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JEREMY S. BREON
PROTHONOTARY
CENTRE COUNTY, PA

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA
CIVIL ACTION LAW

BARRY J. FENCHAK

Plaintiff,

v.

THE PENNSYLVANIA STATE UNIVERSITY BOARD OF TRUSTEES, and MATTHEW SCHUYLER IN HIS OFFICIAL CAPACITY AS CHARIMAN

*Defendant*s.

Docket No. 2024-CV-1843-CI

Type of Case: Civil Action - Equity

Type of Pleading: ***Emergency*** **Motion for Preliminary Injunction**

Filed on Behalf of: Plaintiff

Counsel of Record for Plaintiff:

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IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY

BARRY J. FENCHAK *Plaintiff,* v. THE PENNSYLVANIA STATE UNIVERSITY BOARD OF TRUSTEES, and MATTHEW SCHUYLER IN HIS OFFICIAL CAPACITY AS CHARIMAN *Defendants.*	:	NO. 2024-CV-1843-CI

PLAINTIFF'S EMERGENCY MOTION FOR PRELIMINARY INJUNCTION

Plaintiff, Barry J. Fenchak, Trustee of The Pennsylvania State University Board of Trustees, by and through his undersigned Transparency counsel, pursuant to Rule 1531(a) of the Pennsylvania Rules of Civil Procedure, hereby moves this Honorable Court for an preliminary injunction enjoining the Defendants, The Pennsylvania State University Board of Trustees, and Chairman Matthew Schuyler, from removing Plaintiff from the Board of Trustees until resolution of this litigation, or further order of this Court, and in support thereof, avers as follows:

PROCEDURAL AND FACTUAL BACKGROUND

1. On or about July 16, 2024, Plaintiff, Barry F. Fenchak ("Plaintiff") commenced this action by way of civil complaint. A true and correct copy of the Complaint is attached hereto as Exhibit A.

2. On or about August 7, 2024, Defendants, The Pennsylvania State University Board of Trustees and Matthew Schuyler (collectively, "Defendants"), filed preliminary objections to Plaintiff's complaint. A true and correct copy of the Defendants' Preliminary Objections to the Complaint is attached hereto as Exhibit B.

3. On or about August 27, 2024, Plaintiff filed an amended complaint. A true and correct copy of the Amended Complaint is attached hereto as Exhibit C.

4. On or about September 16, 2024, Defendants filed preliminary objections to Plaintiff's amended complaint. A true and correct copy of the Defendants' Preliminary Objections to the Amended Complaint is attached hereto as Exhibit D.

5. As is detailed in the amended complaint, Plaintiff is a duly elected trustee of Penn State's Board of Trustees, and his case implicates two major issues: (1) Plaintiff's lawful requests for information that he is entitled to as a trustee pursuant to 15 Pa. C.S. § 5512; and (2) the retaliatory actions committed by the Defendants in response to Plaintiff's requests for information. *See id.*.

6. Trustee Fenchak has an embedded right as a trustee of the $4 Billion endowment to request information necessary to perform and his fiduciary duties as a trustee. *See Machen v. Machen & Mayer Electrical Mfg. Co.*, 85 A. 100 (Pa. 1912).

7. After the filing of the amended complaint, the Defendants have engaged in further retaliatory conduct with an ever increasing severity of sanctions, including their intent to move for

Plaintiff's permanent removal from the Board of Trustees during a special meeting of the board, to take place on October 10, 2024 at 8 A.M.

8. As grounds for the removal process, the Defendants have relied, in part, on a complaint "investigated" by the Board, including interviews conducted on the board's behalf by the University's Office of Ethics and Compliance ("OEC").

9. The Defendants plan to remove Plaintiff from the board is wholly improper.

PRETEXTUAL "INVESTIGATION"

10. The University investigation relates to a "complaint" made by an unnamed university employee who reportedly was made uncomfortable by a self-deprecating joke that Plaintiff made that referenced the word "penis."

