IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA

JULES EPSTEIN vs. VALERIE ARKOOSH	NO. 2020-04978

COVER SHEET OF MOVING PARTY

Date of Filing June 15 2020

Moving Party VALERIE ARKOOSH; JOSEPH GALE; KENNETH LAWRENCE JR; MONTGOMERY COUNTY; MONTGOMERY COUNTY BOARD OF COMMISSIONERS; MONTGOMERY COUNTY SALARY BOARD; KAREN SANCHEZ

Counsel for Moving Party PHILIP W NEWCOMER, Esq., ID: 60055

Document Filed (Specify) PRELIMINARY OBJECTIONS

Matter is: X (Appealable) | _ (Interlocutory)

Discovery Needed: __ (Yes) | __ (No)

If applicable, Civil Case Management Order Discovery Deadline: _____

CERTIFICATIONS - Check **ONLY** if appropriate:

_ Counsel certify that they have conferred in a good faith effort to resolve the subject discovery dispute. **(Required by Local Rule 208.2(e) on motions relating to discovery.)**

_ Counsel for moving party certifies that the subject **civil motion** is **uncontested** by all parties involved in the case. (If checked, skip Rule to Show Cause section below.)

By: _____
Counsel for Moving Party

RULE TO SHOW CAUSE - Check **ONE** of the Choices Listed Below:

_____ Respondent is directed to show cause why the moving party is not entitled to the relief requested by filing an **answer** in the form of a **written response** at the **Office of the Prothonotary** on or before the day of 20___.

_____ Respondent is directed to show cause, in the form of a **written response**, why the attached Family Court Discovery Motion is not entitled to the relief requested. Rule Returnable and Argument the day of , 20___ at **1:00 p.m.** at **321 Swede Street, Norristown, PA**.

_____ Respondent is directed to file a **written response** in conformity with the Pennsylvania Rules of Civil Procedure.

_____ Rule Returnable at time of trial.

By: _____

Revised 06.19

Court Administrator

IN THE COURT OF COMMON PLEAS
OF MONTGOMERY COUNTY, PENNSYLVANIA

JULES EPSTEIN, *et al.*,	:	
Plaintiffs,	:	Civil Division
vs.	:	Docket No. 2020-04978
VALERIE ARKOOSH, *et al.*,	:	
Defendants.	:	

ORDER

AND NOW, this _____ day of _____, 2020, upon consideration of the Defendants' Preliminary Objections to Plaintiffs' Complaint for Declaratory and Injunctive Relief, and Plaintiffs' response thereto, it is hereby ORDERED and DECREED that said Preliminary Objections are SUSTAINED. Plaintiffs' Complaint for Declaratory and Injunctive Relief is DISMISSED WITH PREJUDICE, pursuant to Pennsylvania Rule of Civil Procedure 1028(a)(4), for legal insufficiency of the pleading.

BY THE COURT:

_____
J.

NOTICE TO PLEAD
To: Plaintiffs
You are hereby notified to file a written response to the Preliminary Objections within twenty (20) days from service hereof or a judgment may be entered against you.

/s/Philip W. Newcomer
Philip W. Newcomer, Esquire

MONTGOMERY COUNTY SOLICITOR'S OFFICE
By: Philip W. Newcomer, Esquire
Attorney I.D. No. 60055
One Montgomery Plaza, Suite 800
P.O. Box 311
Norristown, PA 19404-0311
(610) 278-3033

Attorney for Defendants, Valerie Arkoosh, Kenneth Lawrence, Jr., Joseph Gale and Karen Sanchez, in their official capacities, Montgomery County Board of Commissioners, Montgomery County Salary Board, and Montgomery County

JULES EPSTEIN, *et al.*,	COURT OF COMMON PLEAS
Plaintiffs,	MONTGOMERY COUNTY, PA
vs.	Civil Division
	Docket No. 2020-04978
VALERIE ARKOOSH, *et al.*,	
Defendants.	

DEFENDANTS' PRELIMINARY OBJECTIONS TO PLAINTIFFS' COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Defendants Montgomery County, the Montgomery County Board of Commissioners, the Montgomery County Salary Board, and Valerie Arkoosh, Kenneth Lawrence, Jr., Joseph Gale and Karen Sanchez, in their official capacities ("Defendants"), through their undersigned counsel, hereby submit these Preliminary Objections to the Complaint for Injunctive and Declaratory Relief of Plaintiffs Jules Epstein, Sara Atkins, Marc Bookman, Michael Conley, Christine Cregar, Christina Dunleavy, John Fagan, Peter Hall, Chris Koschier, Rev. Beth Lyon, Elena Margolis,

Emily Robb, Karl Schwartz, Adrian Seltzer and Leonard Sosnov ("Plaintiffs"). In support of these Preliminary Objections, Defendants aver as follows:

INTRODUCTION

1. The Commonwealth Court has twice affirmed that no provision of the Sunshine Act, 65 Pa. C.S. §§ 701 - 716, requires a county government's decision to hire or fire an at-will employee to take place by vote at a public meeting with prior public comment. *Notarianni v. O'Malley*, No. 733 C.D. 2016, 2017 WL 1337564 (Pa. Cmwlth. Apr. 12, 2017); *Maloney v. Lackawanna Cty. Com'rs*, 862 A.2d 182 (Pa. Cmwlth. Oct. 6, 2004) (table), *affirming* No. 2004-339, 2004 WL 5175141 (Lackawanna C.P. Feb. 13, 2004). These two unreported decisions, while not binding, are well-reasoned, well-supported and persuasive.

2. Fifteen Montgomery County residents nevertheless ask this Court to brush aside *Notarianni* and *Maloney* and to compel the County and its Commissioners or Salary Board "to hold a public meeting at which they hear public comment before taking official action with respect to the firing and/or hiring of the Chief and Deputy Chief Public Defenders of Montgomery County." Complaint (Exhibit A) at ¶ 3.

3. As a matter of law, the Sunshine Act does not require a county government's decision to hire or fire an at-will employee to take place by vote at a public meeting with prior public comment. Plaintiffs' complaint must be dismissed with prejudice for legal insufficiency pursuant to Pa. R. Civ. P. 1028(a)(4).

THE FACTS ALLEGED

4. Plaintiffs allege that the Board of Commissioners held a closed-door, unannounced meeting on February 25, 2020, at which the Commissioners decided to terminate Dean Beer and

Keisha Hudson as Chief Public Defender and Deputy Chief Public Defender, respectively. Exhibit A at ¶¶ 44-45.

5. Plaintiffs further allege that, at the same February 25 closed-door meeting, the Commissioners decided to appoint Carol Sweeney and Gregory Nester as co-chief public defenders. *Id.*

6. The next day, February 26, Mr. Beer and Ms. Hudson were told by County officials that they had been terminated, effective immediately. *Id.* at ¶ 46.

7. The Board of Commissioners also issued a press release on February 26 announcing that, "[e]ffective immediately, the Montgomery County Public Defender's Office will be led by Carol Sweeney and Greg Nester, who will serve as co-chief deputy public defenders going forward." *Id.* at ¶ 47 & Exhibit 1 thereto.

8. At the next regularly scheduled public meeting of the Board of Commissioners, held on March 5, 2020, Chairperson Arkoosh announced that an executive session had been held on February 25 "regarding personnel matters." Exhibit A at ¶¶ 59-60.

9. The previously announced personnel changes in the Public Defender's Officer were not on the agenda for the March 5 Board of Commissioners meeting, and no public vote on those personnel changes was held at that meeting. *Id.* at ¶¶ 61, 67.

10. At the conclusion of the meeting's agenda, during the meeting's public comment period, forty-five individuals spoke over a period of nearly three hours, asking the Commissioners to reverse their decision regarding the terminations of Mr. Beer and Ms. Hudson. *Id.* at ¶ 62.

11. Immediately following the conclusion of the March 5 Commissioners meeting, the Salary Board held its regularly scheduled meeting. *Id.* at ¶ 70.

12. As the complaint acknowledges, the Salary Board is tasked under the County Code with fixing "the compensation of all appointed county officers, and the number and compensation of all deputies, assistants, clerks and other persons whose compensation is paid out of the county treasury[,]" with certain exceptions not applicable here. Exhibit A at ¶ 27 (quoting 16 P.S. § 1625(a)).

13. The Salary Board's duties are defined by statute, and those duties do not include deciding who is hired or fired for any position. *See* 16 P.S. § 1625(a).

14. At the beginning of the March 5 Salary Board meeting, the County Solicitor explained that the Salary Board "is charged under law with setting the salary compensations of all county employees." Exhibit A at ¶ 71. The Solicitor further explained that, while the Salary Board provides a list for transparency's sake of persons who are being removed from the county payroll, "so that people can see as we add staff who is going off," the Salary Board has "no role … in actually approving the terminations." *Id.*

15. The Salary Board listing for its March 5 meeting (Exhibit 9 to the Complaint) identified Mr. Beer and Ms. Hudson as "termination[s]." *Id.* at ¶ 73. Ms. Sweeney and Mr. Nester were listed on the same document as receiving the new job title "Interim Co-Chief PD" with salary raises. *Id.*

16. Before any motion was put forth at the March 5 Salary Board meeting, the Controller asked the Solicitor to clarify that "we are not voting on terminations at the Salary Board." *Id.* at ¶ 75. The Solicitor stated, "That is correct," and he reiterated that "[t]he only thing that is being approved here are the setting of salaries and compensation for the new hires and any changes in salary" for previously hired employees. *Id.* at ¶ 76.

17. The salaries on the March 5 listing were unanimously approved by a vote of the Salary Board, and a public comment period followed the vote. *Id.* at ¶¶ 77-78.

THE CLAIMS ASSERTED

18. The complaint's six counts all incorrectly presume that the requirements of the Sunshine Act governed the decisions to terminate the employment of Mr. Beer and Ms. Hudson and to promote Ms. Sweeney and Mr. Nester.

19. Without regard for the Sunshine Act's definition of "official action" – or the instructive decisions in *Notarianni* and *Maloney, supra* – Plaintiffs contend in Count I of their complaint that the County and its Commissioners violated the Sunshine Act by taking "official action" to terminate the employment of Mr. Beer and Ms. Hudson and promote Ms. Sweeney and Mr. Nester in a closed door meeting on February 25, 2020. Exhibit A at ¶¶ 80-85.

20. In Count II, Plaintiffs similarly contend that the County and its Commissioners violated the Sunshine Act by taking "official action" to terminate the employment of Mr. Beer and Ms. Hudson and promote Ms. Sweeney and Mr. Nester in that February 25 meeting without providing prior opportunity for public comment. *Id.* at ¶¶ 86-90.

21. In Count III, Plaintiffs allege that the February 25 closed-door meeting amounted to an "executive session" under the Sunshine Act and that the County and its Commissioners violated the Act on March 5 by announcing only that the closed door meeting concerned personnel matters, without providing a sufficiently detailed description of the matters discussed. *Id.* at ¶¶ 91-97.

22. Building on the contention that the February 25 closed-door meeting was an "executive session" under the Sunshine Act, Count IV alleges that the County and its Commissioners violated the Act by failing to give the adversely affected employees (Mr. Beer and

Ms. Hudson) opportunity to ask that the employment discussions take place at an open meeting. *Id.* at ¶¶ 98-104.

23. Apparently believing that the Salary Board approves or ratifies who has been hired or fired by the County, Plaintiffs allege in Count V that the Salary Board violated the Sunshine Act when it "voted to approve … [a] 'presentation' … which included the *personnel changes* at the Public Defender Office, without first providing an opportunity for the public to provide comment on that official action." Exhibit A at ¶¶ 106 (emphasis added) & 105-109.

24. Count VI alleges that, "if Mr. Beer and Ms. Hudson were not terminated, and Ms. Sweeney and Mr. Nester were not appointed, until the March 5 meeting of the Salary Board, then Defendants violated the Sunshine Act by not providing an opportunity for public comment prior to taking that official action." *Id.* at ¶¶ 111, 110-116.

THE RELIEF SOUGHT

25. Plaintiffs demand a declaration that the terminations of Mr. Beer and Ms. Hudson and the promotions of Ms. Sweeney and Mr. Nester – decisions which are not covered by the Sunshine Act – somehow violate that Act and thus are void. Exhibit A at pgs. 24-25, ¶¶ a, b, d, & e.

26. Plaintiffs seek the extraordinary remedy of reinstatement for Mr. Beer and Ms. Hudson, which would necessitate removal of Ms. Sweeney and Mr. Nester from their current positions in the Public Defender's Office. *Id.* at pg. 25, ¶¶ c, d & e.

27. Further, Plaintiffs would have this Court fundamentally alter the County's relationship with all of its current and future employees by permanently enjoining Defendants "from taking *any* employment action by hiring or terminating *any* individuals without first

receiving public comment and taking a public vote at a public meeting on that proposed action[.]" *Id.* at ¶ f (emphasis added).

28. In another breathtaking overreach, Plaintiffs would use discrete employment decisions regarding the Chief and Deputy Chief Public Defender to justify a permanent injunction which would subject Defendants in sweeping fashion to contempt of court for "taking *any* official action at a public meeting without first receiving public comment on that proposed action." *Id.* at ¶ g (emphasis added).

29. Plaintiffs also seek attorneys' fees and costs of suit, pursuant to 65 Pa. C.S. § 714.1, for Defendants' allegedly willful violation of the Sunshine Act (*id.* at ¶¶ h & i) – again ignoring the fact that Defendants' actions were supported by persuasive appellate authority. *See Notarianni* and *Maloney, supra.*

30. Plaintiffs are not entitled to any of the relief they request. As a matter of law, their complaint fails to allege a violation of the Sunshine Act.

I. DEMURRER – ALL COUNTS

31. Defendants incorporate herein by reference the averments of paragraphs 1 through 30 above, as if set forth in full.

32. The six counts of Plaintiffs' complaint all rest upon the incorrect conclusion that the requirements of the Sunshine Act governed the decisions to terminate the employment of Mr. Beer and Ms. Hudson and to promote Ms. Sweeney and Mr. Nester.

33. In *Notarianni v. O'Malley*, No. 733 C.D. 2016, 2017 WL 1337564 (Pa. Cmwlth. Apr. 12, 2017) (Exhibit B), a taxpayer and a member of the Lackawanna County Board of Commissioners brought an action for declaratory and injunctive relief under the Sunshine Act to

remove certain county officials, contending that their closed-door appointments constituted "official action" under the Sunshine Act that required a public meeting.

34. Denying plaintiffs the declaratory and injunctive relief they sought, "the trial court noted that county employment decisions do not qualify as 'official action' under the Sunshine Act." *Id.* at *2 (emphasis added).

35. On appeal, a three-judge panel of the Commonwealth Court with extensive experience in local government law unanimously affirmed the decision of the trial court, holding that "[t]here is no provision contained in the Sunshine Act that specifies the hiring or appointment of a county employee constitutes 'official action.'" 2017 WL 1337564, at *5 (emphasis added).

36. Likewise, there is no provision of the Sunshine Act that specifies the firing of a county employee constitutes "official action." Thus, in *Maloney v. Lackawanna Cty. Com'rs*, No. 2004-339, 2004 WL 5175141 (Lackawanna C.P. Feb. 13, 2004) (Exhibit C), *affirmed*, 862 A.2d 182 (Pa. Cmwlth. Oct. 6, 2004) (table), the Commonwealth Court affirmed a trial court decision denying a petition for injunctive relief filed by county employees who alleged that the board of commissioners had terminated their employment illegally in violation of the Sunshine Act.

37. The Commonwealth Court described its decision in *Maloney* as "holding that the termination of County employees did not qualify as official action, and so did not require a public meeting for validity." *Notarianni*, 2017 WL 1337564, at *5 (emphasis added).

38. As explained in Defendants' accompanying memorandum of law, which is incorporated herein by reference, decisions to hire, fire or promote at-will County employees do not constitute "official action" or "agency business" under the Sunshine Act, and thus those decisions are beyond the scope of the Act's requirements.

39. As a matter of law, Plaintiffs' complaint fails to state a claim for violation of the Sunshine Act. The complaint must be dismissed with prejudice pursuant to Pa. R. Civ. P. 1028(a)(4) (legal insufficiency).

WHEREFORE, Defendants Montgomery County, the Montgomery County Board of Commissioners, the Montgomery County Salary Board, Valerie Arkoosh, Kenneth Lawrence, Jr., Joseph Gale and Karen Sanchez, in their official capacities, ask that their Preliminary Objections to Plaintiffs' Complaint be sustained and that Plaintiff's Complaint for Declaratory and Injunctive Relief be dismissed with prejudice for legal insufficiency pursuant to Pa. R. Civ. P. 1028(a)(4).

II. DEMURRER – COUNTS V & VI

40. Defendants incorporate herein by reference the averments of paragraphs 1 through 39 above, as if set forth in full.

41. Counts V and VI of the complaint are directed to the Montgomery County Salary Board and its members.

42. "[T]he salary board performs an *administrative* function of fixing salaries and compensation of the county employees[.]" *Luzerne Cty. Bd. of Com'rs v. Flood*, 874 A.2d 687, 691 (Pa. Cmwlth. 2005) (original emphasis).

43. The Salary Board's duties are prescribed by § 1623 of the County Code. 16 P.S. § 1623.

44. Section 1623 of the County Code does not empower the Salary Board to terminate any county employee, nor does § 1623 authorize the Salary Board to decide who is hired for or promoted to any position. *See, e.g.*, *Pennsylvania Soc. Servs. Union Local 668, Serv. Employees Int'l Union v. Cambria Cty.*, 134 Pa. Cmwlth. 523, 579 A.2d 455, 458 (1990) (salary board "has

no statutory authority to discharge employees in the sheriff's office" and thus the board's removal of deputies from the payroll "did not cause the discharge of the employees").

45. In Count V, Plaintiffs contend that the Salary Board violated the Sunshine Act by failing to give opportunity for public comment before it allegedly "voted to approve" or ratify prior-accomplished "personnel changes at the Public Defender Office" at its March 5 meeting. Exhibit A at ¶ 106.

46. Alternatively, in Count VI, Plaintiffs contend that the Salary Board violated the Sunshine Act by failing to give opportunity for public comment before it allegedly voted to bring about those personnel changes (namely, the terminations of Mr. Beer and Ms. Hudson and the promotions Ms. Sweeney and Mr. Nester) as of March 5. *Id.* at ¶ 111.

47. As a matter of law, the Salary Board did not cause the terminations or promotions in dispute.

48. By its May 5 vote, the Salary Board took the purely administrative step of removing Mr. Beer and Ms. Hudson from the County payroll and approved the salary level to accompany the promotions of Ms. Sweeney and Mr. Nester.

49. Given the statutory limits of its authority, the Salary Board cannot be said to have terminated the employment of Mr. Beer and Ms. Hudson or to have promoted Ms. Sweeney and Mr. Nester to replace them. *See* 16 P.S. § 1623; *Pennsylvania Soc. Servs. Union Local 668,* 579 A.2d at 458.

50. Counts V and VI fail as a matter of law because the Salary Board, by statute, is not responsible for the hiring, firing or promotion of County employees as plaintiffs mistakenly contend.

WHEREFORE, Defendants Montgomery County, the Montgomery County Board of Commissioners, the Montgomery County Salary Board, Valerie Arkoosh, Kenneth Lawrence, Jr., Joseph Gale and Karen Sanchez, in their official capacities, ask that their Preliminary Objections to Plaintiffs' Complaint be sustained and that Counts V and VI of Plaintiff's Complaint for Declaratory and Injunctive Relief be dismissed with prejudice for legal insufficiency pursuant to Pa. R. Civ. P. 1028(a)(4).

Respectfully submitted,
MONTGOMERY COUNTY SOLICITOR'S OFFICE

/s/ Philip W. Newcomer

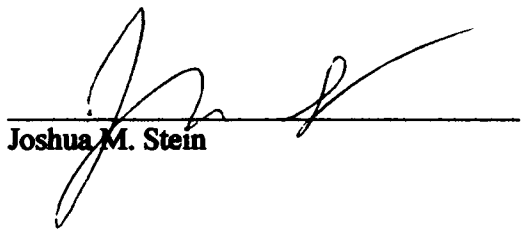
Philip W. Newcomer, Esquire
Attorney I.D. No. 60055
One Montgomery Plaza, Suite 800
P.O. Box 311
Norristown, PA 19404-0311
610-292-5030

Attorney for Defendants,
Valerie Arkoosh, Kenneth Lawrence, Jr.,
Joseph Gale and Karen Sanchez, in their official capacities, Montgomery County Board of Commissioners, Montgomery County Salary Board, and Montgomery County

Dated: June 15, 2020

VERIFICATION

I, Joshua M. Stein, hereby state that I am Solicitor for the County of Montgomery and am authorized to make this verification on the Defendants' behalf in this matter. I further state that I have read the foregoing Preliminary Objections to Plaintiffs' Complaint for Declaratory and Injunctive Relief, and that the facts set forth therein are true and correct to the best of my knowledge, information and belief. I understand that this verification is being made pursuant to 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.



Joshua M. Stein

Dated: June 15, 2020

MONTGOMERY COUNTY SOLICITOR'S OFFICE
By: Philip W. Newcomer, Esquire
Attorney I.D. No. 60055
One Montgomery Plaza, Suite 800
P.O. Box 311
Norristown, PA 19404-0311
(610) 278-3033

Attorney for Defendants, Valerie Arkoosh, Kenneth Lawrence, Jr., Joseph Gale and Karen Sanchez, in their official capacities, Montgomery County Board of Commissioners, Montgomery County Salary Board, and Montgomery County

JULES EPSTEIN, *et al.*, **Plaintiffs,** **vs.** **VALERIE ARKOOSH, *et al.*,** **Defendants.**	COURT OF COMMON PLEAS MONTGOMERY COUNTY, PA Civil Division Docket No. 2020-04978

CERTIFICATE OF SERVICE

I, Philip W. Newcomer, hereby certify that the foregoing Preliminary Objections to Plaintiffs' Complaint and accompanying Memorandum of Law were served on June 15, 2020, electronically via email, upon the following:

Eli Segal, Esq.
Martha E. Guarnieri, Esq.
Pepper Hamilton LLP
3000 Two Logan Square
Eighteenth & Arch Streets
Philadelphia, PA 19103-2799
segale@pepperlaw.com
guarniem@pepperlaw.com
Attorneys for Plaintiffs

Mary Catherine Roper, Esq.
American Civil Liberties Union of PA
P.O. Box 60173
Philadelphia, PA 19102
mroper@aclupa.org
Attorneys for Plaintiffs

/s/ Philip W. Newcomer
Philip W. Newcomer, Esquire

MONTGOMERY COUNTY SOLICITOR'S OFFICE
By: Philip W. Newcomer, Esquire
Attorney I.D. No. 60055
One Montgomery Plaza, Suite 800
P.O. Box 311
Norristown, PA 19404-0311
(610) 278-3033

Attorney for Defendants, Valerie Arkoosh, Kenneth Lawrence, Jr., Joseph Gale and Karen Sanchez, in their official capacities, Montgomery County Board of Commissioners, Montgomery County Salary Board, and Montgomery County

JULES EPSTEIN, *et al.*, **Plaintiffs,** **vs.** **VALERIE ARKOOSH, *et al.*,** **Defendants.**	COURT OF COMMON PLEAS MONTGOMERY COUNTY, PA Civil Division Docket No. 2020-04978

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' PRELIMINARY OBJECTIONS TO PLAINTIFF'S COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

I. MATTER BEFORE THE COURT

The Commonwealth Court has twice affirmed that no provision of the Sunshine Act, 65 Pa. C.S. §§ 701 - 716, requires a county government's decision to hire or fire an at-will employee to take place by vote at a public meeting with prior public comment. *Notarianni v. O'Malley*, No. 733 C.D. 2016, 2017 WL 1337564 (Pa. Cmwlth. Apr. 12, 2017); *Maloney v. Lackawanna Cty. Com'rs*, 862 A.2d 182 (Pa. Cmwlth. Oct. 6, 2004) (table), *affirming* No. 2004-339, 2004 WL 5175141 (Lackawanna C.P. Feb. 13, 2004). These two unreported decisions, while not binding, are well-reasoned, well-supported and persuasive. Nevertheless, fifteen Montgomery County residents ask this Court to brush aside *Notarianni* and *Maloney* and to compel the County and its Commissioners or Salary Board "to hold a public meeting at which they hear public comment before taking official action with respect to the firing and/or hiring of the Chief and Deputy Chief

Public Defenders of Montgomery County." Complaint (Exhibit A) at ¶ 3. But as a matter of law, the Sunshine Act does not require a county government's decision to hire or fire an at-will employee to take place by vote at a public meeting with prior public comment. Plaintiffs' complaint must be dismissed with prejudice for legal insufficiency pursuant to Pa. R. Civ. P. 1028(a)(4).

II. STATEMENT OF QUESTIONS INVOLVED

A. Must plaintiffs' complaint for declaratory and injunctive relief under the Sunshine Act be dismissed with prejudice because Montgomery County's firing and/or hiring of its Chief and Deputy Chief Public Defenders is not "official action" subject to the requirements of that Act?

SUGGESTED ANSWER: YES

B. Must plaintiffs' claims for declaratory and injunctive relief against the Montgomery County Salary Board and its members (Counts V and VI) be dismissed with prejudice for the additional reason that the Salary Board, as a matter of law, does not hire or fire the Chief and Deputy Chief Public Defenders of Montgomery County?

SUGGESTED ANSWER: YES

III. FACTS

A. The Facts Alleged

While plaintiffs' complaint is a lengthy one, the material facts of this matter are uncomplicated and relatively brief. Plaintiffs are fifteen residents[1] of Montgomery County ("County") who disagree with the County's terminations of Dean Beer and Keisha Hudson as

[1] Plaintiffs are Jules Epstein, Sara Atkins, Marc Bookman, Michael Conley, Christine Cregar, Christina Dunleavy, John Fagan, Peter Hall, Chris Koschier, Rev. Beth Lyon, Elena Margolis, Emily Robb, Karl Schwartz, Adrian Seltzer and Leonard Sosnov.

