

BEFORE THE STATE PERSONNEL BOARD OF REVIEW

David Douglas et. al.,	:	Case Nos.:	2022-REM-01-0005
	:		2022-WHB-01-0006
Appellants,	:		2022-REM-01-0007
	:		2022-WHB-01-0008
-vs-	:		2022-REM-01-0009
	:		2022-WHB-01-0010
City of Dover,	:		
	:	Raymond M. Geis	
Appellee.	:	<i>Administrative Law Judge</i>	
	:		

**MAYOR RICHARD P. HOMRIGHAUSEN’S
MOTION TO INTERVENE**

Now comes Intervenor, City of Dover Mayor and Appointing Authority Richard P. Homrighausen, and hereby seeks leave to intervene in the above-captioned appeals as a matter of right as an Appellee. Alternatively, permissive intervention is requested. The reasons for this motion are articulated more fully in the accompanying Memorandum in Support.

Respectfully Submitted,

/s/ Richard P. Homrighausen

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*Mayor and Appointing Authority for the
Appellee, City of Dover*

MEMORANDUM IN SUPPORT

I. STATEMENT OF FACTS

Mayor Richard P. Homrighausen (the “Mayor”) has been the Mayor of the City of Dover for 30 years and is the appointing authority for the Appellee-City. In December 2021, the Mayor removed the three Appellants from their positions due to a loss of confidence in their ability to perform the essential functions of their positions. All three Appellants were indisputably members of the unclassified service at the time of their respective removals.

On or about January 7, 2022, the Appellants appealed their removals to the State Personnel Board of Review and alleged that the Mayor violated Ohio’s Whistleblower Statute (R.C. § 124.341) in terminating their employment. Appellee’s Law Director, Douglas O’Meara (“O’Meara”), failed to inform the Mayor that the three appeals had been filed despite O’Meara’s legal duty to serve as the Mayor’s legal counsel and attorney, (*See* R.C. § 733.51 and Chapter 137 of the Codified Ordinances of Dover (attached hereto as Exhibit A)) and despite the Mayor’s position as appointing authority for the Appellee City.

Following O’Meara’s willful disregard of his legal duty to serve as the Mayor’s attorney, O’Meara entered into settlement discussions with the three Appellants – again without notifying the Mayor, appointing authority for Appellee. Further, the Mayor has been excluded from executive sessions conducted by the City Council of Dover for nearly two years, and, of course, was not included in recent executive sessions or other meetings in which the potential settlement of these cases has presumably been discussed. *See* Exhibit B, February 9, 2022 Article from thebargainhunter.com, p. 2.

Then, on February 8, 2022 at 2:42 PM, the Mayor received an email from O’Meara with a copy of a settlement agreement which was to be considered by Appellee’s City Council less than

five hours later.¹ See Exhibit C, Email from Law Director O’Meara to Mayor with Settlement Agreement. Prior to receiving this email, the Mayor had no knowledge of the proposed settlement terms which are potentially binding on him as Appellee’s Mayor and appointing authority.

The proposed settlement agreement is a most unusual settlement agreement. Some of its terms include:

- An **admission** that “the Mayor’s decision to terminate the employment of all three Appellant Employees was so obviously motivated by illegal retaliation...” (p. 2).
- **Numerous admissions** that removing the three employees was “unlawful.” (pp. 2 & 4).
- A statement that all Appellants are “further evaluating additional legal action against Dover and its employees, representatives, and agents, including the Mayor, seeking additional compensatory damages, attorneys’ fees, punitive damages, and any other available remedies arising out of the termination of their employment” but **without** a waiver and release of all claims against the Mayor in his personal capacity, which, of course, is a customary settlement agreement provision. (p. 2).
- Terminating the employee that currently holds one of the Appellant’s former positions and a statement that this employee “will not be entitled to wages or benefits from the City as the terminated employees.” (p. 4, Section (1)(viii)).
- A **guarantee of employment** for all three (unclassified) Appellants through December 31, 2023, which just so happens to be the same day that the Mayor’s current term ends. (p. 4, Section (1)(viii); p. 5, Section (4)).
 - This includes a provision specifying that in the event any of the Appellants are terminated following their reinstatement, the City will **guarantee the continuance of all wages and benefits** through December 31, 2023 regardless of the reason for the Appellants’ termination. (p. 5, Section (4)).
- A statement that the City agrees “that compensatory damages may not be [an] adequate remedy to the Appellant Employees should any Dover official or employee seek to interfere with the Appellant Employees’ employment relationship in any way,” which is a clear signal to the Mayor that he should not even attempt to address the employment situations of the three employees, despite his status as appointing authority. (p. 4, Section (3)).

¹ Under normal circumstances, the Mayor would not release the entirety of a draft settlement agreement in a public filing. However, Appellee’s City Council has already released the agreement to the press, which was published in full. See Exhibit D, WJER Radio Article published February 9, 2022, at: <https://www.wjer.com/news/dover-council-bringing-back-fired-employees-against-mayors-will/>.

- A provision giving Appellants a **clear contractual right** to seek a temporary restraining order against Appellee and/or the Mayor as a further guarantee of Appellants' continued employment. (p. 4-5, Section (3)).
- A **blatant accusation** that "Dover's Mayor, or those working at his direction, may seek to interfere with the Appellant Employees' employment relationship with Dover, and/or seek to interfere with the execution and administration of this Agreement." (p. 5, Section (4)).

Exhibit C, pp. 2-6.

These provisions were presumably drafted by Law Director O'Meara (at least in part) and were certainly reviewed by Law Director O'Meara because that was shared with the general public during the February 8, 2022 City Council meeting and is referenced in the newspaper article cited in FN 1. The proposed settlement terms are unenforceable and are contrary to Ohio law. Settlement agreements do not admit liability on behalf of an appointing authority. Settlement agreements involving Cities *should* contain a release on behalf of City employees and elected officials (among others) in their personal capacity. Settlement agreements typically are not piecemeal and do not expressly contemplate further action. Settlement agreements do not terminate employees, especially when there is no legal authority to do so since the Mayor is the appointing authority. Settlement agreements cannot guarantee unclassified employees continued employment through a date certain, again, because this is up to the appointing authority. Settlement agreements do not prohibit "interference" with an employment relationship and cannot because that is the function of the appointing authority. And settlement agreements do not anticipate potential "interference" by an appointing authority. Lastly, and perhaps most importantly, Law Directors typically do not admit legal liability on behalf of their clients, whom they are ethically and statutorily obligated to represent.

The proposed settlement agreement is a not-so-subtle attempt to contravene the Mayor's authority and its terms were not drafted in Appellee's or the Mayor's best interests. Further, neither Law Director O'Meara nor City Council have the authority to enter into the terms of this settlement agreement as neither is Appellee's appointing authority. Many key provisions, as described above, are illegal on their face. Despite these serious concerns, Appellee's City Council approved the settlement agreement on the legal advice of Law Director O'Meara. The Mayor's legal interests are clearly not being protected. Accordingly, the Mayor seeks leave to intervene in Appellants' consolidated appeal to protect his own interests, and by extension, those of Appellee City of Dover.

II. LAW AND ARGUMENT

This Board was created by statute, and it derives its jurisdiction from Ohio Revised Code Chapter 124. *Ketron v. Ohio Dept. of Transportation*, (1991), 61 Ohio App. 3d 657, 659. Therefore, the Board, "having been created by statute, possesses only such powers and duties as conferred on it by the provisions of the enabling statute***." *Id.*, citing *Hansen v. State Personnel Bd. Of Review* (1997), 51 Ohio App. 2d 7. Ohio Revised Code § 124.03 delineates the powers and duties of the Board, which include:

(A)(1) Hear appeals, as provided by law, of employees in the classified state service from final decisions of **appointing authorities**. . .

* * *

The state personnel board of review may affirm, disaffirm, or modify the decisions of the **appointing authorities**. . .

* * *

(A)(2) Hear appeals, as provided by law, of **appointing authorities**. . .

R.C. §124(A)(1) – (2). Moreover, with regard to whistleblower appeals, the Revised Code **mandates** that if an employee files such an appeal: "**the board shall immediately notify the employee's appointing authority** and shall hear the appeal." R.C. § 124.341(D).

Accordingly, the appointing authority is a necessary and proper party to any appeal filed with the Board, particularly when the appeal is a whistleblower action. Despite his position as Appellee's appointing authority, the Mayor was not notified that any of Appellants' appeals had been filed even though these appeals have a direct impact on the Mayor's interests. Those interests are typically protected by a City's Law Director; however, that is not the case here as O'Meara is attempting to enter into a settlement agreement that admits liability on behalf of the Mayor and prohibits him from exercising his rights as the City's appointing authority.

The appeals at issue in this consolidated case are appeals of decisions made by Appellee's appointing authority, Mayor Richard P. Homrighausen. As such, the Mayor is a necessary and proper party to these appeals, the result of which will have a direct impact on both him and the Appellee-City for which he is the appointing authority.

The Mayor recognizes that this is an unusual motion. However, this is an unusual case involving a proposed settlement agreement that is unprecedented in its scope and applicability. It ties the Mayor's hands in his capacity as appointing authority. Although he may think so, Law Director O'Meara is not Appellee's appointing authority. He has plainly taken affirmative actions in this case which are not in the best interest of Appellee, and certainly not in the best interest of his client, the Mayor.

The Mayor has a right to be heard in these matters given his status as appointing authority. His interests are not being protected. Therefore, the Mayor seeks leave to intervene in this action to protect the interests of the Appellee for which he serves as the appointing authority.

III. CONCLUSION

For the reasons stated above, the Mayor respectfully requests leave to intervene in Appellants' consolidated appeal.

Respectfully Submitted,

/s/ Richard P. Homrighausen

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*Mayor and Appointing Authority for the
Appellee, City of Dover*

CERTIFICATE OF SERVICE

I certify that a copy of the above *Motion to Intervene* was filed with the State Personnel Board of Review and served by electronic mail this 11th day of February, 2022 upon:

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Mayor Richard P. Homrighausen