

**IN THE
COMMONWEALTH COURT OF PENNSYLVANIA**

CITY OF HARRISBURG, MAYOR :
ERIC PAPENFUSE AND BRUCE :
WEBER, :
MLK Jr. City Government Center :
10 N. 2nd Street, Suite 202 :
Harrisburg, PA 17101 :

Petitioners, :

_____ M.D. 2020

v. :

INTERGOVERNMENTAL :
COOPERATION AUTHORITY :
FOR HARRISBURG, :
c/o Jeffrey B. Engle, Esquire :
2205 Forest Hills Drive, Suite 10 :
Harrisburg, PA 17112 :

Respondent. :

**ORIGINAL JURISDICTION PETITION FOR REVIEW IN THE NATURE
OF A COMPLAINT IN EQUITY SEEKING A DECLARATORY
JUDGMENT AND INJUNCTIVE RELIEF**

Petitioners, City of Harrisburg, Mayor Eric Papenfuse, and the City of Harrisburg’s Director of Financial Management Bruce Weber (hereinafter “Director Weber”), by and through their undersigned counsel, Lamb McErlane PC, hereby file this Original Jurisdiction Petition for Review in the Nature of a Complaint in Equity Seeking a Declaratory Judgment and injunctive relief. Specifically, Petitioners ask this Court to declare that Director Weber — an *ex officio* member of the Intergovernmental Cooperation Authority for Harrisburg, (hereinafter “ICA”) — has

the right to fully participate in ICA executive sessions and to enjoin Respondent from excluding and precluding him from participating in all public and executive session meetings.¹ The ICA's conduct has caused Petitioners severe harm for which they have no adequate remedy at law.

I. STATEMENT OF THE BASIS FOR JURISDICTION OF THE COMMONWEALTH COURT

1. Petitioners file this Original Jurisdiction Petition for Review (pursuant to Chapter 15 of the Pennsylvania Rules of Appellate Procedure) in the Nature of a Complaint in Equity and Seeking a Declaratory Judgment, pursuant to the Declaratory Judgments Act, 42 Pa.C.S. §§ 7532, *et seq.*, Pa.R.C.P. No. 1602, and an action for Injunctive Relief pursuant to Pa.R.C.P. No. 1531.

2. This Court has original jurisdiction of this action against this instrumentality of the Commonwealth under Section 761 of the Judicial Code, 42 Pa.C.S. § 761(a)(1).²

¹ Executive sessions are exempt from the Sunshine Act's (65 Pa.C.S. §§ 701-716) requirement that governmental and local agency meetings be open to the public. While the Sunshine Act requires meetings of Commonwealth governmental and local agencies to be open to the public, Section 707 of the Act allows board members to privately discuss certain confidential matters, such as personnel actions, real estate transactions, and litigation legal strategy. *See* 65 Pa.C.S. §§ 703, 707(a), 708(a).

² Under 65 Pa. Stat. Ann. § 67.102, a "Commonwealth agency" is defined as "[a]ny office, department, authority, board, multistate agency or commission of the executive branch, an independent agency and a State affiliated entity." *Id.* The term also includes any "organization established by the Constitution of Pennsylvania, a statute or an executive order which performs or is intended to perform an essential governmental function." *Id.* A local agency is "[a]ny political subdivision, intermediate unit, charter school, cyber charter school or public trade or vocational

II. PARTIES SEEKING RELIEF

3. City of Harrisburg is a City of the Third Class.

4. The City of Harrisburg is an assisted city within the meaning of Act 124 of 2018.³

5. Under Act 124 of 2018, Director Weber, as the Director of Financial Management for the City of Harrisburg, is a legislatively-designated, *ex officio*⁴ member, of the Intergovernmental Cooperation Authority for Harrisburg.

6. Petitioner Weber brings this action in his official capacity as the Director of Financial Management for the City.

7. Mayor Eric Papenfuse brings this action in his official capacity as Mayor of the City of Harrisburg.

III. GOVERNMENT UNIT WHOSE ACTION IS IN ISSUE

8. This action is brought against Respondent, the Intergovernmental Cooperation Authority for Harrisburg.

school [and a]ny local, intergovernmental, regional or municipal agency, authority, council, board, commission or similar governmental entity." *Id.*

³2018 Pa. ALS 124, 2018 Pa. Laws 124, 2017 Pa. HB 2557, 2018 Pa. ALS 124, 2018 Pa. Laws 124, 2017 Pa. HB 2557.

