UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ROBERT L. BREUDER, Plaintiffs, vs. BOARD OF TRUSTEES OF COMMUNITY COLLEGE DISTRICT NO. 502, DUPAGE COUNTY, ILLINOIS, an Illinois body politic and corporate, KATHY HAMILTON in her official and individual capacity, DEANNE MAZZOCHI in her official and individual capacity; FRANK NAPOLITANO in his official and individual capacity, and CHARLES BERNSTEIN in his official and individual capacity, Defendants.	)	Case No.: 1:15-CV-9323 Hon. Andrea R. Wood

DEFENDANT COLLEGE OF DUPAGE'S MOTION TO CERTIFY FOR INTERLOCUTORY APPEAL PURSUANT TO 28 U.S.C. § 1292(b)

Defendant College of DuPage respectfully requests that this Court certify for immediate interlocutory appeal the portion of its Memorandum Opinion and Order denying the College's Motion to Dismiss on the basis that Dr. Breuder's contract was void *ab initio*. In deciding whether or not to certify an interlocutory appeal, the Court must make the following determinations: "There must be a question of law, and it must be controlling, it must be contestable, and its resolution must promise to speed up the litigation." *Ahrenholz v. Bd. Of Trustees of the Univ. of Ill.*, 219 F.3d 674, 675 (7th Cir. 2000)(emphasis omitted). Here, all four requirements are met. Immediate appellate review of the College's three-pronged void *ab initio* argument makes sense because the issues are purely legal in nature, they are hotly contested, and their definitive resolution will unquestionably expedite the conclusion of this litigation. Accordingly, the College requests immediate appellate review of the following questions:

- Whether, under Illinois law, a board of trustees can tie the hands of future boards to hire or fire an administrator;
- Whether, under Illinois law, a board of trustees can enter into an employment agreement requiring all board members' presence at a termination hearing and a supermajority to vote to terminate; and
- Whether, under Illinois law, a Board can agree to extend an employment agreement based entirely on action taken during a closed session.

1. Whether Plaintiff's Employment Agreement is Void is a Question of Law

The College's three independent rationales for declaring plaintiff's contract void *ab initio* raise legal, not factual, issues. Whether a board of trustees can (a) tie the hands of future boards to hire or fire an administrator; (b) enter into an employment agreement requiring all board members' presence at a termination hearing and a supermajority to vote to terminate; or (c) agree to extend an employment agreement without taking such action publicly presents pure questions of law touching upon the Illinois Constitution, the Illinois Public Community College Act, the Illinois Open Meetings Act, and Illinois common law. This Court did not find otherwise in reaching its decision. Accordingly, whether plaintiff's contract is void *ab initio* involves pure questions of law susceptible to immediate appellate review. *See Ahrenholz*, 219 F.3d at 676 (holding that "question of law" for purposes of Section 1292(b) refers "to a question of the meaning of a statutory or constitutional provision, regulation, or common law doctrine . . .").

2. The Question is Controlling

A question of law is "controlling" under 28 U.S.C. § 1292(b) if "its resolution is quite likely to affect the further course of litigation, even if not certain to do so." *Sokaogon v. Gaming Enter. Co. v. Tushie-Montgomery Assocs., Inc.*, 86 F.3d 656, 659 (7th Cir. 1996); *see also In re Text Messaging Antitrust Litigation*, 630 F.3d 622, 624 (7th Cir. 2011) (question on interlocutory appeal was

controlling because there was a "decent chance (though by no means certain) that were a court to rule the second amended complaint deficient, the case would be over."). Here, an appellate finding that plaintiff's employment agreement is void would necessarily result in the dismissal of Count I (due process property interest) and Count IV (breach of contract). Such a ruling would likely result in the dismissal of Count II as well because plaintiff would no longer have a property interest in his continued employment. At best, plaintiff may have a very limited due process liberty interest claim that might survive with very limited potential damages. Such a claim would involve very limited discovery regarding plaintiff's failure to exhaust his administrative remedies, his inherent defamation claim, and his alleged loss of other employment opportunities. Accordingly, the questions raised by the College are "controlling."

3. The Legal Issues Are Contestable

The legal issues raised by the College's void *ab initio* arguments are undeniably contestable. The employment agreement and its subsequent amendments indisputably tied the hands of future boards to hire or fire the plaintiff. The Court found this legally permissible – largely on the strength of a 42 year old Seventh Circuit case, *Hostrop v. Bd. of Jr. Coll. Dist. No. 515*, 523 F.2d 569 (7th Cir. 1975). But strong arguments exist that *Hostrop* has been supplanted by Illinois law, *see, e.g.*, 110 ILCS 805/3B-1 (limiting tenure to "faculty members" and excluding "administrative personnel"); Seventh Circuit caselaw, *see, e.g., Crull v. Sunderman*, 384 F.3d 453, 466 (7th Cir. 2004) (recognizing that "Illinois courts have held 'it is contrary to the effective administration of a political subdivision to allow elected officials to tie the hands of their successors with respect to decisions regarding the welfare of the subdivision.'"); and Illinois cases which have held uniformly since *Hostrop* that public boards cannot tie successor boards' hands by entering into agreements with high – level employees extending beyond the board's tenure. *See, e.g., Trombetta v. Bd. of Educ., Proviso Twp. High Sch. Dist. No. 209,* 2003 WL 1193337, at *1 (N.D. Ill. Mar. 13, 2003); *Cannizzo v. Berwyn Twp.*, 318 Ill. App. 3d 478, 482-83 (1st Dist. 2000); *Grassini v. DuPage Twp.*, 279 Ill. App.

