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

ADELINE HAMBLEY,

Plaintiff,

Case No: 23-7180-CZ

Hon. Jenny McNeill
Sitting by SCAO Assignment

v.

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

Defendants.

PLAINTIFF'S MOTION FOR LEAVE TO FILE A REPLY BRIEF TO MOTION TO ENFORCE PRELIMINARY INJUNCTION AND FOR ORDER TO STAY DEFENDANTS' OCTOBER 24 TERMINATION HEARING

Plaintiff Adeline Hambley, by and through her attorneys, Pinsky Smith, PC, hereby moves this Court for leave to file a reply to address arguments raised by Defendants in their response to Plaintiff's motion to enforce preliminary injunction and for order to stay the October 24 termination hearing. Since filing her motion, the parties have engaged in written discussions about the "Procedures" that Defendants intend to employ for the October 24 hearing. Those discussions, as well as Defendants' brief in response to Plaintiff's motion, illustrate that Defendants do

not intend to utilize the "good cause" standard required by MCL 46.11(n) or provide Plaintiff with due process protections during that hearing. Plaintiff requests leave to file a reply to directly address those issues.

Accordingly, Plaintiff requests leave to file the attached short reply brief.

PINSKY SMITH, PC
Attorneys for Plaintiff Adeline Hambley

Dated: October 22, 2023

By: /s/ Sarah R. Howard

Sarah Riley Howard (P58531)
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STATE OF MICHIGAN
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and **ALLISON MIEDEMA**,
Ottawa County Commissioners in their
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Defendants.

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

Plaintiff, Ottawa County Health Officer Adeline Hambley, does not seek to prevent Defendants from holding a hearing under MCL 46.11(n), as Defendants assert. The Court of Appeals held that the Board can hold a hearing so long as it complies with MCL 46.11(n). In hearing oral argument on this case, however, the Court of Appeals expressed its view that this Court is in the best position to hear issues related to the preliminary injunction as it now stands. A significant miscarriage of justice will occur if this Court does not delay the hearing long enough to decide what the legal guardrails are for the hearing.

Defendants have made clear that they do not take seriously the statutory requirements of MCL 46.11(n) and will hold a hearing that does not comply with the statute. Defendants fail to recognize that Health Officer Hambley can be terminated only for just cause, that a finding of just cause must be supported by evidence, and that just-cause protections create a property interest that requires due process. (See Ex. 1, Email and attachment, Procedures for Hambley Hearing; Ex. 2, 10/17/23 Email from D. Kallman to S. Howard.) Defendants have already terminated Hambley unlawfully once, and it is imperative that they not do so a second time. If Defendants unlawfully terminate Hambley again, this will not only prejudice her and significantly harm the public interest, but will cause all parties unnecessary hassle and expense if they are forced to undergo a subsequent hearing that complies with the law. Moreover, to the extent that there is any argument that Defendants can act impartially and follow the legal requirements in their quest to pursue Plaintiff's termination, which Plaintiff vigorously disputes, that would be decimated if they acted unlawfully a second time. Accordingly, Plaintiff requests that this Court order Defendants to postpone the hearing scheduled for October 24, 2023 to allow the Court time to consider arguments and issue an order that outlines the legal requirements for any hearing under MCL 46.11(n).

A. MCL 46.11(n) requires "just cause" for termination, which must be supported by substantial evidence.

Defendants apparently disagree that a termination pursuant to MCL 46.11(n) requires a finding of just cause, which must be supported by substantial evidence. Defendants' Counsel has asserted that the language of the statute, i.e., "'in the board's opinion' and the 'board is satisfied' that the officer has engaged in

[incompetence, misconduct, or neglect of duty], then that officer may be removed[.]", means that any whim of the board, no matter how farcical and unsupported by evidence, is acceptable. (See Ex. 2.) This is incorrect. There would be no point in having the hearing if that were the actual standard.

MCL 46.11(n) provides that an officer may be removed under two different circumstances: (1) "if, in the board's opinion, the officer or agent is incompetent to execute property the duties of the office" or (2) "if, on charges and evidence, the board is satisfied that the officer . . . is guilty of official misconduct, or habitual or willful neglect of duty, and if the misconduct or neglect is a sufficient cause for removal." MCL 46.11(n). Under the first circumstance, a Board may remove an officer with fewer procedural safeguards if the officer is "incompetent."