Chief Public Defender and Deputy Chief Public Defender, respectively. Many of these plaintiffs spoke at a March 5, 2020 public meeting of the Board of Commissioners and asked the Board to reconsider the terminations of Mr. Beer and Ms. Hudson. Exhibit A at ¶¶ 7, 9, 13, 14, 18, 20, 21. Others signed a petition calling for the reinstatement of Mr. Beer and Ms. Hudson. *Id.* at ¶¶ 8, 16, 17. One plaintiff also attended a rally outside the Board of Commissioners' March 5 meeting to protest the terminations. *Id.* at ¶ 8. Defendants are the County, its Board of Commissioners, its Salary Board, and the members[2] of those Boards, who are sued in their official capacities only. *Id.* at ¶¶ 22-28.

Plaintiffs allege that the Board of Commissioners held a closed-door, unannounced meeting on February 25, 2020, at which the Commissioners decided to terminate Mr. Beer and Ms. Hudson as Chief Public Defender and Deputy Chief Public Defender. Exhibit A at ¶¶ 44-45. Plaintiffs further allege that, at the same February 25 closed-door meeting, the Commissioners decided to appoint Carol Sweeney and Gregory Nester as co-chief public defenders. *Id.* The next day, February 26, Mr. Beer and Ms. Hudson were told by County officials that they had been terminated, effective immediately. *Id.* at ¶ 46. The Board of Commissioners also issued a press release on February 26 announcing that, "[e]ffective immediately, the Montgomery County Public Defender's Office will be led by Carol Sweeney and Greg Nester, who will serve as co-chief deputy public defenders going forward." *Id.* at ¶ 47 & Exhibit 1 thereto.

At the next regularly scheduled public meeting of the Board of Commissioners, held on March 5, 2020, Chairperson Arkoosh announced that an executive session had been held on

[2] The Board of Commissioners is composed of three members: Defendants Valerie Arkoosh (Chair), Kenneth Lawrence, Jr. (Vice-Chair) and Joseph Gale (Member). Exhibit 1 at ¶¶ 22-25. The Salary Board is comprised of those same three Commissioners, as well as the Controller, Defendant Karen Sanchez.

February 25 "regarding personnel matters." Exhibit A at ¶¶ 59-60. The previously announced personnel changes in the Public Defender's Officer were not on the agenda for the March 5 Board of Commissioners meeting, and no public vote on those personnel changes was held at that meeting. *Id.* at ¶¶ 61, 67. At the conclusion of the meeting's agenda, during the meeting's public comment period, forty-five individuals spoke over a period of nearly three hours, asking the Commissioners to reverse their decision regarding the terminations of Mr. Beer and Ms. Hudson. *Id.* at ¶ 62.

Immediately following the conclusion of the March 5 Commissioners meeting, the Salary Board held its regularly scheduled meeting. Exhibit A at ¶ 70. As the complaint acknowledges, the Salary Board is tasked under the County Code with fixing "the compensation of all appointed county officers, and the number and compensation of all deputies, assistants, clerks and other persons whose compensation is paid out of the county treasury[,]" with certain exceptions not applicable here. *Id.* at ¶ 27 (quoting 16 P.S. § 1625(a)). The Salary Board's duties are defined by statute, and those duties do not include deciding who is hired or fired for any position. *See* 16 P.S. § 1625(a).

At the beginning of the March 5 Salary Board meeting, the County Solicitor explained that the Salary Board "is charged under law with setting the salary compensations of all county employees." Exhibit A at ¶ 71. The Solicitor further explained that, while the Salary Board provides a list for transparency's sake of persons who are being removed from the county payroll, "so that people can see as we add staff who is going off," the Salary Board has "no role … in actually approving the terminations." *Id.*

The Salary Board listing for its March 5 meeting (Exhibit 9 to the Complaint) identified Mr. Beer and Ms. Hudson as "termination[s]." Exhibit A at ¶ 73. Ms. Sweeney and Mr. Nester

were listed on the same document as receiving the new job title "Interim Co-Chief PD" with salary raises. *Id.* Before any motion was put forth at the March 5 Salary Board meeting, the Controller asked the Solicitor to clarify that "we are not voting on terminations at the Salary Board." *Id.* at ¶ 75. The Solicitor stated, "That is correct," and he reiterated that "[t]he only thing that is being approved here are the setting of salaries and compensation for the new hires and any changes in salary" for previously hired employees. *Id.* at ¶ 76. The salaries on the March 5 listing were unanimously approved by a vote of the Salary Board, and a public comment period followed the vote. *Id.* at ¶¶ 77-78.

B. <u>The Claims Asserted</u>

The complaint's six counts all incorrectly presume that the requirements of the Sunshine Act governed the decisions to terminate the employment of Mr. Beer and Ms. Hudson and to promote Ms. Sweeney and Mr. Nester.

Without regard for the Sunshine Act's definition of "official action" – or the instructive decisions in *Notarianni* and *Maloney, supra* – plaintiffs contend in Count I of their complaint that the County and its Commissioners violated the Sunshine Act by taking "official action" to terminate the employment of Mr. Beer and Ms. Hudson and promote Ms. Sweeney and Mr. Nester in a closed door meeting on February 25, 2020. Exhibit A at ¶¶ 80-85. In Count II, plaintiffs similarly contend that the County and its Commissioners violated the Sunshine Act by taking "official action" to terminate the employment of Mr. Beer and Ms. Hudson and promote Ms. Sweeney and Mr. Nester in that February 25 meeting without providing prior opportunity for public comment. *Id.* at ¶¶ 86-90.

In Count III, plaintiffs allege that the February 25 closed-door meeting amounted to an "executive session" under the Sunshine Act and that the County and its Commissioners violated

the Act on March 5 by announcing only that the closed door meeting concerned personnel matters, without providing a sufficiently detailed description of the matters discussed. Exhibit A at ¶¶ 91-97. Building on the contention that the February 25 closed-door meeting was an "executive session" under the Sunshine Act, Count IV alleges that the County and its Commissioners violated the Act by failing to give the adversely affected employees (Mr. Beer and Ms. Hudson) opportunity to ask that the employment discussions take place at an open meeting. *Id.* at ¶¶ 98-104.

Counts V and VI concern the March 5, 2020 Salary Board meeting. Apparently believing that the Salary Board approves or ratifies who has been hired or fired by the County, plaintiffs allege in Count V that the Salary Board violated the Sunshine Act when it "voted to approve … [a] 'presentation' … which included the *personnel changes* at the Public Defender Office, without first providing an opportunity for the public to provide comment on that official action." Exhibit A at ¶¶ 106 (emphasis added) & 105-109. Count VI alleges that, "if Mr. Beer and Ms. Hudson were not terminated, and Ms. Sweeney and Mr. Nester were not appointed, until the March 5 meeting of the Salary Board, then Defendants violated the Sunshine Act by not providing an opportunity for public comment prior to taking that official action." *Id.* at ¶¶ 111, 110-116.

C. The Relief Plaintiffs Seek

Plaintiffs request relief that is unprecedented under and unjustified by the Sunshine Act. Plaintiffs demand a declaration that the terminations of Mr. Beer and Ms. Hudson and the promotions of Ms. Sweeney and Mr. Nester – decisions which are not covered by the Sunshine Act – somehow violate that Act and thus are void. Exhibit A at pgs. 24-25, ¶¶ a, b, d, & e. Plaintiffs seek the extraordinary remedy of reinstatement for Mr. Beer and Ms. Hudson, which would necessitate removal of Ms. Sweeney and Mr. Nester from their current positions in the Public Defender's Office. *Id.* at pg. 25, ¶¶ c, d & e. Further, plaintiffs would have this Court

fundamentally alter the County's relationship with all of its current and future employees by permanently enjoining the defendants "from taking *any* employment action by hiring or terminating *any* individuals without first receiving public comment and taking a public vote at a public meeting on that proposed action[.]" *Id.* at ¶ f (emphasis added). In another breathtaking overreach, plaintiffs would use discrete employment decisions regarding the Chief and Deputy Chief Public Defender to justify a permanent injunction which would subject the defendants in sweeping fashion to contempt of court for "taking *any* official action at a public meeting without first receiving public comment on that proposed action." *Id.* at ¶ g (emphasis added). Plaintiffs also seek attorneys' fees and costs of suit, pursuant to 65 Pa. C.S. § 714.1, for the defendants' allegedly willful violation of the Sunshine Act (*id.* at ¶¶ h & i) – again ignoring the fact that the defendants' actions were supported by persuasive appellate authority. *See Notarianni* and *Maloney, supra.*

Plaintiffs are not entitled to any of the relief they request. As a matter of law, their complaint fails to allege a violation of the Sunshine Act.

IV. ARGUMENT

A. The Complaint Must Be Dismissed With Prejudice Because The Sunshine Act Does Not Govern Decisions To Fire Or Hire The Chief And Deputy Chief Public Defenders Of Montgomery County.

In *Notarianni v. O'Malley*, No. 733 C.D. 2016, 2017 WL 1337564 (Pa. Cmwlth. Apr. 12, 2017)[3], a taxpayer and a member of the Lackawanna County Board of Commissioners brought an action for declaratory and injunctive relief under the Sunshine Act to remove certain county officials, contending that their closed-door appointments constituted "official action" under the

[3] A copy of the Commonwealth Court's unreported decision in *Notarianni* is attached for the Court's convenience as Exhibit B.

Sunshine Act that required a public meeting. The defendants countered that the county's board of commissioners, as a matter of long-standing practice, "does not vote on hires or appointments at public meetings, believing such executive functions are not subject to public meeting requirements." *Id.* at *2. Denying plaintiffs the declaratory and injunctive relief they sought, "the trial court noted that county employment decisions do not qualify as 'official action' under the Sunshine Act." *Id.* at *2 (emphasis added). On appeal, a three-judge panel of the Commonwealth Court with extensive experience in local government law unanimously affirmed the decision of the trial court. That appellate panel's analysis is persuasive here.

With certain exceptions, the Sunshine Act requires an agency to conduct "official action and deliberations by a quorum ... at a meeting open to the public." 65 Pa. C.S. § 704. "Official action" is defined as:

> (1) Recommendations made by an agency pursuant to statute, ordinance or executive order.
>
> (2) The establishment of policy by an agency.
>
> (3) The decisions on agency business made by an agency.
>
> (4) The vote taken by any agency on any motion, proposal, resolution, rule, regulation, ordinance, report or order.

65 Pa. C.S. § 703 (emphasis added). Critically, the Commonwealth Court panel in *Notarianni* held that "[t]here is no provision contained in the Sunshine Act that specifies the hiring or appointment of a county employee constitutes 'official action.'" 2017 WL 1337564, at *5 (emphasis added). Likewise, there is no provision of the Sunshine Act that specifies the firing of a county employee constitutes "official action."

The *Notarianni* court explained that "[t]he essence of official action is its connection to agency business." 2017 WL 1337564, at *6 (emphasis added). "Agency business" is defined as follows:

> The framing, preparation, making or enactment of laws, policy or regulations, the creation of liability by contract or otherwise or the adjudication of rights, duties and responsibilities, but not including administrative action.

65 Pa. C.S. § 703. The hiring or firing of a county employee does not fall within any of the three categories of "agency business" created by § 703's definition of that term. First, it is not "[t]he framing, preparation, making or enactment of laws, policy or regulations[.]" *Id.* Second, at-will employment decisions do not necessitate "the creation of liability by contract or otherwise[.]" *Id.* Third, for at-will employees, their hiring or firing is not "the adjudication of rights, duties and responsibilities." *Id.* Thus, the *Notarianni* court concluded that the hiring of county employees – other than by contract[4] – is not "agency business" that can be the subject of "official action." 2017 WL 1337564, at *6.

The *Notarianni* court's analysis of the Sunshine Act's definitions of "official action" and "agency business" is straight-forward and compelling. If the Legislature had intended the Sunshine Act's requirements to apply to decisions to hire, fire or promote at-will government employees, the Act would have said so in its definitions of "official action" and "agency business." It does not. There is no violation of the Sunshine Act here.

---

[4] The *Notarianni* court acknowledged that there are cases, such as *Preston v. Saucon Valley Sch. Dist.*, 666 A.2d 1120 (Pa. Cmwlth. 1995); *Morning Call v. Bd. of Sch. Dirs.*, 642 A.2d 619 (Pa. Cmwlth. 1994), where the Commonwealth Court found that the hiring of certain school district employees by contract required action in an open meeting, but the court found those cases to be distinguishable. The *Notarianni* court reasoned:

> [C]ases holding that hires by contract constitute official action do not necessarily apply to hires by appointment. Nor do they hold that all hires are official actions requiring a vote. Agency business expressly includes contracts as a basis for official action, whereas appointments of County Officials, all of whom are at-will, do not fall neatly within any of the three categories.

2017 WL 1337564, at *7.

The *Notarianni* court also relied upon the case of *Maloney v. Lackawanna Cty. Com'rs*, No. 2004-339, 2004 WL 5175141 (Lackawanna C.P. Feb. 13, 2004)[5], *affirmed*, 862 A.2d 182 (Pa. Cmwlth. Oct. 6, 2004) (table), describing that matter as follows:

> In *Maloney*, the trial court denied a petition for injunctive relief of county employees alleging the Board [of Commissioners] illegally terminated their employment, and held the Sunshine Act did not apply to their terminations. The trial court distinguished between policy-making or legislative decisions, which require openness, and executive or administrative decisions, such as those relating to an individual's competence, which do not.
>
> This Court affirmed the trial court's decision in *Maloney*, holding that the termination of County employees did not qualify as official action, and so did not require a public meeting for validity. This Court's adoption of the trial court's reasoning in *Maloney*, that local government would be paralyzed by the need to undertake all hiring and firing of County employees at public meetings, is sound and offers reasonable grounds to uphold the trial court's order denying relief here.

Notarianni, 2017 WL 1337564, at *5 (emphasis added).

Here is what the trial court in *Maloney* had to say about the petitioners' unprecedented attempt to impose the Sunshine Act's requirements upon every employment decision made by a large county government:

> Our problem with the Petitioners' argument and position is rather straight forward. Looking at the Commonwealth of Pennsylvania as a covered agency or large municipalities such as the City of Philadelphia or the City of Pittsburgh where they have potentially thousands of employees, Petitioners would have us adopt the position that to lay off an employee not covered by a collective bargaining agreement would require formal open meetings to both hire and fire under the most routine of employment circumstances imaginable.
>
> That could potentially paralyze essential government functions and monopolize agendas with matters concerning personnel and administration that cannot be shown to dominate agendas elsewhere in this Commonwealth as the Petitioners would urge on Lackawanna County.

Maloney, 2004 WL 5175141 (emphasis added).

[5] A copy of the opinion of the Lackawanna County Court of Common Pleas in *Maloney* is attached for the Court's convenience as Exhibit C.

As in Lackawanna County, the City of Philadelphia and other large local governments, the governing body of Montgomery County does not vote on all hirings, firings, promotions, demotions, transfers, layoffs and leaves of the County's numerous at-will employees in open meetings with public comment. Doing so would most certainly monopolize the agendas of the Board of Commissioners and impede essential government functions. Fortunately, doing so is not required given the Sunshine Act's definitions of "official action" and "agency business" – as the Commonwealth Court held in both *Notarianni* and *Maloney*.

The six counts of Plaintiffs' complaint all rest upon the incorrect conclusion that the requirements of the Sunshine Act governed the decisions to terminate the employment of Mr. Beer and Ms. Hudson and to promote Ms. Sweeney and Mr. Nester. Consequently, those counts fail as a matter of law, and plaintiffs' complaint must be dismissed with prejudice for legal insufficiency pursuant to Pa. R. Civ. P. 1028(a)(4).

Counts I & II

Counts I and II fault the County and its Commissioners for deciding at a February 25 closed-door meeting to terminate the employment of Mr. Beer and Ms. Hudson and promote Ms. Sweeney and Mr. Nester – doing so without a public vote and an opportunity for prior public comment. However, as *Notarianni* and *Maloney* illustrate, the Sunshine Act's requirements of a public meeting with a vote following public comment do not apply to such employment decisions involving at-will County employees. Counts I and II thus fail as a matter of law.

Counts III & IV

Counts III and IV allege that the February 25 closed-door meeting amounted to an "executive session" under the Sunshine Act and that the County and its Commissioners violated the Act by failing to providing a sufficiently detailed description of the matters discussed and

failing to give the adversely affected employees (Mr. Beer and Ms. Hudson) opportunity to ask that the employment discussions take place at an open meeting. *See* 65 Pa. C.S. § 708 (governing conduct of "executive sessions"). But an executive session under § 708 is an exception to the Act's requirement under § 704 that "official action and deliberations" on agency business must take place at an open meeting. *See* 65 Pa. C.S. §§ 704 & 707. Again, *Notarianni* and *Maloney* teach that a county's hiring or firing of an at-will employee does not fall within the Act's definitions of "official action" and "agency business," so as to subject that decision-making process to the requirements of the Sunshine Act. Section 708's requirements for an executive session obviously do not apply where the Sunshine Act itself does not apply. *See, e.g., Jones v. Sch. Dist. of Philadelphia*, 206 A.3d 1238, 1251 (Pa. Cmwlth. 2019) ("since no official action was necessary" to accomplish teacher's court-ordered reinstatement, § 708's requirements for an executive session did not apply). Counts III and IV thus fail as a matter of law.

Counts V & VI

Counts V and VI concern the March 5, 2020 Salary Board meeting. These counts allege that the Salary Board either: (i) voted on March 5 without prior public comment to approve or ratify the prior-accomplished terminations of Mr. Beer and Ms. Hudson and related promotions of Ms. Sweeney and Mr. Nester (Count V), or (ii) voted to accomplish those terminations and promotions at the March 5 meeting without allowing prior public comment (Count VI), violating the Sunshine Act's public comment requirement in either scenario. However, *Notarianni* and *Maloney* demonstrate that decisions to hire or fire at-will county employees are beyond the scope of the Sunshine Act, necessitating dismissal of Counts V and VI. Moreover, as explained below, these two counts must be dismissed for the additional reason that they rest upon a fundamental misunderstanding of the Salary Board's role.

B. Counts V And VI Must Be Dismissed With Prejudice For The Additional Reason That The Salary Board Does Not Determine Who Is Hired Or Fired By The County.

In *Penksa v. Holtzman*, 153 Pa. Cmwlth. 94, 620 A.2d 632 (1993), the Commonwealth Court described the composition of the Salary Board under the County Code as follows:

> The salary board consists of the three county commissioners and the controller, or the treasurer in counties where there is no controller. Section 1622 of the Code, 16 P.S. § 1622. Moreover, when the salary board considers the number or salaries of 'deputies or other employe[e]s of any county officer or agency, such officer or the executive head of such agency shall sit as a member of the board' for that particular decision only. Section 1625 of the Code, 16 P.S. § 1625. The decision of the majority of the salary board governs. *Id.*

620 A.2d at 634.

The Salary Board's duties are prescribed by § 1623 of the County Code, which provides in pertinent part:

> [T]he board, subject to limitations imposed by law, shall fix the compensation of all appointed county officers, and the number and compensation of all deputies, assistants, clerks and other persons whose compensation is paid out of the county treasury (except employe[e]s of county officers who are paid by fees and not by salary), and of all court criers, tipstaves and other court employe[e]s, and of all officers, clerks, stenographers and employe[e]s appointed by the judges of any court and who are paid from the county treasury. Between annual salary board meetings whenever required by any judge, county officer or executive head of any separate board, commission or division whose deputies', assistants', clerks' and employe[e]s' numbers or compensation is sought to be fixed, the board shall meet and consider and shall fix and determine the same. All salaries fixed under the provisions of this act shall be paid out of the county treasury in the manner provided by law.

16 P.S. § 1623(a) (emphasis added). The Salary Board's duties thus are limited to the fixing of compensation for all appointed county officers and the fixing of the number and compensation for certain other county employees. *Id.*; *accord*, *Luzerne Cty. Bd. of Com'rs v. Flood*, 874 A.2d 687, 691 (Pa. Cmwlth. 2005 ("[T]he salary board performs an *administrative* function of fixing salaries and compensation of the county employees[.] (original emphasis)). Critically here, § 1623 of the County Code does not empower the Salary Board to terminate any county employee, nor does

§ 1623 authorize the Salary Board to decide who is hired for or promoted to any position. *See, e.g., Pennsylvania Soc. Servs. Union Local 668, Serv. Employees Int'l Union v. Cambria Cty.*, 134 Pa. Cmwlth. 523, 579 A.2d 455, 458 (1990) (salary board "has no statutory authority to discharge employees in the sheriff's office" and thus the board's removal of deputies from the payroll "did not cause the discharge of the employees").

Plaintiffs contend that the Salary Board violated the Sunshine Act by failing to give opportunity for public comment before it: (i) allegedly "voted to approve" or ratify prior-accomplished "personnel changes at the Public Defender Office" at its March 5 meeting (Count V, ¶ 106), or, alternatively, (ii) allegedly voted to bring about those personnel changes (namely, the terminations of Mr. Beer and Ms. Hudson and the promotions Ms. Sweeney and Mr. Nester) as of March 5 (Count VI, ¶ 111). Plaintiffs seek nothing less than the reinstatement of the employment of Mr. Beer and Ms. Hudson and the voiding of the promotions of Ms. Sweeney and Mr. Nester. Exhibit A at pgs. 24-25, ¶¶ a – e. Counts V and VI, however, mischaracterize the statutory role and authority of the Salary Board.

As a matter of law, the Salary Board did not cause the terminations or promotions in dispute. By its May 5 vote, the Salary Board took the purely administrative step of removing Mr. Beer and Ms. Hudson from the County payroll and approved the salary level to accompany the promotions of Ms. Sweeney and Mr. Nester. Given the statutory limits of its authority, the Salary Board cannot be said to have terminated the employment of Mr. Beer and Ms. Hudson or to have promoted Ms. Sweeney and Mr. Nester to replace them. *See* 16 P.S. § 1623; *Pennsylvania Soc. Servs. Union Local 668,* 579 A.2d at 458. Counts V and VI fail as a matter of law because the Salary Board, by statute, is not responsible for the hiring, firing or promotion of County employees as plaintiffs mistakenly contend.

V. RELIEF SOUGHT

For the reasons set forth above, Defendants Montgomery County, the Montgomery County Board of Commissioners, the Montgomery County Salary Board, Valerie Arkoosh, Kenneth Lawrence, Jr., Joseph Gale and Karen Sanchez asks that their Preliminary Objections to Plaintiffs' Complaint be sustained and that the Complaint be dismissed with prejudice, pursuant to Pennsylvania Rule of Civil Procedure 1028(a)(4), for legal insufficiency of the pleading.

Respectfully submitted,
MONTGOMERY COUNTY SOLICITOR'S OFFICE

/s/ Philip W. Newcomer

Philip W. Newcomer, Esquire
Attorney I.D. No. 60055
One Montgomery Plaza, Suite 800
P.O. Box 311
Norristown, PA 19404-0311
610-292-5030

Attorney for Defendants,
Valerie Arkoosh, Kenneth Lawrence, Jr.,
Joseph Gale and Karen Sanchez, in their official capacities, Montgomery County Board of Commissioners, Montgomery County Salary Board, and Montgomery County

Dated: June 15, 2020

EXHIBIT A

TO PRELIMINARY OBJECTIONS

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA

JULES EPSTEIN

vs.

VALERIE ARKOOSH

NO. 2020-04978

NOTICE TO DEFEND - CIVIL

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER.

IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.

LAWYER REFERENCE SERVICE
MONTGOMERY BAR ASSOCIATION
100 West Airy Street (REAR)
NORRISTOWN, PA 19404-0268

(610) 279-9660, EXTENSION 201

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA

JULES EPSTEIN

vs.

VALERIE ARKOOSH

NO. 2020-04978

CIVIL COVER SHEET

State Rule 205.5 requires this form be attached to any document commencing an action in the Montgomery County Court of Common Pleas. The information provided herein is used solely as an aid in tracking cases in the court system. This form does not supplement or replace the filing and service of pleadings or other papers as required by law or rules of court.

Name of Plaintiff/Appellant's Attorney: Eli Segal, Esq., ID: 205845

Self-Represented (Pro Se) Litigant ☐

Class Action Suit ☐ Yes ☒ No

MDJ Appeal ☐ Yes ☒ No

Money Damages Requested ☐

Commencement of Action:

Complaint

Amount in Controversy:

Case Type and Code

Miscellaneous:

Other

Other: VIOLATION OF PA SUNSHINE ACT

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA, CIVIL DIVISION

Montgomery County Residents Jules Epstein; Sara Atkins; Marc Bookman; Michael Conley; Christine Cregar; Christa Dunleavy; John Fagan; Peter Hall; Chris Koschier; Rev. Beth Lyon; Elena Margolis; Emily Robb; Karl Schwartz; Adrian Seltzer; and Leonard Sosnov,

Plaintiffs,

v.

Valerie Arkoosh, Kenneth Lawrence, Jr., Joseph Gale, and Karen Sanchez, in their official capacities; the Montgomery County Board of Commissioners; the Montgomery County Salary Board; and Montgomery County,

Defendants.

No. _____

NOTICE TO DEFEND

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days, or within the time set by order of the court, after this petition for review and notice are served, by entering a written appearance personally or by attorney and filling in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claims or relief requested by the plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER.

IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.

LAWYER REFERENCE SERVICE
MONTGOMERY BAR ASSOCIATION

100 West Airy Street (REAR)
NORRISTOWN, PA 19401
(610) 279-9660, EXTENSION 201

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA, CIVIL DIVISION

Montgomery County Residents Jules Epstein; Sara Atkins; Marc Bookman; Michael Conley; Christine Cregar; Christa Dunleavy; John Fagan; Peter Hall; Chris Koschier; Rev. Beth Lyon; Elena Margolis; Emily Robb; Karl Schwartz; Adrian Seltzer; and Leonard Sosnov, **Plaintiffs,** **v.** **Valerie Arkoosh, Kenneth Lawrence, Jr., Joseph Gale, and Karen Sanchez, in their official capacities; the Montgomery County Board of Commissioners; the Montgomery County Salary Board; and Montgomery County,** **Defendants.**	**No. _____**

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

I. INTRODUCTION

1. For decades, the public policy of this Commonwealth has been that citizens have the right to attend all meetings of public agencies where public business is discussed and decided—and to give comment before action is taken in their names. That right of participation and transparency is, in the words of the General Assembly, "vital to the enhancement and proper functioning of the democratic process," because "secrecy in public affairs undermines the faith of the public in government and the public's effectiveness in fulfilling its role in a democratic society." 65 Pa.C.S. § 702. In Pennsylvania, the citizenry's right to know about and participate in government decisionmaking is protected by the Sunshine Act.

2. The appointment of the Chief Public Defender of the County—an office specifically provided for by the Pennsylvania Constitution, Art. IX, § 4—is one of the most important actions that a County undertakes. In Montgomery County, however, Chief Dean Beer and Deputy Chief Keisha Hudson of the Public Defender Office were summarily terminated and just as summarily replaced by new Chiefs in secret meetings, without public notice or an opportunity to comment. Worse, when citizens of Montgomery County—including Plaintiffs in this action—demanded in a public meeting that the Defendants reconsider this action in public, that demand was refused.

3. Plaintiffs, residents of Montgomery County, have been forced to turn to this Court to compel Defendants to do their legal duty: to hold a public meeting at which they hear public comment *before* taking official action with respect to the firing and/or hiring of the Chief and Deputy Chief Public Defenders of Montgomery County.

4. Plaintiffs have sued the County Board of Commissioners and its members and the County Salary Board and its members because it is impossible to determine from public records which of those entities engaged in the illegal actions set forth in this Complaint. What is clear is that neither of those entities followed the law with respect to public notice and comment prior to the terminations and replacement of the Chief and Deputy Chief Public Defender. The uncertainty as to which body—the Montgomery County Board of Commissioners or the Montgomery County Salary Board—took the official actions in this matter only underscores the significant public harm and violation of the Sunshine Act.

II. JURISDICTION AND VENUE

5. This Court has original jurisdiction over this Complaint pursuant to 42 Pa.C.S. § 931(a)(1) and 65 Pa.C.S. § 715.

6. Venue exists in this Court pursuant to Pennsylvania Rules of Civil Procedure 1006 and 2103 because this action arose in Montgomery County and this is a suit against one or more political subdivisions located within Montgomery County.

III. PARTIES

7. Plaintiff Jules Epstein lives in Elkins Park in Montgomery County. On March 5, he spoke before the Board of Commissioners and asked them to reconsider the terminations of Mr. Beer and Ms. Hudson.

8. Plaintiff Sara Atkins lives in Wynnewood in Montgomery County. She signed a petition urging Defendants to reinstate Mr. Beer and Ms. Hudson and attended a March 5 rally outside the Board of Commissioners' meeting to protest the terminations.

9. Plaintiff Marc Bookman lives in Wyndmoor in Montgomery County. On March 5, he spoke before the Board of Commissioners and asked them to reconsider the terminations of Mr. Beer and Ms. Hudson.

10. Plaintiff Michael Conley lives in Narberth in Montgomery County.

11. Plaintiff Christine Cregar lives in Oreland in Montgomery County.

12. Plaintiff Christa Dunleavy lives in Hatboro in Montgomery County.

13. Plaintiff John Fagan lives in Willow Grove in Montgomery County. On March 5, he spoke before the Board of Commissioners and asked them to reconsider the terminations of Mr. Beer and Ms. Hudson.

14. Plaintiff Peter Hall lives in Jenkintown in Montgomery County. On March 5, he spoke before the Board of Commissioners and asked them to reconsider the terminations of Mr. Beer and Ms. Hudson.

15. Plaintiff Chris Koschier lives in in Montgomery County.

16. Plaintiff Rev. Beth Lyon lives in Glenside in Montgomery County. She signed a petition urging Defendants to reinstate Mr. Beer and Ms. Hudson.

17. Plaintiff Elena Margolis lives in Cheltenham in Montgomery County. She signed a petition urging Defendants to reinstate Mr. Beer and Ms. Hudson.

18. Plaintiff Emily Robb lives in Narberth in Montgomery County. On March 5, she spoke before the Board of Commissioners and asked them to reconsider the terminations of Mr. Beer and Ms. Hudson.

19. Plaintiff Karl Schwartz lives in Elkins Park in Montgomery County.

20. Plaintiff Adrian Seltzer lives in Wynnewood in Montgomery County. On March 5, he spoke before the Board of Commissioners and asked them to reconsider the terminations of Mr. Beer and Ms. Hudson.

21. Plaintiff Leonard Sosnov lives in Wyndmoor in Montgomery County. On March 5, he spoke before the Board of Commissioners and asked them to reconsider the terminations of Mr. Beer and Ms. Hudson.

22. Defendant Valerie Arkoosh is a Commissioner and the Chair of the Montgomery County Board of Commissioners and a member of the Montgomery County Salary Board. She lives in Springfield Township in Montgomery County and is sued only in her official capacities.

23. Defendant Kenneth Lawrence, Jr., is a Commissioner and the Vice Chair of the Montgomery County Board of Commissioners and a member of the Montgomery County Salary Board. He lives in Plymouth Meeting in Montgomery County and is sued only in his official capacities.

24. Defendant Joseph Gale is a Commissioner on the Montgomery County Board of Commissioners and a member of the Montgomery County Salary Board. He lives in Plymouth Township in Montgomery County and is sued only in his official capacities.

25. Defendant the Montgomery County Board of Commissioners is composed of the three sitting Montgomery County Commissioners. 16 Pa.C.S. § 3503(a). The Board of Commissioners is an "agency" as that term is defined by the Sunshine Act. 65 Pa.C.S. § 703. A board of county commissioners is empowered by the County Code to issue "resolutions and ordinances prescribing the manner in which powers of the county shall be carried out and generally regulating the affairs of the county," 16 Pa.C.S. § 509(a), and serves as "the responsible managers and administrators of the fiscal affairs of their respective counties in accordance with the provisions of [the County Code] and other applicable law." 16 Pa.C.S. § 1701. The Montgomery County Board of Commissioners has the sole authority to appoint and remove the Montgomery County Public Defender. 16 Pa.C.S. § 9960.4; *Sasinoski v. Cannon*, 696 A.2d 267, 272 (Pa. Commw. Ct. 1997).

26. Defendant Karen Sanchez is the Controller of Montgomery County and a member of the Montgomery County Salary Board. She is sued only in that official capacity.

27. Defendant the Montgomery County Salary Board is comprised of the three Montgomery County Commissioners (Defendants Arkoosh, Lawrence, and Gale) as well as the Controller (Defendant Sanchez). The Montgomery County Salary Board is a separate "agency" from the Montgomery County Board of Commissioners as that term is defined by the Sunshine Act. 65 Pa.C.S. § 703. Its duties are set forth by the County Code, 16 Pa.C.S. § 1622, et. seq., and consist of fixing "the compensation of all appointed county officers, and the number and compensation of all deputies, assistants, clerks and other persons whose compensation is paid out

of the county treasury (except employes [sic] of county officers who are paid by fees and not by salary), and of all court criers, tipstaves and other court employes [sic], and of all officers, clerks, stenographers and employes [sic] appointed by the judges of any court and who are paid from the county treasury." Executive heads of agencies also serve as members of the Salary Board whenever decisions are made regarding "the number or salaries" of employees in their departments. 16 Pa.C.S. § 1625(a). During the March 5, 2020 meeting at issue in this Complaint, the Salary Board consisted only of Defendants Arkoosh, Lawrence, Gale, and Sanchez.

28. Defendant Montgomery County is a Class 2A county and is one of the most populous counties in Pennsylvania, with a population of more than 800,000 people. In 2018, Montgomery County committed 4.7 percent of its population to confinement in state correctional facilities, the fourth highest of any county in Pennsylvania.[1]

IV. FACTUAL BACKGROUND

The Sunshine Act

29. The Sunshine Act requires that the decisions of public agencies such as the Montgomery County Board of Commissioners and the Montgomery County Salary Board be made in public and subject to public comment. As the General Assembly explained in its findings supporting passage of the Sunshine Act, the "right of the public to be present at all meetings of agencies and to witness the deliberation, policy formulation and decisionmaking of agencies is vital to the enhancement and proper functioning of the democratic process and …

[1] 2018 Annual Statistical Report, Pennsylvania Department of Corrections at 4, https://www.cor.pa.gov/About%20Us/Statistics/Documents/Reports/2018%20Annual%20Statistical%20Report.pdf

secrecy in public affairs undermines the faith of the public in government and the public's effectiveness in fulfilling its role in a democratic society." 65 Pa.C.S. § 702(a).

30. Accordingly, the General Assembly has declared that it is the "public policy of this Commonwealth to insure the right of its citizens to have notice of and the right to attend all meetings of agencies at which any agency business is discussed or acted upon as provided in this chapter." *Id.* at § 702(b).

31. Whenever an agency takes any "official action" as defined by the Act, it must do so "at a meeting open to the public." *Id.* at § 704. In addition, the agency "*shall* provide a reasonable opportunity" for residents "to comment on matters of concern, official action or deliberation which are or may be before the board or council *prior to* taking official action." *Id.* at § 710.1(a) (emphasis added).

32. Recognizing that sensitive matters sometimes require discussion out of the public eye, the Sunshine Act contains a *narrow* exception that allows certain *discussions*—but not *decisions*—to occur in private "executive session." Thus, the Act provides that an agency may hold an executive session:

> To *discuss* any matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of performance, promotion or disciplining of any specific prospective public officer or employee or current public officer or employee employed or appointed by the agency, or former public officer or employee, provided, however, that the individual employees or appointees whose rights could be adversely affected may request, in writing, that the matter or matters be discussed at an open meeting. The agency's decision to discuss such matters in executive session shall not serve to adversely affect the due process rights granted by law, including those granted by Title 2 (relating to administrative law and procedure).

65 Pa.C.S. § 708(a)(1) (emphasis added).

33. In addition to expressly limiting consideration of personnel matters in executive session to mere "discuss[ions]," the Sunshine Act further specifies that any "[o]fficial action on [such] discussions . . . shall be taken at an open meeting." *Id.* at § 708(c).

34. In other words, the Sunshine Act permits an agency like the Montgomery County Board of Commissioners to *discuss* personnel matters in private (although the agency must allow the impacted personnel to request that the discussion occur at an open meeting). However, any *official action* taken on information discussed during the closed session must occur in public and the public must be permitted an opportunity to comment *prior to* the agency taking official action.

35. Moreover, when an executive session is held, the agency must announce the "reason for holding the executive session" at the next public meeting. *Id.* at § 708(b).

Events Leading up to the Terminations of Mr. Beer and Ms. Hudson

36. Dean Beer became the Deputy Chief Public Defender of the Office of the Public Defender in September 2013 and the Montgomery County Board of Commissioners later appointed him Chief Public Defender in January 2016. Prior to his tenure at the Office of the Public Defender, he served as a public defender in Philadelphia and Charlotte, North Carolina for several decades.

37. Keisha Hudson became Deputy Chief Public Defender in May of 2016. Prior to joining the Office of the Public Defender, she served for ten years as an Assistant Federal Defender for the Federal Community Defender for the Eastern District of Pennsylvania, Capital Habeas Unit. Ms. Hudson began her legal career as a public defender with the Defender Association of Philadelphia.

38. On February 3, 2020, the Office of the Public Defender filed an *amicus curiae* brief with the Supreme Court of Pennsylvania in support of the petitioners in *Philadelphia Community Bail Fund v. Arraignment Court Magistrates*, 21 EM 2019, a case challenging cash bail practices in Philadelphia. The Office filed the brief to share with the Supreme Court the experiences that the Office and its clients have had with cash bail in Montgomery County and the Office's view, based on these experiences, that cash-bail-related injustices are not a Philadelphia-only problem:

> While specific approaches to cash bail practices may differ between counties, the systemic failures found in Philadelphia's current cash bail practices are ubiquitous throughout the state. Montgomery County is one of many in which the judicial decision-makers of minor courts frequently fail to consider alternatives to cash bail, do not take into account the accused's ability to pay, and impose excessive bail for the purpose of ensuring pretrial incarceration.

Brief of *Amicus Curiae* the Montgomery County Office of the Public Defender, 21 EM 2019 at 2 (Pa. filed Feb. 3, 2020). The brief went on to describe and criticize the particular cash bail practices of various judges in Montgomery County.

39. The Washington Post reported that two days after the Office filed this brief, President Judge Thomas Del Ricci of the Montgomery County Court of Common Pleas summoned Mr. Beer into his office.[2] According to Mr. Beer, Judge Del Ricci "excoriated him and demanded that he withdraw the brief," "threatened to terminate the pretrial services program" that the County was in the process of implementing to reduce judges' reliance on cash

---

[2] Radley Balko, "A Pennsylvania County Fired Its Two Top Public Defenders for Doing Their Jobs," The Washington Post (Mar. 2, 2020), https://www.washingtonpost.com/opinions/2020/03/02/pennsylvania-county-fired-its-two-top-public-defenders-doing-their-jobs/.

bail, "threatened . . . to report Beer to the state bar," and "suggested that he could have Beer fired." *Id.*

40. The Washington Post also reported that Mr. Beer said that when he initially met with County officials to discuss what had happened with Judge Del Ricci, they supported Mr. Beer and "told him that . . . Del Ricci's statements were inappropriate." *Id.* However, four days later, Montgomery County Chief Operating Officer Lee Soltysiak e-mailed Mr. Beer instructions to "withdraw" the brief on the grounds that Mr. Beer had failed to "communicate[] both with our office and with the courts" prior to filing it. (February 10, 2020 e-mail from Soltysiak to Beer, attached as Exhibit 1).

41. In compliance with Mr. Soltysiak's instruction, Mr. Beer and the Office of the Public Defender filed a motion with the Supreme Court of Pennsylvania to withdraw the *amicus curiae* brief on February 11.

42. On February 13, Mr. Beer wrote Mr. Soltysiak a letter, asking for "clarification, both regarding the course of events concerning the amicus brief . . . and my independent role as Chief Public Defender." (February 13, 2020 letter from Beer to Soltysiak, attached as Exhibit 2). The letter asserted that Mr. Soltysiak ordered Mr. Beer to withdraw the brief within hours of a closed-door meeting between Mr. Soltysiak and court administration. *Id.*

43. On February 20, Mr. Soltysiak wrote Mr. Beer a letter in which he expressed that he was "very disappointed in the manner in which" Mr. Beer had sought to advance "overall justice reform." (February 20, 2020 letter from Soltysiak to Beer, attached as Exhibit 3). Among the examples that Mr. Soltysiak raised was the filing of the *amicus* brief without giving Mr. Soltysiak or County Solicitor Joshua Stein an opportunity to review and comment on it or to request that it not be filed at all. *Id.*

The Terminations of Mr. Beer and Ms. Hudson and Public Reaction

44. Upon information and belief, five days later, on February 25, the Montgomery County Board of Commissioners, comprised of the Defendant Commissioners, held a closed-door and unannounced executive session. To date, no Defendant has explained what occurred at the February 25 executive session, other than to state that it was "regarding personnel matters."

45. On information and belief, Defendants Arkoosh, Lawrence, and Gale voted at the February 25 executive session on a proposal to terminate Mr. Beer and Ms. Hudson and, at the same executive session, Defendants Arkoosh, Lawrence, and Gale also voted on a proposal to appoint Carol Sweeney and Gregory Nester as co-chief public defenders.

46. On February 26, Mr. Beer and then Ms. Hudson were told by County officials that they had been terminated, effective immediately. On information and belief, after Mr. Beer and Ms. Hudson gathered their personal items, security officers escorted them out of the office. As the Office of the Public Defender is located in the courthouse, this spectacle was witnessed by the employees of the Office, courthouse staff, and members of the public.

47. The same day, the Montgomery County Board of Commissioners issued a press release announcing that, "[e]ffective immediately, the Montgomery County Public Defender's Office will be led by Carol Sweeney and Greg Nester, who will serve as co-chief deputy public defenders going forward."[3] (February 26, 2020 Press Release, attached as Exhibit 4).

---

[3] Although the press release described Ms. Sweeney and Mr. Nester as "co-chief deputy public defenders," as is discussed below, the document later approved by the Salary Board instead describes them as "Interim Co-Chief PD."

48. Defendants Arkoosh, Lawrence, and Gale did not provide the public with an opportunity to provide comment prior to taking official action to terminate Mr. Beer and Ms. Hudson and promote Ms. Sweeney and Mr. Nester.

49. On information and belief, Defendants Arkoosh, Lawrence, and Gale did not inform Mr. Beer and Ms. Hudson about the February 25 executive session prior to its convening or give them an opportunity to request that the matter of their employment be discussed at an open meeting.

50. On information and belief, Mr. Beer and Ms. Hudson were only paid through February 26 and their benefits terminated at the end of that month.

51. Defendants Arkoosh, Lawrence, and Gale failed to make the public aware of the official actions of firing Mr. Beer and Ms. Hudson and promoting Ms. Sweeney and Mr. Nester until after those actions occurred.

52. Nevertheless, the public did respond swiftly to these actions once they were made known. Almost immediately, Montgomery County residents and local organizations condemned the closed-door firings of Mr. Beer and Ms. Hudson and praised Mr. Beer and Ms. Hudson's tireless efforts to cultivate an office known for providing exceptional representation to indigent defendants in Montgomery County. This local outcry was echoed by criminal justice advocates across the country and eventually reached national media outlets, including the New York Times and the Washington Post. Groups including the National Legal Aid & Defender Association, the American Council of Chief Defenders, the Pennsylvania Association of Criminal Defense Lawyers, Gideon's Promise, the National Participatory Defense Network, and the NAACP Pennsylvania State Conference all criticized the firings and urged the Commissioners to reinstate Mr. Beer and Ms. Hudson.

53. On February 28, Defendants Arkoosh, Lawrence, and Gale issued a statement acknowledging that they "have received questions from individuals and organizations regarding Montgomery County's commitment to cash bail reform and to the Public Defender's office." (February 28, 2020 Board of Commissioners Statement, attached as Exhibit 5). The statement went on to state that the Commissioners are "wholly committed to supporting the vitally important work of the Public Defender's office and their dedication to defending the Constitutional rights of indigent individuals accused of violating the law." *Id.*

54. Among those who were denied an opportunity to provide the Commissioners with public comment before the terminations were the employees of the Office of the Public Defender themselves. On March 2, twenty-seven current employees of the Office—a majority of the Office—wrote an open letter expressing that Mr. Beer and Ms. Hudson had "earned our support by fiercely and zealously advocating for each and every client, establishing a holistic and trauma-informed approach to Public Defense, engaging in community outreach and organization, striving for policy reform, and serving as strong mentors and support systems to us, their employees." (Open letter from Public Defenders, attached as Exhibit 6). The employees described the profound dismay the staff felt over the firing, which left them "feeling as if their vision, and ours, is not supported by Montgomery County." *Id.* They implored Defendants Arkoosh, Lawrence, and Gale to "consider the thoughts and experiences of those of us who most closely worked with Dean and Keisha, those of us who share their vision and wish to see it continue, those of us who understand the high quality representation and advocacy they espoused in the office and in the community, and the partnerships they forged to advance our clients' interests and the broader issue of criminal justice reform." *Id.*

55. Local media has featured multiple opinion pieces that are critical of the decision to terminate Mr. Beer and Ms. Hudson. An opinion piece in the Legal Intelligencer noted that the "circumstances surrounding these events raise serious questions about whether public defense in Pennsylvania, especially Montgomery County, is independent and free to advocate openly for the people it is supposed to serve. And the stakes could not be higher. Undermining a defense attorney's ability to vociferously defend clients should concern us all."[4] Similarly, an editorial in the Montgomery County Intelligencer criticized the Commissioners as having "apparently lost sight of the fact that a public defender's job is to advocate for criminal defendants who cannot afford legal representation. And sometimes that advocacy extends beyond the courtroom in ways that county officials don't like."[5]

56. However, prior to firing Mr. Beer and Ms. Hudson, Defendants Arkoosh, Lawrence, and Gale never gave any of the many individuals and organizations who have been so vocal about the terminations an opportunity to share their input with the Commissioners.

57. On March 4, a group of nineteen private criminal defense attorneys who practice in Montgomery County filed an *amicus curiae* brief that was substantially the same as the brief that the Office of the Public Defender had filed and Mr. Beer had been ordered to withdraw. Brief of *Amicus Curiae* Members of the Criminal Defense Bar Who Practice in Montgomery

---

[4] Norman Reimer and Miriam Krinsky, "Fear of Reprisals Threatens Independence of Public Defenders and Erodes Right to Counsel," The Legal Intelligencer (Mar. 4 2020), https://www.law.com/thelegalintelligencer/2020/03/04/fear-of-reprisals-threatens-independence-of-public-defenders-and-erodes-right-to-counsel/.

[5] Editorial Board, "Montgomery County Made a Mess When Its Public Defenders Went Public," The Intelligencer (Mar. 12, 2020), https://www.theintell.com/opinion/20200312/editorial-montgomery-county-made-mess-when-its-public-defenders-went-public/1.

County in Support of Petitioners, 21 EM 2019 at 6-7 (Pa. filed Mar. 4, 2019) (attached as Exhibit 7).

58. In their Application for leave to file that brief, the *amici* defense attorneys wrote that they had "reviewed the Public Defender's *amicus* brief and, based on" their collective experience of "over 300 years of [] representing criminal defendants in Montgomery County," believed that the Public Defender's brief "to be an accurate representation of the bail practices in Montgomery County." *Id.* Those attorneys explained that, "[d]ue to the accuracy of the Public Defender's brief, the retaliation against the Public Defender for filing an accurate brief, the illegal and unconstitutional bail practices in Montgomery County, and the importance of bringing the situation in Montgomery County to the Court's attention," they felt it "necessary to submit" the *amicus* brief. *Id.*

The March 5, 2020 Commissioners' Meeting

59. The Montgomery County Commissioners held their next regularly scheduled meeting of the Montgomery County Board of Commissioners on March 5, 2020.

60. At the outset of the meeting, Defendant Arkoosh acknowledged that the Commissioners had held an executive session on February 25, stating: "Finally, I need to mention that an executive session was held on February 25, 2020 regarding personnel matters." Defendants Arkoosh, Lawrence, and Gale did not provide any other detail about the executive session other than generally describing it as "regarding personnel matters."

61. Defendant Arkoosh then noted that general public comments would be held at the end of the meeting, after completing all agenda items. The personnel changes in the Public Defender Office were not on the agenda. (March 5, 2020 Board of Commissioners meeting Agenda, attached as Exhibit 8).

62. At the conclusion of the meeting's agenda, and during the meeting's "general comment" period, forty-five individuals gave public comment on Defendant Arkoosh, Lawrence, and Gale's decision to fire Mr. Beer and Ms. Hudson, including many of the Plaintiffs in this action. Several additional people signed up to speak but had to leave because the general public comment period lasted nearly three hours due to the large number of commenters. All of the commenters asked the Commissioners to reverse their decision; not one of the commenters supported the terminations.

63. At the conclusion of the public comment period, Defendant Arkoosh stated that the decision to terminate Mr. Beer and Ms. Hudson had been difficult for her to make because she remained committed to criminal justice reform.

64. Defendant Lawrence stated that "I know that I didn't ask enough questions, I know that I need to demand better answers. I know I didn't educate myself as I should have when this decision was made" and that "I don't want to serve . . . . if an action that I fully supported is viewed as hurting the weakest and most oppressed in our community." He, however, then stated that he would not "make a motion," presumably meaning a motion to reinstate Mr. Beer and Ms. Hudson, but rather called for "mediation and reconciliation."

65. Defendant Gale remained silent as to the terminations.

66. Defendant Arkoosh then adjourned the meeting and ordered a brief recess before the Salary Board meeting.

67. At no time during the March 5 Board of Commissioners meeting did the Commissioners vote on whether to terminate Mr. Beer or Ms. Hudson. Instead, they left no doubt that the two had been terminated prior to the meeting.

68. According to news reports, County Solicitor Stein has determined that "employment terminations are not covered under the open meeting law and the only employment actions that require a public vote at an advertised meeting are hiring and changes in salary."[6] Indeed, Defendant Arkoosh, Lawrence, and Gale's position is that they "do not have vote publicly to make Beer and Hudson's termination official."[7]

69. While the Commissioners' meeting took place, a protest simultaneously took place across the street on the steps of the courthouse, where more than 100 people attended to protest the terminations of Mr. Beer and Ms. Hudson.[8]

The March 5, 2020 Salary Board Meeting

70. The Salary Board Defendants held their next regularly scheduled meeting of the Salary Board on March 5, 2020, immediately following the conclusion of the Commissioners' Meeting.

71. At the beginning of the Salary Board meeting, Defendant Arkoosh asked Mr. Stein to "clarify the role of Salary Board." Mr. Stein responded: "Salary Board is charged under the law with setting the salary compensations of all county employees. To be clear, while we provide the 'off-roll,' or the list of individuals that are separated from county employment for

---

[6] Jo Ciavaglia, "Did Montgomery County's decision to remove its top public defenders violate Sunshine law?" Bucks County Courier Times (Mar. 6, 2020), https://www.buckscountycouriertimes.com/news/20200306/did-montgomery-countyrsquos-decision-to-remove-its-top-public-defenders-violate-sunshine-law.

[7] Joshua Vaughn, "Pennsylvania Public Defenders Not Reinstated Despite Public Outcry Over Firing," The Appeal (Mar. 6, 2020), https://theappeal.org/pennsylvania-public-defenders-not-reinstated-despite-public-outcry-over-firing/.

[8] Vinny Vella, "Protesters Descend on Montgomery County Commissioners Meeting to Oppose Public Defenders' Firing," The Philadelphia Inquirer (Mar. 5, 2020), https://www.inquirer.com/news/montgomery-county-public-defenders-commissioners-protest-dean-beer-keisha-hudson-20200305.html.

transparency sake, so that people can see as we add staff who is going off, technically there is no role in Salary Board in actually approving the terminations. Those terminations are decided by each department head."

72. Donna Pardieu, the Director of Human Resources, then described a document for "Salary Board consideration," which consisted of various new hires, individuals who were retiring, individuals who were terminated, and salary changes. (March 5, 2020 Salary Board Listing, attached as Exhibit 9).

73. Mr. Beer and Ms. Hudson were listed on the document provided by Ms. Pardieu as "termination." *Id.* Ms. Sweeney and Mr. Nester were listed on the same document as receiving the new job title "Interim Co-Chief PD" with salary raises. *Id.*

74. Defendant Arkoosh then asked whether there was a motion to approve the Salary Board "presentation" from Ms. Pardieu.

75. Before any motion was put forth, Defendant Sanchez asked Mr. Stein to "clarify again, I heard your statement, but just clarify as far as, I know you said for transparency sake, just clarify: we are not voting on terminations at the Salary Board."

76. Mr. Stein replied, "That is correct. The only thing that is being approved here are the setting the salaries and compensations for the new hires and any changes in salary such as promotions or otherwise changes [sic]."

77. Defendant Sanchez then moved to approve the presentation, which was unanimously approved.

78. Only *after* approval did Defendant Arkoosh ask whether there was any "general public comment related to Salary Board." At no time did the Salary Board provide an opportunity for public comment *prior to* voting on the "presentation" from the Director of

Human Resources. While there was a "general" public comment period at the earlier meeting of the Montgomery County Board of Commissioners, that entity is a separate agency from the Salary Board.

79. As is stated above, it appears that the official action terminating Mr. Beer and Ms. Hudson occurred on February 25 at the executive session. In the alternative, the official action terminating Mr. Beer and Ms. Hudson occurred at the March 5 meeting of the Salary Board when it voted to approve the "presentation" from the Ms. Pardieu.

V. CLAIMS

COUNT I

Violation of the Sunshine Act by Taking Official Action in a Closed Executive Session (against Defendants Montgomery County, Arkoosh, Lawrence, Gale, and the Montgomery County Board of Commissioners)

80. Plaintiffs hereby incorporate and adopt each and every allegation set forth in the foregoing paragraphs of the Complaint.

81. The Sunshine Act requires that whenever an agency takes an "official action," it must do so "at a meeting open to the public." 65 Pa.C.S. § 704.

82. Defendants violated the Sunshine Act by taking official action to: 1) terminate Mr. Beer; 2) terminate Ms. Hudson; 3) appoint Ms. Sweeney; and 4) appoint Mr. Nester, without doing so at a meeting open to the public. Those actions are presumptively void.

83. Defendants, through counsel, have publicly stated that they never take a public vote on employment decisions.

84. Defendants were aware of their obligation under the Sunshine Act to take official action only at a meeting open to the public.

85. Defendants willfully violated the Sunshine Act by taking this unlawful action.

COUNT II

Violation of the Sunshine Act by Taking Official Action Without First Taking Public Comment (against Defendants Montgomery County, Arkoosh, Lawrence, Gale, and the Montgomery County Board of Commissioners)

86. Plaintiffs hereby incorporate and adopt each and every allegation set forth in the foregoing paragraphs of the Complaint.

87. The Sunshine Act requires that agencies "*shall* provide a reasonable opportunity" for residents "to comment on matters of concern, official action or deliberation which are or may be before the board or council *prior to* taking official action." 65 Pa.C.S. § 710.1(a) (emphasis added).

88. Defendants violated the Sunshine Act by taking official action by: 1) terminating Mr. Beer; 2) terminating Ms. Hudson; 3) appointing Ms. Sweeney; and 4) appointing Mr. Nester without prior public comment. Those actions are presumptively void.

89. Defendants were aware of their obligation under the Sunshine Act to permit public comment prior to taking an official action.

90. Defendants willfully violated the Sunshine Act by taking this unlawful action.

COUNT III

Violation of the Sunshine Act by Not Describing the Matters Discussed at the Closed Executive Session (against Defendants Montgomery County, Arkoosh, Lawrence, Gale, and the Montgomery County Board of Commissioners)

91. Plaintiffs hereby incorporate and adopt each and every allegation set forth in the foregoing paragraphs of the Complaint.

92. The Sunshine Act requires that, if an agency holds an executive session, then the "reason for holding the executive session must be announced at the open meeting occurring immediately prior or subsequent to the executive session." 65 Pa.C.S. § 708(b).

93. At the March 5 meeting of the Montgomery County Board of Commissioners, Defendants stated only that the February 25 executive session was held "regarding personnel matters."

94. The reason given by Defendants was legally insufficient because it was not "specific, indicating a real, discrete matter that is best addressed in private." *Reading Eagle Co. v. Council of City of Reading*, 627 A.2d 305, 307-08 (Pa. Commw. Ct. 1993) (description of executive session to discuss matters "of litigation" is legally insufficient).

95. Defendants violated the Sunshine Act by not providing a sufficiently detailed description of the matter discussed, which involved: 1) terminating Mr. Beer; 2) terminating Ms. Hudson; 3) appointing Ms. Sweeney; and 4) appointing Mr. Nester.

96. Defendants were aware of their obligation under the Sunshine Act to describe the reasons for the executive session.

97. Defendants willfully violated the Sunshine Act by taking this unlawful action.

COUNT IV

Violation of the Sunshine Act by Not Providing the Adversely Affected Employees an Opportunity to Ask that the Employment Discussions Take Place at an Open Meeting (against Defendants Montgomery County, Arkoosh, Lawrence, Gale, and the Montgomery County Board of Commissioners)

98. Plaintiffs hereby incorporate and adopt each and every allegation set forth in the foregoing paragraphs of the Complaint.

99. The Sunshine Act permits agencies to discuss employment matters in executive session, "provided, however, that the individual employees or appointees whose rights could be adversely affected may request, in writing, that the matter or matters be discussed at an open meeting." 65 Pa.C.S. § 708(a)(1).

100. Mr. Beer and Ms. Hudson were terminated as a result of the discussion that occurred at the February 25 executive session. However, they were unaware that that discussion was taking place and were not provided an opportunity to request, in writing, that this employment matter be discussed in an open meeting instead of behind closed doors.

101. Failing to provide this opportunity violates the Sunshine Act. *See Easton Area Joint Sewer Authority v. Morning Call*, 581 A.2d 684, 686 (Pa. Commw. Ct. 1990) (finding a violation of the Sunshine Act in a lawsuit brought by newspaper where the agency "repaired to an executive session with the announcement of a 'personnel matter'" and then reconvened to hold the vote on the official action without giving the employee the "opportunity" to ask for an open meeting on the issue").

102. Defendants violated the Sunshine Act by: 1) not providing Mr. Beer with an opportunity to request that his employment status be discussed at an open meeting; and 2) not providing Ms. Hudson with an opportunity to request that her employment status be discussed at an open meeting.

103. Defendants were aware of their obligation under the Sunshine Act to permit affected employees to request in writing that the personnel matter discussed at an executive session instead by discussed in an open meeting.

104. Defendants willfully violated the Sunshine Act by taking this unlawful action.

COUNT V

Violation of the Sunshine Act by Taking Official Action Without First Taking Public Comment (against Defendants Montgomery County, Arkoosh, Lawrence, Gale, Sanchez and the Montgomery County Salary Board)

105. Plaintiffs hereby incorporate and adopt each and every allegation set forth in the foregoing paragraphs of the Complaint.

106. At the March 5 meeting of the Salary Board, Defendants voted to approve the "presentation" from the Director of Human Resources, which included the personnel changes at the Public Defender Office, without first providing an opportunity for the public to provide comment on that official action. Instead, Defendants only permitted the public to make public comments *after* the vote to approve the "presentation."

107. By taking this official action without first taking public comment, Defendants violated the Sunshine Act. 65 Pa.C.S. § 710.1(a). Those actions are presumptively void.

108. Defendants were aware of their obligation under the Sunshine Act to permit public comment prior to taking an official action.

109. Defendants willfully violated the Sunshine Act by taking this unlawful action.

COUNT VI (in the alternative)

Violation of the Sunshine Act by Taking Official Action Without First Taking Public Comment (against Defendants Montgomery County, Arkoosh, Lawrence, Gale, Sanchez and the Montgomery County Salary Board)

110. Plaintiffs hereby incorporate and adopt each and every allegation set forth in the foregoing paragraphs of the Complaint.

111. In the alternative, if Mr. Beer and Ms. Hudson were not terminated, and Ms. Sweeney and Mr. Nester were not appointed, until the March 5 meeting of the Salary Board, then Defendants violated the Sunshine Act by not providing an opportunity for public comment prior to taking that official action. 65 Pa.C.S. § 710.1(a).

112. The Salary Board is a separate legal entity from the Montgomery County Board of Commissioners and was created by 16 Pa.C.S. § 1622. *See Penska v. Holtzman*, 620 A.2d 632, 634-36 (Pa. Commw. Ct. 1993) (distinguishing between the salary board and commissioners). The makeup of the Salary Board includes both the Commissioners and Defendant Sanchez.

113. Although the Montgomery County Board of Commissioners heard general public comments at the conclusion of its March 5, 2020 meeting—many of which addressed the personnel matters at issue in this complaint—the Salary Board did not hear public comment prior to taking official action at its March 5 meeting.

114. Thus, Defendants violated the Sunshine Act at the March 5 Salary Board meeting by taking official action to: 1) terminating Mr. Beer; 2) terminating Ms. Hudson; 3) appointing Ms. Sweeney; and 4) appointing Mr. Nester without prior public comment. Those actions are presumptively void.

115. Defendants were aware of their obligation under the Sunshine Act to permit public comment prior to taking an official action.

116. Defendants willfully violated the Sunshine Act by taking this unlawful action.

PRAYER FOR RELIEF

Petitioners have only one remedy for the violations of their right to transparency and to have a voice in their local government: a legal challenge to void the illegal acts of Defendants. *See* 65 Pa.C.S. § 713. Petitioners have suffered and will continue to suffer harm as a result of the unlawful acts, omissions, policies, and practices of Respondent, as alleged herein, unless this Court grants the relief requested.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court enter judgment in their favor and against Defendants and:

a. Declare that the terminations of Mr. Beer and Ms. Hudson violated the Sunshine Act;

b. Declare that the terminations of Mr. Beer and Ms. Hudson are void;

c. Issue an injunction directing the Defendants to reinstate Mr. Beer and Ms. Hudson;

d. Declare that the official actions appointing Ms. Sweeney and Mr. Nester to replace Mr. Beer and Ms. Hudson violated the Sunshine Act;

e. Declare that the official actions appointing Ms. Sweeney and Mr. Nester to replace Mr. Beer and Ms. Hudson are void;

f. Issue a permanent injunction to enjoin the Montgomery County Board of Commissioners and Defendants Arkoosh, Lawrence, and Gale, from taking any employment action by hiring or terminating any individuals without first receiving public comment and taking a public vote at a public meeting on that proposed action;

g. Issue a permanent injunction to enjoin the Montgomery Country Salary Board and Defendants Arkoosh, Lawrence, Gale, and Sanchez from taking any official action at a public meeting without first receiving public comment on that proposed action;

h. Award Plaintiffs attorneys' fees; and

i. Award Plaintiffs costs and such other and further relief that this Honorable Court deems just and appropriate.

Dated: March 23, 2020

Respectfully submitted,

Eli Segal
PA I.D. No. 205845
Martha E. Guarnieri
PA I.D. No. 324454
PEPPER HAMILTON LLP
3000 Two Logan Square
Eighteenth and Arch Streets
Philadelphia, Pennsylvania 19103-2799
p: 215.981.4239
f: 800.349.9205
segale@pepperlaw.com
guarniem@pepperlaw.com

Mary Catherine Roper
PA I.D. No. 71107
Andrew Christy
PA I.D. No. 322053
Hayden Nelson-Major
PA I.D. No. 320024
AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA
P.O. Box 60173
Philadelphia, PA 19102
Tel: 215-592-1513
mroper@aclupa.org

Counsel for Plaintiffs

VERIFICATION

I, [signature], verify that the facts set forth in the foregoing complaint as to me are true and correct to the best of my information, knowledge, and belief. I understand that the statements contained herein are subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

Dated: 3/15/20 [signature]

VERIFICATION

I, Sara Atkins, verify that the facts set forth in the foregoing complaint as to me are true and correct to the best of my information, knowledge, and belief. I understand that the statements contained herein are subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

Dated: 3/16/2020

Sara Atkins

VERIFICATION

I, Mark Bookman, verify that the facts set forth in the foregoing complaint as to me are true and correct to the best of my information, knowledge, and belief. I understand that the statements contained herein are subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

Dated: 03/15/2020

Marc Bookman

VERIFICATION

I, Michael Conley, verify that the facts set forth in the foregoing complaint as to me are true and correct to the best of my information, knowledge, and belief. I understand that the statements contained herein are subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

Dated: 3/17/2020

VERIFICATION

I, Christine Cregar, verify that the facts set forth in the foregoing complaint as to me are true and correct to the best of my information, knowledge, and belief. I understand that the statements contained herein are subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

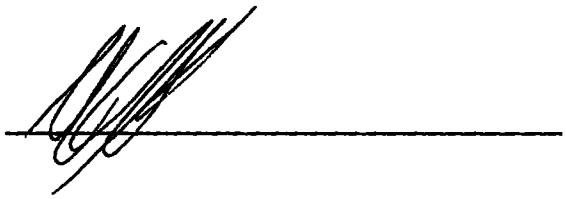
Dated: 3/16/20

Christine C.

VERIFICATION

I, Christa S. Dunleavy, verify that the facts set forth in the foregoing complaint as to me are true and correct to the best of my information, knowledge, and belief. I understand that the statements contained herein are subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

Dated: 3-16-20



VERIFICATION

I, John R Fagan, verify that the facts set forth in the foregoing complaint as to me are true and correct to the best of my information, knowledge, and belief. I understand that the statements contained herein are subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

Dated: 8/16/20

John R Fagan

VERIFICATION

I, Peter C. Hall, verify that the facts set forth in the foregoing complaint as to me are true and correct to the best of my information, knowledge, and belief. I understand that the statements contained herein are subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

Dated: 3/6/20

_____

VERIFICATION

I, Chris Foschier, verify that the facts set forth in the foregoing complaint as to me are true and correct to the best of my information, knowledge, and belief. I understand that the statements contained herein are subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

Dated: 3/19/20

VERIFICATION

I, Beth G. Lyon, verify that the facts set forth in the foregoing complaint as to me are true and correct to the best of my information, knowledge, and belief. I understand that the statements contained herein are subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

Dated: 3/16/2020

Beth G. Lyon

VERIFICATION

I, Elena Margolis, verify that the facts set forth in the foregoing complaint as to me are true and correct to the best of my information, knowledge, and belief. I understand that the statements contained herein are subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

Dated: March 19, 2020

Elena Margolis

VERIFICATION

I, Emily Robb, verify that the facts set forth in the foregoing complaint as to me are true and correct to the best of my information, knowledge, and belief. I understand that the statements contained herein are subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

Dated: 3/15/20

Emily Robb

VERIFICATION

I, Karl Schwartz, verify that the facts set forth in the foregoing complaint as to me are true and correct to the best of my information, knowledge, and belief. I understand that the statements contained herein are subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

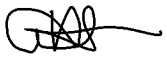
Dated: 3/15/20

Karl Schwartz

VERIFICATION

I, Adrian Seltzer, verify that the facts set forth in the foregoing complaint as to me are true and correct to the best of my information, knowledge, and belief. I understand that the statements contained herein are subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

Dated: 3/17/2020



VERIFICATION

I, LEONARD SOSNOV, verify that the facts set forth in the foregoing complaint as to me are true and correct to the best of my information, knowledge, and belief. I understand that the statements contained herein are subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

Dated: 3/16/20

Leonard Sosnov

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

Dated: March 23, 2020

Eli Segal
PA I.D. No. 205845
Martha E. Guarnieri
PA I.D. No. 324454
PEPPER HAMILTON LLP
3000 Two Logan Square
Eighteenth and Arch Streets
Philadelphia, Pennsylvania 19103-2799
p: 215.981.4239
f: 800.349.9205
segale@pepperlaw.com
guarniem@pepperlaw.com

Mary Catherine Roper
PA I.D. No. 71107
Andrew Christy
PA I.D. No. 322053
Hayden Nelson-Major
PA I.D. No. 320024
AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA
P.O. Box 60173
Philadelphia, PA 19102
Tel: 215-592-1513
mroper@aclupa.org

Counsel for Plaintiffs

Supreme Court of Pennsylvania

Court of Common Pleas
Civil Cover Sheet

Montgomery County

For Prothonotary Use Only:	TIME STAMP
Docket No:	

The information collected on this form is used solely for court administration purposes. This form does not supplement or replace the filing and service of pleadings or other papers as required by law or rules of court.

Commencement of Action:
- [x] Complaint
- [ ] Writ of Summons
- [ ] Petition
- [ ] Transfer from Another Jurisdiction
- [ ] Declaration of Taking

Lead Plaintiff's Name: Jules Epstein

Lead Defendant's Name: Valerie Arkoosh

Are money damages requested? ☐ Yes ☒ No

Dollar Amount Requested: (check one) ☐ within arbitration limits ☐ outside arbitration limits

Is this a *Class Action Suit*? ☐ Yes ☒ No

Is this an *MDJ Appeal*? ☐ Yes ☒ No

Name of Plaintiff/Appellant's Attorney: Eli Segal, Esq.; Mary Catherine Roper, Esq.

☐ **Check here if you have no attorney (are a Self-Represented [Pro Se] Litigant)**

SECTION B

<u>Nature of the Case</u>: Place an "X" to the left of the **<u>ONE</u>** case category that most accurately describes your ***PRIMARY CASE.*** If you are making more than one type of claim, check the one that you consider most important.

TORT (*do not include Mass Tort*)
- [ ] Intentional
- [ ] Malicious Prosecution
- [ ] Motor Vehicle
- [ ] Nuisance
- [ ] Premises Liability
- [ ] Product Liability *(does not include mass tort)*
- [ ] Slander/Libel/ Defamation
- [ ] Other:

MASS TORT
- [ ] Asbestos
- [ ] Tobacco
- [ ] Toxic Tort - DES
- [ ] Toxic Tort - Implant
- [ ] Toxic Waste
- [ ] Other:

PROFESSIONAL LIABLITY
- [ ] Dental
- [ ] Legal
- [ ] Medical
- [ ] Other Professional:

CONTRACT (*do not include Judgments*)
- [ ] Buyer Plaintiff
- [ ] Debt Collection: Credit Card
- [ ] Debt Collection: Other
- [ ] Employment Dispute: Discrimination
- [ ] Employment Dispute: Other
- [ ] Other:

REAL PROPERTY
- [ ] Ejectment
- [ ] Eminent Domain/Condemnation
- [ ] Ground Rent
- [ ] Landlord/Tenant Dispute
- [ ] Mortgage Foreclosure: Residential
- [ ] Mortgage Foreclosure: Commercial
- [ ] Partition
- [ ] Quiet Title
- [ ] Other:

CIVIL APPEALS

Administrative Agencies
- [ ] Board of Assessment
- [ ] Board of Elections
- [ ] Dept. of Transportation
- [ ] Statutory Appeal: Other
- [ ] Zoning Board
- [ ] Other:

MISCELLANEOUS
- [ ] Common Law/Statutory Arbitration
- [ ] Declaratory Judgment
- [ ] Mandamus
- [ ] Non-Domestic Relations Restraining Order
- [ ] Quo Warranto
- [ ] Replevin
- [x] Other: Violation of PA Sunshine Act (65 P.A.C.S. 701-716)

EXHIBIT 1

From: Soltysiak, Lee

Sent: Monday, February 10, 2020 5:12 PM

To: Beer, Dean

Cc: Stein, Josh

Subject: the brief

Dean,

I believe the best course of action regarding the brief is to withdraw it. I believe the lack of communication both with our office and with courts beforehand was a fatal flaw in the strategy and leaves us with very limited options. I do believe there was a way we could have had a different outcome on this issue had the matter been handled differently starting in December and not after the fact in February.

I understand a significant amount of work went into the drafting of the brief, and I commend your office's commitment to our constituents. However, the lack of strategy and internal communication has undermined that work and is what led me to this decision.

Please withdraw the brief immediately.

Thank you,

Lee

Lee A. Soltysiak

Chief Operating Officer

Montgomery County

610-278-1464

EXHIBIT 2

MONTGOMERY COUNTY
BOARD OF COMMISSIONERS
VALERIE A. ARKOOSH, M.D., MPH, CHAIR
KENNETH E. LAWRENCE, JR., VICE CHAIR
JOSEPH C. GALE, COMMISSIONER

OFFICE OF THE PUBLIC DEFENDER
MONTGOMERY COUNTY COURTHOUSE • PO BOX 311
NORRISTOWN, PA 19404-0311

PHONE: 610-278-3295
FAX: 610-278-5941 • TDD: 610-631-1211
WWW.MONTCOPA.ORG/PUBLICDEFENDER
WWW.FACEBOOK.COM/MONTCOPAPD
DEAN M. BEER, ESQ., CHIEF DEFENDER

February 13, 2020

Lee A. Soltysiak
Chief Operating Officer
Montgomery County
(Delivered vii email)

Lee,

I am writing this letter to have clarification regarding my role as the Chief Public Defender of Montgomery County. I am also concerned about the status of my employment, in light of the events and statements made to me, as described below. I would like clarification, both regarding the course of events concerning the amicus brief in *Philadelphia Bail Fund vs. The First Judicial District* and my independent role as the Chief Public Defender.

I have been the Chief Public Defender since January 2016. Since that time, I have never sought, nor have I been required to seek, permission from the Commissioners to take positions on behalf of my office and our clients. I have tried to keep the Commissioners informed of what I am doing and why. Consistently, I have had support from the Commissioners' Office on my advocacy on behalf of our clients and my office, both inside and outside the Courthouse.

As a way of background, the Supreme Court of Pennsylvania exercised King's Bench jurisdiction over a lawsuit addressing cash bail practices in the First Judicial District. The issues presented by the Special Master, parties, and participants for Supreme Court jurisprudence included questions about the evidentiary standards relevant to bail determinations, the extent to which other due process protections (such as the creation of a reviewable record) applied at bail

determinations, and whether robust ability-to-pay determinations are required when monetary bail is set as a condition of release. The resulting Supreme Court jurisprudence will thus affect bail determinations throughout the state, including Montgomery County.

Our office was asked by counsel for the Petitioners in the bail litigation, the ACLU-Pennsylvania, to file an amicus brief in support of their position, which included, inter alia, the positions that a robust ability-to-pay hearing is necessary when setting conditions of monetary bail; a clear and convincing evidentiary standard is applicable at bail determination hearings, and that evidence may not be based on hearsay; and such hearings trigger due process protections that call for, among other things, some form of written record explaining the rationale behind bail determinations. These positions are consistent with the position of our office and, in the professional opinion of collective attorneys in the office, promote improved outcomes for our clients across the board. Counsel for petitioners explained that they would be seeking amicus support from various interested parties but that our office was able to contribute from the unique perspective of a non-party county public defender office, a perspective that would encourage the Court to reach the statewide issues that were raised by the Special Master, parties, and participants in a case that arose out of Philadelphia. After much discussion and consultation with legal experts about the importance of demonstrating the reality of pretrial/bail issues that exist outside of Philadelphia, our office determined that it was in the best interest of our indigent clients to participate as amicus by discussing county indigent defense realities outside of Philadelphia County. It is a testament to the individuals in this office that we are respected in the Commonwealth of Pennsylvania as one of the best public defender offices.

Shortly before filing the brief, on February 3, 2020, I sent it to both you and Josh Stein. Josh's response, via email, came late afternoon, after the brief was filed. His concerns were that our brief consisted of complaints and did not advance the litigation of the plaintiffs in the case. The following afternoon, on February 4, 2020, I sent you and Mr. Stein an email explaining why we filed the brief.

Late in the afternoon, on February 5, 2020, Judge DelRicci asked me to come up to his office. He was visibly upset and asked me what I thought I was doing. He picked up a copy of the brief and began telling me that I should not have filed it and that I should have consulted him before filing. I am curious about how Judge

DelRicci received a copy of the brief since it had not been accepted as a public record as of the time he confronted me with it. Nor was he served with it. Judge DelRicci argued that parts of the brief were inaccurate and that we failed to acknowledge that the courts were working to address some of these issues. He also claimed that what we are asking for in the brief is in opposition to what we have supported in the pretrial program. He told me that if I did not withdraw our brief he would no longer support the proposed pretrial program we are working on in the county and he would inform Val (Dr. Valarie Arkoosh) that he no longer wanted the program. I told him I would review his concerns and get back to him.

Understanding how important a pretrial bail program was to our clients, our office, the Commissioners, and me personally, I wanted time to reflect and get your input on this issue. As I have informed Judge DelRicci in the past, I work for the Commissioners and have received positive feedback on that position from both you and Commissioner Arkoosh.

On February 6, 2020, I sent a text to you asking to meet and a meeting was set for Friday at 3pm. At that meeting, Lee Awbrey and I met with you and Josh. Lee Awbrey was the author of the brief and worked with plaintiff's counsel. We discussed many aspects of the brief. I felt it was a positive conversation and that you were generally supportive. One of Judge DelRicci's complaints was that we did not include the work he and others were doing in Montgomery County to address the dire situation outlined in the brief (the facts of which he generally agreed with). I also explained his threats to pull the pretrial program.
Both you and Josh were generally supportive. You stated that you wished that we had come to you earlier in the process. You reiterated that Judge DelRicci had no business threatening the Public Defender because I was under the Commissioners' authority. You indicated that you would explain this to Judge DelRicci. Lee Awbrey and I also offered to amend the brief to include the steps the county has taken to address the concerns in the brief. We both left the meeting feeling positive that we would ultimately be supported.