3d 614, 620 (3d Dist. 1996); *see also Walters v. Village of Colfax*, 466 F. Supp. 1046, 1057 (C.D. Ill. 2006) (plaintiff had no property interest in job because employment contract was void *ab initio* under *Grassini*); *LaSalle Nat'l Bank v. Village of Brookfield,* 95 Ill. App. 3d 765, 769 (1st Dist. 1981) (Under Dillon's Rule, any fair and reasonable doubt about local governments' powers is resolved against the governmental unit). At the very least, then, the legality of plaintiff's term employment agreement is a "contestable" issue ripe for appellate review.

Illinois state courts have expanded *Millikin v. Edgar Cnty.*, 32 N.E. 493 (1892) to numerous types of governmental entities, including townships, mental health boards, and highway commissioners. The upshot of this Court's ruling is that Community Colleges would be the *only* type of governmental entity in Illinois *not* subject to the rule set forth in *Millikin.* With respect, it seems unusual that Illinois courts would except Community Colleges from that rule. It makes sense for the Seventh Circuit (which decided the *Hostrop* case upon which the Court relied) to determine for itself the continued viability of that decision.

Also hotly contested is the legality of the provision in plaintiff's contract giving him the right to appear before all seven members of the Board (rather than a quorum) *and* requiring a supermajority vote of five of those seven members (rather than a simple majority) to terminate his employment. Those provisions fly in the face of the Public Community College Act, and the College is unaware of any other Court holding that such provisions are lawful. Necessarily, then, this too is a "contestable" issue that raises issues of first impression subject to immediate appellate review. *See Boim v. Quranic Literacy Inst.*, 291 F.3d 1000, 1007-08 (7th Cir. 2002) (accepting appeal and stating that questions of first impression are "certainly contestable"); *Pavey v. Conley*, No. 3:03-CV-662 RM, 2006 WL 3715019, at *1 (N.D. Ind. Dec. 14, 2006) (citing *Boim* and holding that issues were controlling questions of law in part because they were questions of first impression); *Brewton v. City of Harvey*, 319 F. Supp. 2d 890, 893 (N.D. Ill. 2004) (finding that issue "is

contestable because it appears to be a matter of first impression."); *Drnek v. City of Chicago*, 205 F. Supp. 2d 894, 900 (N.D. Ill. 2002) (holding that issue was "contestable because … it is a question of first impression.").

This Court found the quorum and supermajority provisions lawful because the Public Community College Act "explicitly alters the Board's decision procedures with respect to terminations of tenured faculty." Opinion at 8. Respectfully, the Court's citation to 110 ILCS 805/3B-4 ("a majority vote of all its members" required to proceed with dismissal of a tenured faculty member for cause) proves the College's point. In the example relied upon by the Court, the Illinois legislature carved out an exception to the quorum provision for tenured faculty, but not for administrators. This proves that the Illinois legislature knew how to confer additional powers to Boards when it intended to do so. *See, e.g.*, 110 ILCS 805/3-38 (permitting Community College Boards to enter into leases for a period not to exceed five years "when authorized by the affirmative vote of 2/3 of the members of the board"); 110 ILCS 805/3-48 (allowing a Community College Board member to provide "materials, merchandise, property, services, or labor" to a Community College if "such contract is approved by a majority vote of those board members presently holding office"); 110 ILCS 805/3A-2 (in discussing approved uses for bond proceeds, requiring that "such remaining proceeds may also be used for any other authorized purpose designated in a resolution approved by not less than 5 members of the board of trustees"); *see also* 70 ILCS 3705/7 (Public Water District Act allows appointment of general manager to "serve a term of five years" who "may be discharged only upon unanimous vote of the board of trustees"). It gave Boards no such powers with respect to administrators. Therefore, the College respectfully believes that this Court erred on this point – or at the very least created a "contestable" issue for appeal.