Defendants erroneously interpret "incompetent" as it is used in the colloquial sense, as in someone who does not excel at the job. That interpretation, however, conflicts with Michigan law. Throughout Michigan statutes, the term "incompetent" is used to refer to someone who is incapable of performing a task due to physical or mental incapacity. See e.g., MCL 128.157 (an incompetent person is someone who is insane, non compos mentis, or an infant). See also *Young v Twp of Green Oak*, 471 F.3d 674, 686 (6th Cir 2006) (concluding that the Michigan Supreme Court would likely interpret the term incompetency as used in the VPA as including "an employee's physical inability to perform the essential functions of his or her job"). The fact that there is no hearing requirement for incompetency confirms this interpretation, since an "incompetent" individual could not participate in a hearing. See, e.g., MCL 330.2022 (a trial cannot proceed while a criminal

defendant is incompetent). Moreover, common sense dictates that, if an individual became unable to perform their duties, such as by illness or injury, the Board could remove that individual without all the procedural safeguards that are required under other circumstances.

Because there is no legitimate argument that Plaintiff is "incompetent" to perform the duties of Health Officer, the only grounds for which she could be removed are "official misconduct, or habitual or willful neglect of duty," which require "charges and evidence." As explained in Hambley's opening brief, she has the protections of "just-cause" employment and may only be terminated for the grounds listed. Contrary to what Defendants appear to suggest, the grounds for termination cannot be satisfied based on their feelings, political ideology, or personal opinions about Plaintiff; rather, they must make factual findings that are supported by substantial evidence.

B. Any termination hearing under MCL 46.11(n) must provide Plaintiff with due process.

Defendants fail to recognize the well-settled law that an employee who can be terminated only for just cause has a property interest in employment. Defendants argue that *Sherrod v. City of Detroit*, 244 Mich. App. 516, 523-24 (2001) is not applicable because it concerned at-will employment. On the contrary, the court in that case made clear that the VPA "converts at-will public employment into just-cause employment" and thus "granted the plaintiff a property right in continued employment." *Id.* Like in this case, it is precisely because a statute provided just-cause protections that the plaintiff had property interests and due process rights. Moreover, as the court explained in *Sherrod*, "[a]nalysis of what process is due in a

particular proceeding depends on the nature of the proceeding and the interest affected by it." *Id.* at 524. Plaintiff's role in leading a large health department that oversees important public programs equates to significant public interest in her employment, in addition to her personal interests.

Defendants rely on *People v Coutu*, 459 Mich 348, 354 (1999) to argue that Plaintiff is a public officer and thus cannot hold a property interest in continued employment. That case, however, addressed the questions of whether deputy sheriffs could be charged with the common law offense of misconduct in office, and thus has no bearing on whether Plaintiff has a property interest in this case.

Defendants' reliance on *People v Smith*, 502 Mich 624 (2018) is similarly misplaced. In that case, the Michigan Supreme Court addressed the enforceability of an elected politician's criminal plea deal. *Id.* at 628. While he was a sitting state senator, the defendant was criminally charged with various felonies and entered into a plea deal that included, among other things, an agreement that he would resign from office and never hold state office again. *Id.* at 628-29. In analyzing whether public policy favored enforcing the provision, the Court noted that "public offices should not be treated like private property." *Id.* at 726. The Court went on to explain that a public office does not implicate a property interest that gives rise to due process protections. *Id.* at 726-27.

That an elected politician has no property interest in his office is hardly a novel concept. A state senator may be removed from office under a variety of circumstances, including the whim of the voters. A local public health officer, however, cannot be removed based on the whim of some commissioners. The

legislature ensured that when created a "just cause" standard for termination by enacting MCL 46.11(b).

Defendants repeatedly attempt to compare Hambley to elected officials and political appointees, ignoring the fact that those positions lack "just-cause" employment protections. The legislature intentionally removed the position of Health Officer from the political realm by providing just-cause protections. Thus, health officers are more akin to civil service employees who "are guaranteed continued employment absent just cause for dismissal," and have a "property interest [that] is sufficient to merit due process protections." *York v. Civil Serv Comm'n*, 263 Mich App 694, 703 (2004).

