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I. STATEMENT OF FACTS

Defendant/Appellee Board of Education of Lockland Local School District's (hereinafter the "Board" or "Lockland") *Merit Brief* confirms that the material facts are not in dispute. The Board called a special meeting to consider Plaintiff/Appellant Adam Stewart's (hereinafter "Stewart") continued employment on August 23, 2012. Shortly after convening the special meeting, the Board adjourned into executive session over the objection of Stewart. During the first executive session, the Board deliberated Stewart's continued employment. The Board then reconvened into public session to hear Stewart's evidence against the proposed resolution terminating his employment. It then again adjourned into executive session over the objection of Stewart. During this second executive session, the Board again deliberated Stewart's continued employment. When it emerged from executive session, the Board voted to terminate Stewart's nonteaching employment contract.

II. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

a. THE BOARD REFUSES TO ACKNOWLEDGE THE PROFOUND IMPACT LOUDERMILL HAD ON MATHENY.

Lockland has argued that the open deliberation requirement of R.C. 121.22(G)(1) is only triggered when a public employee has a statutory right to a public hearing. *Brief of Appellee* at pp. 7-10. According to Lockland, because Stewart has no statutory right to a hearing concerning his continued employment, *Matheny v. Frontier Local Board of Education*, 62 Ohio St.2d 362, 405 N.E.2d 1041 (1980) prohibits him from demanding that the Board conduct deliberations at his due process hearing in public. *Id.* The Board's view, though, fails to account for the profound impact the U.S. Supreme Court's decision in *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487 (1985) had on Ohio's open meeting laws and this Court's decision in *Matheny*.

In *Matheny*, the Court denied several non-tenured teachers' attempts to require a school board to deliberate upon the nonrenewal of their limited contracts in public. *Matheny*, 62 Ohio St.2d at 368. In support of its decision, the *Matheny* Court repeatedly stated that the teachers had neither a statutory right to continued employment nor a constitutional expectation of continued employment past the term of their limited contracts. *See e.g. Matheny*, 62 Ohio St.2d at 364 (“We believe these causes presently under review present a less forceful claim of entitlement than that rejected by this Court in [*Depas v. Bd. of Edn.*, 52 Ohio St.2d 193, 370 N.E.2d 744 (1977)]¹, in that here there is no claim that the board must consider any specific criteria for reappointment.”); *Id.* (“We hold that under the provisions of R.C. Chapter 3319, a non-tenured teacher has no expectancy of continued employment past the terms of his limited contract. Therefore, there is no property right involved here as claimed by appellants. In the absence of such a constitutionally protected interest, due process does not require a hearing by the board on the issue of non-renewal of such contract.”); *Id.* at 367 (“We do not believe that the words ‘unless the public employee . . . requests a public hearing . . .’ were intended to grant the right to a hearing where none existed previously, as in the instance of contract considerations of non-tenured teachers.”); *Id.* at 368 (“Nothing in this section grants a non-tenured teacher the right to demand that those deliberations be made in public. For this reason, we further hold that R.C. 121.22 does not give rise to an expectancy of continued employment for non-tenured teachers . . .”). As a result, the Court found that private deliberations on the non-renewals were permissible. *Id.*

The *Matheny* Court's ruling was thus clearly intended to prevent employees from using the Open Meetings Act as an independent basis for a hearing on every employment decision.

¹ Where the Court held that a school principal employed under a limited contract did not have an expectation of continued employment even where a school board was required to consider certain criteria when considering reappointment.

Brief of Amicus Curiae Ohio Employment Lawyers Association in Support of Appellant Adam Stewart at pp. 8, 10-11. However, given its repeated references to the lack of a property interest in the teachers' positions, it seems clear that had the teachers possessed such rights – which would exist independent of the Open Meetings Act – the Court would have concluded they were entitled to both a hearing and public deliberations concerning their continued employment should they so desire.² Such a conclusion is strengthened by the *Matheny* Court's acknowledgment that the goal of the executive session exemption to the open meeting requirement for personnel issues was to protect the privacy of the individual employee. *Id.* at pp. 6-7.

Five years after *Matheny* was decided, the U.S. Supreme Court issued its decision in *Loudermill* holding that a public employee who could only be terminated for cause has a property interest in his continued employment and that due process entitles him to a hearing prior to being terminated. *Loudermill*, 470 U.S. at 547-548. Here, unlike the non-tenured teachers in *Matheny*, and like the employees in *Loudermill*, Stewart has a property interest in his continued employment with Lockland. This constitutionally protected interest in continued employment requires the Board to conduct a hearing prior to terminating him. *Matheny*, 62 Ohio St.2d at 364; *Loudermill*, 470 U.S. at 547-548. This hearing is elsewhere provided by law and does not originate through the Open Meetings Act. Therefore, to protect his privacy, Stewart could demand that deliberations be conducted in executive session rather than in public. R.C. 121.22(G)(1); *Matheny*, 62 Ohio St.2d at 366-367; *Merit Brief of Appellant* at Ex. B, ¶ 20 (DeWine, J., concurring) (citing *Gannett Satellite Information Network v. Chillicothe City School Dist. Bd. of Edn.*, 41 Ohio App.3d 218, 220, 534 N.E.2d 1239 (4th Dist. 1988)). Stewart chose to waive his right to privacy on two separate occasions at the special meeting. The Board

² These rights would likewise be triggered if the employee also had a statutory right to a hearing prior to being terminated as well. *Matheny*, 62 Ohio St.2d 367-368.

failed to honor both requests choosing instead to retreat behind closed doors and insulate itself from public criticism and accountability. Such retreats are violations of the Open Meetings Act.

b. LOCKLAND DID NOT ADHERE TO THE SPIRIT AND PURPOSE OF THE OPEN MEETINGS ACT.

The Board has suggested it followed the mandate of the Open Meetings Act by simply permitting Stewart to speak publically against the recommendation to terminate his nonteaching employment contract at the special meeting. *See Brief of Appellee* at pp. 21-22. It further argues that its executive sessions were appropriate because it properly weighed the objectives of open consideration of Stewart's employment against the inhibiting effect of public discussions regarding personnel matters in choosing to enter executive session for deliberations. *Id.* The Board's *Amicus Curiae*, the Ohio School Boards Association (the "SBA") similarly suggests, in part, that requiring public deliberation in personnel matters may inhibit a board member from openly and honestly discussing the individual subject to discipline because of a pre-existing relationship between the decision-maker and the employee. *Brief of Amicus Curiae Ohio School Boards Association in Support of Defendant-Appellee Board of Education of Lockland Local School District* at pp. 7-8. Both suggestions only further prove that the Board violated the spirit and purpose of the OMA.

As this Court has repeatedly held, the open meeting requirement is designed to ensure accountability in government officials and to prevent secret deliberations on matters of public importance. *State ex rel Cincinnati Post v. City of Cincinnati*, 76 Ohio St.3d 540, 668 N.E.2d 903 (1996). When elected officials are permitted to meet behind closed doors to engage in secret deliberations on public issues, their constituents are harmed. If, as the Board and the SBA suggest, members feel inhibited about discussing personnel matters in public, then they are probably not individuals the public wants serving as their representatives. "If the employee is not

concerned about a public airing of issues, there is little justification to allow policymakers to shield their discussions from the public ear.” *Merit Brief of Appellant* at Ex. B, ¶ 20 (DeWine, J., concurring) (citing *Gannett Satellite Information Network v. Chillicothe City School Dist. Bd. of Edn.*, 41 Ohio App.3d 218, 220, 534 N.E.2d 1239 (4th Dist. 1988)). Further, the scenario presented by the SBA, where a board member has a prior relationship with an employee, is a clear example of why a public deliberations requirement, upon the employee’s request, is necessary in the personnel context so that there is absolutely no potential for impropriety or special treatment for any employee.

c. OVERRULING THE FIRST DISTRICT PRESENTS A CLEAR LANDSCAPE FOR PUBLIC BODIES AND THEIR EMPLOYEES.

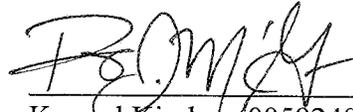
The SBA has also suggested that a ruling in Stewart’s favor would result in a “blur[ed] line” for its members going forward because they would be forced to weigh whether to hold individual hearings in public or risk violating the open meetings laws. *Brief of Amicus Curiae Ohio School Boards Association in Support of Defendant-Appellee Board of Education of Lockland Local School District* at pp. 9-10. Contrary to that belief, though, a ruling in Stewart’s favor actually makes a public body’s decision with respect to employee termination easy: It must honor the employee’s wishes. The beauty of such a ruling lies in its simplicity. If the employee is entitled to a *Loudermill* hearing or a statutory hearing prior to being terminated and wants a public hearing and public deliberations, the public body must honor that request. If the employee is entitled to a *Loudermill* hearing or a statutory hearing prior to being terminated and desires a private hearing and private deliberations, the public body must honor that request. Such a ruling has additional benefits as well. Namely, in the personnel context, a public body would never risk violating the Open Meetings Act so long as it adheres to an employee’s request for a private or public hearing.

III. CONCLUSION

Where a hearing is statutorily authorized, a public employee can require public deliberations under the Open Meetings Act. *Matheny*, 62 Ohio St.2d at 367. *Matheny's* holding, though, explicitly extends to hearings "elsewhere provided by law," not strictly statutory hearings. Stewart had a constitutional right to a *Loudermill* due process hearing prior to the Board passing a resolution to terminate his contract. This hearing is elsewhere provided by law. Therefore, under *Matheny*, Stewart can require the Board to deliberate in public rather than during an executive session under the public meeting exception of the Open Meetings Act. He exercised that right not once, but twice at the August 23, 2012 special meeting. The Board failed to honor both of his requests.

The resolution passed by the Board to terminate Stewart's nonteaching employment contract, which came as a result of the deliberations during improper executive sessions, is therefore invalid and without legal effect. R.C. 121.22(H). As a result, the court of appeals erroneously affirmed the granting of the Board's motion for summary judgment and its decision must be reversed and summary judgment granted in favor of Stewart. This Court must further issue an injunction, pursuant to R.C. 121.22(I)(1), compelling the Board to comply with the provisions of the Open Meeting Act and award Stewart a civil forfeiture of five hundred dollars, as well as attorney's fees and costs, pursuant to R.C. 121.22(I)(2).

Respectfully Submitted,



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CERTIFICATE OF SERVICE

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