STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OTTAWA

ADELINE HAMBLEY,

Plaintiff,

v.

OTTAWA COUNTY,
a Michigan County; and
JOE MOSS, **SYLVIA RHODEA**,
JACOB BONNEMA, **LUCY EBEL**,
GRETCHEN COSBY, **REBEKAH CURRAN**,
ROGER BELKNAP, and **ALLISON MIEDEMA**,
Ottawa County Commissioners in their
individual and official capacities,

Defendants.

Case No: 23-7180-CZ

Hon. Jenny McNeill
Sitting by SCAO Assignment

BRIEF IN SUPPORT OF PLAINTIFF'S MOTION TO ENFORCE PRELIMINARY INJUNCTION AND FOR ORDER TO STAY DEFENDANTS' OCTOBER 24 TERMINATION HEARING

The Court of Appeals remanded this matter to this Court yesterday, October 12, 2023, after affirming this Court's declaratory judgment that Plaintiff Adeline Hambley is the Ottawa County Health Officer, and that she was such when Defendants illegally demoted her on January 3, 2023. Health Officer Hambley files this motion to enforce the Preliminary Injunction as amended that the Court of Appeals also affirmed. That requires a ruling from this Court on the "just cause" standard which applies at the hearing that Defendants have set for October 24, and a determination of the processes available to Hambley. To that end, Hambley seeks

a stay of the October 24 termination hearing planned by Defendants, which as currently planned, will be in violation of the Preliminary Injunction.

The Court of Appeals affirmed the grant of a preliminary injunction to Health Officer Hambley as it was amended by the appeals court, to permit Defendants to move to terminate Hambley only under the limited circumstances of "just cause" as found in MCL 46.11(n) and only if they adhere to the requirements of a fair hearing with all that due process requires.

Nonetheless, Defendants intend to hold a termination hearing starting on October 24, 2023, for Health Officer Hambley which, as Hambley's fact evidence will demonstrate, will not comply with MCL 46.11(n) or the preliminary injunction. For the reasons further explained below, Hambley requests that this Court stay a termination hearing until the parties can present evidence on Plaintiff's motion for an order to enforce the preliminary injunction and until this Court can rule on what is required at that hearing under MCL 46.11(n).

Moreover, Defendants also have stated that they intend to file an application for leave to appeal with the Michigan Supreme Court, seeking the ability to challenge the Court of Appeals' ruling agreeing with this Court that Adeline Hambley is the duly-appointed Health Officer for Ottawa County. Since that is the position they take, which would again indicate that Defendants do not believe that they need to have a hearing under MCL 46.11(n), Hambley seeks a stay of the October 24 hearing until the Supreme Court determines whether to grant the application. Hambley should not have to go through the hearing when Defendants assert "it doesn't really matter" because of their litigation position continuing to

challenge this Court and the Court of Appeals on her status as Health Officer.

Accordingly, Health Officer Hambley respectfully requests that this Court: (1) hear legal arguments on Hambley's motion to enforce the preliminary injunction on Friday, October 20, 2023; (2) enter a stay of the October 24 County termination hearing of Hambley until the parties can have an evidentiary hearing in this Court pertaining to the fact questions in Hambley's motion to enforce the preliminary injunction; and until the Michigan Supreme Court rules on Defendants' forthcoming application for leave to appeal.

BACKGROUND[1]

On April 18, 2023, this Court issued an opinion and order denying Defendants' motion for summary disposition, awarding partial summary disposition to Health Officer Hambley, and granting a preliminary injunction prohibiting defendants from removing Hambley until trial in this matter (to be held within six months under MCR 3.310). Defendants then filed an application for leave to appeal with the Michigan Court of Appeals, which halted the case in this Court until now.

