different meanings. As we have stated, the term ‘public hearing’ in subdivision (G)(1) of this statute refers only to the hearings elsewhere provided by law. Accordingly, we hold that R.C. 121.22 authorizes a school board to conduct private deliberations upon the renewal of a limited contract.

Id.

Further, the *Matheny* Court also explained the legislative history behind R.C. 121.22(G)(1) as follows:

It may reasonably be concluded, and we so hold, that in enacting R.C. 121.22(G)(1), the General Assembly *intended to leave undisturbed the provision of R.C. Chapter 3319 relating to teacher employment*. Supportive of this conclusion is the fact that absent an exception to the otherwise broad mandate of R.C. 121.22(C), such section would be in conflict with existing statutes which promulgate procedures applicable to *teacher* employment actions...That section [3319.16] further provides that a teacher whose contract is terminated has the right to a hearing which “shall be private unless the teacher requests a public hearing.” (Emphasis added.)²

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

² The hearing referred to in R.C. 3319.16 is the appeal procedure a teacher may invoke upon receiving a notice of intent to terminate. The hearing may be public or private before the board of education or a state-appointed referee (this appeal hearing is separate from the pre-disciplinary *Loudermill* hearing). R.C. 3319.081 does not contain a similar appeal procedure, but rather provides that a non-teaching employee may appeal his or her termination directly to court.

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 previously existed....”

Id. at 367 (emphasis added).

As the Court in *Matheny* explained, this pre-existing statutory right of teachers to demand a public hearing under R.C. 3319.16 is a reason the General Assembly made an exception to a public body’s right to meet in executive session under the Open Meetings Act. If a teacher exercises his or her statutory right to a public hearing on the issue of the teacher’s termination under R.C. 3319.16, then a board of education is required under R.C. 121.22(G)(1) to hold the entire hearing in public. However, a non-teaching employee is not afforded this same choice of a public or private hearing under R.C. 3319.081. In fact, R.C. 3319.081 provides no statutory right to a hearing prior to the board of education’s action to terminate the employee’s contract. Thus, without an independent statutory basis to demand a public hearing on his employment, discipline or dismissal, a non-teaching employee has no right to demand a public hearing under R.C. 121.22(G)(1). Given this legislative history as explained by the Court in *Matheny*, courts have correctly applied *Matheny* to allow public employees the right to demand a public hearing only if a pre-existing statute gave them the right to a public hearing before the governing body.

Proposition of Law No. 2: A pre-disciplinary *Loudermill* hearing is not a public hearing “elsewhere provided by law,” which entitles a public employee to demand that the governing body deliberate in public with respect to his or her employment.

Stewart’s argument that *Matheny* should be overruled because it predated *Loudermill* is fundamentally flawed because *Loudermill* did not entitle him to a pre-disciplinary public hearing in open session before the Board of Education. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487 (1985). The essential elements of due process required to be provided to a public employee facing discipline under *Loudermill* and *Local 4501, Communications Workers*

of America v. Ohio State University, 49 Ohio St.3d 1, 550 N.E.2d 164 (1990), are well established: oral or written notice of the charges, an explanation of the evidence and an opportunity to present the employee's side of the story. *Loudermill* at 547-548. Such pretermination/pre-discipline "hearing" need not be elaborate. *Id.* at 545. In fact, the *Loudermill* hearing does not have to definitively resolve the propriety of the termination, and it may serve only as an initial check against mistaken decisions. *Local 4501* at 3, quoting *Loudermill*, 844 F.2d at 310-312. Indeed, only the "barest of a pretermination procedure, especially when an elaborate post-termination procedure is in place[.]" is necessary. *Id.*

Indeed, there are numerous cases where courts have determined that the *Loudermill* hearing is satisfied under circumstances where the basic elements (notice and opportunity to be heard) are provided by administrators, managers or other responsible supervisors, either orally or in writing—without the involvement of the public body itself. *E.g.*, *Lee v. Western Reserve Psych. Hab. Ctr.*, 747 F.2d 1062, 1068-1069 (6th Cir. 1984) (written notice of charges and appearance before patient abuse committee to answer questions); *Brasslett v. Cota*, 761 F.2d 827 (1st Cir. 1985) (one hour conference with superior orally advising of charges and providing opportunity to defend and rebut charges); and *Washington v. Cleveland Civ. Serv. Comm.*, 8th Dist. No. 94596, 2010-Ohio-5608, ¶ 30-31 (written letters of charges and opportunity to respond).