Finally, whether the terms of plaintiff's employment agreement violated the Open Meetings Act is also very contested. As before, the College is unaware of any caselaw supporting the Court's

decision – making this another issue of first impression. The Court did not cite any authority in its opinion – other than the Open Meetings Act itself. In doing so, the Court misapprehends the requirements of the Open Meetings Act. No dispute exists that the OMA applies to the College, as a local government unit. Nor can dispute exist that the OMA prohibits final action in closed session. 5 ILCS 120/2(e). Nevertheless, plaintiff's employment contract obliged the College's board to vote on termination notices exclusively during closed session. Such a provision squarely runs afoul of the OMA. The Court tries to legalize this provision of the contract by citation to an exception to the OMA, which holds that public bodies "may hold closed meetings to *consider* . . . the appointment, employment, compensation, discipline, performance, or dismissal of specific employees of the public body . . . " Opinion at 9, citing 5 ILCS 120/2(c)(1) (emphasis added). But *considering* one's employment or dismissal is far different from taking *final action* on one's employment or dismissal. The OMA forbids the latter in closed session. Illinois courts are *uniform* in finding that final action must occur in public. *See Grissom v. Bd. of Educ. of Buckley-Loda Cmty. Sch. Dist. No. 8*, 75 Ill.2d 314, 326-27 (1979) (the OMA requires final action in open session, but the Act not violated when Board drew up signed findings on termination of tenured teacher in closed session and voted on the termination in open session); *Bd. of Educ. of Springfield Sch. Dist. No. 186 v. Attorney Gen. of Illinois*, 398 Ill. Dec. 833, 839-40 (4th Dist. 2015) (Board did not violate the OMA when it took a final vote in open session but signed superintendent's separation agreement in closed session); *Kosoglad v. Porcelli*, 132 Ill. App. 3d 1081, 1092 (1st Dist. 1985) (the OMA allows a public body to consider dismissal matters in closed session as long as final action is taken at an open meeting).

Moreover, on July 24, 2015, the Illinois Attorney General's Office issued a determination letter stating that a prior Board had violated the OMA approving the Third Addendum to the President's employment agreement; on March 17, 2016, the DuPage County State's Attorney

concluded that the prior Board violated the OMA by taking final action to extend plaintiff's contract in closed session in this very circumstance.[1]

Therefore, for all of these reasons, the Court's opinion erred on this point – or, at the very least, created a "contestable" issue that requires appellate review.

4. The Determination of This Issue Will Speed Up the Litigation

An appeal from the Order may "head off protracted, costly litigation." *Ahrenholz*, 219 F.3d at 677. If the College prevails on appeal, the case against the College will come to an end (or, at the very least, be limited to a single issue), allowing the parties and the Court to avoid extensive discovery and discovery litigation, possibly additional dispositive motion practice, not to mention a possible trial of the case.

[1] The Illinois Attorney General has likewise issued multiple binding opinions that recognize subjects may be *considered* during closed session, but that *final action* requires a public Board vote. *See, e.g.*, http://foia.ilattorneygeneral.net/pdf/opinions/2012/12-013.pdf (committee reached consensus during closed session "at least not to oppose the proposed" agreement; but no subsequent deliberation and vote on the recommendation was made in open session, violating Open Meetings Act); http://foia.ilattorneygeneral.net/pdf/opinions/2013/13-003.pdf (board agreed in closed session to terminate a tenured professor, but failed to motion and vote to terminate the professor in open session, violating the Open Meetings Act; the "plain language of section 2(e) of OMA clearly prohibits a public body from taking final action on any matter during a closed meeting. ***There is no exception for employment-related decisions***.") (emphasis added)

Conclusion

Pursuant to 28 U.S.C. § 1292(b), the College requests immediate appellate review of the following questions:

- Whether, under Illinois law, a board of trustees can tie the hands of future boards to hire or fire an administrator;
- Whether, under Illinois law, a board of trustees can enter into an employment agreement requiring all board members' presence at a termination hearing and a supermajority to vote to terminate; and
- Whether, under Illinois law, a Board can agree to extend an employment agreement based entirely on action taken during a closed session.

Dated: March 17, 2017

Respectfully submitted,

s/Andrew C. Porter

Andrew C. Porter
Katie Klamann
DRINKER BIDDLE & REATH LLP
191 North Wacker Drive
Suite 3700
Chicago, IL 60606
(312) 569-1364
andrew.porter@dbr.com
Katie.klamann@dbr.com

Attorneys for Defendant Board of Trustees of Community College District No. 502, DuPage County, Illinois

CERTIFICATE OF SERVICE

I, Andrew C. Porter, hereby certify that, on March 17, 2017, I caused copies of the foregoing Defendant College of DuPage's Motion to Certify for Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b) to be served via electronic and U.S. mail to the following counsel of record:

James R. Figliulo
Melissa N. Eubanks
FIGULIULO & SILVERMAN, P.C.
10 S. LaSalle Street, Suite 3600
Chicago, IL 60603
(312) 251-4600
jfigliulo@fslegal.com
meubanks@fslegal.com

Martin A. Dolan
DOLAN LAW, P.C.
10 S. LaSalle Street, Suite 3702
Chicago, IL 60603
(312) 676-7600
mdolan@dolanlegal.com

Terry A. Ekl
Vincent C. Mancini
Patrick L. Provenzale
Tracy L. Stanker
EKL, WILLIAMS & PROVENZALE LLC
Two Arboretum Lakes
901 Warrenville Road, Suite 175
Lisle, IL 60532
(630) 654-0045
tekl@eklwilliams.com
vmancini@eklwilliams.com
pprovenzale@eklwilliams.com
tstanker@eklwilliams.com

/s/ Andrew C. Porter