11. The joke, which was lifted by Plaintiff, nearly verbatim, from the movie "A League of Their Own," was uttered by plaintiff on the afternoon of July 19th, 2024, shortly after the conclusion of a board meeting on the Penn State Altoona campus.

12. While in the presence of several staff members of the University IT department, Plaintiff commented that for trustees, one of the nice aspects of off-site meetings was that they always received "gift bags" from the folks at the local Commonwealth Campus, including baseball hats.

13. Plaintiff, in an attempt to be funny and bring levity to an otherwise serious and stressful atmosphere that often surrounds board meetings, mentioned that, unfortunately, one of the gifts was a very nice PSU ball cap and that he generally can't wear ball caps because his wife says: "You like the umpire in the movie League of Their Own" where the Tom Hanks character told the umpire "you look like a penis with that little ball cap on."

14. This remark, while foolishly made, was nothing more than a self-deprecating joke, and was lifted, nearly verbatim, from the movie.

15. The Defendants launched an investigation as a result of this incident, and they, in conjunction with the OEC, interviewed several persons, including Plaintiff.

16. Plaintiff and his counsel have not been given a copy of the complaint, in part or in full.

17. The Defendants "investigation" of Plaintiff was pretextual. It was an opportunity for them to bootstrap their pre-conceived plan to remove Plaintiff from the board (as punishment for his prior information requests) to a purported "safety" concern.

18. The Defendants' have relied on this incident, in part, as the basis for the permanent removal of Plaintiff from the board.

19. They contend that Plaintiff not only poses a safety concern to the University at large as a result of this incident, but this incident somehow violated the amorphous Trustee Code of Conduct established by the amendments to the bylaws, adopted on July 30, 2024.

20. As addressed in further detail below, the amended bylaws were not in effect on the date of this incident, and therefore may not lawfully be used as a basis to remove Plaintiff from the board. In short, they created bylaws to hammer Trustee Fenchak for a past action.

21. Nonetheless, the Defendants newfound safety concerns are preposterous, as they are belied by the board's longstanding ignorance of actual safety threats posed by the conduct, actions or behavior of persons and trustees other than Plaintiff.

22. Under any reasonable interpretation of the alleged incident investigated by Defendants, and OEC (whose authority to investigate an alleged violation of the Board's Code of Conduct is a mystery), there are no grounds to reasonably conclude that that Plaintiff's utterance

of a self-deprecating bad joke has rendered him a danger to others, or that he has otherwise engaged in abusive or harassing behavior.

23. At most, Plaintiff's recitation of a line from a PG rated movie, was an ill-advised attempt to be humorous, and he regrets that it resulted in someone feeling uncomfortable.

24. It certainly does not rise to the level of harming or endangering the PSU community.

25. Even if one assumes that the Defendants' "investigation" was legitimately undertaken, which it was not, the investigation was highly flawed as the Defendants were actively involved in the investigation, undermining its integrity and undercutting any argument that the it was conducted fairly, independently, and without bias.

IMRPOPER MOTIVE FOR REMOVAL

26. The fact of the matter is that the Defendants have admitted that their decision to move for Plaintiff's removal from the Board is not based solely on the incident giving rise to their investigation, but instead is based on Plaintiff's "well documented behavior."[1]

27. In other words, the Defendants have openly admitted that their decision to permanently remove Plaintiff from the board is based, in large part, on his prior conduct (*i.e.* his requests for information.

28. Not just routine information, but information related to a $1 Billion contract that was not presented to the Board for a vote; information related to the financial health of the endowment.

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[1] https://www.centredaily.com/news/local/education/penn-state/article292173480.html#campaignName=statecollege_breaking_newsletter

29. This cumulative behavior that the Board complains of is that Plaintiff asks questions, asks the right questions that the Board does not want to divulge.

30. This is extremely troubling as Plaintiff's prior conduct (*i.e.* information requests, etc.), and the Defendants' responses thereto, are directly at issue in this pending lawsuit. *See* Exhibit C.