Defendants' Counsel's comparison of the scheduled hearing to an impeachment hearing (Ex. 2) demonstrates how significantly Defendants misunderstand the requirements of MCL 46.11(n). Under the Michigan Constitution, a majority of the House of Representatives has the power to impeach a civil officer for corrupt conduct in office or for crimes and misdemeanors, and such official can be removed from office with a two-third concurring resolution in the Senate. Mich Const Art XI, § 7. Even at a superficial level, this process bears no resemblance to a hearing under MCL 46.11(n). More importantly, however, a Health Officer has a property interest in her employment by virtue of the just-cause standard, and a public official has no such property interest. See *People v Smith*, 502 Mich 624, 638 (2018) ("[T]here is no property interest in holding public office.").

Because there is a dearth of case law interpreting the standards for termination under MCL 46.11(n), the Court may look to the standards for similar

types of hearings. In the discussing administrative hearings, the Supreme Court has explained that "the right to a hearing before an unbiased and impartial decisionmaker is a basic requirement of due process." *Dep't of Licensing & Regulatory Affairs/Unemployment Ins. Agency v. Lucente*, 508 Mich 209, 244 (2021). The Supreme Court applied this requirement to hearings to suspend an individual's driver's license in *Crampton v Mich Dep't of State*, 395 Mich 347 (1975). The Court held that the plaintiff's due process rights were violated when his license was suspended following a hearing in front of a panel that included a member of the Lansing Police Department. *Id.* at 349. Because the suspension arose out of an arrest for driving while intoxicated, which the plaintiff disputed, the Court held that it was impermissible for a law enforcement officer to sit on the panel. *Id.* at 357. The Court explained that "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Id.* at 357-58. Accordingly, the Court concluded that the plaintiff had demonstrated a violation of his due process right to a hearing before a fair, impartial tribunal. *Id.* at 358.

Similarly, the inability to call Commissioners as witnesses on relevant questions like whether the alleged reasons for termination are a pretext, is another significant denial of due process, as detailed in Hambley's opening brief.

C. Plaintiff primarily seeks a ruling from the Court on the legal requirements under MCL 46.11(n). To the extent the Court feels it needs to answer any fact questions first, Hambley seeks the opportunity to present evidence.

Primarily, Plaintiff merely seeks clarification in the form of a ruling from this Court as to the requirements of MCL 46.11(n). As the briefs on the motion make clear, the parties have significant disagreements about the correct interpretation of

MCL 46.11(n). Without guidance from the Court, it is a foregone conclusion that Defendants will terminate Plaintiff at a hearing that does not meet the statute's mandates. At that time, this Court will need to rule on Hambley's objections that the hearing did not comply with due process when she amends her claims, i.e., that the board improperly ousted her without having substantial evidence supporting its findings and conclusions. It serves justice far better for the parties if this Court makes those legal determinations now, rather than after the parties have gone to the cost and expense of a hearing. The Court of Appeals contemplated that very work by this Court. A short adjournment of the October 24 hearing, necessary for this Court to consider the arguments and decide if it needs evidence on any subjects, would be both permissible and prudent.

Conclusion

The Court of Appeals remanded this case quickly, recognizing that this Court is in the best position to address issues related to Defendants' efforts to terminate Hambley. In their rush to terminate her, however, Defendants have created circumstances that will deprive the Court of the opportunity to adequately consider the requirements of MCL 46.11(n) before a hearing is held. Without a ruling from the Court on the issues raised by Health Officer Hambley, Defendants will hold a hearing that does not meet the statute's requirements. Accordingly, Hambley requests that this Court order Defendants to postpone the October 24 hearing until the Court can rule on the requirements of MCL 46.11(n).

PINSKY SMITH, PC
Attorneys for Plaintiff

Dated: October 22, 2023

By: /s/ Sarah R. Howard
Sarah Riley Howard (P58531)
146 Monroe Center, N.W., Suite 418
Grand Rapids, MI 49503
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PROCEDURE FOR MS. HAMBLEY HEARING ON OCTOBER 24, 2023 PURSUANT TO MCL 46.11(n)

1. Judge Thomas E. Brennan, Jr., will preside over the hearing:

    a. Judge Brennan will explain the hearing process and read a summary of the charges.
    b. Judge Brennan is not the decision maker/trier of fact – that is the Board's role.
    c. Judge Brennan's role is to ensure a fair process and maintain order.
    d. Judge Brennan will not be making evidentiary rulings as this is not a court proceeding and the Rules of Evidence do not apply. Hearsay will be allowed.
    e. Judge Brennan will accept evidence for filing:
        i. Notice of Hearing and Charges with attached exhibits; and
        ii. Evidence from Ms. Hambley, i.e., her testimony; other documents; other written statements; affidavits; etc. **Ms. Hambley must submit to the Chairman of the Board of Commissioners a copy of all documents, written statements, affidavits, and any other tangible evidence by 8:00 a.m. on October 20, 2023, that she intends to use at the hearing.** This will permit the Chairman to provide copies to all the Commissioners.

2. There will be no opening statements.

3. Ms. Hambley or any witness may be called to testify. Ms. Hambley will have October 24, 2023, and October 25, 2023 (if necessary) to provide any live witness testimony to the Board. There will be no further live witness testimony after October 25, 2023. However, Ms. Hambley and/or her counsel will not be permitted to call Judge Brennan, the Commissioners who are deciding the hearing, or Corporate Counsel as witnesses.

4. If Ms. Hambley desires to have a subpoena issued to compel a witness to appear, **she must submit all subpoena requests to Ottawa County Corporate Counsel no later than 8:00 a.m. on October 18, 2023**. Once the subpoenas are issued by the Chairman of the Board pursuant to MCL 46.3(5), corporate counsel will provide the subpoenas to Ms. Hambley or her counsel, and it shall be the responsibility of Ms. Hambley to provide service of process and proof of service to Ottawa County Corporate Counsel.

5. Judge Brennan shall administer the oath and swear in any witness to testify.

6. Ms. Hambley will be heard as is her right under MCL 46.11(n). As outlined above, she can present whatever evidence of any kind that she desires the Board to consider. Attorney Howard will also be able to speak and present evidence on Ms. Hambley's behalf. All evidence submitted by Ms. Hambley, or her attorney shall be admitted, shall be considered by the Board, and shall be made a part of the record of the hearing. Ottawa County Corporate Counsel and any Commissioners who desire to ask any witness or Ms. Hambley questions shall be permitted to ask questions.

7. The entire hearing proceedings shall be video recorded and preserved. The hearing proceedings shall also be live streamed on Ottawa County's YouTube channel and made

available for the public to view. The video recording of the hearing and all evidence introduced at the hearing shall be publicly posted on the Ottawa County website as soon as possible after the completion of the hearing. No transcript of the hearing proceedings will be prepared. If Ms. Hambley desires to have a transcript, she may have a transcript prepared at her own expense.

8. At the end of the live witness portion of the hearing, Judge Brennan shall be released from duty, and the Board will have an open and public discussion. The Board may take any action it deems appropriate at that time, including, but not limited to, the removal of Ms. Hambley pursuant to MCL 46.11(n).

Sarah Riley Howard

From: David Kallman <dave@kallmanlegal.com>
Sent: Tuesday, October 17, 2023 12:39 PM
To: Sarah Riley Howard; Jack Jordan
Cc: Lanae Monera; Elizabeth Geary; Stephen Kallman
Subject: RE: Procedures for Hearing

Sarah,

Thank you for your email. If Ms. Hambley does not complete her presentation on October 24th, the Board would plan to recess and continue the special meeting on October 25th for a second full day.

Unfortunately, I am now unavailable to meet this afternoon, but please see the bolded responses below to your questions:

- Should I plan on public comment before the hearing? I know this was mentioned before, but I don't see where there is a requirement to do so at a special meeting. And it's going to eat up a lot of the limited time we have in the two days that you have stated this hearing will last, so my preference is not to do it. This is particularly true when the Commission has a board meeting that evening on October 24 where they will take public comment. I object to receiving less than two days for the hearing.
    - **The OMA requires public comment at any "meeting" of a "quorum" of the Board, so we will be fully complying with all requirements of the OMA. The Board Rules specify that there must be two times for public comment at every meeting of the Board. However, unlike a regular meeting, a special meeting agenda can allow for public comment after your client has had her opportunity to be heard. In short, public comment will occur after you have given your full presentation to the Board. If you need two full days for Ms. Hambley to be heard pursuant to MCL 46.11(n), the Board will accommodate your request.**
- Will you or your team as lawyers for the County and other Defendants be presenting your case for termination first? Will I have an opportunity to cross-examine any witness that you present?
    - **This is not a trial. This is not a court/judicial proceeding. This is not a court evidentiary hearing. This is not corporate counsel's "case" for removal of Ms. Hambley. This is a legislative hearing where a commissioner has raised charges and Ms. Hambley will have a full opportunity to be heard pursuant to MCL 46.11(n). Because the entire purpose of this hearing is to give Ms. Hambley the full opportunity to be heard, she will present first. If additional witnesses are called, you will have an opportunity to ask questions of those witnesses. At the outset of the hearing, the charges and all exhibits (including Ms. Hambley's) will be submitted and accepted by the Board for consideration.**
- Presence of judge: We object to having a judicial officer at all if all he will do is swear in witnesses. The BOC chair can do so.
    - **See answer to next question.**
- Unilateral selection of judge: If there is going to be someone in the role of judicial officer, we object to the County and Chairperson Moss selecting that person.
    - **This is not a judicial proceeding, and the Judge is not a "judicial officer" because he is not acting on behalf of the judicial branch or in any judicial capacity. This proceeding is akin to an impeachment proceeding where a Judge is brought in to preside over the legislative proceeding. To be clear, MCL 46.11(n) does not require a Judge to preside, but we are bringing one in to assist the Board in conducting the hearing. The Judge's role will be to maintain order, swear in witnesses, and provide assistance if a dispute arises. MCL 46.11(n) does not provide you with any authority to object to the Board utilizing a Judge for assistance because this hearing is a legislative proceeding.**