On June 6, 2023, the Court of Appeals granted the application to appeal on: (1) whether Hambley was the duly-appointed health officer for Ottawa County; and (2) whether preliminary injunction was correctly entered. The order granting leave to appeal vacated the portion of the injunction stopping Defendants from acting under MCL 46.11(n) to remove Plaintiff until trial. But the appeals court order on the preliminary injunction, which was affirmed yesterday, made clear that

[1] Plaintiff incorporates by references the statements of facts included in her previous briefs filed with this Court.

Defendants could remove Health Officer Hambley ***only*** in the limited circumstances under MCL 46.11(n), i.e., for "just cause," and when fair, due processes are given.

While appeal was pending, Defendants continued to retaliate against Health Officer Hambley. Most recently, Defendants have retaliated against Hambley because she communicated directly with the public about Defendants' plans to slash the County public health budget and by attempting to cut her out of the last-minute multiple revisions of the Health Department budget entirely. Defendants approved the budget for fiscal year 2023-2024 at a public hearing on September 26, 2023. At 11:00 p.m., while the hearing was still ongoing, Defendants' attorney forwarded Defendant Joe Moss's unilateral Notice of Hearing for October 19 to fire Hambley.

On October 10, 2023, Commissioner Doug Zylstra noted at a Board meeting that Defendant Moss's unilateral termination hearing notice failed to comply with MCL 46.10. The Commission eventually voted in a split decision to re-notice the hearing.[2] (See Oct. 10, 2023 Meeting Video, found at https://www.youtube.com/watch?v=luKxteqm6uE&list=PLyDvvIv66xGdxnFV8qE1q-mhjSDl32WsD&index=1.) This occurred, however, only after Defendant Moss declared a "recess," which lasted more than 90 minutes, during which it appeared that commissioners in the Ottawa Impact ("OI")-affiliated majority met out of public view. At least one fellow commissioner accused them of meeting during the recess in secret in violation of the Open Meetings Act – and two Commissioners then denied

[2] The hearing eventually changed to October 24, 2023, because Hambley's counsel had an insurmountable conflict in another case on the first amended date of October 23, 2023.

denying that they were speaking in a "quorum." (See 10/10/2023 Board Meeting Video at 2:39:21 – 2:40:14.) This, of course, is not enough to determine whether the OI majority violated OMA during this 90-minute "recess," since it is well-established that utilizing a round-the-table discussion with sub-quorum groups also violates OMA. E.g., *Booth Newspapers, Inc. v. Univ. of Mich. Bd. of Regents*, 444 Mich 211, 216-17, 227-31 (1993). When the meeting resumed after the recess, county corporate counsel indicated that "we" have decided to re-notice the hearing to a different date, even though the Board had yet to discuss it in the open meeting. (See *id.* at 2:38:44 – 2:39:10.)

Defendants have also made multiple statements since June giving rise to only one conclusion: that the termination hearing for Health Officer Hambley will not comply with MCL 46.11(n) because it is a pre-determined sham proceeding. As one example, on September 28, 2023, the day after Defendant Moss filed the first Notice, he participated in an interview with Justin Barclay, a radio show host. (Ex 1, 9/28/23 Unofficial, Excerpted Tr of Moss Interview; see posted copy of video at https://twitter.com/i/status/1707560848871309651, last accessed 10/9/2023.) In that interview, Barclay describes how OI candidates intended to install their own candidate as health officer when they first took office. Defendant Moss states that although it had taken longer to terminate Hambley than people would expect, Defendants were attempting to "cross [their] T's and dot [their] I's," and "do things the right way." Defendant Moss indicated that their candidate Nate Kelly was waiting in the wings; Moss explained that Defendants voted to appoint Kelly in January, but that Defendants had to "work through [some] details" because

Hambley had sued. (Ex. 1.) On October 9, 2023, 2023, Fox 17 reported that MDHHS confirmed that Defendants submitted an application seeking state approval for Nate Kelly, on September 29, 2023, two days after Defendant Moss filed the Notice to terminate Health Officer Hambley. (See https://www.fox17online.com/news/local-news/lakeshore/ottawa/ottawa-county-readies-new-interim-health-officer-if-hambley-is-removed, accessed Oct 12, 2023.)