31. The defendants cannot be permitted to circumvent these legal proceedings and bypass litigation of Plaintiff's claims, particularly a statutory claim (Count I - 15 Pa. C.S. § 5512), by summarily removing him from the board, let alone permanently remove him from the Board under a pretext.

32. To further demonstrate the insincerity of the Defendants' alleged safety concerns posed by Plaintiff, this Court needn't look any further than the Board's prior restrictions imposed upon Plaintiff, including the board's prohibition of Plaintiff's in-person attendance of board meetings and functions.

33. While these prior restrictions are improper, as discussed in the amended complaint, they demonstrate that the removal of Plaintiff from the board is wholly unnecessary at this point.

34. Defendants' removal of Plaintiff from the board will do nothing to advance their purported safety concerns, however, it will serve to assist them in defeating Plaintiff's claims in this lawsuit, which is their actual motive.

PROCEDURAL ARTIFICE

35. The Defendants are also improperly, and unlawfully, attempting a retroactive application of the amended bylaws for conduct that occurred *prior to* their adoption.

36. On July 30th, 2024, the Board adopted amended bylaws (the "amended bylaws") that substantially ease their burden for removal of a trustee.[2]

37. In addition to imposing a new Trustee Code of Conduct rife with nebulous standards, Section 2.05 of the amended bylaws permits the Defendants to pursue removal of a trustee such as Plaintiff for a mere violation of the newly adopted Code of Conduct. *See* a true and correct copy of Section 2.05 of the amended bylaws, attached hereto as Exhibit D.

38. The new standard of removal established by the amended bylaws substantially eases the Defendants burden to remove Plaintiff from the board.

39. The prior bylaws contained a heightened standard of removal of a trustee and only permitted the trustee to be removed in the event of a "breach of fiduciary duties."

40. Here, the Defendants are attempting to permanently remove Plaintiff from the board under the revised removal provisions of the amended bylaws.

41. However, the alleged conduct or actions of Plaintiff, which the Defendants cite as grounds for his removal from the board, all occurred *prior to* July 30th, 2024.

42. This is wholly improper, as it is a retroactive application of the amended bylaws for acts or conduct occurring prior to the adoption of the amended bylaws.

43. Any alleged actions or conduct of Plaintiff occurring *prior to* July 30th, 2024, are subject to, and governed by, the bylaws in effect at that the time of his conduct.

44. The Defendants are legally and contractually bound to the bylaws, and they may lawfully avail themselves of the lessened removal standards of the amended bylaws, where the alleged conduct or actions of Plaintiff occurred prior to July 30th.

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[2] https://bpb-us-e1.wpmucdn.com/sites.psu.edu/dist/7/64540/files/2024/07/Bylaws-2024-July.pdf

45. Rather, they must be held to the removal standard of "breach of fiduciary duties," as that was the standard in effect at the time of the incidents relied on by the Board as justification to remove Plaintiff.

INJUNCTIVE RELIEF

46. Pursuant to Pa. R. A.P. 1532(a), this Court may order special relief, including a preliminary or special injunction "in the interest of justice and consistent with the usages and principles of law."

47. The standard for obtaining a preliminary injunction under this rule is the same as that for a grant of a preliminary injunction pursuant to the Pennsylvania Rules of Civil Procedure. *Shenango Valley Osteopathic Hosp. v. Dep't ofHealth*, 499 Pa. 39, 51, 451 A.2d 434, 441 (Pa. 1982); *Commonwealth ex rel. Pappert v. Coy*, 860 A.2d 1201, 1204 (Pa. Commw. Ct. 2004).

48. Preliminary injunctive relief may be granted at any time following the filing of a Petition for Review. *See* Pa. R. A.P. 1532(a).