⁴ *Ex officio* describes those who become members of a body because of some other office they hold. *See* Black's Law Dictionary 597 (7th ed. 1999)(*ex officio* means "[b]y virtue or because of an office; by virtue of the authority implied by the office.").

IV. STATUTORY PROVISION AT ISSUE

9. Act 124 of 2018, Section 202. Governing board.

(a) Composition of board--

(1) The powers and duties of an authority shall be exercised by a governing board composed of five members appointed as follows:

(i) One member shall be appointed by the Governor.

(ii) One member shall be appointed by the President pro tempore of the Senate.

(iii) One member shall be appointed by the Minority Leader of the Senate.

(iv) One member shall be appointed by the Speaker of the House of Representatives.

(v) One member shall be appointed by the Minority Leader of the House of Representatives.

(vi) *The Secretary of the Budget and the director of finance of an assisted city shall serve as ex officio members of the board.* The ex officio members may not vote and shall not be counted for purposes of establishing a quorum. The Secretary of the Budget and the director of finance of an assisted city may designate in writing a representative of their respective offices to attend meetings of the board on their behalf.

V. GENERAL STATEMENT OF MATERIAL FACTS

10. Petitioners bring this matter to resolve a conflict between the City of Harrisburg, its Mayor and its Director of Financial Management, on the one hand, and the ICA, on the other.

11. Specifically, Petitioners seek a declaration, as a matter of state law, that Director Weber has the statutory right to fully participate in all public and executive sessions of the ICA and an order permanently enjoining the ICA from excluding him from these meetings.

12. Since its inception, the ICA has excluded Director Weber from participation in Board executive sessions—presumably because Director Weber, as an *ex officio* member of the Board, is not permitted to vote — thereby excluding Director Weber from full ICA board participation.

13. As set forth below, the actions of the ICA are contrary to the provisions of the enabling act that created the ICA as well as important policies underlying the statute which promote transparency in government.

14. The ICA was created in 2018 by the General Assembly of the Commonwealth of Pennsylvania to help certain third-class cities, like the City of Harrisburg, achieve financial stability and exit Act 47, the Commonwealth’s program for financially-distressed municipalities.

15. In furtherance of these goals, the General Assembly empowered the ICA to examine consolidations, as well as to review the distressed City’s staffing levels, shared services, pensions and collective bargaining agreements.

16. Act 124 also authorized the ICA to hire an executive director, to contract with consultants and to maintain a website.

17. Act 124 mandates that the ICA file annual reports and audits with state officials and directs the ICA to approve a financial plan each year accounting for the City’s revenues and expenditures.

18. However, the ICA's primary tasks are to negotiate and finalize a five-year financial recovery plan for and an initial Intergovernmental Cooperation Agreement with the City.

19. Indeed, finalization of the five-year recovery plan and an initial Intergovernmental Cooperation agreement are essentially the ICA's *raison d'être*, because a final and approved initial Intergovernmental Cooperation Agreement is a necessary predicate to Harrisburg's ability to exit the state's program for financially distressed municipalities - the goal of Act 124.

20. Currently, the ICA is comprised of Audry Carter, the chair of the Board, Ralph Vartan, vice-chair, Tina Nixon, secretary/treasurer, Kathy Speaker MacNett and Doug Hill.

21. The ICA Board meets monthly to discuss the various issues identified above.

22. Finance Director Bruce Weber (or his designee) have attended monthly ICA board meetings as *ex officio* members.

23. On at least three (3) occasions since its first meeting in 2019, the Board has convened executive sessions to discuss matters outside of the public setting in which it has excluded Director Weber from attending.

24. Director Weber is a statutorily-authorized member of the ICA charged with the fiduciary responsibility of a board member under Section 202 (a)(1)(vi) of

Act 124 and related subsections who is entitled to participate in these executive sessions.

25. Director Weber has made clear his desire to attend these executive sessions and expressed his firm belief that it is his fiduciary obligation that he do so.

26. Mayor Papenfuse, on Director Weber's behalf and on behalf of the City of Harrisburg, also has requested that the Board allow Finance Director Weber attend executive session meetings.

27. Mayor Papenfuse and Director Weber have a keen interest in the subject matter of ICA public and executive session meetings which discuss the strategy to exit Act 47 and other issues relating to the City's finances and ICA's statutory charge.

28. However, the Board has unequivocally denied both Director Weber's and Mayor Papenfuse's requests to grant Director Weber access to these executive sessions.