- Lack of opening statements: Health Officer Hambley does not have a fair and meaningful opportunity to be heard without opening statements.
    - **This is not a court or judicial proceeding. This is a legislative hearing. However, if you desire to make a statement at the beginning of Ms. Hambley's opportunity to be heard, feel free to do so.**
- Witness/exhibit notice: If Health Officer Hambley has to give you advance notice of our witnesses and exhibits, we should receive the same notice of the BOC's witnesses and exhibits.
    - **Again, this is not a court or judicial proceeding. This is a legislative hearing. There are no witness lists and no exhibit lists. This is an opportunity for Ms. Hambley to be heard pursuant to MCL 46.11(n). However, as for exhibits, you have already received the charges and all exhibits in support of the charges. I am not aware of any other exhibits that will be added to the charges. As for your exhibits, we required in the procedures that you provide a copy of all your exhibits by Friday, October 20, 2023, at 8:00 a.m. so that copies can be made and provided to all of the commissioners. Again, there are no rules of evidence and hearsay is permitted. Thus, you may submit any documents you desire. As for witnesses, Ms. Hambley may call any person she desires to testify, except for those listed in the procedures. The procedures also provided the opportunity for Ms. Hambley to request that the Chair issue a subpoena for a witness if she believes that is necessary.**
- No provision for rebuttal evidence: If the County or any witness provides evidence for which rebuttal evidence is necessary, Health Officer Hambley should have the right to present that, even if the witness or exhibit was not previously disclosed.
    - **Again, this is not a court or judicial proceeding. This is a legislative hearing. This is an opportunity for Ms. Hambley to be heard pursuant to MCL 46.11(n). However, if rebuttal witnesses or exhibits are necessary, you will be given that opportunity.**
- Bar on calling Commissioners as witnesses: Some of the Commissioners have evidence which is centrally relevant to the claims in the Notice. Evidence of retaliation, pre-existing desire to terminate and evidence of pretext, and other illegal motives negate a finding of just cause – see case law below. Health Officer Hambley does not have a fair and complete opportunity to challenge the charges without an opportunity to call Commissioners as witnesses.
    - **Again, this is not a court or judicial proceeding. This is a legislative hearing. MCL 46.11(n) does not require that the Board allow any witnesses to be called. However, as a courtesy and to assist Ms. Hambley in her opportunity to be heard, the Board is permitting witnesses. This is an opportunity for Ms. Hambley to be heard pursuant to MCL 46.11(n). The statute grants no authority whatsoever, either explicit or implicit, for the officer/agent to call a member of the deciding Board of Commissioners as a witness. However, you will be permitted to submit any documents you desire, including, but not limited to, communications, texts, and emails of any county officials (including the Commissioners).**
- Lack of discovery prior to this hearing: Under the case law, evidence of retaliation, pre-existing desire to terminate and evidence of pretext, and other illegal motives besides retaliation all negate a proper finding of just cause to terminate. 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). Under the circumstances here, Health Officer Hambley does not have a full, fair opportunity to refute the charges without discovery in her existing litigation case prior to the termination hearing.
    - **Again, this is not a court or judicial proceeding. This is a legislative hearing. Further, the Board has no discovery authority and no authority to subpoena documents. Every case you cite has no bearing whatsoever on this legislative proceeding and has absolutely nothing to do with MCL 46.11(n). All of those cases deal with issues in a lawsuit filed after a person has been actually terminated, not before.**
- Lack of a neutral decisionmaker: Due process requires an unbiased and impartial decisionmaker. None of the seven commissioners who voted to demote Health Officer Hambley to "interim" in violation of statute in their

first day in office on January 3, 2023 should be included in the decision in the termination hearing, since they would not meet the standard for a neutral decisionmaker under the case law.