Stewart had a due process right to a pretermination *Loudermill* "hearing." He was provided with this necessary process. Stewart also had a statutory right to be provided with written notice of the Board's action terminating his contract per R.C. 3319.081(C). He was provided with this notice. None of these procedures include a right to a public hearing

conducted in open session before the Board. Thus, when the First District analyzed Stewart's due process rights it concluded:

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.

Decision at ¶ 16. As the following demonstrates, because a *Loudermill* hearing need not be either (1) public or (2) before the public body itself, it is not a public hearing "elsewhere provided by law" as stated in *Matheny*. Therefore, the right to a *Loudermill* hearing cannot serve as the basis for a public employee to demand a public hearing under R.C. 121.22(G)(1).

Proposition of Law No. 3: Since *Loudermill* does not require discussion or deliberation by the public employer following presentment of an employee's "side of the story," a public employee cannot demand a public employer discuss or deliberate upon his or her employment in open session.

Even if the Court were to expand the holding of *Matheny* to require public bodies to conduct *Loudermill* hearings in public if requested by the employee, the Board of Education did so here. Stewart was provided with the essential elements of a pre-discipline due process hearing in *open session*. First, on August 21, 2012, Stewart was given written notice that the Board would be considering terminating his employment, including a list of grounds in support of the proposed action. (*Id.*, Lawler Aff. at ¶ 3, Ex. 1). Second, on August 23, 2012, Stewart and his counsel were afforded the opportunity to address the charges against him, present evidence and give his side of the story in *open session* of the Board, prior to the Board adopting the resolution to terminate. (*Id.*, Gibson Aff. at ¶ 7-8). Third, the Board voted in *open session* on August 23 to

terminate his employment contract. (*Id.*) Because all elements of the *Loudermill* hearing were conducted in public, the Board did not violate the Open Meetings Act, even under Stewart's flawed interpretation of *Loudermill's* impact on R.C. 121.22(G)(1).

Indeed, courts in other states with similar laws have made a distinction between the "hearing," which must be in public and the "deliberations," which may be held in executive session. (*See, e.g.,* California, Georgia, Vermont, Wisconsin, Wyoming, *infra* pages 16, 19-20). Thus, even assuming *arguendo* that a *Loudermill* hearing is a hearing "elsewhere provided by law" for which Stewart could demand a public hearing, all essential elements of his *Loudermill* hearing were held in public. Therefore, the Board did not violate the Open Meetings Act by conducting a *Loudermill* hearing in public and then adjourning into executive session to deliberate.

Proposition of Law No. 4: This Court must not rewrite R.C. 121.22(G)(1) to limit a public employer's ability to deliberate in executive session regarding certain personnel matters.

I. The General Assembly Has Not Chosen to Revise R.C. 121.22(G)(1) Since *Matheny* Was Decided by this Court.

Matheny was decided in 1980, and the several courts that have applied the case since then have declined to expand its holding to situations other than those where an employee has a *statutory* right to a hearing. *See Conner v. Village of Lakemore*, 48 Ohio App.3d 52, 54, 547 N.E.2d 1230 (9th Dist. 1988) ("R.C. 737.19 authorizes a hearing, and dictates that it should be held at a regularly scheduled meeting of the village legislative authority. Where a hearing is statutorily authorized, and a public hearing is requested, R.C. 121.22(G)(1) precludes the holding of an executive session to consider the dismissal of a public employee or official." *Id.* at 54); *see also Schmidt v. Village of Newtown*, 1st Dist. No. C-110470, 2012 Ohio 890; *State ex rel. Floyd v. Rock Hill Local Sch. Dist. Bd. of Edn.*, 4th Dist. No. 1862, 1988 Ohio App. LEXIS 471 (Feb.

10, 1988); *Davidson v. Sheffield-Sheffield Lake Bd. of Edn.*, 9th Dist. No. 89CA004624, 1990 Ohio App. LEXIS 2190 (May 23, 1990); *State ex rel Harris v. Industrial Comm. of Ohio*, 10th Dist. No. 95APE07-891, 1995 Ohio App. LEXIS 5491 (Dec. 14, 1995).

The General Assembly has revised the Open Meetings Act several times since *Matheny*, and has taken no action to change R.C. 121.22(G)(1) in reaction to *Matheny* or the cases following it. Indeed, there is pending legislation, S.B. 93, which proposes to revise and expand Ohio's Open Meetings Act in several ways, including by:

- changing the definition of meeting to mean “any assemblage, congregation, or other gathering of a majority of the members of a public body for the consideration or discussion of the public business of the public body, including, without limitation: for receiving or making reports, presentations, recommendations or comments or for receiving or giving advice concerning the public business or body.”
- providing stricter rules regarding when a public body meets with its attorney in executive session; and
- providing that the public body's minutes must include the time the public body convened and adjourned from executive session, must identify by name all individuals who were in attendance during the executive session (except for those individuals considered or discussed pursuant to the “personnel” exception in (G)(1)), and must indicate the period of time each named individual attended the executive session.

Thus, while the General Assembly is considering changes to the OMA that emphasize public access, it is not considering any changes to the personnel exception in response to *Matheny* or its application over the last 30 years. Because the General Assembly has chosen not to act in response to the precedent following *Matheny*, such intent should not be inferred here by the judiciary. “In construing [a statute], our paramount concern is the legislative intent in enacting the statute.” *Steele v. Morrissey*, 103 Ohio St.3d 355, 2004-Ohio-4960, 815 N.E.2d 1107, ¶ 21, citing *State ex rel. United States Steel Corp. v. Zaleski*, 98 Ohio St.3d 395, 2003 Ohio 1630, 786 N.E.2d 39, ¶ 12. As the *Matheny* Court explained, the legislative intent was to

make R.C. 121.22(G) consistent with existing statutes that provide an employee with a right to a public hearing, not to independently grant such a right. Therefore, the Court should not infer such a right in the instant matter.

II. Similar to Ohio, Many States Have Open Meetings Act Laws Which Limit An Employee's Right to a Public Hearing.

Stewart cites to legislation from other states that provide for a public employee's right to a public hearing or discussion prior to termination, arguing the Court should interpret R.C. 121.22(G)(1) in a similar fashion. However, many states have a law in effect that limit an employee's right to a public hearing. *See e.g. Alabama* (Ala Code § 36-25A-7 (executive session allowed to discuss the job performance of certain public employees) and Alabama Open Meetings Act A Manual for Public Officials During the Meeting, Chapter IV, p. 22, <http://education.ua.edu/wp-content/uploads/2014/01/Alabama-Open-Meetings-Training-Manual.pdf> (accessed August 29, 2014) (the public body may call an executive session only if the individual being discussed does not fall into any of the following categories: an elected or appointed public official; an appointed member of a state or local board or commission; an employee who must file a statement of economic interest under state law)); *Arkansas* (Ark. Code Ann. § 25-19-106(c)(1) (A governing body may meet in executive session to consider the "employment, appointment...or resignation of any public officer or employee") and *Arkansas Freedom of Information Handbook*, pp. 22, 26, <https://static.ark.org/eeuploads/ag/foi-handbook-16ed-final.pdf> (accessed August 29, 2014) (When a public body is meeting in executive session to consider disciplining an employee, all discussion must be related to the legal purpose for which the session was called. Such discussion may properly delve into all circumstances surrounding the incident that gave rise to the question of discipline in the first place without contravening the FOIA. Once a decision has been made in executive session that discipline or