29. The ICA also has not provided Director Weber any reports, summaries or minutes of any executive session meetings.

30. To add insult to injury, the ICA has offered no explanation for its decision to preclude Director Weber from attending executive sessions, notwithstanding Director Weber and Mayor Papenfuse's repeated requests that the ICA explain its rationale.

31. Rather, the ICA has responded with “radio silence” to the Mayor’s and Director Weber’s request for permission for Director Weber to attend these executive sessions.

VI. NOTICE TO PLEAD

32. Respondent, the Intergovernmental Cooperation Authority for Harrisburg is hereby notified to plead to this Original Jurisdiction Petition for Review within thirty days from service hereof or a default judgment may be entered against Respondent.

VII. STATEMENT OF THE RELIEF SOUGHT

Count I – Request for Injunctive Relief

33. Paragraphs 1 through 32, above, are incorporated herein by reference as if set forth in full here at length.

34. The provisions of Section 202 of Act 124 of 2018 are clear and direct:

(a)(1)(vi) The Secretary of the Budget and the director of finance of an assisted city shall serve as ex officio members of the board. The ex officio members may not vote and shall not be counted for purposes of establishing a quorum. The Secretary of the Budget and the director of finance of an assisted city may designate in writing a representative of their respective offices to attend meetings of the board on their behalf.

35. It is clear from the statute that the General Assembly specifically agreed that the Finance Director of an affected City (in this case, the City of Harrisburg) is to be considered a member of the ICA and that he or she (or his or her designee) is authorized to attend ICA Board meetings.

36. Other than the fact that Act 124 of 2018 does not permit Director Weber to vote, the Act contains no statutory limitation on his authority as an ICA member.

37. Nothing in Act 124 gives the ICA the right to exclude Director Weber from the ICA's executive sessions; thus, the ICA's decision to block Director Weber's ability to attend its closed-door executive sessions violates the plain language of Act. *See e.g., Pennsylvania Financial Responsibility Assigned Claims Plan v. English*, 664 A.2d 84, 87 (Pa. 1995) (“[w]here the words of a statute are clear and free from ambiguity the legislative intent is to be gleaned from those very words.”).

38. The ICA's decision to exclude Weber from executive session meetings also is invalid and unlawful because it exceeds or conflicts with the enabling legislation that created ICA. *Commonwealth v. Smith*, 454 A.2d 1 (Pa. 1982) (“We begin with the well-settled principle that the power and authority to be exercised by administrative agencies must be conferred by the legislature.”).

39. The ICA's conduct also undermines the policies favoring transparency in government. *See, e.g., Levy v. Senate of Pennsylvania*, 65 A.3d 361, 381 (Pa. 2013) (“[T]he objective of the RTKL is to empower citizens by affording them access to information concerning the activities of their government ... [C]ourts should liberally construe the RTKL to effectuate its purpose of promoting access to official government information in order to prohibit secrets, scrutinize actions of public officials, and make public officials accountable for their actions.”).

40. The ICA's violation of this statute constitutes immediate and irreparable harm and issuing injunctive relief to avoid such a violation is justified. *Central Dauphin Educ. Ass'n v. Central Dauphin Sch. Dist.*, 792 A.2d 691, 698 (Pa. Cmwlth. 2001) (citing *Public Utility Comm'n v. Isreal*, 52 A.2d 317, 321 (Pa. 1947)).

41. Petitioners are entitled to injunctive relief enjoining the ICA's violation of law.

42. Petitioners' right to relief is clear.

43. In *McCord v. Pennsylvania Gaming Control Bd.*, 9 A.3d 1216 (Pa. Cmwlth. 2010), this Court granted a similar request from Pennsylvania's then-Treasurer, to attend executive session Gaming Board meetings.

44. In the *McCord* case, this Court recognized that an *ex officio* member of the Gaming Board had the right to attend Gaming Board executive sessions. *Id.*

45. As a result, this Court enjoined the Gaming Board from "taking any action preventing or otherwise inhibiting the [Treasurer] or his designee(s) from attending and participating in all sessions of the Board (public and private)..." *Id.*

46. Importantly, this Court held that the Sunshine Act does not limit executive sessions to "voting members" and, indeed, that because Section 708 precludes official action from taking place in executive sessions, "the legal right to vote as a member of the board is of no consequence with respect to participation in an executive session." *Id.*

47. Clearly, considering this Court's decision in *McCord*, the ICA has no legal basis upon which to preclude Director Weber from participating in executive sessions.

48. Accordingly, