

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

**JOHN DOE AND JANE DOE,  
AS THE NATURAL PARENTS  
AND NEXT FRIENDS OF THEIR  
MINOR CHILD, JAMES DOE**

**Case No. 02:08 CV 575**

**Plaintiffs,**

**JUDGE GREGORY L. FROST**

**v.**

**Magistrate Judge NORAH MCCANN KING**

**MOUNT VERNON CITY SCHOOL  
DISTRICT BOARD OF EDUCATION,  
et al.,**

**Defendants.**

**MEMORANDUM CONTRA OF DEFENDANT JOHN FRESHWATER, IN HIS  
PERSONAL CAPACITY, TO PLAINTIFFS' AND DEFENDANTS' JOINT MOTION  
FOR A PROTECTIVE ORDER**

Now comes Defendant John Freshwater, by and through his Trial Counsel, R. Kelly Hamilton, who represents Defendant in his personal capacity. As and for his response to the jointly filed Motion for a Protective Order, Defendant Freshwater objects to the motion upon the basis that this Court lacks sufficient jurisdiction to issue said order; the motion would violate the preclusive effect federal courts give to administrative proceedings; Defendant Freshwater's due process rights would be affected; and there exists no substantive basis, in general or particular to this matter, to warrant a protective order. Defendant Freshwater more thoroughly objects in the following Memorandum Contra but requests the privilege of supplementing this Memorandum with an exhaustive brief should the matter proceed to a hearing.

**MEMORANDUM CONTRA**

**Jurisdiction**

The parties' motion for a protective order from this Court seeks to have the order enforced in a state administrative employment proceeding.

Respectfully, this Court does not have authority to make enforcement measures in a statutorily designed state employment proceeding despite the existence of the instant action. Absent removing the state employment proceeding to this jurisdiction there is no basis for this Court's intervention, lest to reason otherwise could have the effect of forum shopping in the least to at worst supplanting the entire state statutorily enacted administrative forum.

### **Preclusive Effect**

Ohio Revised Code § 3319.16 has been recognized by this Court as providing for a basis for a preclusive effect in determining matters. Specifically, as § 3319.16 termination hearings are judicial in nature and provide for adequate state appellate review, it is logical that federal courts should give preclusive effect to unreviewed board of education factual determinations made pursuant to § 3319.16 termination hearings.

*Featherstone v. Columbus Public Schools*, (1999) No. 96 CV 00128.

Ohio Revised Code § 3319.16 provides for notice, a hearing by neutral referee, representation by counsel, presentation of evidence and witnesses under oath, and cross-examination. Therefore, the process is judicial in nature.

The appointed Referee in the state employment proceeding, of which the parties' motion seeks this court's interjection, ruled on September 8, 2008, that the provisions of Ohio Revised Code § 3319.16 permit the teacher the exclusive right to elect whether the administrative hearing shall be conducted in public or private. Exhibit A. As the remaining provisions of Ohio Revised Code Title 33 – *Education and Libraries*, permit

appeal of the referee's decisions through the local courts of common pleas, the preclusive effect doctrine requires the parties' motion to be brought in a state local court.

### **Due Process**

Defendant Freshwater seeks to enforce the statutory right of due process as created by Ohio Revised Code § 3319.16. Defendant Freshwater's due process includes the ability to cross-examine in a public forum, at his option, instead of being secluded and shrouded in the secrecy that the parties' motion seeks. Defendant Freshwater is not seeking extraordinary process, rather simply what the legislature in the State of Ohio has deemed significantly important so as to codify the procedure.

Historically, Ohio has dealt with administrative hearings for public school teachers for at least fifty-eight (58) years. In what appears to be the first judicial ruling on a public school teacher's administrative employment hearing, neither the then ruling court, nor nearly six decades of legislative enactments have determined a need to hold portions of a "public hearing" behind closed doors for the benefit of either the students or a student accuser. *Applebaum v. Wulff, et al*, Court of Common Pleas of Ohio, Cuyahoga County. No. 612303, July 25, 1950.

Since the creation of the Ohio Rules of Evidence there has not been a rule explicitly crafted to create a forum of presentation as requested by the parties' motion. Although protective rules have been enacted, such as RULE 601 (A). *General Rule of Competency* and RULE 807. *Hearsay Exceptions; Child Statements in Abuse Cases*, the parties have not cited a single evidentiary rule to support its request.

The parties have not provided any admissible testimony to support a protective order nor cited any admissible evidence to suggest any student would realistically be harmed.

**Conclusion**

Defendant Freshwater has requested the hearing be a “public hearing” as opposed to a “private” hearing. Defendant Freshwater objects to any hearing other than mandated to R.C. 3319.16. Application of the law requires Teacher Freshwater’s choice to be given his lawful election.

Respectfully submitted,

s/ R. Kelly Hamilton

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Attorney for Defendant John Freshwater

**CERTIFICATE OF SERVICE**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

I hereby certify that on September 23, 2008, I electronically filed the foregoing MEMORANDUM CONTRA OF DEFENDANT JOHN FRESHWATER, IN HIS PERSONAL CAPACITY, TO PLAINTIFFS’ AND DEFENDANTS’ JOINT MOTION FOR A PROTECTIVE ORDER, with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

s/ R. Kelly Hamilton

The Law Office of R. Kelly Hamilton (0066403)



THOMAS A. DEPLER / R. LEE SHEPHERD  
G. WILLIAM DEPLER (1912-1978)  
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September 8, 2008

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In re: John Freshwater/Mount Vernon City School District

Dear Counselors:

Enclosed please find the Decision on the Mount Vernon City School District Board of Education's Motion. If you have any questions, please let me know.

Respectfully,

POLAND, DEPLER  
AND SHEPHERD CO., L.P.A.



R. Lee Shepherd

RLS:lws



IN THE MATTER OF TERMINATION OF THE  
EMPLOYMENT OF JOHN FRESHWATER

The Mount Vernon City School  
District Board of Education,

Employer

R. Lee Shepherd, Esq.  
Referee

and

**DECISION**

John Freshwater

Teacher

The Mount Vernon City School District Board of Education has filed a Motion requesting that the hearing in the matter of the termination of the employment of John Freshwater be held in closed session. This motion has been opposed by Mr. Freshwater. Legal counsel for both the Board of Education and Mr. Freshwater have filed briefs/memorandums.


Ohio Revised Code §3319.16 (Termination of Contract by Board of Education) provides, *inter alia*:

“the hearing shall be private unless the teacher requests a public hearing”

In this matter, by written request of his legal counsel, the teacher has requested a public hearing. This statutory provision is plain and unequivocal. It is subject to one and only one interpretation. The hearing must be public if the teacher so requests. Ohio case law interpreting Ohio Revised Code §3319.16 in no way modifies this mandate.



Everyone involved in this proceeding must endeavor to preserve the order and formality expected within any administrative hearing. The rights of all persons involved, most notably the teacher, must be protected at all costs. Every measure as permitted within the bounds of the Revised Code will be invoked, if necessary, to ensure the sanctity of the proceedings.

  
R. Lee Shepherd

9/8/2008U:\Luann\My Documents\freshwaterdecision.doc