On Monday February 10, 2020, I was in Courtroom 6 handling cases when Judge DelRicci showed up and wanted to speak with me. He asked me if I had made a decision. I told him that I was waiting for the Commissioners' decision since I had spoken with you both. He asked me if I told you about the threat to pull the pretrial program. When I told him yes he was concerned and said he wished I had

not done that. He wanted to speak with Val personally. He then said that must be why you were meeting with Mike Kehs at 11. I told him once I heard back from you I would personally meet with him to give him my decision.

At 12:15 that day, I received your email instructing me to withdraw our brief immediately. You stated "I believe the best course of action regarding the brief is to withdraw it. I believe the lack of communication both with our office and with courts beforehand was a fatal flaw in the strategy and leaves us with very limited options."

My first concern is the clear belief on your (and presumably Josh's) part, that I must communicate with the courts before filing something that affects my clients on behalf of my office. There is no role for judicial oversight of our office, especially when the Judge's concerns seemed to be political in light of his threat to pull the pretrial services program. Additionally, in all of my conversations with you previously, you affirmed the fact that it was improper for Judge DelRicci to tell me what to do or how to represent my office and our clients. You were also concerned that his actions interfered with the authority of the county and Commissioners.

My concern is why the decision changed so drastically and quickly. Within an hour of this meeting with Mike Kehs, your decision changed and you stated I should have communicated with the court about my work. I would like to know why this decision was made. Additionally, you said I should have communicated with you beforehand about the brief. That is a conversation I would like to have in order to better understand when it is required that I consult with you on legal matters and filings. It is problematic because the Public Defender's Office should act independently, outside of the political realm.

After receiving your email, I spoke with Judge DelRicci and I informed him that I would withdraw the brief. He then asked me what I was going to do to fix the problem. He went on to ask me what I was going to do publicly, implying that I needed to let people know I was wrong. I again told him I believed that our brief was accurate and would do nothing more. He was angry with this and also wanted me to apologize to him. I told him that I would not apologize and while I withdrew the brief, I stood by its accuracy.

Also during the conversation, I said that I did what "you guys" wanted me to do. He vigorously said he had no knowledge about what others had asked me to do. He said he had had no communications with you or Josh or anyone else to have me pull the brief.

During that meeting, Judge DelRicci made the following statements:

- He threatened my role as the Chief Public Defender and my ability to advocate in the best interests of our clients. He told me I would no longer be consulted or brought into the conversations regarding criminal court matters, including bail reform. I asked if this position extended to other people in my office, to which he replied, yes, because they work for me.
- He threated my law license. On Monday he had said that he was thinking about filing a disciplinary board complaint against me. During this latter conversation he said that he had decided to file a disciplinary board complaint.
- He threatened my job. He stated that many people in the county wanted to see me fired but he was not one of them. He stated that a number of times. I believed this was a veiled threat aimed at getting me to back off of the positions I have taken.

Lastly, after that conversation, pursuant to a text to you that we should talk, I received a phone call from Josh. I told him I was now concerned about withdrawing the brief in light of the new threats. Josh agreed with me that Judge DelRicci could not keep me out of the decision-making process and threaten me. Josh said he and you would speak to the Judge. Despite my strong reservations, I followed your instructions and withdrew the brief.

I am concerned that there may be political pressure on the Commissioners' office for my firing based on the zealous advocacy of myself and my lawyers. I hope that the individuals in Montgomery County who want me fired will not prevail. Additionally, I hope I have the support of the Commissioners with respect to the independence of this office from judicial pressure. I cannot be an effective advocate if I have to consult with the Courts about my work.

Attached to this letter is a copy of the ABA Ten Principles Of A Public Defense Delivery System. The first principle states, "The public defense function, including the selection, funding, and payment of defense counsel, is independent." An

Also during the conversation, I said that I did what "you guys" wanted me to do. He vigorously said he had no knowledge about what others had asked me to do. He said he had had no communications with you or Josh or anyone else to have me pull the brief.

During that meeting, Judge DelRicci made the following statements:

- He threatened my role as the Chief Public Defender and my ability to advocate in the best interests of our clients. He told me I would no longer be consulted or brought into the conversations regarding criminal court matters, including bail reform. I asked if this position extended to other people in my office, to which he replied, yes, because they work for me.
- He threated my law license. On Monday he had said that he was thinking about filing a disciplinary board complaint against me. During this latter conversation he said that he had decided to file a disciplinary board complaint.
- He threatened my job. He stated that many people in the county wanted to see me fired but he was not one of them. He stated that a number of times. I believed this was a veiled threat aimed at getting me to back off of the positions I have taken.

Lastly, after that conversation, pursuant to a text to you that we should talk, I received a phone call from Josh. I told him I was now concerned about withdrawing the brief in light of the new threats. Josh agreed with me that Judge DelRicci could not keep me out of the decision-making process and threaten me. Josh said he and you would speak to the Judge. Despite my strong reservations, I followed your instructions and withdrew the brief.

I am concerned that there may be political pressure on the Commissioners' office for my firing based on the zealous advocacy of myself and my lawyers. I hope that the individuals in Montgomery County who want me fired will not prevail. Additionally, I hope I have the support of the Commissioners with respect to the independence of this office from judicial pressure. I cannot be an effective advocate if I have to consult with the Courts about my work.

Attached to this letter is a copy of the ABA Ten Principles Of A Public Defense Delivery System. The first principle states, "The public defense function, including the selection, funding, and payment of defense counsel, is independent." An

independent public defenders' office is important to our clients, our office, and the citizens of Montgomery County. I have confirmed that with Robert Tintner, Esq., who handles the Ethics Hotline for the Philadelphia Bar Association.

Thank you for reading this letter. I hope that you understand my concerns about our office's independence and my ability to be an effective advocate for this office. I appreciate the past support you and the Commissioners have given to this office and me and I look forward to our future work together.

Thank you,

Dean M. Beer
Chief Public Defender
Montgomery County

CC: Josh Stein, Esq. (via email)

SERVING THE WHOLE COMMUNITY TO MAKE THE COMMUNITY WHOLE

EXHIBIT 3

MONTGOMERY COUNTY
BOARD OF COMMISSIONERS
VALERIE A. ARKOOSH, MD, MPH, CHAIR
KENNETH E. LAWRENCE, JR., VICE CHAIR
JOSEPH C. GALE, COMMISSIONER

OFFICE OF THE CHIEF CLERK
CHIEF OPERATING OFFICER
PO BOX 311
NORRISTOWN, PA 19404-0311
610-278-3020
WWW.MONTCOPA.ORG
LEE A. SOLTYSIAK
CHIEF OPERATING OFFICER

February 20, 2020

Dean Beer
Chief Public Defender
Montgomery County

Dear Dean:

I'm writing this letter in response to your February 13th, 2020 letter requesting clarification of your role as the Chief Public Defender of Montgomery County. There is no question that your intentions in regards to providing quality representation to clients are genuine. Moreover, the administration has been supportive of many of the positions you have taken with respect to overall justice reform. However, in my role as COO, I have been very disappointed in the manner in which you have sought to advance those positions on a number of occasions.

For example, in August 2019, I met with you regarding your improper use of County legal interns from your office for a project that was outside the scope of your job as Montgomery County Public Defender. Specifically, you and Chief Deputy Keisha Hudson directed summer legal interns at the County to use County resources to research social media posts of police officers in several different municipalities for the purpose of providing information to the Philly Voice.

The County Employee Handbook prohibits use of County equipment and staff for anything other than official County business unless the use is "de minimus." The news article that was ultimately published by the Philly Voice concerning the results of the research stated that a team of researchers was assigned "to scour social media posts from as many officers in Montgomery County's 51 municipal police departments as they could find."

Clearly this project did not involve a "de minimus" use of County equipment and staff. Further, it was outside the scope of what you and those in your office are tasked to do, as the research was not related to any cases being handled by your office. Rather, it was intended to mirror similar research done by the Plain View Project after the Plain View Project declined to undertake the research in Montgomery County. Your use of County equipment and staff for this outside project also violated the County Ethics Policy.

Moreover, while you were working on this project that was certain to draw public attention, you failed to communicate with me. It was only after you had provided all of the background information to the press did you contact me to give me a "heads up" that a reporter had reached out to you for a comment. While I am supportive of the goals you were attempting to achieve with this project, I cannot condone the process you employed in gathering the information. Coordination and earlier communication with me and others in County Administration could have resulted in a process that would have been more appropriate and beneficial in achieving the goal you were trying

to advance. The course of action you chose to take most likely undermined your efforts to shed light on an important issue.

In January, you raised questions about the phone rates of GTL at the Youth Center. Again, rather than bringing those concerns directly to me, your office filed a Right to Know request to obtain a list of all calls placed by juvenile residents for the preceding year. Fortunately because of the sizeable information sought, the request was brought to the attention of County Solicitor, Josh Stein. Josh immediately contacted you to discuss the basis for the request and only then did you express the concern that the phone rates at the Youth Center were too high. Within hours after Josh contacted you about the Right to Know request, he addressed the issue and confirmed with GTL that thereafter the phone rates at the Youth Center would be the same as the rates for County Prison.

Once more, if you had brought this to my attention when you first became aware of the issue more than a month earlier, it could have been addressed much sooner and in a more appropriate and less adversarial fashion. However, you seem determined to work against County administration instead of along with it.

The situation with the recent filing of a brief in the ACLU cash bail case before the Pennsylvania Supreme Court is very similar. You know that the administration is in favor of the reform sought in the case and in fact, you are aware that changes to the pre-trial process in Montgomery County have been budgeted for and are being pursued. In an effort to advance this issue state-wide, you put at risk the collaborative efforts of your office, the Courts, the District Attorney, and County Administration to bring about a positive change in bail practices for your clients in Montgomery County.

Rather than alerting me in December that the ACLU had requested you file an amicus brief, you waited until February to forward a brief to Josh and I that was filed before we were afforded any time for meaningful comment. All briefs in the case, including amicus briefs, had been due to be filed with the Supreme Court no later than January 30, 2020. Therefore, there was no time constraint for filing the brief which was filed Nunc Pro Tunc. Even though you were not required to file the brief on February 3rd, you filed it before Josh or I had an opportunity to review and provide comments. The fact that you forwarded the brief prior to filing, and then subsequently filed without waiting for feedback indicates to me that you were well aware, not only that comments would be forthcoming, but that there was a strong chance those comments would include a request to amend or refrain from filing the brief at all.

To be clear, the President Judge has not influenced my evaluation of your performance. I expect, as I do with all Department Heads, that the Chief Public Defender show good judgment and follow the policies of the County in performance of duties. There is no question that you do not report to the Courts or require the approval of Courts for anything you are responsible for, and nothing of the sort has been said or implied. However, the ability to work collaboratively wherever possible with other groups on clearly common goals would undoubtedly be more effective.

As the Public Defender of Montgomery County, you are appointed by the County Commissioners, and tasked under the Pennsylvania Public Defender Act with furnishing legal counsel to any person who, for lack of sufficient funds, is unable to obtain it. Your function as it pertains to that mandate

is where a minimal amount of oversight is necessary. You, and your staff, are zealous advocates for those you are tasked with defending, and your work in that regard is appreciated beyond measure.

It is when you choose to act outside of that scope that your conduct has proven to be as frustrating as it is puzzling. I would have welcomed, and quite frankly expected, the opportunity to work with you and your office on these issues on the front end when we could develop an appropriate strategy to make progress on these important matters. I am certain we would have worked together to develop a plan focused on how best to accomplish the goals. Instead, you have chosen to go-it-alone and repeatedly ignore county policy along with the advice given by me and others on numerous occasions which has undermined the very issues you are advocating for each and every time.

The ability of the Public Defender to function independently in the representation of indigent clients in Montgomery County is important. What is also important is the ability of the head of that department to realize the broader implications of acting on certain desired reforms in a manner that is outside the intended scope of the position. Your repeated inability to realize when it is both beneficial and appropriate to engage with me, the Commissioners, or the Solicitor before taking a particular action is deeply concerning.

You have requested clarification on your role as the Chief Public Defender for Montgomery County. The fact that you have been in your position for almost four years, have demonstrated numerous instances of questionable judgment, and just now seek a review of your position demonstrates the concerns that I have in your work for Montgomery County.

Lee A. Soltysiak
Chief Operating Officer
Montgomery County

EXHIBIT 4

NEWS

MONTGOMERY COUNTY BOARD OF COMMISSIONERS
VALERIE A. ARKOOSH, MD, MPH, CHAIR
KENNETH E. LAWRENCE, JR., VICE CHAIR
JOSEPH C. GALE, COMMISSIONER

Contact:
John Corcoran, Director of Communications 610-278-3061 jcorcora@montcopa.org

FOR IMMEDIATE RELEASE: FEB. 26, 2020

Montgomery County Announces New Leadership at Public Defender's Office

Norristown, PA (Feb. 26, 2020) – Effective immediately, the Montgomery County Public Defender's Office will be led by Carol Sweeney and Greg Nester, who will serve as co-chief deputy public defenders going forward.

Carol is currently Case Management Chief and Greg serves as Chief of the Mental Health Unit. Both are senior leaders who will bring their experience, skills and expertise to bear in leading the office and ensuring our most vulnerable residents receive high-quality representation while also moving forward on needed reforms and partnerships to improve the justice system.

Montgomery County is dedicated to implementing initiatives that reduce recidivism, provide diversionary programs and treatment options to eliminate the need for incarceration and improve outcomes for those released from prison, all while protecting the safety of our communities. These initiatives are a collaborative effort that involve many of our county offices and partner agencies.

Carol is a graduate of Penn State and the Widener University Delaware School of Law. She began her career in the Montgomery County District Attorney's Office where she was head of the Narcotics Enforcement Team and co-chief of the Trial Division. She was in private practice for 15 years before joining the Public Defender's Office in 2008. She has been the Case Management Chief for three years, supervising 24 trial attorneys, and is the Behavioral Court liaison.

Greg is a graduate of Indiana University and the Indiana University School of Law – Indianapolis. He has been with the Public Defender's Office for over 10 years and was previously Chief of the Pre-Trial Unit.

EXHIBIT 5

MONTGOMERY COUNTY BOARD OF COMMISSIONERS

Cash Bail Reform Statement from Montgomery County

We have received questions from individuals and organizations regarding Montgomery County's commitment to cash bail reform and to the Public Defender's office.

We remain wholly committed to supporting the vitally important work of the Public Defender's office and their dedication to defending the Constitutional rights of indigent individuals accused of violating the law. Their zealous advocacy on behalf of their clients must continue to extend beyond the courtroom, and their efforts to provide a holistic approach to the extra-legal concerns of those they represent is a model for Public Defenders offices across the country.

Montgomery County is in full support of justice reform efforts and specifically cash bail reform. We recognize that people of color as well as economically disadvantaged people are disproportionality impacted by our justice system. Pennsylvania ranks 7th highest in the nation for racial disparity for incarcerated people. We know this impacts not only individuals, but their families, neighborhoods, and communities. We are committed to developing strategies to combat this injustice.

In early 2019, the County and Courts began a collaborative effort across County departments to develop an alternative to cash bail that could eliminate pre-trial detention of individuals that have been charged with certain crimes, simply because of their inability to pay bail. This administration wants to put an end to people being held in pre-trial detention solely for economic reasons.

This team includes representation from the Public Defenders' Office, District Attorneys' Office, Courts, Prison, Commissioners Office, and Adult Probation. This group has been working together, reviewing various program models across the state and country. Representatives from these offices traveled to Pittsburgh to view Allegheny County's model pre-trial services program, and researched others around the country for best practices to develop our own program here in Montgomery County.

Based upon this work, the team presented a plan to the County Commissioners to fund a comprehensive Pre-Trial Services Unit in the 2020 budget. The Chair and Vice Chair of the Board of Commissioners gave their full support for this plan and voted to include a new position in the 2020 county budget to launch this initiative. This position was advertised in January 2020; interviews are underway and this role will be filled shortly.

Montgomery County is dedicated to eliminating the negative impacts currently felt by many people of color as well as economically disadvantaged members of the community due to the current cash bail system. The creation of the Pre-Trial services program is a significant step in the ongoing effort for meaningful and equitable justice reform in Montgomery County.

- February 28, 2020

MONTGOMERY COUNTY COURT HOUSE, PO BOX 311, NORRISTOWN, PENNSYLVANIA 19404-0311
TEL: 610-278-3020 FAX: 610-278-5943
WWW.MONTCOPA.ORG

EXHIBIT 6

We, as individuals who are current members of the Montgomery County Public Defender's Office, write in support of our former Chiefs, Dean Beer and Keisha Hudson. They earned our support by fiercely and zealously advocating for each and every client, establishing a holistic and trauma-informed approach to Public Defense, engaging in community outreach and organization, striving for policy reform, and serving as strong mentors and support systems to us, their employees. A vast majority of us were hired by Dean and Keisha and we came from other Public Defender Offices, other fields of social justice, from judicial clerkships, and other passions because we saw and respected the vision that Dean and Keisha fostered for an independent office that tirelessly advocated within the courthouse and within the community. The Mission Statement of the Office is:

> "The Montgomery County Office of the Public Defender fights for every client, recognizing their individualized experiences. We champion change by being the voice that demands justice and fairness for all. We are administrative support clerks. We are investigators. We are social workers. We are paralegals. We are attorneys. Together, we are Public Defenders."

Following the events of the last week, we are left feeling as if their vision, and ours, is not supported by Montgomery County. To witness our Chiefs fired, in serial fashion, escorted from the Office by security, given no opportunity to stop to explain their dismissal or to check on the staff they had recruited and advocated for daily was deeply upsetting, and created a sense of confusion, fear, and had a chilling effect on those of us who remained. We were left to question the independence of the Office, the impact of our advocacy, and whether such advocacy would be limited. We have been provided no explanation for the firings—all we have been told is that they have been replaced, and we then received a subsequent follow-up statement detailing the County's commitment to indigent defense, the Office, and the County's support of a pretrial services program and bail reform.

While we are grateful to hear that the County supports us, and a Pretrial program, it remains deeply concerning that the actions of the last few weeks may speak louder than any words. The Office of the Public Defender had submitted an amicus brief, in support of bail reform, to the Pennsylvania Supreme Court. We were asked to file this in support of state-wide bail reform, and to shine a light on the issues of pretrial detention and cash bail. The amicus brief provided specific examples of people who suffered as a result of cash bail in Montgomery County. Shortly after its filing, the amicus brief was withdrawn. Then our Chiefs were fired. Given the close proximity of those events, it is hard to not draw a direct line between the brief and the firings. It is also difficult to

understand how a brief, advocating for bail reform, would not advance the interests of a county pretrial services program. The seeming influence over our Office's ability to advocate for policy initiatives is deeply concerning. This is particularly true where Dean and Keisha consistently encouraged us to zealously advocate for each individual client, while also recognizing and striving for overall criminal justice reform.

As Public Defenders, our mission extends beyond the individual client and the individual case. Our mission necessarily includes exposing systemic issues, and tackling them with the same advocacy that we utilize in a courtroom. Dean and Keisha exemplified this with their work in the office, and the community. They have established and maintained relationships with numerous stakeholders in the community, providing partnership opportunities and increasing our involvement and interaction with community issues. Some of these local partnerships and programs include: Legal Aid of Southeastern Pennsylvania; Pottstown Trauma Informed Community Connection; Youth Law Enforcement Forums in Pottstown, Jenkintown, Norristown, and Cheltenham; Youth Courts in Norristown High School, Pottstown Middle School , and Cheltenham High School; numerous law schools for clinics and practicums including appellate clinics with Penn and Drexel, and an expungement clinic with Villanova, and The Juvenile Law Center, who provided assistance on juvenile lifer cases and data collection on juvenile fines and costs issues. Dean and Keisha were also responsible for establishing a satellite Public Defender Office in June 2016, which has served nearly 1000 clients to date and was an important step in easing access to the services of our office. Additionally, Dean and Keisha were instrumental in continuing a Participatory Defense Hub, one of the first in the country, which helps family members navigate the criminal justice system, and provides them the power to assist in their loved-one's case. Additionally, Dean and Keisha have created training partnerships with the Public Defender's Association of Pennsylvania (PDA), The Pennsylvania Association of Criminal Defense Lawyers (PACDL), the National Association for Criminal Defense Lawyers (NACDL), Pennsylvania Bar Institute (PBI), and Gideon's Promise. Not only can employees attend these trainings, but several staff members serve as faculty on these programs. Gideon's Promise, in particular, provides a multi-year training program for our young hires that allows them to not only learn best practices, but to have a community of support as they navigate the early years of Public Defense.

These partnerships and community outreach often necessitated long hours, both in the office and in the community for Dean and Keisha. The number of evenings that Dean remained in the office past 7, only to then run to community events is beyond count. However, he never complained because he believed that our work in the community was equally as important as our work in the courtroom. Additionally, both Dean and Keisha routinely demonstrated that they were willing to share our workload by providing coverage in the Pottstown Satellite Office and the Criminal Miscellaneous List, representing clients in preliminary hearings and probation revocations, and, recently,

Keisha served as second chair in a Homicide case. Dean and Keisha did not just talk the talk, they actively and consistently walked the walk. This level of commitment inspired us every day. To know that they had our backs, that they were in the fight too, that they recognized and understood the challenges of our work was invaluable.

Under their leadership, the Office now receives nationwide applicants for attorney positions and interns. Our Office's prominence has risen under their leadership, and it would be unfortunate if these recent events jeopardized our partnerships or our respect within the Public Defense or Montgomery County Communities. The citizens of Montgomery County deserve a Public Defender's Office that protects their rights above all other interests. We can say with commitment, heart, and passion, that Dean and Keisha ensured that the citizens received exactly that promise.

You may notice that we have referred to our Chiefs by their first names throughout—that is because they have always treated us as people, not just employees. They have assisted us with case strategy, expert funding, our personal community outreach, training, and development. They have lent us their strength by standing alongside us as we take verdicts or hear the results of challenging sentencing proceedings. To know that your bosses care about you personally matters. This work can be hard, and it takes a village, and we have been so grateful to have Dean and Keisha as the leaders of our village.

We ask that the County Commissioners consider the thoughts and experiences of those of us who most closely worked with Dean and Keisha, those of us who share their vision and wish to see it continue, those of us who understand the high quality representation and advocacy they espoused in the office and in the community, and the partnerships they forged to advance our clients' interests and the broader issue of criminal justice reform.

To be clear, our current leadership, Greg Nester and Carol Sweeney, have our full support. They have earned and deserve our respect, and their dedication to us and the office is unquestioned. However, we are deeply troubled by the events that led to Dean and Keisha's firing. As such, we feel that both the Commissioners and our county citizens deserve to know that Keisha and Dean were strong advocates, supportive bosses, and great community partners. As those of us who worked hand and hand with them daily, we cannot let our respect, appreciation, and support for them go unstated. We also take this opportunity to note that zealous representation requires independence from outside influence. We cannot effectively advocate if we are beholden to Courts or County Officials or fear reprisal for our advocacy.

We ask that the Commissioners reconsider this action, and reinstate Dean Beer and Keisha Hudson as leaders of our office.

We also make a promise to the citizens of Montgomery County that we remain fully committed to zealous advocacy in the courtroom and in the community.

Carrie Allman
Vanessa Bellino
Lauren Zitsch
Josh Thorn
Mike Daly
Jeff Matus
Erin Boyle
Katie Ernst
Alana Hook
Molly Marcus
Emily Sieber
Mike Sontchi
Kari Grimsrud
Adrienne Kosinski
Martin Lock
Ravi Marfatia
Brie Halfond
Rachel Silver
Madison Leonard
Marissa McGarry
Jacqui Robbins
Elizabeth Brogan
Amanda Deptula
Katie Cronin
Meghan Schanbacher
Julia Lucas
Lee Awbrey

EXHIBIT 7

Received 3/4/2020 9:44:09 PM Supreme Court Eastern District

Filed 3/4/2020 9:44:00 PM Supreme Court Eastern District
21 EM 2019

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

---

21 EM 2019

THE PHILADELPHIA COMMUNITY BAIL FUND, *et al.*,
Petitioners,

v.

ARRAIGNMENT COURT MAGISTRATES OF THE FIRST JUDICIAL DISTRICT OF THE COMMONWEALTH OF PENNSYLVANIA,
Respondents.

ORDER

AND NOW, this ______ day of ______________________, 2020, upon consideration of the Application of Members of the Criminal Defense Bar Who Practice in Montgomery County for Leave to File an *Amicus Curiae* Brief *Nunc Pro Tunc* in Support of Petitioners, it is hereby ORDERED that the Application is GRANTED. The Prothonotary is directed to accept the *amicus curiae* brief attached to the Application for filing.

By the Court:

____
J.

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

---

21 EM 2019

THE PHILADELPHIA COMMUNITY BAIL FUND, *et al.*,
Petitioners,

v.

ARRAIGNMENT COURT MAGISTRATES OF THE FIRST JUDICIAL DISTRICT OF THE COMMONWEALTH OF PENNSYLVANIA,
Respondents.

APPLICATION OF MEMBERS OF THE CRIMINAL DEFENSE BAR WHO PRACTICE IN MONTGOMERY COUNTY FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF *NUNC PRO TUNC* IN SUPPORT OF PETITIONERS

Pursuant to Pa. R.A.P. 531(b)(1)(iii), Applicants, members of the criminal defense bar who practice in Montgomery County, respectfully request relief in the form of leave to file *nunc pro tunc* the attached *amicus curiae* brief. In support of this Application, Applicants aver as follows:

1. The Amended Petition for Extraordinary Relief Under the King's Bench Jurisdiction and resulting Report of the Special

Master involve the important question of the operation of cash-bail practices in the First Judicial District.

2. The issues presented in this case, however, are prevalent in counties throughout the state, including Montgomery County.

3. This Court's enforcement of existing rules that govern cash-bail practices, and clarification of the applicable evidentiary standards and other due process requirements, will directly affect persons accused of crimes in Montgomery County. The standards and procedures applied by the First Judicial District that result from this Petition will also operate as a model for practices in other counties, such as Montgomery County.

4. The Applicants represent individuals at all stages of their criminal proceedings and have a substantial interest in this matter. The law governing bail practices directly affects our clients, their families, and the communities we serve.

5. The Applicants have, collectively, over 300 years of experience representing criminal defendants in Montgomery County.

6. The Montgomery Office of the Public Defender filed its own *amicus curiae* brief in this matter on February 3, 2020, and this Court granted leave and deemed its brief timely filed on February 11, 2020.

7. On February 11, 2020, the Montgomery County Office of the Public Defender filed to withdraw its brief. Then, on February 26, 2020, the Chief and Deputy Chief of the Montgomery County Office of the Public Defender were abruptly fired by the Montgomery County Board of Commissioners, apparently in response to the *amicus* brief in this matter.

8. Applicants have reviewed the Public Defender's *amicus* brief, and, based on the above-referenced experience, believe it to be an accurate representation of the bail practices in Montgomery County.

9. Due to the accuracy of the Public Defender's brief, the retaliation against the Public Defender for filing an accurate brief,[1] the illegal and unconstitutional bail practices in Montgomery County, and the importance of bringing the situation in Montgomery County to the Court's attention, Applicants felt it necessary to submit the attached *amicus* brief.

10. The *amicus* brief submitted by Applicants is substantially the same as the one filed on February 3, 2020, by the Montgomery County Office of the Public Defender.

11. Applicants would not be filing their *amicus* brief this late but for the unique circumstances presented by the Public Defender's withdrawal of its brief and subsequent retaliatory firings.

---

[1] "The circumstances surrounding these events raise serious questions about whether public defense in Pennsylvania, especially Montgomery County, is independent and free to advocate openly for the people it is supposed to serve." Norman L. Reimer & Miriam Aroni Krinsky, *Fear of Reprisals Threatens Independence of Public Defenders and Erodes Right to Counsel*, The Legal Intelligencer, posted 4 March 2020 at 1:55 p.m., *available at* https://www.law.com/thelegalintelligencer/2020/03/04/fear-of-reprisals-threatens-independence-of-public-defenders-and-erodes-right-to-counsel/

12. The parties will not be prejudiced by the Court's acceptance of the Applicant's brief *nunc pro tunc* because it is substantially the same as the Public Defender's brief, which was filed over a month ago.

WHEREFORE, members of the criminal defense bar who practice in Montgomery County respectfully request that the Court grant leave to file the attached *amicus curiae* brief *nunc pro tunc* in support of Petitioners.

Respectfully submitted,

/s/ *Jason E. Parris*
Jason E. Parris, Esq.
I.D. No. 312363
Abramson & Denenberg, P.C.
1315 Walnut Street, Suite 500
Philadelphia, Pennsylvania 19107
(215) 546-1345
jparris@adlawfirm.com

Date: March 4, 2020

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non- confidential information and documents.

/s/ *Jason E. Parris*
Jason E. Parris, Esq.
I.D. No. 312363
Abramson & Denenberg, P.C.
1315 Walnut Street, Suite 500
Philadelphia, Pennsylvania 19107
(215) 546-1345
jparris@adlawfirm.com

Date: March 4, 2020

EXHIBIT 8

MONTGOMERY COUNTY BOARD OF COMMISSIONERS
VALERIE A. ARKOOSH, MD, MPH, CHAIR
KENNETH E. LAWRENCE, JR., VICE CHAIR
JOSEPH C. GALE

Agenda

March 5, 2020

A. Call to Order

B. Roll Call and Pledge of Allegiance

C. Commissioners' Comments

D. Approval of Minutes
1. February 20, 2020

E. Announcements, Commendations & Reports
1. Coronavirus Update – Michel Masters, Director of Communicable Diseases/Public Health and Todd Stieritz, Public Safety/Public Affairs Coordinator

F. Resolutions
1. Authorization of Municipal Community Planning Assistance Contracts for Collegeville Borough, West Norriton Township, and Abington Township – John Cover
2. Authorization to apply to the Delaware Valley Regional Planning Commission for a Transportation and Community Development Initiative Grant – Brian Olszak
3. Authorization to apply for DCNR grant funding for a conservation and trail easement on the Camp Laughing Waters property in New Hanover and Upper Frederick Townships – John Cover
4. Authorization for Emergency Replacement of an Electrical Transformer at One Montgomery Plaza – Tom Bonner

G. Advertisement of RFPs - Montgomery County
1. RFP on behalf of Commerce for Career Development Content Services
2. RFP on behalf of Commerce for Computer Skills Training
3. RFP on behalf of Commerce for Assessment Services

- All RFPs & Bids are available on the County's Purchasing website: www.montcopa.org/Purchasing

H. Awards of Contract – Montgomery County

1. Contract Award – Assets & Infrastructure – Engineering – CMC Engineering of Kimberton, PA - $30,100.00
2. Contract Award: Assets & Infrastructure – Design Services – HRM Architects of Princeton, NJ - $83,065.00
3. Contract Award: ITS - Maintenance – Infor (US), Inc., of Alpharetta, GA - $278,839.04
4. Contract Award: ITS - Support Agreement – Microsoft Corporation of Redmond, WA - $241,834.63
5. Contract Award: ITS – Aerial Imagery Services - Nearmap US Inc. of South Jordan, UT - $70,000.00 per year
6. Contract Award: Public Safety - Software – CDW Government of Chicago, IL - $42,735.00
7. Contract Award: Voter Services – Equipment – E. Thomas Brett Business Machines of Horsham, PA - $23,368.00
8. Contract Award: Voter Services - Advertising – Montgomery Newspapers of Dallas, TX - $22,500.00
9. Contract Renewal: Human Resources - Commercial Insurance Broker: - KMRD Partners, Inc. of Warrington, PA - $135,000.00
10. Contract Renewal: ITS - Wiring Services- Atlantic Coast Communications NJ Inc. of Pennsauken, NJ - $145,000.00
11. (1) Contract, (4) Contract Renewals and (3) Amendments for Health and Human Services

    - Providers and Services are listed in the front of the room

I. Awards of Contract – Southeast PA Regional Task Force
   1. Contract Award: Equipment - Selex ES Inc. dba Leonardo/ELSAG of Greensboro, NC - $21,097.75
   2. Contract Renewal: Managed Services – Mission Critical Partners of Port Matilda, PA - $144,180.00

J. General Public Comment – limited to 5 minutes

K. Closing Commissioners' Comments

L. Upcoming Meeting Dates
   1. March 19, 2020

M. Adjournment

N. Salary Board

O. General Public Comment – limited to 2 minutes

P. Adjournment

Office of Health and Human Services

Office of Behavioral Health & Developmental Disabilities

Contract Amendment Office of Developmental Disabilities 2019/2020 Budget No. 62601-655040	Prior Contract Amount	Decreased/ Increased Amount	Revised Contract Amount
Advance Lane Training and Employment Corporation Twin Park Industrial Center 3151 Advance Lane Colmar, PA 18915 Prior Res. No. 328	$150,234.00	$10,453.00	$160,687.00

Contract Renewal Office of Developmental Disabilities 2019/2020 Budget No. 62601-655040	Services Provided	Contract Amount
Temple University Institute on Disabilities 3340 N. Broad Street Student Faculty Center Philadelphia, PA 19140	Residential and day monitoring.	$55,000.00

Contract Amendment Office of Drug and Alcohol 2019/2020 Budget No. 62801-655040	Prior Contract Amount	Decreased/ Increased Amount	Revised Contract Amount
Valley Forge Medical Center 1033 W. Germantown Pike Norristown, PA 19403			Fee for Service
Adult, Male and Female, IDU, <u>Pregnant Women</u>			
Medically Managed Intensive Inpatient Withdrawal Management Services 4-WM (834A)	0	$589.37/FFS	

Contract Renewals Office of Mental Health 2019/2020 Budget No. 62701-655040	Services Provided	Contract Amount
Access Services, Inc. 500 Office Center Drive Fort Washington, PA 19034	**Family Support Services – Comprehensive Community Support Services – PATH Federal and PATH State Match; Transitional & Community Integration – Forensic Services – Justice Related Services.**	$372,181.00

Gregorio Consulting 10446 Claiborne Road Claiborne, MD 21624	**Trauma Informed System of Care Initiative Consultant.**	$24,890.00

(RFP 18-02)

Mental Health Partnerships 1211 Chestnut St Philadelphia, PA 19107	The Family Empowerment Satisfaction Team (FEST) is a program that serves as independent evaluators of the behavioral health services provided to children and adolescents by Montgomery County by surveying parents and caregivers and the youth receiving services about accessibility, appropriateness and effectiveness of services, and overall satisfaction with services. FEST reports the findings, with recommendations, to Montgomery County Managed Care Services and works together with all stakeholders to help strengthen a resilience and recovery orientation to Montgomery County's delivery of managed care services and supports provided to families and youth.	$291,892.00

The Council of Southeastern Pennsylvania, Inc. 4459 W Swamp Rd Doylestown, PA 18902	Consumer satisfaction surveys and reports for Montgomery County residents receiving treatment services. Amendment is for administrative services mandated by HealthChoices that were not included in original contract agreement	$ 10,217.82 Revised contract value: $78,336.82

Office of Children and Youth

CONTRACT RENEWAL:

2019/2020

Provider Name		Rate
The Impact Project, Inc.		
Specialized Foster Care I	231100 FA	$66.39/Day per Child
Specialized Foster Care II	231100 FB	$83.78/Day per Child
Specialized Foster Care III	231100 FC	$87.37/Day per Child
Foster Care SIL 4 (Project LIFE)	231100 FD	$95.42/Day per Child
Foster Care (Project LIFE) Mother and Baby	231100 FE	$120.04/Day per Mother and Baby
SAL Level I	231100 FI	$64.46/Day per Child
• Rental Assistance I		$16.40/Day per approved Child
• Rental Assistance II		$24.95/Day per approved Child
Foster Care Group 1 – SOS Level I	231100 FF	$135.86/Day per Child
Foster Care Group 2 – SOS Level II	231100 FG	$129.67/Day per Child
Critical Care Foster Care	231100 FJ	$99.65/Day per Child

EXHIBIT 9

NEW HIRES

NAME	DEPARTMENT	JOB TITLE	SALARY	TRANSACTION	DATE
BLACKLETTER, Rebecca	Assets & Infrastructure	Environmental Educ.	$30,488.63	Full Time ($16.75)	03/09/20
SHAFFER, Kevin	Assets & Infrastructure	Plumber/Fitter II	$42,378.00	Full Time ($24.15)	03/23/20
SWEENY, Denae	Children & Youth	Caseworker	$45,912.13	Full Time ($23.54)	03/09/20
VINHAR, Ashley	Clerk of Courts	Accounting Tech III	$30,779.00	Full Time ($17.54)	03/09/20
FISHPAW, Janel	Conservation District	Res. Conservationist	$45,962.75	Full Time ($23.57)	03/09/20
BUCSOK, Brittany	District Attorney	O.S.P. V	$27,702.00	Full Time ($15.78)	03/09/20
KOHL, Rebecca	Managed Care Solutions	Data Analyst Mgr	$70,829.95	Full Time	03/09/20
MURPHY, Patricia	Mental Health	MIS Analyst	$57,571.55	Full Time ($29.52)	03/09/20
WONG, Catherine	Public Defender	Attorney I	$58,723.43	Full Time	03/09/20
BASRA, Adi	Security	Security Officer	$12.81	Part Time	03/09/20
BRIDGES, Lavin	Security	Security Officer	$27,500.69	Full Time ($13.22)	03/09/20
ROYSTER, Troy	Security	Security Officer	$26,941.32	Rehire Full Time ($12.95)	03/09/20
BUTLER, Austin	Sheriff	Deputy Sheriff	$39,000.00	Full Time ($20.00)	03/07/20
FASSNACHT, Michael	Sheriff	Deputy Sheriff	$39,000.00	Full Time ($20.00)	03/07/20

	OFF ROLL				
NAME	DEPARTMENT	JOB TITLE	SALARY	TRANSACTION	DATE
LEONARD, Samantha	Adult Probation	Adult Probation Officer	$42,848.08	Resignation	03/06/20
NIELSON, Brianna	Clerk of Courts	O.S.P. V	$28,602.32	Resignation	02/14/20
MCCLEARY, Madelyn	Courts	Law Clerk	$43,004.99	Resignation	08/28/20
TROUTMAN, Jennifer	Day Care	Resource/Referral Spec.	$38,026.26	Resignation	03/06/20
WITHERITE, Kayla	District Attorney	O.S.P. V	$30,129.38	Resignation	03/06/20
BLOSKY, Maggie	District Justice	District Court Clerk	$29,701.94	Resignation	02/27/20
GALLAGHER, Kelly	District Justice	District Court Clerk	$29,702.18	Resignation	02/21/20
BEER, Dean	Public Defender	Chief	$123,334.74	Termination	02/26/20
HUDSON, Keisha	Public Defender	Chief Deputy	$111,050.54	Termination	02/26/20
LUCAS, Julia	Public Defender	Attorney II	$61,276.81	Resignation	03/06/20
BROWN, Christopher	Public Safety	Sr. Telecommunicator	$48,571.63	Resignation	02/20/20
WELSH, Neal	Public Safety	Sr. Telecommunicator	$55,246.59	Retirement **(27 years)**	02/21/20
KAMENS, Gene	Security	Security Officer	$36,962.17	Retirement **(17 years)**	03/27/20
SANDERS, Garnell	Security	Security Officer	$27,915.75	Termination	02/12/20

	OTHER				
NAME	DEPARTMENT	JOB TITLE	SALARY	TRANSACTION	DATE
SABOL, Candace	Adult Probation	O.S.P. V	$31,870.00	Promotion ($30,295.98)	03/09/20
HENRY, Ashley	Assets & Infrastructure	Custodian	$27,317.33	PT to FT ($16.34)	03/09/20
BALKIEWICZ, Victoria	Community Connections	Caseworker	$42,559.06	Upgrade ($41,724.57)	03/09/20
LEWIS, Darrell	Community Connections	Caseworker	$54,763.08	Upgrade ($53,689.29)	03/09/20
BENDER, Katelynn	Community Connections	Caseworker	$44,385.37	Upgrade ($43,515.07)	03/09/20
RINES, Theresa	Community Connections	Caseworker	$48,830.79	Upgrade ($47,873.32)	03/09/20
WIDNEY, Annette	Community Connections	Caseworker	$48,830.79	Upgrade ($47,873.32)	03/09/20
BULLARD, Raushanah	Courts	Judicial Assistant	$53,418.00	PT to FT ($31.26)	03/23/20
LYONS, Mary	Courts	Court Clerk	$44,032.59	Salary Change ($43,254.40)	03/09/20
MURRAY, Timothy	Courts	Court Clerk	$44,032.59	Salary Change ($43,254.40)	03/09/20
PIO, Matthew	Courts	Court Clerk	$44,032.59	Salary Change ($43,254.40)	03/09/20
SPOTTS, Serena	Courts	Court Reporter	$56,089.00	PT to FT ($35.21)	04/06/20
LOEFFEL, Danielle	District Justice	Sr. District Court Clerk	$41,057.10	Promotion ($37,324.64)	03/09/20
PANNING, Janet	Health	Interim Deputy Admin.	$63,100.00	Salary Change ($54,072.71)	03/09/20
NESTER, Gregory	Public Defender	Interim Co-Chief PD	$104,416.00	Salary Change ($84,611.98)	02/27/20
SWEENEY, Carol	Public Defender	Interim Co-Chief PD	$104,416.00	Salary Change ($83,241.90)	02/27/20
CORCORAN, John	Public Safety	Fire Svs Outrch Coord.	$62,434.00	Transfer-Comm. ($102,663.83)	03/09/20

EXHIBIT B

TO PRELIMINARY OBJECTIONS

2017 WL 1337564
Only the Westlaw citation is currently available.

THIS IS AN UNREPORTED PANEL DECISION OF THE COMMONWEALTH COURT. AS SUCH, IT MAY BE CITED FOR ITS PERSUASIVE VALUE, BUT NOT AS BINDING PRECEDENT. SEE SECTION 414 OF THE COMMONWEALTH COURT'S INTERNAL OPERATING PROCEDURES.

Commonwealth Court of Pennsylvania.

Jerry NOTARIANNI and Kim Yencho, Appellants
v.
Patrick O'MALLEY, Laureen Cummings, John Brazil, John Cerra, Andy Wallace, Don Frederickson, Ed Staback, and Lackawanna County Salary Board

No. 733 C.D. 2016
|
Argued: March 6, 2017
|
FILED: April 12, 2017

BEFORE: HONORABLE ROBERT SIMPSON, Judge, HONORABLE MICHAEL H. WOJCIK, Judge, HONORABLE JAMES GARDNER COLINS, Senior Judge

MEMORANDUM OPINION

SIMPSON, JUDGE

***1** Jerry Notarianni (Notarianni), a member of the three-member Board of Commissioners of Lackawanna County (Board), and taxpayer Kim Yencho (collectively, Appellants), appeal the order of the Lackawanna County Court of Common Pleas (trial court) [1] denying mandatory preliminary injunctive relief seeking removal of certain county officials for improper appointments, and designation of Notarianni as "Minority Commissioner" entitled to his own solicitor. Appellants contend the appointments constitute official action under the Sunshine Act, 65 Pa. C.S. §§ 701–716, requiring a public meeting, and are improper attempts by a lame-duck board to bind a successor. Appellants assert preliminary injunctive relief is necessary to prevent irreparable harm during the pendency of the litigation. Discerning reasonable grounds for the trial court's order, we affirm.

I. Background

A. Material Facts

Lackawanna County (County) retained the County Commissioner form of government when it adopted its Home Rule Charter (Charter) in 1976. Reproduced Record (R.R.) at 406a–432a. Pursuant to the Charter, the Board is comprised of three county commissioners, elected in odd-numbered years and every fourth year thereafter. Electors may vote for no more than two candidates.

In 2015, the Board was comprised of two Democrats, Corey O'Brien and James Wansacz, and one Republican, Patrick O'Malley. In early 2015, O'Malley changed his registration from Republican to Democrat. Then, O'Brien resigned, and Democrat Ed Staback was appointed to complete his term. Through the remainder of 2015, until the newly elected commissioners took office, Commissioners Staback (D), O'Malley (D) and Wansacz (D) comprised the Board (2015 Board or Lame-duck Board).

In the 2015 election for County Commissioners, O'Malley ran for reelection, and Notarianni also ran as a Democrat. Laureen Cummings successfully ran as a Republican candidate. As a result of the election, the current Board is comprised of Commissioners O'Malley and Notarianni as Democrats, and Cummings as a Republican (Current Board). Commissioner O'Malley was the only Commissioner remaining from the 2015 Board after the election.

Before the Current Board assumed office on January 4, 2016, Don Frederickson served as County Solicitor, and John Brazil served as an assistant solicitor. After the 2015 election, Frederickson advised O'Malley he no longer wanted to serve as County Solicitor. Then–Commissioner Staback of the lame-duck Board, executed a hiring form, which Commissioner O'Malley also signed, appointing Brazil as County Solicitor. Pursuant to their written approval, Brazil was to start on December 29, 2015, before the Current Board took office. Brazil then named Frederickson an assistant solicitor.

The Board did not appoint a County Solicitor at the reorganization meeting held after the Current Board's installation on January 4, 2016. Also, the position of Chief Clerk was not filled at the reorganization meeting. Subsequent

to assuming office, Commissioners O'Malley and Cummings approved the appointment of Andy Wallace to serve as Chief Clerk, by signing a hiring form.

***2** As sole Republican commissioner, Cummings appointed John Cerra as Minority Solicitor. The County consistently construed the term Minority Commissioner in the Charter as meaning the member of the minority party.

Historically, the County made appointments to county positions by obtaining written assent of two of the three Commissioners on a hiring form. See Tr. Ct., Slip Op., 4/6/16, Finding of Fact (F.F.) No. 28. The County consistently followed this long-standing practice for solicitorships and other hires. The Board does not vote on hires or appointments at public meetings, believing such executive functions are not subject to public meeting requirements. F.F. No. 15.

B. Procedural History

In January 2016, Appellants filed a two-count complaint against Appellees, comprised of: two members of the Current Board, (Democrat O'Malley and Republican Cummings); outgoing Commissioner Staback; certain county officials (County Solicitor Brazil, Assistant Solicitor Frederickson, Minority Solicitor Cerra, and Chief Clerk Wallace) (collectively, County Officials); and, the Lackawanna County Salary Board (Salary Board). The pleadings allude to backroom politics, deceptive behavior, secret deals, and appointments made in violation of public meeting requirements.

In Count I for Injunctive Relief, Appellants alleged the County Officials' appointments violate the Sunshine Act, the County Charter, and the prohibition against "lame-duck" commitments. Alleging that the remedy under the Sunshine Act is injunctive relief, that there is no adequate remedy at law, and that continued service by County Officials will cause irreparable harm, Appellants requested the trial court remove County Officials from their positions.

In Count II for Declaratory Judgment and Mandatory Injunction, Appellants sought a declaration that County Officials' appointments are improper and, thus, void. Appellants also asked the trial court to declare Notarianni the Minority Commissioner with the right to appoint a Minority Solicitor, and to direct the Salary Board to fund the Minority Solicitor that Notarianni appoints.

In January 2016, Appellants also filed the petition for injunctive relief, mandatory injunction and declaratory judgment at issue here (Petition). Therein, Appellants alleged there is no adequate remedy at law and that County Officials' continued service causes irreparable harm. As to Notarianni they assert:

> [S]ince Mr. O'Malley [D] and Ms. Cummings [R] have aligned themselves to assume the Majority role, Mr. Notarianni [D] must be deemed the Minority Commissioner so that he [may] be granted the opportunity to appoint his own solicitor under the ... Home Rule Charter and so that he may serve as a true 'watchdog' for the taxpayers of Lackawanna County.

Appellants' Br. at 11; Reproduced Record (R.R.) at 67a.

After holding a hearing on the Petition, in April 2016, the trial court denied Appellants' requested relief. In its 30–plus page opinion, the trial court made 80 findings of fact. It reasoned that Appellants did not show irreparable harm in allowing County Officials to continue their service, and it determined their removal "would cause much greater harm than good [because] [a]ll positions render important services to the [Board] and to the citizens of Lackawanna County." Tr. Ct., Slip Op. at 33 (unnumbered). The trial court emphasized it was "compelled to point out that each one of these [County Officials] were agreed upon by hire by two of the then serving [Board]—a majority" in that two of the three sitting commissioners agreed to the hires. Id.

***3** As to Appellants' claim that appointments made outside a public meeting are void, the trial court noted that County employment decisions do not qualify as "official action" under the Sunshine Act, based on Maloney v. Lackawanna County Commissioners (C.P. Lackawanna, No. 2004 Civil 339, filed February 18, 2004), 2004 WL 5175141. This Court affirmed, adopting the trial court's "comprehensive opinion." Maloney v. Lackawanna Cnty. Comm'rs (Pa. Cmwlth., No. 633 C.D. 2004, filed October 6, 2004) (unreported), Slip Op. at 4.

As to the Minority Commissioner claim, the trial court explained the historical construction of that term in the Charter referred to the minority party. Accordingly, Notarianni, as one of two Democrats on the Board, did not qualify.

Appellants appealed the denial of preliminary injunctive relief. [2]

II. Discussion

Appellants seek mandatory relief to: (1) remove County Officials because they were appointed outside a public meeting in violation of the Sunshine Act and the Charter, and as to the Chief Solicitor and his assistants, by a lame-duck Board; and, (2) declare Notarianni as the "Minority Commissioner" based on a voting bloc of the other two commissioners in appointing officials that Appellants seek to remove. Appellants claim the County Officials' appointments are void, and constitute irreparable harm as violations of law. Appellants contend a preliminary injunction is necessary to protect the public's trust in government. With regard to their Minority Commissioner claim, they assert Notarianni's designation is necessary to serve the needs of his constituents.

A. Legal Standards

In order to obtain preliminary injunctive relief, Appellants must establish six prerequisites as to both the improper appointment/removal claim *and* the Minority Commissioner claim. The six elements are: (1) a clear right to relief; (2) immediate and irreparable harm in the absence of an injunction; (3) restoration of the status quo; (4) no adequate remedy at law exists and the injunction is appropriate to abate the alleged harm; (5) greater injury will result by not granting than by granting the injunction; and, (6) the preliminary injunction will not adversely affect the public interest. Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mount, Inc., 828 A.2d 995 (Pa. 2003). The absence of any one of the six prerequisites is grounds to deny injunctive relief. Lee Publ'ns, Inc. v. Dickinson Sch. of Law, 848 A.2d 178 (Pa. Cmwlth.) (en banc), appeal denied, 857 A.2d 675 (Pa. 2004) (Sunshine Act context).

When reviewing a trial court's order as to a preliminary injunction, "appellate courts must engage in a review of the record and provide some discussion of the reasons for reversing a trial court's order granting or denying a preliminary injunction ...." Reed v. Harrisburg City Council, 927 A.2d 698, 705 (Pa. Cmwlth. 2007). Our "review is limited to determining whether the record demonstrates any apparently reasonable grounds to support the trial court's decision." Id. (emphasis added); see also Giant Eagle Mkts. Co. v. United Food & Commercial Workers Union, 652 A.2d 1286 (Pa. 1995). Stated differently, "[o]ur review of a trial court['s] order is limited to examining the record for an abuse of discretion." Watts v. Manheim Twp. Sch. Dist., 84 A.3d 378, 391 (Pa. Cmwlth. 2014), aff'd, 121 A.3d 964 (Pa. 2015). We do not inquire into the merits. Id.

***4** Further, in commanding the performance of an affirmative act, a mandatory injunction "is the rarest form of injunctive relief" and an extreme remedy. Wyland v. W. Shore Sch. Dist., 52 A.3d 572, 583 (Pa. Cmwlth. 2012). Because mandatory injunctions are issued more sparingly than prohibitory injunctions, Mazzi v. Commonwealth, 432 A.2d 985 (Pa. 1981), courts apply greater scrutiny. Purcell v. Milton Hershey Sch. Alumni Ass'n, 884 A.2d 372 (Pa. Cmwlth. 2005). Accordingly, "[t]he case for a mandatory injunction must be made by a very strong showing, one stronger than required for a restraining-type injunction." Wyland, 52 A.3d at 582. However, "[w]hile the standard is greater for a mandatory injunction, the primary elements of clear right, irreparable harm, retaining the status quo and preventing greater injury are the same ...." Id. at 583.

Here, the relief Appellants request is both preliminary and mandatory: (1) removal of County Officials as improper appointees; and, (2) designation of Notarianni as Minority Commissioner so he may appoint the Minority Solicitor.

B. Likelihood of Success

As the moving party, Appellants must establish a clear right to relief. However, in terms of an injunction, Appellants need not prove the elements of the underlying claim to show a reasonable likelihood of success on the merits. SEIU Healthcare Pa. v. Commonwealth, 104 A.3d 495 (Pa. 2014). Our Supreme Court explained that where the other elements for a preliminary injunction are shown, a moving party "need only demonstrate that substantial legal questions must be resolved to determine the rights of the parties." Id. at 505 (emphasis added) (citing Fischer v. Dep't of Pub. Welfare, 439 A.2d 1172 (Pa. 1982)).

1. Alleged Improper Appointments

Appellants challenge the legality of the following appointments: Brazil as County Solicitor, and his naming of Frederickson as assistant solicitor; Wallace as Chief Clerk; and, Cerra as Minority Solicitor. Appellants assert the Sunshine Act requires public meetings for appointments of high-ranking county officials. They argue the written assent for appointment amounts to a vote that qualifies as official action under the statute and the Charter. Because County Officials were not appointed during a public meeting, Appellants contend their appointments are void, mandating their removal from office.

Appellees maintain that neither the Charter nor the Sunshine Act expressly requires hiring decisions to be made at public meetings. In addition, Appellees cite Maloney to support the trial court's analysis of the Sunshine Act.

a. Public Meeting Requirement

There is no dispute that County Officials' appointments were effected by written assent of two commissioners on a hiring form, outside a public meeting. Appellants assert this lack of openness is grounds to void their appointments, and remove them from office.

The Sunshine Act upholds "the right of the public ... to witness the deliberation, policy formation and decision[-]making of agencies [as such is] vital to the enhancement and proper functioning of the democratic process." 65 Pa. C.S. § 702. It confers a right on citizens "to attend all meetings of agencies at which any agency business is discussed or acted upon ...." Id.

To that end, with certain exceptions, the Sunshine Act requires an agency to conduct "official action and deliberations by a quorum ... at a meeting open to the public." 65 Pa. C.S. § 704. "Official action" is defined as:

> (1) Recommendations made by an agency pursuant to statute, ordinance or executive order.
>
> (2) The establishment of policy by an agency.
>
> (3) The decisions on agency business made by an agency.
>
> ***5** (4) The vote taken by any agency on any motion, proposal, resolution, rule, regulation, ordinance, report or order.

65 Pa. C.S. § 703 (emphasis added).

There is no provision contained in the Sunshine Act that specifies the hiring or appointment of a county employee constitutes "official action." Id.

Like the Sunshine Act, the Charter requires all Board meetings to be open to the public. Charter, § 1.3–304. Section 1.3–302(j) of the Charter grants the Board the power "to appoint or confirm, as the case may be, officers and employees as provided by [the] Charter, by ordinance or state law." R.R. at 411a. One such appointment is that of County Solicitor, who in turn, appoints assistant solicitors. Charter, § 1.15–1503(a); R.R. at 427a. The method of appointment, including the necessity for a meeting, is unspecified.

Appellants contend the public meeting provisions in both the Charter and the Sunshine Act require appointments to occur during a public meeting. They argue the trial court committed an error of law in determining the hiring of county employees is not official action subject to the Sunshine Act. Specifically, they assert "[Appellees] violated the Sunshine Act when they did not return to a public meeting to vote" on the appointments. Appellants' Br. at 9–10.

In determining that the hiring of county employees is not official action under the Sunshine Act, the trial court relied on Maloney. In Maloney, the trial court denied a petition for injunctive relief of county employees alleging the Board illegally terminated their employment, and held the Sunshine Act did not apply to their terminations. The trial court distinguished between policy-making or legislative decisions, which require openness, and executive or administrative decisions, such as those relating to an individual's competence, which do not.

This Court affirmed the trial court's decision in Maloney, holding that the termination of County employees did not qualify as official action, and so did not require a public meeting for validity. This Court's adoption of the trial court's reasoning in Maloney, that local government would be paralyzed by the need to undertake all hiring and firing of County employees at public meetings, is sound and offers reasonable grounds to uphold the trial court's order denying relief here.

However, Appellants contend Maloney does not apply because the courts did not consider the vote component of Section 703(4) of the Sunshine Act, 65 Pa. C.S. § 703(4). Official action only includes votes on "any motion, proposal, resolution, rule, regulation, ordinance, report or order." Id. Appellants cite nothing to indicate an appointment fits within one of those submissions.

Significantly, Appellants challenge the lack of a vote as to the appointments in a public meeting, not the discussion leading to the appointments. The Sunshine Act permits discussion of personnel matters outside public view, in executive session. 65 Pa. C.S. § 708(a)(1);[3] Dusman v. Bd. of Dirs. of Chambersburg Area Sch. Dist., 123 A.3d 354 (Pa. Cmwlth. 2015). Such matters expressly include appointments.[4] Further, to the extent a public vote is required to validate the appointments, that flaw may be cured by conducting the vote in a public meeting. Smith v. Twp. of Richmond, 82 A.3d 407 (Pa. 2013).

***6** Appellants emphasize that the appointments require two written assents of the Commissioners under the Charter; these assents qualify as "votes." Yet, Appellants identify no legal support for their contention that a written assent is equal to a vote, and the Charter does not so specify. Further, "votes" must occur at public meetings only when they pertain to certain submissions like motions and resolutions. Thus, while the claim is colorable, their right is less than clear.

Moreover, the trial court recognized that it has been a long-standing practice to carry out county appointments by the written assent of at least two board members on forms usually generated by the personnel office. In that regard, the trial court determined, even if there was a violation of the Sunshine Act, the law did not require it to set aside the appointments at issue because the decision as to invalidating action at an unauthorized meeting was within its discretion. See 65 Pa. C.S. § 713 (providing as to business transacted at an unauthorized meeting that, "[s]hould the court determine that the meeting did not meet the requirements of this chapter, it may in its discretion find that any or all official action taken at the meeting shall be invalid.").

Appellants also suggest the appointment of "higher ranking officials," like County Officials, must take place in a public meeting, because that qualifies as official action. However, they cite no case law in support. Cf. Taylor v. Borough Council Emmaus Borough, 721 A.2d 388 (Pa. Cmwlth. 1998) (stating in *dicta*, that after closed investigation, the act of firing employee would constitute official action).

Case law holding that hires of high-ranking officials need to occur in a public meeting is limited to the hiring of superintendents of school districts. Further, the analysis turned on the fact that the agencies involved were school districts subject to the Public School Code of 1949,[5] and the hires at issue had contracts. See Preston v. Saucon Valley Sch. Dist., 666 A.2d 1120 (Pa. Cmwlth. 1995); Morning Call v. Bd. of Sch. Dirs., 642 A.2d 619 (Pa. Cmwlth. 1994).

Relevant here, in Preston, this Court reasoned that the vote on a superintendent's contract and salary increase needed to occur in a public meeting. However, in addition to Section 508 of the Public School Code, we held the hiring of a superintendent constituted official action under the Sunshine Act (then 65 P.S. § 278).[6] Out of context, Preston may support that, to be valid, a hiring decision of a high-ranking official must occur in a public meeting. In context, it matters that a superintendent is hired by contract that requires a vote at a public meeting for approval. Entering a contract is a decision on agency business, i.e., official action.

The essence of official action is its connection to agency business. The Sunshine Act defines "agency business" as: "[1] the framing, preparation, making or enactment of laws, policy or regulations[;] [2] the creation of liability by contract or otherwise[;] or [3] the adjudication of rights, duties and responsibilities, but not including administrative action." 65 Pa. C.S. § 703. "Administrative action" is defined as: "[t]he execution of policies relating to persons or things as previously authorized or required by official action of the agency adopted at an open meeting of the agency[,] ... not [including] the deliberation of agency business." Id.

***7** In sum, cases holding that hires by contract constitute official action do not necessarily apply to hires by appointment. Nor do they hold that all hires are official actions requiring a vote. Agency business expressly includes contracts as a basis for official action, whereas appointments of County Officials, all of whom are at-will, do not fall neatly within any of the three categories.

Arguably, appellate authority is split as to whether hiring and firing decisions must be approved by a vote in a public meeting. Compare Maloney with Morning Call and Preston. Thus, we are not persuaded that Appellants established a

likelihood of success on the merits as to a violation of the Sunshine Act.

b. Lame–Duck Appointees

Appellants also argue a predecessor board may not bind its successor, under the precedent established in Lobolito, Inc. v. North Pocono School District, 755 A.2d 1287 (Pa. 2000). In Lobolito, our Supreme Court determined that an agreement to build a new school, entered by a school board at the expiration of its term, did not bind the successor board. The Court reasoned that a lame-duck board "cannot enter into a contract which will extend beyond the term for which the members of the body were elected." Id. at 1289.

This Court extended this prohibition against binding successors to the employment context in Borough of Pitcairn v. Westwood, 848 A.2d 158 (Pa. Cmwlth. 2004). There, we reasoned an appointment of a police chief encompasses a governmental function. Thus, the governing body's attempt to bind a successor body was unenforceable and contrary to public policy. Significantly, we held the appointment was illegal from the outset, and so voided the employment contract.

The prohibition against a lame-duck body making an eleventh-hour appointment is predicated on the binding nature of the decision on a successor body. Appellants cite no case law expanding this principle to at-will employees.

Here, the only appointment challenged on lame-duck grounds is that of County Solicitor, who then selects assistant solicitors. When appointed to start on December 29, 2015, John Brazil was already serving with Don Frederickson as an assistant solicitor. The lame-duck appointment substituted Brazil for Frederickson as County Solicitor, and moved Frederickson to assistant solicitor. At the reorganization meeting held on January 4, 2016, following the installation of the new Commissioners, no appointment of County Solicitor was held.

Appellants' argument that Lobolito offers grounds to invalidate the Solicitor's appointment as a lame-duck attempt to bind a successor board is unpersuasive. Appointees, per the County Code, are subject to removal by the appointing authority at-will. 16 P.S. § 450(b).[7] Unlike a contract, appointments to at-will positions do not have binding effect. Regardless, under Lobolito, a successor board is free to rescind a contract when it was entered by a lame-duck predecessor.

Though not cited by Appellants, this Court held lame-duck appointments to non-vacant positions are invalid in Ross Township v. Menhorn, 588 A.2d 1347 (Pa. Cmwlth. 1991). There, six days before the organizational meeting of the new board, the lame-duck board met and appointed individuals to certain positions, which were to become effective the day before the organizational meeting, because no vacancies existed until then. At the organizational meeting, the new board rescinded the lame-duck appointments and replaced the appointees. The new appointees commenced an action in *quo warranto*, seeking a declaration as to the rightful office holders. The trial court dismissed the action as to two lame-duck appointments based on "well settled past practices" since 1969. Id. at 1349. This Court reversed, reasoning: "Appointments to public positions ... where no vacancies existed are invalid, regardless of the past practices of the local municipality because an incumbent governing body lacks the power to appoint to positions where vacancies will not occur until after [its] term in office expires." Id. Thus, the start date and whether there was a vacant position at the time of the appointment is relevant.

***8** Here, County Solicitor Brazil and assistant solicitor Frederickson started while the Lame-duck Board remained in office, and before the Current Board assumed office. Frederickson asked to be replaced as County Solicitor. Further, after assuming office, the Current Board had an opportunity to make their own appointments at the reorganization meeting. Moreover, Appellants acknowledge the County Officials here serve at-will appointments, and so are not binding on the Current Board. The applicability of Lobolito is contingent on a lame-duck body creating long-term obligations, circumstances which are not present here.

2. Minority Commissioner

Asserting that Commissioners O'Malley (D) and Cummings (R) have aligned themselves so as to assume the majority role, Notarianni (D) asks to be deemed the Minority Commissioner based on their voting alliance. As a result, he claims that as Minority Commissioner, he is entitled to appoint his own solicitor, the Minority Solicitor, pursuant to the applicable provisions of the Charter. He also argues the Salary Board is required to fund the Minority Solicitor he appoints.

The trial court rejected Democrat Notarianni's assertion that he should be appointed Minority Commissioner. It reasoned that Commissioner Cummings (R), as Commissioner of the minority party, was the Minority Commissioner. Therefore, she had the right under the Charter to designate an assistant solicitor to give her legal advice. She appointed a Minority Solicitor pursuant to the Board's long-standing hiring practice. In addition, the trial court observed that the only indicia of any political alignment between Commissioners O'Malley and Cummings were the two appointment actions they undertook, which the court concluded did not render Notarianni a *de facto* Minority Commissioner.

Despite the County's long-standing, consistent practice of designating the commissioner of the minority party as the Minority Commissioner, Appellants proffer an alternate interpretation. Citing the Pennsylvania Manual for County Commissioners[8] in support, Appellants maintain the majority/minority role "is not determined exclusively by party." Manual (4th ed., Aug. 2015) at 8. Rather, that role may correspond to personality and personal philosophy that dictate voting blocs.

Our state Constitution does not address Minority Commissioner status. Notably, Article 9, section 4, "County government," does not mention a minority solicitor or commissioner. It merely provides: "Three county commissioners shall be elected in each county. In the election of these officers each qualified elector shall vote for no more than two persons, and the three persons receiving the highest number of votes shall be elected." PA. CONST., art. IX, § 4.

The sole authority for a minority solicitor in the present case is Section 1.15–1503 of the Charter, entitled "Legal Services." It states in pertinent part:

> The Board of County Commissioners shall appoint a County Solicitor who shall be the chief legal officer and attorney for the County government except for those elected offices already authorized a Solicitor. The County Solicitor shall appoint assistant solicitors in such numbers and at such salaries as shall be fixed by the Salary Board. One of these assistant solicitors shall be designated solely to give legal advice to the Minority County Commissioners, and shall be the appointment of the Minority Commissioner.

***9** R.R. at 427a (emphasis added). This provision does not show Appellants have a clear right to relief.

In part, Appellants claim Notarianni should be named Minority Commissioner because denying him counsel through the Minority Solicitor denies "the voters who overwhelmingly selected [him] [their] ability to govern with the benefit of competent[,] trustworthy legal counsel." Appellants' Br. at 20. Thus, his claim is predicated on serving those who voted for him, and whose interests are being marginalized because he is the Minority Commissioner and majority rules.

Although there are no decisions on point as to the meaning of "Minority Commissioner," our Supreme Court addressed the import of a county commissioner's party designation in Commonwealth ex rel. Teller v. Jennings, 186 A.2d 916 (Pa. 1963). There, our Supreme Court affirmed a trial court's dismissal of a district attorney's *quo warranto* action seeking a declaration that a county commissioner forfeited his right to office when he changed his party affiliation after being elected. The Jennings Court observed the purpose of the state constitution provision[9] dealing with the election of county commissioners was to encourage the *initial* representation of both major political parties. Once assuming office, a commissioner became the representative of *all* his constituents, "and not merely those who voted for him or happen to belong to his political party." Id. at 918.

We agree with Appellants that there is no requirement that the "Minority Commissioner" correspond to the commissioner affiliated with the minority party. Because commissioners may switch parties, or run as independents, the Board may not be comprised of a clear majority and minority by party. Indeed, the 2015 Board was comprised entirely of Democrats.

Because there is no definition of the term "Minority Commissioner," or case law construing same, the term is open to determination. Here, Appellants offer a reasonable construction of "Minority Commissioner" as one who is consistently in the minority, and out-voted by two-to-one, based on a voting bloc. That said, Appellants did not establish Notarianni's Minority Commissioner status based on a voting bloc on this record. At best, the alleged voting alliance is

comprised of two decisions to make two appointments, which may or may not have been in concert. To the contrary, Cummings exercised independent judgment in appointing Wallace. F.F. No. 74. To construe the term by reference to a voting bloc with no showing of an alliance, would subject the status of Minority Commissioner to constant change, potentially on a vote-by-vote basis.

In short, the trial court did not abuse its discretion in determining two appointments were insufficient to show a voting bloc that would render Notarianni forever in the minority, such that he and his constituents would be disadvantaged without specially designated counsel. Thus, Notarianni did not establish he qualified as Minority Commissioner under the Charter so as to have a clear legal right to appoint the Minority Solicitor.

C. Remaining Elements for Injunctive Relief

***10** Appellants were required to establish five prerequisites for preliminary injunctive relief, in addition to a clear right, or substantial legal question as to respective rights. SEIU Healthcare.

As to irreparable harm, this Court holds "[f]ailure to comply with an open government statute is sufficiently injurious to constitute irreparable harm." Grine v. Cnty. of Centre, 138 A.3d 88, 101 (Pa. Cmwlth. 2016) (en banc) (citing Patriot–News Co. v. Empowerment Team of Harrisburg Sch. Dist. Members, 763 A.2d 539 (Pa. Cmwlth. 2000) (injunction granted to prevent Sunshine Act violation)); see also SEIU Healthcare, 104 A.3d at 508 ("when conduct sought to be restrained violates a statutory mandate, irreparable injury will have been established.").

However, the alleged statutory mandate under the Sunshine Act that hiring or appointment actions constitute official action is less than clear. At best, there is a substantial legal question as to the requirement of a public meeting for hiring decisions or filling non-elected vacancies, such that irreparable harm is not established from a statutory violation. Appellants articulated no irreparable harm other than violating a non-express public meeting requirement.

Nonetheless, presuming Appellees violated the Sunshine Act by not appointing the County Officials in a public meeting, which statutory violation constitutes irreparable harm, Appellants must meet four other prerequisites for preliminary injunctive relief. This includes a requirement that denial of injunctive relief would cause greater harm than granting it. The trial court concluded the harms favored denying injunctive relief because removing the County Officials and creating vacancies would cause greater harm than letting the appointments stand. Tr. Ct., Slip Op. at 33. In support, the trial court noted Brazil served as an assistant solicitor under Frederickson. Notarianni admitted Frederickson's competence as a solicitor, and he offered no basis to believe that Brazil and Frederickson do not serve his interests.

Moreover, the harm Appellants allege to the public trust is speculative. Speculative harm is legally insufficient to support a preliminary injunction. Summit Towne Centre; Reed. The harm as articulated reflects Notarianni's self-interest as opposed to that of his constituents, who are not limited to his supporters. Jennings.

In addition, Appellants seek to alter the status quo, not maintain it. Notarianni did not have a Minority Solicitor, and the other solicitorships he challenges were in place before he took office. To remove the appointees would void the actions of a majority of the Current Board, in favor of one commissioner.

III. Conclusion

Because Appellants did not establish all six prerequisites to injunctive relief as to either their improper appointment or Minority Commissioner claims, and there are reasonable grounds to support the trial court's denial of the preliminary injunctive relief[10] sought, we affirm the trial court's order.

***11** Judge Hearthway did not participate in the decision in this case.

ORDER

AND NOW, this 12th day of April, 2017, the order of the Lackawanna County Court of Common Pleas is **AFFIRMED**.

All Citations

Not Reported in Atl. Rptr., 2017 WL 1337564

Footnotes

1 Because the Lackawanna County bench recused, Kenneth W. Seamans, S.J. of the Susquehanna County Court of Common Pleas presided.

2 Appellees also filed preliminary objections, which the trial court sustained in part and overruled in part in July 2016. The trial court dismissed the claims seeking removal of County Officials from office, holding a *quo warranto* proceeding offers the exclusive remedy. The trial court overruled the preliminary objections to the Minority Commissioner claims. Thus, Appellees filed an answer.

3 An agency may hold an executive session, closed to the public, "to discuss any matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of performance, promotion, or disciplining of any specific prospective public officer or employee or current public officer or employee employed or appointed by the agency, or former public officer or employee..." 65 Pa. C.S. § 708(a)(1).

4 We distinguished between an appointment and an election, connoting a vote, in Public Opinion v. Chambersburg Area School District, 654 A.2d 284 (Pa. Cmwlth. 1995). Applying its common usage, we defined "appointment" as:

> [t]he selection or designation of a person, by the person or persons having authority therefor, to fill an office or public function and discharge the duties of the same. The term 'appointment' is to be distinguished from 'election.' 'Election' to office usually refers to vote of people, whereas 'appointment' relates to designation by some individual or group.

Id. at 289 (citing BLACK'S LAW DICTIONARY 91 (5th ed. 1979)).

5 Act of March 10, 1949. P.L. 30, as amended, 24 P.S. §§ 1–101–27–2702. Section 508 of the Public School Code, 24 P.S. § 5–508, presupposed that when entering a contract of any kind, the school board would vote at a public meeting.

6 Section 8 of the Sunshine Act of 1986, Act of July 3, 1986, P.L. 388, repealed by, Act of October 15, 1998, P.L. 729.

7 Act of August 9, 1955, P.L. 323, as amended, 16 P.S. § 450(b).

8 Although the Manual is not in the record, it is publicly available. However, it focuses on the role as aligned with the minority party, stating the nominating and election mechanism assures each party has minority party representation.

9 Then article 14, Section 7 of the Pennsylvania Constitution is substantively the same as the current provision on County government, in article 9, Section 4.

10 Appellees also argued this Court should dismiss the appeal, except as to the surviving Minority Commissioner claim, because the trial court dismissed the counts relating to improper appointments. We decline to dismiss the action because this case involves matters of open government that are important to the public, capable of repetition, and yet evading review. Public Defender's Office of Venango Cnty. v. Venango Cnty. Ct. of Common Pleas, 893 A.2d 1275 (Pa. 2006).

End of Document

EXHIBIT C

TO PRELIMINARY OBJECTIONS

2004 WL 5175141 (Pa.Com.Pl.) (Trial Order)
Court of Common Pleas of Pennsylvania,
Civil Action - Law.
Lackawanna County

James P. MALONEY, Gerald T. Gaughan, of Rita Stella and Jerry Mulherin, Petitioners,
v.
LACKAWANNA COUNTY COMMISSIONERS: Robert C. Cordaro and A.J. Munchak, Respondents.

No. 2004 Civil 339.
February 13, 2004.

Memorandum and Order

Minora, J.

Background

Presently before the Court is a document entitled "Petition for Injunctive Relief Pursuant to the Sunshine Act."

Another filed document entitled Complaint also "...complains to this Honorable Court for Injunctive Relief and other Relief pursuant to the Sunshine Act..." In the Complaint, the wherefore clause prays for relief requesting "... that this Honorable Court issue an injunction *against the termination of the Plaintiffs and declare the termination invalid, award the Plaintiffs reinstated to their positions, award back pay and attorneys fees." Emphasis added.* Neither pleading, the Petition nor the Complaint, specifies the specific type of injunctive relief being requested, therefore, we elect to treat the Petition as a petition for preliminary or special injunction pursuant to the Sunshine Act and the Complaint as a request for permanent injunctive relief.

On January 27, 2004, Plaintiffs filed a "Petition for Injunctive Relief Pursuant to the Sunshine Act," which as indicated, we elected to treat as a request for preliminary or special injunctive relief.

The pleading essentially identifies the Petitioners and Respondents and alleges that all Petitioners were Lackawanna County employees that were unlawfully terminated by the Respondents upon Respondents assuming majority control of the Lackawanna County Board of Commissioners on January 5, 2004, significantly over three weeks before they filed the instant cause of action. All Petitioners were allegedly terminated by identical letters dated January 2, 2004, before the Cordaro-Munchak team took their oaths of office on Monday, January 5, 2004 as majority Commissioners. The letters were actually sent to Petitioners on the afternoon of January 5, 2004. It is further alleged that this chronology precluded the termination decision occurring at a public meeting and therefore, it is finally alleged that a violation of the "Sunshine Act" at 65 Pa. C.S.A. § 708 necessarily happened. In their prayer for relief, Petitioners pray that this violation entitled then to injunctive relief under Section 65 Pa. C.S.A. § 713 of the Sunshine Act. They finally pray for relief in their Petition requesting this Court, "*...issue an injunction against the termination of the Petitioners and declare the terminations void.*" *Emphasis added.*

The Sunshine Act, 65 Pa. C.S.A. § 713 states that, "The court may enjoin any challenged action until a judicial determination of the legality of the meeting at which the action was adopted is reached." Once again the specific type of injunctive relief is not spelled out in the statutory scheme, however, the wording suggests an injunction prior to a determination of a meetings' legality which suggests that the preliminary or special injunction standard ought to be applied. Accordingly, this Court will apply the

standards for a preliminary injunction as articulated in the Rules of Civil Procedure, Pa. R.Civ.Pro. 1531 and case law absent contrary guidance within the statutory scheme of the Sunshine Act. [1]

The Stipulated Facts and Issues

On January 30, 2004 at 10:00 a.m. a hearing was scheduled and held before the undersigned after a colleague had recused himself from the matter. At that time, the parties agreed upon a limited set of facts which all counsel stipulated to as governing this matter.

(1) A termination of the Plaintiff's employment with Lackawanna County took place; and

(2) The termination was done outside of the context of an open meeting.

At this same hearing, the Court, with the benefit of counsel, requested that the parties address certain issues that, at a minimum, all parties felt needed to be addressed.

(1) is an open meeting required for official action in terminating an employee from employment?

(2) If the answer to issue number one (1) is in the affirmative, must the enjoining allowed for violations of the Sunshine Act meet the elements of the traditional common law injunction or preliminary injunction or is there a statutory remedy provided for under the Act?

(3) If the answer to number one (1) is in the affirmative, would that then also require that the initial hiring also be done at an open hearing?

(4) is the adoption of a budget a sufficient public or official action to cure the Sunshine Act defects as alleged?

Finally, a briefing schedule was established. Respondents had already filed a brief, however, Petitioners requested until Wednesday, February 4, 2004 to submit their brief and Respondents were allowed until February 6, 2004 to file a rebuttal brief. Accordingly, this matter is now ripe for disposition by the Court.

Issue I

Is an open meeting required for official action in terminating an employee from employment?

Petitioner's Position

The Petitioner's argue that the answer to this issue is in the affirmative. They direct the Court to 65 Pa. C.S.A § 704 which mandates official action and deliberation by a quorum of the members of an agency shall take place at a meeting open to the public. They argue that the Lackawanna County Board of Commissioners (hereinafter "Board") is a covered agency under 65 Pa. C.S.A. § 703 pp. 321-323 and there seems little dispute from either side that the Board is a covered agency under the Sunshine Act.

Petitioners argue that having established that the Board is a covered agency and having established that as a public agency the Board must conduct their official actions at a meeting open to the public, Petitioners now argue that the employment matters herein are, in fact, official actions.

Petitioners say that official action is best defined under the definitions of agency business and of official action at *Id.* at pages 323-326. Under the official action definition at subparagraph B, official action is defined as, "The decisions on agency business made by an agency." We have already established the Board as an agency now we must look to the definition of agency business. The concept of agency business is defined as, "...the creation of rights, duties or responsibilities not including administrative action." See *Id.* at page 326.

Quite arguably hiring, firing and personnel matters can be construed as administrative in nature.

In the Webster's Third New International Dictionary, unabridged, the word administrative is defined to mean, "of, belonging to, proceeding from, or suited to administration." Administration is defined in relevant part: 2b as; "performance of executive duties: management, direction, superintendence;" 4a as, "the total activity of a state in the exercise of its political powers including the action of the legislative, judicial and executive departments: government;" 4b as, "the management of public affairs as distinguished from the executive or political function of policy making."

Returning to Petitioners argument, official action under the Sunshine Act at paragraph (3) is the only section which arguably applies: (3) The decisions on agency business made by an agency. 65 Pa C.S.A. § 703 at page 323. We then must proceed to the definition of agency business which states, "the framing, preparation, making or enactment of law, policy or regulations, the creation of liability by contract or otherwise or the adjudication of rights, duties or responsibilities, *but not including administrative actions.*" *Id.* at page 326. *Emphasis added.*

It is also arguable that the above referenced exclusion was meant to apply to the numerous administrative agencies within the Commonwealth of Pennsylvania and its political subdivisions, but once again diligent search of the statute does not provide the reliable guidance needed.

Respondent's Position

Respondent's claim that after exhaustively searching the case law of this Commonwealth, the only instances where the Sunshine Act was deemed to be applicable in the hiring or termination of employment was where some prerequisite accompanying statute required official public action in order to complete the employment-related task. Thus in the case of the School Code, public school superintendents must be appointed at a public meeting. See *Bologna v. St. Mary's Area School Board,* 699 A.2d 831 (Pa. Cmwlth. 1997) and *Preston v. Saucon Valley School District,* 666 A.2d 1120, 1122 which stands for the proposition that the salary of school superintendent must be voted upon at a public meeting per the school code.

Additionally, there is a considerable body of law that provides Civil Service laws require an open hearing in order to reduce rank or to discipline employees for misconduct. Once again accompanying statutes require the public convening of an agency which must then meet the dictates of the Sunshine Act. See *In Re: Appeal of Blystone,* 600 A.2d 672 (1991) and *Harrisburg v. Pickles,* 492 A.2d 90, 96 (1985).

Discussion

Before proceeding to the other issues, the Court believes that it is prudent to address the merits of the first issue because it represents the watershed or gateway issue leading into the remaining issues. For example, if an open meeting is not required, we need not address the remaining issues that flow from the first issue.

Our problem with the Petitioners' argument and position is rather straight forward. Looking at the Commonwealth of Pennsylvania as a covered agency or large municipalities such as the City of Philadelphia or the City of Pittsburgh where they have potentially thousands of employees, Petitioners would have us adopt the position that to lay off an employee not

covered by a collective bargaining agreement would require formal open meetings to both hire and fire under the most routine of employment circumstances imaginable.

That could potentially paralyze essential government functions and monopolize agendas with matters concerning personnel and administration that cannot be shown to dominate agendas elsewhere in this Commonwealth as the Petitioners would urge on Lackawanna County.

When dealing in a broad context such as this, it is often helpful to return to the public policy underlying any Act such as the Sunshine Act in order to refocus efforts on the case at issue. The Sunshine Act at 65 Pa. C.S.A. § 702 makes legislative findings and declarations at subparagraph (a). " Findings", the Act declares,

"The General Assembly finds that the *right of the public* to be present at all meetings of agencies and to witness *deliberation, policy formulation and decision making* of agencies is vital to the enhancement and proper functioning of the democratic process and the secrecy in public affairs *undermines the faith of the public in government* and the public's effectiveness in fulfilling its role in a democratic society." *Emphasis added.*

Curiously, the "Findings" speak to the right of the public and the faith of the public. While petitioners are surely members of that same "public", the findings of our general assembly do not speak to the subjective rights of individual members of the public, rather they speak to the rights and faith of the public in their collective sense and that collective body's role in our democratic society.

At 65 Pa. C.S.A § 702(b) entitled "Declarations" this view of the collective whole of the public is further supported when, "The General Assembly hereby declares it to be the public policy of this Commonwealth to insure that the rights of its citizens have notice of and the right to attend all meetings of agencies at which any agency business is discussed or acted upon as provided in this chapter."

Other cases support this view that the Findings and Notice refer to the public as the collective whole and not the subjective rights of its individual constituents.

In the case of the *Press-Enterprises, Inc. v. Benton Area School District,* 604 A.2d 1221 (Pa. Cmwlth. 1992), the court observed that the purpose of the Sunshine Act (old Act 65 P.S. § 272) is to give citizens the opportunity to observe the decision-making process of public agencies. Likewise in *Babac v. Pennsylvania Milk Marketing Board,* 584 A.2d 399 (Pa. Cmwlth. 1990) (old Act 65 P.S. § 277), the court observed that the purpose of the Sunshine Act is to insure the public's ability to witness and evaluate the actions of public officials and to allow the public to determine if it is being adequately represented; acts of deliberation, discussion and policy formulation as well as formal action require open meetings

Arguably, petitioners might allege this means the formal actions of employee termination must be done in public, however, one case guides this court to a contrary view. In the case of *The Morning Call. Inc. v. The Board of School Directors of the Southern Lehigh School District,* 642 A.2d 619 (Pa. Cmwlth. 1994), the court ruled the act of reducing the selection of school superintendent candidates from five (5) in number down to three (3) was properly done is executive session. This is even more significant because a provision in the school code mandated that the selection vote be in public. The court stated at page 623, "... the vote taken (to reduce the number of finalists from five to three) was a vote on a matter which was secondary to the ultimate matter being decided, and the Sunshine Act envisions that such a vote is a necessary component of the discussion that precedes true official action, especially where there is a need for privacy in considering candidates. "*We agree.*" Id. at page 623. *Emphasis added.* The court looked at the old purpose of the Sunshine Act at 65 P.S. § 272 which is quite similar to our present declarations and findings at 65 Pa. C.S.A § 702, "the Act reveals a clear distinction between the openness required of agencies with respect to their policy-making decisions and the confidentiality permitted them with respect to executive decisions about the character and competence of individuals." *Id.* at page 624.

Accordingly, the Commonwealth Court has drawn a clear distinction between matters of policy-making and matters of personnel This gains greater significance when viewed in the context of the accompanying statute the Public School Code of 1949 24 Pa C.S.A. § 5508 which dictates that, "One of these requirements is that the appointment of a district superintendent must be accomplished by the affirmative vote of the majority of the board of school directors and *that vote is recorded*" *Emphasis added.*

There exists a resounding absence. a void if you will, of any accompanying statute in the Petitioners case herein Additionally, their prayer for relief in both their Petition and their Complaint requests individual employment right vindication along with a remarkable absence of public policy findings and declarations dealing with the stated purpose of the Act by the General Assembly.

As was so cogently stated by the Honorable Judge Carpenter in the case of *Nearhood v. City of Altoona,* 96 EQ 4003, Blair County, 32 D.&C. 4th 97 (1996) at page 99,

"We do not believe that the Plaintiff's proposed use of the Sunshine Law as a basis for injunctive relief to protect his personal, private employment right is fundamentally sound. The Sunshine Law does not exist to vindicate the private rights of individuals in their employment."

Judge Carpenter goes on to state, "We view this as an action not contemplated by or within the purpose of the Sunshine Law. *Id.* at page 100-101.

This Court finds persuasive the opinions of the Commonwealth Court in *Morning Call, supra.* and its conclusion that the Sunshine Law reveals a clear distinction between policy-making decisions which require openness and executive decisions regarding an individual's character and competence which do not.

This Court further finds persuasive the opinion of Judge Carpenter in *Nearhood, supra.* wherein he concludes the Sunshine Law does not exist to expedite assertions of individual employment rights. Essentially, the *Nearhood* court concludes that to apply the Sunshine Law in a manner that advances individual employment rights as opposed to the common public rights is not "fundamentally sound." That, therefore, is how we characterize Petitioners use of the Sunshine Law as fundamentally unsound and therefore we deny their requested relief thereunder.

Issue II

Injunctive Relief

While our decision that the Sunshine Law does not apply in the context of this case effectively ends the matter, the Court has commented on the types of preliminary or special injunction which applies to the Petition and permanent injunction which we believe applies to the Petitioners' Complaint.

For that reason, we believe it to be appropriate to review the elements of required by a petitioner when seeking injunctive relief. Pennsylvania Rule of Civil Procedure section 1531 is entitled "Special Relief. Injunctions."

At subparagraph (a) it states,

> "A court *shall* issue a preliminary or special injunction only after written notice and hearing unless it appears to the satisfaction of the court that immediate and irreparable injury will be sustained before notice can be given or a hearing held, in which case the court *may* issue a preliminary or special injunction without hearing or notice."

In our case, notice was given and a hearing was held on January 30, 2004 with stipulations agreed upon and briefing schedules taking us until February 6, 2004 arranged.

Under Pennsylvania law, a preliminary injunction may only be granted by the Court if the following requirements are met by the party seeking the injunction:
1. a party seeking a preliminary injunction must show that an injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages;

2. the party must show that greater injury would result from refusing an injunction than from granting it, and concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings;

3. the party must show that a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct;

4. the party seeking an injunction must show that the activity it seeks to restrain is actionable, that its right to relief is clear, and that the wrong is manifest, or, in other words, must show that it is likely to prevail on the merits;

5. the party must show that the injunction it seeks is reasonably suited to abate the offending activity; and

6. the party seeking an injunction must show that a preliminary injunction will not adversely affect the public interest.

Summit Towne Ctr., Inc. v. Shoe Show of Ricky Mt., Inc., 573 Pa. 637, 828 A.2d 995, 1001 (2003) (citations omitted). The Pennsylvania Supreme Court has reiterated that a preliminary injunction is a "harsh remedy" and the "essential prerequisites" must be proven by the petitioner in order to be afforded relief. *Summit Towne Ctr.,* 828 A.2d at 1001 (citations omitted). All of the requirements must be established and if petitioner cannot meet one of the requirements, then the preliminary injunction should be denied. *Id.*

As shall be made evident herein, the Petitioners do not even allege these necessary threshold elements, let alone provide evidence to support them.

1. Petitioners cannot establish that they will suffer immediate and irreparable harm that cannot be adequately compensated by damages without the granting of the injunction.

The Petitioners do not set forth any immediate or irreparable harm that they will suffer that cannot be adequately compensated by damages. Any damages to them in the form of lost wages or benefits can be recovered in an action at law. They have not asserted and cannot assert any other irreparable harm. Even if there were some type of irreparable harm to the general public because of an alleged lack of open meetings that harm is not specific to these Petitioners. Consequently, they themselves have not suffered irreparable harm.

In addition, the three weeks of time that has elapsed since the terminations on January 5, 2004 until their filing date of January 27, 2004 mitigates against a finding of immediate harm to the Petitioners. Specifically, preliminary injunction relief is to address urgent matters which, if left. unaddressed, would result in *immediate* and irreparable harm. Over three weeks passed since the terminations and during that time, the Petitioners did not seek any relief for the alleged immediate and irreparable harm which they were apparently suffering.

2. Petitioners cannot show that greater injury would result from refusing an injunction than from granting it and that issuance of an injunction will not substantially harm other interested parties.

The Petitioners have not demonstrated that greater injury would result from denying the injunction than from granting it. They have not shown that they cannot be made whole by an adjudication by the court when the complaint is eventually filed and the matter ripe for resolution. In addition, they have not shown, nor can they show, that granting the injunction will not substantially harm other interested parties.

To the contrary, granting the injunction will only harm the County and County taxpayers by forcing them to pay for employees in positions determined to be eliminated due to the extreme budgetary concerns. As stated by the Honorable A. Richard Caputo of the United States District Court for the Middle District of Pennsylvania: [2]

In deciding a preliminary injunction, the Court must consider the harm to the non-moving party if an injunction is granted. Currently, the County is experiencing a budget deficit in excess of nine million dollars. In an attempt to save money, the County decided to no longer retain the positions that the Plaintiffs' occupied. Indeed, Commissioner Cordaro testified that the County will eliminate an additional one hundred net positions in the near future. Any additional unexpected costs will cause further strain on the budget, with the burden of the budget falling on the citizens of the County.
If any injunction were wrongly granted, the harm to the County would be primarily the cost of the salaries and benefits paid to the Plaintiffs If the County prevails at tnal, it is unlikely that the County will be able to recoup the salary and benefits paid to the Plaintiffs. It is unclear how long it will take to adjudicate this matter on the merits. Because the County is attempting to remedy the budget deficit, I find that the County would be worse off if the injunction were granted.

Wrightson, et al. v. Lackawanna Cty., et al., 04-0038, at p. 17 (M.D. Pa. 2004)(Caputo, J.). [3] Consequently, granting the injunction would substantially harm the County and the taxpayers of the County, and denying it would cause no greater harm to the Petitioners. [4]

3. The Petitioners cannot demonstrate that the injunction would restore the status quo as it existed immediately prior the alleged wrongful conduct.

Again, the Petitioners, at best. have alleged nothing more than a technical violation of the Sunshine Act. In fact, if they were correct and their terminations did violate the Sunshine Act, the status quo would still be that their positions would be subject to elimination and/or they would be terminated. They would merely be later terminated during a public meeting that complied with the alleged violations of the Sunshine Act,

4. The Petitioners cannot establish that the activity they seek to restrain is actionable, that their right to relief is clear, that the alleged wrong is manifest or that it is likely to prevail on the merits of the case.

Petitioners cannot meet this element because this court has already concluded they cannot demonstrate a violation of the Sunshine Act. The Sunshine Act was not designed to protect employees with their employment. Rather, the Act was intended to permit the public to "witness the deliberation, policy formulation and decision-making of agencies." 65 Pa. C.S.A. § 272. See also *Press Enterprise, Inc. v. Benton Area School District,* 146 Pa. Cmwlth. 203, 210, 604 A.2d 1221, 1225 (1992) (legislative intent in enacting Sunshine Act is to give citizens an opportunity to observe the decision-making process of public agencies)

As has been earlier stated after an exhaustive search of the case law in Pennsylvania, Respondents determined that the only situations where the Sunshine Act was deemed to be applicable in hiring or terminating employees was where some other accompanying statute required official public action in order to execute the needed action, such as in the case of public school

employees or civil service employees See *Bologna v. St. Mary's Area School Board.* 699 A.2d 831, 1997 Pa Cmwlth. LEXIS 375, 699 A.2d 831, 833 (1997) (appointment of superintendent must occur at public meeting pursuant to public School Code); *Preston v. Saucon Valley School District,* 1995 PA. Cmwlth. LEXIS 452, 666 A.2d 1120, 1122 (1995) (Salary of superintendent must be voted upon at a public meeting pursuant to Public School Code); *In Re: Appeal of Blystone,* 144 Pa. Cmwlth. 27, 600 A.2d 672 (1991) (civil service laws governed reduction in rank of a police chief to patrolman); *Harrisburg v. Pickels,* 89 Pa. Cmwlth. 155, 492 A.2d 90, 96 (1985) (civil service code of cities of the third class require hearing and order to discipline employees for misconduct).

In the instant case, we do not even have any request that the County Commissioners be required to follow the Sunshine Law in future proceedings. Clearly, this action and request for injunction have nothing to do with the Petitioners' interest in the greater common public's right to know but solely in protecting their own personal employment.

If one examines the language of the Sunshine Act as well, it is evident that terminations of employment, as well as other decisions regarding employment, need not be made in open, public meetings. Specifically, the Sunshine Act provides that "Official action and deliberations by a quorum of the members of an agency shall take place at a meeting open to the public ..." 65 Pa. C.S.A. § 704. Official action is defined as

1. Recommendations made by an agency pursuant to statute, ordinance or executive order.

2. The establishment of policy by an agency.

3. The decisions on agency business made by an agency.

4. The vote taken by an agency on any motion, proposal, resolution, rule, regulation, ordinance, report or order.

65 Pa. C.S.A. § 703.

Termination of an employee does not constitute a recommendation made by an agency pursuant to statute, ordinance or executive order Nor by any stretch of the imagination can termination of an employee be considered the establishment of policy. Finally, termination of an employee, particularly under the facts of this case, is not a vote taken on a motion, proposal, resolution, rule, regulation, ordinance, report or order. [5]

The only arguable question remains as to whether termination of an employee constitutes "decisions on agency business." At subparagraph (3), agency business is defined in the Sunshine Act as:

1. the framing, preparation, making or enactment of laws, policy or regulations:

2. the creation of liability by contract or otherwise; or

3. the adjudication of rights, duties or responsibilities, but not including administrative action

See 65 Pa. C.S.A. § 703. Termination of an employee does not constitute the framing, preparation, making or enactment of laws, policy or regulations. Likewise, termination of an employee does not constitute the creation of liability by contract or otherwise. Finally, termination of an employee does not constitute the adjudication of rights, duties and responsibilities. [6]

As noted, the Sunshine act provides that "deliberations" shall take place at a meeting open to the public. 65 Pa. C.S.A. § 704. Deliberations are defined as "[t]he discussion of agency business held for purpose of making decision." 65 Pa. C.S.A. § 703. As already discussed, the termination of an employee does not constitute "agency business."

Consequently, employee terminations need not be conducted in open meetings pursuant to the Sunshine Act, as we have earlier concluded.

Factually, it should also be noted that no acts relating to individual employment have been alleged to have been taken at past public meetings in Lackawanna County. This is true especially for the Petitioners who carry the burden of proof and have pled no minutes nor agendas of past meetings or past administrations. Neither decisions to hire or terminate nor votes on the same were alleged to have been made during public board meetings, relative to these individual Petitioners nor other employees.

That absence of factual pleading by Petitioners in both their Petition and Complaint is thunderous in its silence.

5. The Petitioners cannot demonstrate that the injunction that they seek is reasonably suited to abate the offending activity.

The Petitioners do not assert any interest on behalf of the public to have access to routine employment decisions made by the County. Consequently, they cannot argue that an injunction would abate what they allege to be illegal activity. This is due to the fact that their challenge, as noted earlier, sounds in the manner of their termination, rather than the right of the public to participate in the termination.

6. The Petitioners cannot demonstrate that the preliminary injunction will not adversely affect the public interest.

As noted, several of the terminations at issue were made in response to a devastating budget crisis that was faced by the new majority Commissioners. In finding that the granting of a preliminary injunction was not in the public interest, Judge Caputo relied, in part, in the budgetary crisis of the County and found that "[g]ranting the injunction will cause real and tangible impact on the County." Exhibit A at pg 18 However, he stated that "[n]ot granting the injunction, at worst, leaves the Plaintiffs with the ability to recover damages, and perhaps reinstatement." *Id.*

Resultantly then the answer to Issue II is that a party seeking injunctive relief for violations under the Sunshine Act must meet the traditional elements for a common law preliminary or special injunction and a permanent injunction as circumstances warrant Only such an interpretation gives life to the statutory scheme by providing it with standards and elements that must be proven to gain injunctive relief at the same time allows for a consistent and reconciled reading coexistence with the voluminous case law on this issue.

Issue III

With regard to this issue the entitlement to Sunshine Act relief was required to be found at Issue I. Since this necessary prerequisite has failed this Issue also fails and absent a compulsory accompanying statute no initial hiring need be done at an open hearing (Recall for example the hiring of the school superintendent, *supra.*).

Petitioners have conceded that in order for their position to be consistent. if a public action was required to fire employees then a public action would also be required to hire employees. Respondents position is that there was never in. Lackawanna County a history a hiring of county employees at a duly advertised Board of Commissioners meeting. Respondents essentially assert the negative, stating their position that these Petitioners were not hired at an open meeting and therefore they need not be fired at an open meeting.

Once again there is an absence of evidence by the Petitioners to the contrary. As the moving parties, the Petitioners did not bring in one set of official minutes from the Board of Commissioners nor one agenda showing that these hiring and termination matters were routinely considered at open Board of Commissioner's meetings.

Respondents would further argue that even if Petitioners are correct they were improperly hired, then they likewise were improperly paid and therefore equitably estopped from raising their claim herein.

Looking at this argument in its abstract however is not necessary, we have determined that the Sunshine Act, "does not exist to vindicate the private rights of individuals in their employment." *Nearhood, supra.* at page 100. As the Court in *Nearhood* further stated, "We do not believe that Plaintiff's proposed use of the Sunshine Law as a basis for injunctive relief to protect his personal, private employment right is fundamentally sound" *Id.* Therefore having made this determination, neither hiring not firing need be done at an open meeting.

Issue IV

If a Sunshine Law violation occurred would budget adoption by a sufficient public or official action to cure the defect as alleged?

We have already determined that no prerequisite Sunshine Act violation has occurred, however, if hypothetically it had, one could argue that adoption of the budget with sufficient detail and specific information could potentially cure the defects. Both sides seem in agreement on this, however, they diverge because Petitioners say it is possible conceptually but not so in this case. Conversely, Respondents say it was both possible and accomplished in this case.

There is no evidentiary record nor stipulation of facts present herein to adequately address the issue. Therefore, the Court would decline the need to address this issue when our earlier decision at Issue I has rendered this issue moot.

Conclusion

This task confronting the Court is not one sought nor relished No one likes to see people lose their employment especially when some of these Petitioners have been long term employees of Lackawanna County

It is beyond cavil that our County is in a desperate financial situation as has been very well described by Judge Caputo of the United States District Court for the Middle District of Pennsylvania In his case. *Wrightson et al v Lackawanna County et al.,* at 3:CV 04-0038. he clearly articulates this County's desperate financial situation. We acknowledge his opinion and its contribution to our work and incorporate it herein by reference as the Court's Exhibit A.

Despite the unpleasantness of the task at hand, this Court is both oathbound and duty-bound to follow the dictates of the law as it best views those dictates. In this case, the Court has made its best determination that the Sunshine Act should not and does not apply under the circumstances of their case. It has further concluded that the traditional elements of equity governing injunctions should apply to Sunshine Act litigation despite the statutory reference to injunctive relief without reference to those traditional elements of proof for injunction.

Using those elements, even if the Sunshine Act did apply, the Court would have felt compelled to deny the relief sought by Petitioners for failure to meet those injunction elements of proof. This would be so for two reasons: for the reasons we have articulated at Issue II in this opinion and for the reasons included in the scholarly opinion of Judge Caputo attached hereto as Exhibit A and incorporated be reference.

For all of these reasons, the Court must conclude, however, reluctantly, that the Petitioners have not established that the Sunshine Act should apply to the facts in this case regarding Petitioners termination of employment. Therefore, the relief sought by Petitioners is totally denied and dismissed.

ORDER

AND NOW TO WIT, this 18th day of February, 2004, the relief sought by the Petitioners herein is totally DENIED and DISMISSED.

BY THE COURT:

<<signature>>, J.

Footnotes

1 See Pa R Civ Pro 1531 This Court acknowledges finding one case that states that the Rule 1531 standards for injunctive relief under the Sunshine Act are not applicable See *Patterson v. DeCarbo,* 46 D &C 4th 148, 152 (2000) Our belief is this would leave us with injunctions without standards of proof or elements of proof contrary to appellate court cases. See *Captello v. Duca,* 672 A 2d 1373, 1376 (Pa. Super. 1996) which states that " [text illegible]it is clear that a preliminary injunction may be granted *only* when the moving party sufficiently carries that burden to establish the following five elements [text illegible] quoting Pa R Civ.Pro. 1531 *Emphasis added*

2 Judge Caputo presided over the preliminary injunction hearing for four other former county employees who were terminated on the same day as the Petitioners, also for budgetary reasons, and who sought a preliminary injunction to be reitsnated to their positions The matter is docketed at *Wrightson, et al v. Lackawanna [text illegible] et al,* 04-0038 (M D Pa 2004) (Caputo. J)

3 A copy of Judge Caputo's opinion is attached hereto as Exhibit A.

4 This is particularly true since the Petitioners are not disputing their actual terminations or the right of the County to terminate them, only the manner of their terminations [text illegible] that they were not done during a public meeting At most, the Petitioners are alleging a technical violation n of the Sunshine Act which, if true. could be readily remedied by renewing their terminations at a public meeting

5 I his category however woud be applicable it tormal action is tequited pursuant to some other statute. such as the public school code or the civil service code

6 Although one might argue that termination of an employee for disciplinary reasons is a type of "adjudication of rights", none of the Petitioners were terminated for disciplinary reasons, but solely due to budgeting constraints

End of Document