49. The requirements for the Court to consider before issuing a preliminary injunction are as follows:

> (1) whether the injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages; (2) whether greater injury would result from refusing the injunction than from granting it; (3) whether the injunction will restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; (4) whether plaintiffs are likely to prevail on the merits; (5) whether the injunction is reasonably suited to abate the offending activity; and (6) whether the injunction will not adversely affect the public interest. *Free Speech LLC v. Philadelphia*, 884 A.2d 966, 970 (Pa. Commw. Ct. 2005); *Warehime v.* Warehime, 860 A.2d 41, 46 (Pa. 2004); *Kessler v. Broder, et al.*, 2004 PA Super 200, 851 A.2d 944, 946 (Pa. Super. Ct. 2004) (citing *Summit*

Towne Centre, Inc. v. Shoe Show ofRocky Mt., Inc., 573 Pa. 637, 646, 828 A.2d 995, 1001 (Pa. 2003)).

50. "[T]o sustain a preliminary injunction, the plaintiff's right to relief must be clear, the need for relief must be immediate, and the injury must be irreparable if the injunction is not granted." *Sovereign Bank v. Harper*, 674 A.2d 1085, 1091 (Pa. Super. 1996). Only "reasonable grounds" need exist for a trial court to grant injunctive relief. *Id.* (citing *William v. Children's Hosp. of Pittsburg*, 479 A.2d 452, 453 (Pa. 1984)).

51. In this matter, Plaintiff meets all elements necessary for this Honorable Court to enter a preliminary injunction.

I. The Injunction Is Necessary To Prevent Immediate And Irreparable Harm That Cannot Be Adequately Compensated By Damages

52. First, an injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages.

53. If the board is permitted to bulldoze ahead with Plaintiff's permanent removal from the board, the immediacy and irreparability of the harm is self-evident: (a) he will immediately lose all rights conferred upon him as a duly elected member of the board; (b) he will immediately be deprived of the ability to represent the alumni constituents that elected him to his position on the board; (c) the Defendants will immediately take the position that Plaintiff is no longer entitled to any information that he is lawfully entitled to as a trustee pursuant to 15 Pa.C.S. § 5512.

54. Importantly, Plaintiff would not be adequately compensated for these deprivations by a mere award of damages.

II. Greater Injury Will Result From Refusing The Injunction Than From Granting It

55. Second, greater injury would result by denying this request for injunctive relief,

than by granting it, as all of Plaintiff's rights as duly elected trustee would immediately by deprived from him upon his removal from the board.

56. Moreover, Plaintiff would be forced to incur additional legal costs and could potentially deprived of his day in court in this action, as the Defendants will undoubtedly move to dismiss this action on the grounds that Plaintiff is no longer a trustee and therefore is no longer entitled to any information under 15 Pa. C.S. § 5512.

57. Furthermore, his constituents, who elected Plaintiff to the board, would be denied representation on the board by their elected trustee.

58. Conversely, the only arguable harm to Defendants by the granting of this injunction would be that they cannot unilaterally push Plaintiff off the board without a hearing on the merits for the claims raised in this lawsuit.

59. Simply put, the harm of not granting this injunction is far greater than any conceivable harm that could result from its entry.

III. Granting a Preliminary Injunction Will Restore and Preserve The Status Quo

60. Third, as set forth at length in Plaintiff's Amended Complaint, the Defendants have engaged in a longstanding campaign of retaliation against Plaintiff in response to his requests for information.

61. The Defendants have amplified their retaliatory efforts and now seek to impose the ultimate punishment: Plaintiff's permanent removal from the Board of Trustees.

62. Granting an injunction will restore the parties to the status that existed prior to the Defendant's invocation of removal proceedings and will allow for a full and fair determination of Plaintiff's claims in this lawsuit.

IV. Plaintiff is Likely to Prevail on the Merits

63. Fourth, as set forth in Plaintiff's Amended Complaint, Plaintiff is likely to prevail on the merits of the claims asserted in this lawsuit.

64. Both the legislature and the Supreme Court of Pennsylvania have clearly and unequivocally established Plaintiff's *absolute* right to the information that he has requested from Defendants. *See* 15 Pa. C.S. § 5512; *Machen v. Machen & Mayer Electrical Mfg. Co.*, 85 A. 100 (Pa. 1912).