Among other similar admissions, on June 7, 2023, the day after the Court of Appeals amended the preliminary injunction, WZZM TV-13 interviewed Defendants' attorney David Kallman on what that amendment meant for Defendants. Kallman indicated it was good news and said, "I think that the board wants to exercise its authority and **bring someone on board that they're comfortable with**." (WZZM TV-13 Broadcast, June 7, 2023, found at https://www.wzzm13.com/article/news/local/ottawa-county/michigan-state-appeals-court-vacates-order-health-officer/69-2d2c3082-079f-4d78-b432-d1ae55f2eba3, at 00:29-00:35 [emphasis added].) Terminating Health Officer Hambley in order to "bring someone on board that they're comfortable with" is directly contrary to the requirements of MCL 46.11(n) – as well as the independence provided by the Public Health Code. It is also exactly the scenario that the preliminary injunction aimed to prevent, and which the appeals court affirmed as amended.

Yesterday, on October 12, 2023, the Court of Appeals issued its opinion as previously noted and remanded the case to this Court to resume proceedings. Thereafter, Defendants' counsel sent Hambley's lawyer a list of "Procedures" that would be implemented for the termination hearing, which, as previously announced,

include use of a retired judge that Defendants solely selected (who hails from Defendants' home jurisdiction), even though the judge will apparently have no power to enforce Rules of Evidence – since those will not be used. The judge will make no decisions. Use of a retired judge that Defendants hand-selected is merely theater to attempt to give the proceeding the look of a fair hearing. Defendants are also requiring Hambley and her lawyer to disclose all witnesses and evidence to them in advance, without the reverse advance notice of the entirety of Defendants' case. Defendants have also forbidden Commissioners from being called as witnesses, even though some of them clearly have information directly relevant to Hambley's claim that the firing was intended from day one and does not provide the required "just cause" to terminate.

Finally, Defendants' counsel has told both Fox 17 and the Holland Sentinel that Defendants will go to the Michigan Supreme Court to seek leave to appeal the holding that Hambley is the lawful Health Officer, but that they **also** intend to hold the termination hearing. (E.g., S. Leach, "Court of Appeals: Hambley is rightful health officer, board may fire her," 10/12/2023 Online version, found at https://www.hollandsentinel.com/story/news/politics/courts/2023/10/12/court-of-appeals-hambley-is-rightful-health-officer-board-may-fire-her/71152633007/.) According to the article:

> … Mr. Kallman said even if Hambley is removed from her position prior to filing with the high court, his clients plan to proceed on the principle in dispute.
>
> "What we're concerned with here is what they've ruled in terms of the (Open Meetings Act) and resolutions and minutes and things like that," he said. "So it goes beyond just this particular case and scenario

with Ms. Hambley."

> When asked why a termination hearing is necessary, given that the board's position is that Hambley was never properly appointed to the role, Kallman said: "Missy [sic] Hambley's position has been all along that she has held the office as the permanent health officer. And it's the board's position she was interim. Frankly, **I think it doesn't matter. ... Whether it's interim or full, they're still gonna hold their hearing. So what difference does it make?**"

(*Id.* [emphasis added].)

ARGUMENT

I. MCL 46.11(n) protects Health Officer Hambley from arbitrary termination and requires actual finding of "just cause" to legally fire her.

Under MCL 46.11(n), Hambley may be terminated only under the limited circumstances specified, i.e., for "just cause." The entire purpose of providing "just cause" termination subject to due process was to prevent exactly this type of termination at the sole pleasure of the Board. See, e.g., MCL 46.11(n) (listing particular grounds for termination). As such, Hambley is not an at-will employee, but is instead protected by the "just cause" standard for termination. "Just cause" does not mean any reason that Defendants can put together as a sham justification.