other action is needed, all further acts of the public body should be public, citing *Commercial Printing Co. v. Rush*, 261 Ark. 468, 549 S.W.2d 790 (1977)); *California* (Cal. Gov't Code § 54957(b)(1)) a legislative body may hold a closed session "to consider the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee or to hear complaints or charges brought against the employee by another person or employee ***unless the public employee requests a public session...***" "In order to hold a closed session on specific complaints or charges against an employee, the employee must be given written notice of his or her right to have the complaints or charges heard in open session. The notice must be delivered to the employee personally or by mail at least 24 hours before the time for holding the session.") Cal. Gov't Code § 54957(b)(2). This notice provision has been held ***not*** to apply to a closed session ***to consider or deliberate*** on whether complaints or charges brought against an employee justify dismissal or disciplinary action, but only to meetings "to hear" – as in a proceeding where witnesses are heard and evidence presented – the complaints or charges against the employee. *Bollinger v. San Diego Civil Service Com.*, 71 Cal. App. 4th 568, 574-75, 84 Cal. Rptr. 2d 27 (1999) (closed session to consider whether to affirm demotion recommendation did not require notice to employee and thus action could not be nullified where prior public evidentiary hearing was afforded employee); *Kolter v. Commission on Professional Competence of the Los Angeles Unified School Dist.*, 170 Cal. App. 4th 1346, 1352, 88 Cal. Rptr. 3d 620 (2009) (closed hearing to consider whether charges against employee justified initiation of dismissal proceedings did not trigger notice provision where employee was ***thereafter provided public evidentiary hearing*** on charges)); *Georgia* (O.C.G.A. § 50-14-3(6) meetings held to discuss or deliberate about the appointment, employment, compensation, hiring, disciplinary action or dismissal, or periodic evaluation or rating of a public officer or

employee may be closed. However, *those portions of such meetings during which evidence is received or argument heard about the discipline or dismissal of a public employee must be open to the public.* O.C.G.A. § 50-14-3(6)); *Idaho* (Idaho Code § 67-2345(1)(b) An executive session may be held to consider the dismissal of, or to hear complaints or charges brought against, a public officer, employee, staff member, or individual agent, or public school student); *Illinois* (5 ILCS § 120/2(c)(1) a public body may hold closed meetings to consider “the appointment, employment, compensation, discipline, performance, or dismissal of specific employees of the public body,” and *Grissom v. Board of Education of Buckley-Loda Comm. Sch. Dist., No. 8*, 55 Ill. App.3d 667, 673 (roll call vote was held to be a sufficient final action to terminate a teaching employee even though full discussion of the matter took place in closed session)); *Indiana* (Ind. Code § 5-14-1.5-6.1(b)(6) executive session permitted “[w]ith respect to any individual over whom the governing body has jurisdiction, to receive information concerning the individual's alleged misconduct; and to discuss, before a determination, the individual's status as an employee, a student or an independent contractor who is a physician or a school bus driver.”); *Kansas* (K.S.A. § 75-4319(b)(1) executive session permitted to discuss personnel matters involving non-elected personnel, and *A Citizen's Guide to KOMA/KORA*, p.9, <http://ag.ks.gov/docs/default-source/publications/a-citizen's-guide-to-koma-kora.pdf?sfvrsn=10> (accessed August 29, 2014), “[t]he body may only discuss its own individual employees and applicants for employment. They are not permitted to discuss elected officials, independent contractors, candidates for appointment to other boards or commissions or general concerns affecting all employees, such as a proposed pay plan.”); *Kentucky* (KRS § 61.810(f) executive session permitted for discussions or hearings which might lead to the appointment, discipline, or dismissal of an individual employee, member, or student without restricting that employee's,