65. Moreover, the courts of this commonwealth have routinely ruled against the Defendants, and awarded attorney's fees, for their wrongful evasion of the mandates of 15 Pa. C.S. § 5512. *See In re Nonprofit Corporation Trustees to Compel Inspection of Corporate Information*, 157 A.3d 995 (Pa. Cmwlth. 2017).

66. Plaintiff is entitled to the information that he seeks from Defendants as a matter of law. Accordingly, he is likely to prevail on the claims raised in this lawsuit.

V. The Injunction is Reasonably Suited to Abate the Offending Activity

67. "A preliminary injunction must be reasonably suited to abate the offending activity." *SEIU Healthcare Pennsylvania*, 104 A.3d at 509.

68. Without an injunction, the Defendants will continue to plow forward with their goal of permanently removing Plaintiff from the board and stopping this lawsuit in its tracks.

69. And as their *retroactive* application of the amended bylaws demonstrates, the Defendants will stop at nothing to remove Plaintiff from the board and deny him his day in Court.

70. An injunction is reasonably suited to stop the Defendants' misconduct, and it will allow the merits of Plaintiff's lawsuit to be fairly and fully litigated, and a decision on the merits will be rendered by this Honorable Court, not by any closed-door executive sessions or secretive

governance committees controlled by the Defendants.

VI. An Injunction will not Adversely Affect the Public Interest

71. An injunction will not adversely affect the public interest in this matter.

72. To the contrary, an injunction will serve the public interests of due process, transparency, good governance, and faithful discharge of the laws of this Commonwealth.

CONCLUSION

73. For the foregoing reasons, this Honorable Court should enter a preliminary injunction enjoining the Defendants from removing Plaintiff from the Board of Trustees until a final resolution of this litigation has occurred.

WHEREFORE, Plaintiff respectfully requests that this Honorable Court enter the attached order granting the petition for a preliminary injunction and enjoining the Defendants from removing Plaintiff from the Board of Trustees until further order of this Court.

Respectfully submitted,

By: */s/ Justin J. Boehret*
/s/ Erika L. Silverbreit
/s/ Terry L. Mutchler
JUSTIN J. BOEHRET, ESQ.
ERIKA L. SILVERBREIT, ESQ.
TERRY L. MUTCHLER, ESQ.
Counsel for Plaintiff
Transparency Law and Public Data Team
OBERMAYER REBMANN MAXWELL
& HIPPEL LLP

Date: September 20, 2024

VERIFICATION

I, Barry J. Fenchak, Plaintiff in the above-referenced action, verify that the statements set forth in the foregoing Petition are true and correct to the best of my knowledge, information and belief. I understand that the statements made herein are subject to the penalties of 18 Pa. C.S.A. § 4904, relating to unsworn falsification to authorities.

Date: 9/20/24

Barry J. Fenchak

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.

Respectfully submitted,

OBERMAYER REBMANN MAXWELL & HIPPEL LLP

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Dated: September 20, 2024

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CERTIFICATE OF GOOD FAITH EFFORT

Pursuant to Centre County Local Rule 208.2(e), we, Erika L, Silverbreit and Justin J. Boehret, hereby certify that we have conferred with counsel for the opposing party in a good faith effort to resolve by agreement the issues raised by this application without intervention of the court. The issues raised by this motion have not been resolved and the parties affected by this application received notice of the date and time I intend to present this application to the court.

OBERMAYER REBMANN MAXWELL & HIPPEL LLP

/s/ Justin J. Boehret
/s/ Erika L. Silverbreit
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Erika L. Silverbreit, Esquire
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Philadelphia, PA 19102
Attorney for Plaintiff

Date: September 20, 2024

CERTIFICATE OF SERVICE

I, Justin J. Boehret, hereby certify that on this date a true and correct copy of the foregoing document was served upon the following counsel for the Defendants, via email and regular mail:

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Dated: September 20, 2024