- **Again, this is not a court or judicial proceeding. This is a legislative hearing. The only due process required is that which is explicitly stated in MCL 46.11(n). The statute makes it abundantly clear that it is the Board that makes this decision. As the Court of Appeals held last week, "we conclude that the Commission nonetheless retains the authority to terminate Hambley if the Commission complies with the procedures and standards prescribed in MCL 46.11(n)." The Court of Appeals never held that Ms. Hambley was entitled to any due process beyond what is in the statute. Moreover, there is no mechanism in the statute to somehow remove the Board, or any of its members, and find a substitute decision maker with Ms. Hambley's approval. Your request would be akin to a governor or president complaining that impeachment proceedings in the legislature are not in front of an impartial body. Just as there is no right for a governor or president to request that an alternative legislative body decide the impeachment, Ms. Hambley has no right to request that some new entity or board, or less than the full board, make the decision pursuant to MCL 46.11(n).**

- In addition to failing because they are factually untrue, the charges fail to state lawful reasons for termination on their face, since they are contrary to First Amendment rights, and rights/duties under the Public Health Code, of Health Officer Hambley.
    - **Again, this is not a court or judicial proceeding. This is a legislative hearing. Ms. Hambley does not have the right to engage in incompetence, misconduct, or neglect of duty. As MCL 46.11(n) clearly states: if "in the board's opinion" and the "board is satisfied" that the officer has engaged in that wrongful conduct, then that officer may be removed. It is the Board that makes this determination. We are not aware of any First Amendment right or statutory right for a health officer to engage in incompetence, misconduct, or neglect of duty. However, we understand that Ms. Hambley disagrees with the charges and that is the whole point of her having an opportunity to be heard.**

I trust this answers your questions. Feel free to let me know if you have further questions.

Thank you for the reminder for the waivers of service in the Cramer case, I plan on filing those today.

If I can be of any further assistance or there are any other issues you would like to discuss, please let me know.

Dave

David Kallman
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From: Sarah Riley Howard <showard@pinskysmith.com>
Sent: Monday, October 16, 2023 11:19 AM
To: Jack Jordan <jjordan@miottawa.org>
Cc: Lanae Monera <lmonera@miottawa.org>; Stephen Kallman <steve@kallmanlegal.com>; David Kallman <dave@kallmanlegal.com>; Elizabeth Geary <egeary@pinskysmith.com>
Subject: RE: Procedures for Hearing

Hello Jack,

Yes, I heard from the Court Friday – my date in the other case is moved. I am now good for October 24. I'm presuming that I should also block out October 25 to accommodate Day 2. Let me know if that is the plan.

I can make tomorrow (Tuesday) at 4 pm work. Let me know if you want to send a videoconference link or if you want me to do it. Here are the issues I have on my list to discuss:

- Should I plan on public comment before the hearing? I know this was mentioned before, but I don't see where there is a requirement to do so at a special meeting. And it's going to eat up a lot of the limited time we have in the two days that you have stated this hearing will last, so my preference is not to do it. This is particularly true when the Commission has a board meeting that evening on October 24 where they will take public comment. I object to receiving less than two days for the hearing.
- Will you or your team as lawyers for the County and other Defendants be presenting your case for termination first? Will I have an opportunity to cross-examine any witness that you present?
- Presence of judge: We object to having a judicial officer at all if all he will do is swear in witnesses. The BOC chair can do so.
- Unilateral selection of judge: If there is going to be someone in the role of judicial officer, we object to the County and Chairperson Moss selecting that person.
- Lack of opening statements: Health Officer Hambley does not have a fair and meaningful opportunity to be heard without opening statements.
- Witness/exhibit notice: If Health Officer Hambley has to give you advance notice of our witnesses and exhibits, we should receive the same notice of the BOC's witnesses and exhibits.
- No provision for rebuttal evidence: If the County or any witness provides evidence for which rebuttal evidence is necessary, Health Officer Hambley should have the right to present that, even if the witness or exhibit was not previously disclosed.
- Bar on calling Commissioners as witnesses: Some of the Commissioners have evidence which is centrally relevant to the claims in the Notice. Evidence of retaliation, pre-existing desire to terminate and evidence of pretext, and other illegal motives negate a finding of just cause – see case law below. Health Officer Hambley does not have a fair and complete opportunity to challenge the charges without an opportunity to call Commissioners as witnesses.
- Lack of discovery prior to this hearing: Under the case law, evidence of retaliation, pre-existing desire to terminate and evidence of pretext, and other illegal motives besides retaliation all negate a proper finding of just cause to terminate. 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). Under the circumstances here, Health Officer Hambley does not have a full, fair opportunity to refute the charges without discovery in her existing litigation case prior to the termination hearing.
- Lack of a neutral decisionmaker: Due process requires an unbiased and impartial decisionmaker. None of the seven commissioners who voted to demote Health Officer Hambley to "interim" in violation of statute in their first day in office on January 3, 2023 should be included in the decision in the termination hearing, since they would not meet the standard for a neutral decisionmaker under the case law.
- In addition to failing because they are factually untrue, the charges fail to state lawful reasons for termination on their face, since they are contrary to First Amendment rights, and rights/duties under the Public Health Code, of Health Officer Hambley.

I also wanted to send a friendly reminder to file the Waivers of Service in the Jared Cramer case. I can e-file them myself if you prefer, but you said you were going to, so I'm following up.

I'll look forward to our discussion on Tuesday at 4:00 p.m.
Sarah

From: Jack Jordan <jjordan@miottawa.org>
Sent: Saturday, October 14, 2023 7:13 AM
To: Sarah Riley Howard <showard@pinskysmith.com>
Cc: Lanae Monera <lmonera@miottawa.org>; Stephen Kallman <steve@kallmanlegal.com>; David Kallman <dave@kallmanlegal.com>
Subject: RE: Procedures for Hearing

Good morning Sarah,

Hope all is well. Thank you for your email and like you, I was out of the office yesterday (Friday). We appreciate your court scheduling situation, as we've all dealt with those before. We were wondering if you had heard from the Court yesterday regarding your motion? Let me know.

As for your request to meet regarding the Hearing Procedures, we have a full schedule on Monday and most of Tuesday, but we would all be free for a Teams/Zoom videoconference on Tuesday at 4:00 pm. Please let me know if that is an acceptable time. Thank you and have a nice weekend.

Jack

From: Sarah Riley Howard <showard@pinskysmith.com>
Sent: Thursday, October 12, 2023 7:46 PM
To: Jack Jordan <jjordan@miottawa.org>
Cc: Lanae Monera <lmonera@miottawa.org>; Stephen Kallman <steve@kallmanlegal.com>; David Kallman <dave@kallmanlegal.com>
Subject: RE: Procedures for Hearing

Jack,

Thank you for your email. I have been out of the office today, but I wanted to advise that I have not yet heard from the other court in which I made a motion yesterday to move my other October 24 hearing to an alternate date. Fortunately, though, opposing counsel in my other case did not object to my motion. I will call chambers tomorrow to see if I am able to get any idea about when I will hear something, and I'll update you after that.

I will also plan to review the Procedures for the hearing that you sent today, and I will send your team my formal response as soon as possible. I object to some, and our position is that there needs to be some additions pursuant to the case law. Once I've sent my formal response, I think it would be a good idea if we had an in-person meeting or a Teams/Zoom videoconference to see if we can come to any agreements in advance. If you are willing to do this, I suggest we meet sometime this coming Monday or Tuesday (Oct 16/17).

I'll look forward to your response.

Thank you,
Sarah

From: Jack Jordan <jjordan@miottawa.org>
Sent: Thursday, October 12, 2023 12:41 PM
To: Sarah Riley Howard <showard@pinskysmith.com>
Cc: Lanae Monera <lmonera@miottawa.org>; Stephen Kallman <steve@kallmanlegal.com>; David Kallman <dave@kallmanlegal.com>
Subject: Procedures for Hearing

Good afternoon Sarah,

Hope that you are having a good day. Please find attached the Procedures for Ms. Hambley's Hearing, pursuant to MCL 46.11(n), scheduled for October 24, 2023. Thank you.

Jack

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Ottawa County
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