Under Michigan law, whether "just cause" is established by the factfinder is subject to judicial review. *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 621 (1980). The role of the factfinder will differ depending on the circumstances. *Id.* at 622. If the employer claims the employee was discharged for specific misconduct and the employee denies that conduct, the first question of fact is whether the employee committed the conduct. *Id.* Where the employer asserts the employee was discharged for a reason, and the employee claims it was actually a

different reason, the finder of fact must determine the actual reason. *Id.* "The jury is always permitted to determine the employer's true reason for discharging the employee." *Id.* The jury's role is to determine whether the employer actually had a rule or policy, which was consistently enforced, and whether the employer was actually discharged for violating it. *Id.* at 624.

As the Michigan Court of Appeals explained in an unpublished opinion considering "just cause" under the Veterans Preference Act, which was the statute upon which MCL 46.11(n) was based, the "just-cause is defined under the VPA in this case and incudes 'official misconduct' and 'habitual, serious, or willful neglect in the performance of duty.'" *Rose v. Houghton Lake Ambulance Serv.*, No. 24327, 2004 Mich. App. Lexis 719, at *12-13 (Ct. App. March 16, 2004). In reviewing an employer's decision to terminate under the VPA, courts look to whether the decision was supported by "competent, material, and substantial evidence." *Grant v. Meridian Charter Twp.*, 250 Mich. App. 13, 18 (2002).

Under the evidence currently available to her without benefit of litigation discovery, and the face of the Notice of Hearing, Defendants cannot establish this "just cause" at the upcoming hearing.

II. Due process is required in a hearing under MCL 46.11(n), and the hearing that Defendants intend to provide won't meet the standard.

Both federal and state courts have long recognized that public employees with "just cause" protections have a property interest in continued employment that gives rise to due process protections. See *Rodgers v. 36th Dist Court*, 529 F App'x 642, 650 (6th Cir. 2013) ("Supreme Court and Sixth Circuit precedent clearly

establishes that public employees who may be fired only for 'just cause' have property interests in their continued employment protected by due process."); *Sherrod v. City of Detroit*, 244 Mich. App. 516, 523, 625 N.W.2d 437, 442 (2001) (noting that a law that "converts at-will public employment into just-cause employment" creates a property interest in continued employment).

Due process "requires the opportunity to be heard at a meaningful time and in a meaningful manner." *York v Civil Serv Comm*, 263 Mich App 694, 702; 689 NW2d 533 (2004). *Id.* (quotation marks omitted). To meet that requirement, a party must have "the chance to know and to respond to the evidence against [her] . . . ." *Id.* (quotation marks omitted). In this matter, Hambley cannot adequately know and respond to the evidence against her without the time and opportunity to engage in discovery and to subpoena witnesses, including Commissioners. While Defendants have conceded the ability to subpoena and call witnesses for live testimony, Defendants have said that they will not permit Hambley to call any Commissioners to testify.

A just cause standard includes consideration of an employer's motive in making employment decisions, such as whether they are pretextual, a subterfuge, or done for purposes of retaliation or evasion of the just cause standard. See, e g, *Hammond v. United of Oakland*, 193 Mich App 146, 153 (1992) (just cause analysis requires consideration of an employer's motive); *Ewers v. Stroh Brewery Co.*, 178 Mich. App. 371, 378 (1989) (pretextual claims cannot be used to evade a just cause requirement); *McCart v. J. Walter Thompson, Inc.*, 437 Mich 109, 118 n 2 (1991).

Moreover, Health Officer Hambley is entitled to a hearing before a "neutral decisionmaker," which she cannot receive before the members of the County Commission here. "A hearing before an unbiased and impartial decisionmaker is a basic requirement of due process." *Crampton v. Mich. Dep't of State*, 395 Mich. 347, 351 (1975). It is not necessary to show "actual bias in situations where experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Id.* (internal quotation marks omitted). Among the situations that may present that risk are where the decisionmaker "(1) has a pecuniary interest in the outcome; (2) has been the target of personal abuse or criticism from the party before him; (3) is enmeshed in other matters involving petitioner; or (4) might have prejudged the case because of prior participation as an accuser, investigator, fact finder or initial decisionmaker." *Id.* (internal quotation marks omitted). It is difficult to imagine a case in which the last two of these circumstances could be more pronounced.