member's, or student's right to a public hearing if requested; however, the AG Opinion No. 94-OMD-122, provides that the Open Meetings Act does not give municipal employees the right to notice and a hearing in a termination proceeding. It only gives that employee the right to an open and public hearing if a hearing has been scheduled (*i.e.*, police officers have statutory right to a hearing prior to dismissal; therefore, public hearing is required if requested by employee)); *Maryland* (Maryland Code § 10-508(a)(1) meetings that concern the appointment, employment, assignment, promotion, discipline, demotion, compensation, removal, resignation, or performance evaluation of appointees, employees or officials over whom the entity has jurisdiction or any other personnel matter affecting one or more specific individuals may be closed); *Mississippi* (Mississippi Code § 25-41-7(4)(a) (transaction of business and discussion of personnel matters relating to the job performance, character, professional competence, or physical or mental health of a person holding a specific position may be held in executive session)); *Missouri* (Missouri Rev. Stat. § 610.012(3) (executive session permitted for “hiring, firing, disciplining or promoting of particular employees by a public governmental body when personal information about the employee is discussed or recorded”) and AG Opinion No. 129-97 (The vote of each school board member must be available to the public on votes to hire, fire, discipline or promote particular employees in a closed meeting pursuant to Section 610.021(3). But the information considered during the closed meeting and before the actual vote is taken does not have to be disclosed)); *New York* (N.Y. Pub. Off. Law § 105(f) (executive session permitted to discuss the “medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation”)); *North Carolina* (N.C. Code § 143-318.11(6) (executive session permitted to consider to consider the

qualifications, competence, performance, character, fitness, conditions of appointment, or conditions of initial employment of an individual public officer or employee or prospective public officer or employee; or to hear or investigate a complaint, charge, or grievance by or against an individual public officer or employee...Final action making an appointment or discharge or removal by a public body having final authority for the appointment or discharge or removal shall be taken in an open meeting.”); *North Dakota* (N.D.C.C. §§ 15.1-14 and 15.1-15 provide for executive session exceptions to the open meeting law when superintendents, directors of multidistrict units, administrators, or teachers are subject to suspension, nonrenewal or discharge proceedings); *Oklahoma* (O.S. § 25.307(B)(1) (executive session permitted for “discussing the employment, hiring, appointment, promotion, demotion, disciplining or resignation of any individual salaried public officer or employee”)); *South Dakota* (S.D. Code § 1-25-2 (executive session permitted for discussing the qualifications, competence, performance, character or fitness of any public officer or employee)); *Utah* (Utah Code § 52-4-205(1)(a) (executive session permitted to discuss the character, professional competence, or physical or mental health of an individual)); *Vermont* (1 V.S.A. § 312(e) (the deliberations of a school board, undertaken in conjunction with a quasi-judicial proceeding, are exempt from Vermont’s open meeting law)); *Virginia* (Virginia Code § 2.2-3711(A)(1) (executive session permitted for the discussion, consideration, or interview of prospective candidates for employment; assignment, appointment, promotion, performance, demotion, salaries, discipline or resignation of specific public officers, appointees, or employees of any public body)); *Wisconsin* (Wis. Stat. § 19.85(1)(b) (Executive session permitted for “[c]onsidering dismissal, demotion, licensing or discipline of any public employee or person licensed by a board or commission or the investigation of charges against such person, or considering the grant or denial of tenure for a

university faculty member, and the taking of formal action on any such matter; provided that the faculty member or other public employee or person licensed is given actual notice of any evidentiary hearing which may be held prior to final action being taken and of any meeting at which final action may be taken. The notice shall contain a statement that *the person has the right to demand that the evidentiary hearing or meeting be held in open session*) and <http://www.doj.state.wi.us/sites/default/files/dls/open-meetings-law-compliance-guide-2010.pdf> (accessed August 29, 2014) “Where actual notice is required, the notice must state that the person has a right to request that any such evidentiary hearing or final action be conducted in open session. If the person makes such a request, the governmental body may not conduct an evidentiary hearing or take final action in closed session. *The body may, however, convene in closed session under Wis. Stat. § 19.85(1)(b) for the purpose of deliberating about the dismissal, demotion, licensing, discipline, or investigation of charges. Following such closed deliberations, the body may reconvene in open session and take final action related to the person’s employment or license.*” See *State ex rel. Epping v. City of Neillsville*, 218 Wis. 2d 516, 581 N.W.2d 548 (Ct. App. 1998)); *Wyoming* (Wyoming Code § 16-4-405 (executive session permitted to consider the appointment, employment of a public employee *unless the employee requests a public hearing. However, following the hearing, the governing body may deliberate on its decision in executive session.*)

Thus, clearly many other states have found valid reasons for public employers to hold executive sessions under similar circumstances as the instant matter. Moreover, several courts have interpreted similar provisions that allow a public employee to demand a public hearing to apply only to the presentation of evidence and the vote to terminate, but not to the deliberations of the public body.