The Commissioners are enmeshed in other matters involving Hambley, as this Court well knows. Seven of the new commissioners attempted to demote Hambley and remove her as Health Officer in favor of a political appointee as one of their first acts in office, despite having a prior legal opinion that she was protected by MCL 46.11(n) and that they could not replace her with a political appointee. After she filed suit to resolve the question and alleged unlawful retaliation, Defendants developed the litigation theory that she was never really appointed as a matter of law in the first place – which has now been rejected by two courts. While this case has been stayed awaiting interlocutory appeal, Defendants have

intensified their efforts at illegal retaliation, including (1) extreme budget cuts in the Health Department, some of which they were forced to walk back after conceding Hambley's public statements that negative consequences like state MDHHS intervention might occur; (2) cutting Hambley out of the County's public communication channels even though she has independent authority to communicate with the public via the Public Health Code, (3) forcing her to swear an oath to testify at a Board Committee meeting under MCL 46.11(k) without prior notice – likely in the hope that she would refuse so the Board could utilize the MCL 46.11(k) procedure to fire her for refusal to swear the oath (which they could not use since she testified under oath) – and now, (5) attempting to fire her at a rushed termination hearing before Commissioners are back in the trial court where they will be subject to litigation discovery.

Any reasonable observer would believe that the seven commissioners who voted to demote Hambley on day one have prejudged the case. It is beyond dispute that several of the commissioners came into office with the stated intent to fire Hambley as soon as possible. Defendants have a replacement for Appellee Hambley waiting in the wings and are simply trying to "cross [their] T's and dot [their] I's'" so that they can terminate Hambley under cover of claiming it to be a lawful hearing. This is not a real fact-finding termination hearing imbued with due process, but the fulfillment of Defendant Moss's (and others') campaign promise to install a candidate who serves at their pleasure.

There is even more now to suggest that Defendants do not intend to comply with due process and will do irreparable harm to respect for the protections that the

Legislature saw fit to enact for local public health officials. Such a result will not be able to be adequately remedied with money damages after a trial, or even a belated order to be returned to the Health Officer position. Any suggestion that some of Defendants have not prejudged this case and can act as neutral decisionmakers strains credulity. As the Court of Appeals noted, the best place to sort out these questions – and hear evidence of it, and/or permit litigation discovery to proceed – is here, in the trial court, and not at an appeals court. The time for that has now arrived with the Court of Appeals' swift decision and remand to this Court.

Accordingly, Health Officer Hambley asks that this Court enforce the preliminary injunction, and ensure that it is conducted – if at all – only with a hearing that complies with all of the requirements of MCL 46.11(n). Hambley is entitled to a time to present evidence to this Court in an evidentiary hearing that the current hearing does not and will not do that.

III. This Court should issue stay of the October 24, 2023 hearing until Hambley has an adequate opportunity to present her proofs that the planned hearing violates MCL 46.11(n), AND until the Michigan Supreme Court adjudicates (or declines to hear) Defendants' appeal to the Michigan Supreme Court on the foundational question of Hambley's status as Health Officer.

Health Officer Hambley should not be forced to undergo the time and legal expense of a termination hearing while Defendants also pursue a Michigan Supreme Court application for leave to appeal on the question of whether she is the Health Officer.[3] They should not be permitted to have their cake and eat it too, so to

[3] Defendants have taken the position that Hambley must provide her own attorney for the termination hearing at her own expense. Hambley takes the position that she is entitled to an attorney at County expense to provide legal counsel on the

speak – by holding a hearing without having to submit to discovery or testify themselves regarding evidence of their motives, and then at the same time **still** arguing their litigation position that Hambley was never fully appointed in the first place. Hambley is entitled to have that settled before the hearing takes place. Hambley asks that the Court take up the issue of whether to stay the October 24, 2023 hearing with a TRO at the scheduled hearing in this Court on October 20, 2023, giving Defendants time to respond prior to that time and at the October 20 hearing in this Court.

Courts have applied a similar test to the TRO/preliminary injunction test when evaluating motions to stay: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *O'Halloran v. Sec'y of State & Dir. of the Bureau of Elections*, 510 Mich. 970, 970 (2022) (Bernstein, J., concurring). These factors all weigh heavily in favor of granting a stay until the Court can rule on Hambley's motion to enforce the preliminary injunction.

A. Hambley has shown irreparable harm to her and to the public without an injunction, satisfying the first and fourth factors.

As the public health officer for Ottawa County, a legal issue she has now won

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issues in this lawsuit, since Ottawa County corporation counsel has a clear conflict. Hambley plans to submit a separate motion for an order for payment of her attorney fees and costs, briefing her entitlement to those and to an immediate order for same while this case is pending.

twice, Hambley is charged with broad responsibility to protect the public health in the County. She directs a department of over 100 people in operating a multitude of state-mandated programs and ensuring compliance with multiple statutes, rules, ordinances, regulations, and grant programs. Michigan's public health code is to "be liberally construed for the protection of the health, safety, and welfare of the people of this state." MCL 333.1111. Any person who willfully opposes or obstructs the health officer in performance of that person's legal duty to enforce a health law has violated the criminal law. MCL 333.1291; MCL 333.1299.

Defendants' acts have demonstrated their intent to terminate Hambley from day one. Defendants have spoken publicly, and repeatedly, about how this "hearing" is their next try at summary ouster of Hambley. Unless Defendants are stopped from holding a hearing on October 24, Defendants will conduct a hearing that does not comply with 46.11(n). Hambley and the public will suffer irreparable harm which cannot be fully vindicated after the fact.

B. Any harm to Hambley and the public far outweighs potential harm to Defendants, since Hambley merely asks for the status quo for a short period.

Defendants first asserted that Plaintiff was not the duly appointed health officer and thus could be terminated without good cause or a hearing; that argument has now been rejected by both this Court and the Court of Appeals, but Defendants intend to go to the Michigan Supreme Court next. Defendants have also manufactured reasons to terminate Hambley – reasons which would not constitute "just cause" even if true, and which are not true in any event. Defendant Moss, without a vote of the Commission or a sufficient number of commissioners to

satisfy MCL 46.10, filed charges and scheduled a termination hearing. That hearing was postponed, however, because Defendants Moss again ignored proper procedures in the pursuit of political aims. Because Defendants have made clear that they do not intend to follow the procedures required by MCL 46.11(n) (or the Open Meetings Act), Hambley asks this Court to halt the scheduled hearing to allow the parties to be heard on the issues at stake, so when the hearing goes forward, it does so in compliance with MCL 46.11(n), as the Court of Appeals directed. Moreover, Defendants should not be allowed to proclaim that the hearing "doesn't matter" because they also intend to go to the Supreme Court and seek reversal of the holding that Hambley is public health officer, and at the same time, still go forward with the hearing. If they are to go to the Michigan Supreme Court, the termination hearing should be stayed in the meantime.

C. Hambley is likely to prevail on the merits of her motion.

For the reasons discussed, Hambley is likely to succeed on the merits of her motion to enforce the preliminary injunction.

CONCLUSION

Accordingly, Hambley respectfully requests that this Court enforce the preliminary injunction and stay the October 24 hearing until parties can be heard on Hambley's motion to order Defendants to comply with the proper procedures for a termination hearing pursuant to MCL 46.11(n).

PINSKY SMITH, PC
Attorneys for Plaintiff Adeline Hambley

Dated: October 13, 2023

By: /s/ Sarah R. Howard

Sarah Riley Howard (P58531)
146 Monroe Center St NW, Suite 418
Grand Rapids, MI 49503
(616) 451-8496
showard@pinskysmith.com