III. The Board Adhered to the Spirit and Letter of the Open Meetings Act.

Stewart cites to the general public policy underlying the OMA as a reason for this Court to expand the scope of *Matheny*. The Board does not agree it needs to be expanded because an appropriate balance of public access and candid deliberation was provided in the instant matter. R.C. 121.22 requires public officials to conduct meetings on official business in public. *State ex rel. Cincinnati Post v. Cincinnati*, 76 Ohio St.3d 540, 542, 668 N.E.2d 903 (1996). R.C. 121.22(H) provides that a resolution, rule or formal action is invalid unless adopted in an open meeting of the public body and that any such resolution or formal action that results from deliberations in a meeting not open to the public is invalid “*unless the deliberations were for a purpose specifically authorized in division (G) * * * and conducted at an executive session.*” (Emphasis added.)

Indeed, the OMA itself recognizes that certain sensitive information may be discussed privately. *See State ex rel. Cincinnati Post*, at 544. One court has described the purpose of the exception contained in R.C. 121.22(G)(1):

The legislature has balanced the two objectives of open, public consideration and full and complete consideration, and determined that ***in personnel matters the inhibiting effect of open discussion is determinative and overrides the need for public discussion.***

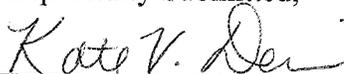
Kauffman v. Tiffin City Council, 3rd Dist. No. 13-84-9, 1985 Ohio App. LEXIS 8627, (Aug. 14, 1985) (emphasis added). As long as an executive session is properly convened for the purpose of considering certain specified matters under R.C. 121.22(G), and the deliberations during the executive session are for a purpose specifically authorized thereunder, there is no violation of the OMA. *State ex rel. Hardin v. Clermont Cty. Bd. of Elections*, 12th Dist. Nos. CA2011-05-045 and CA2011-06-047, 2012-Ohio-2569, 972 N.E.2d 115, ¶ 55, discretionary appeal not allowed in 134 Ohio St.3d 1451, 2013-Ohio-347, 982 N.E.2d 729.

Here, the Board struck the proper balance of entering into an executive session for the specific purpose of considering a public employee's employment, discipline and possible dismissal—an action expressly authorized by R.C. 121.22(G)(1)—while providing Stewart the opportunity to publically speak against the contemplated Board action, thereby keeping the public informed of his arguments in defense and the business of the Board in general. Stewart's counsel was permitted to speak on his behalf in open session and the Board then voted in open session on its Resolution to Terminate the Non-Teaching Employment Contract of Adam Stewart. In taking all of these actions, the Board followed the mandates of the OMA.

CONCLUSION

Stewart's arguments are without merit. The Board did not violate the OMA by deliberating in executive session. The law is clear that a public body may adjourn into executive session to consider the dismissal of a public employee. The law is equally clear that the exception to a public body's right to enter executive session to discuss certain personnel matters only applies if the employee has a right under other statutory law to demand a public hearing. Moreover, even if this Court views the right to a hearing under *Loudermill* as a hearing "elsewhere provided by law" as stated in *Matheny*, Stewart's *Loudermill* evidentiary hearing was conducted in open session. Nothing in *Loudermill* precludes a public employer from privately deliberating following an employee telling his/her "side of the story." Therefore, the Board did not violate the Open Meetings Act by deliberating in executive session. For all of the foregoing reasons, the Board respectfully requests that this Court affirm the decision of the First District Court of Appeals.

Respectfully Submitted,



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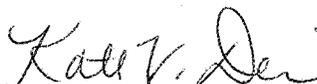
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing *Merit Brief of Appellee Lockland Local School District Board of Education* was sent by regular U.S. mail, postage prepaid, to Konrad Kircher and Ryan J. McGraw, Attorneys for Plaintiff, Kircher Law Office, LLC, 4824 Socialville-Foster Road, Mason, OH 45040 on this 22nd day of September 2014.



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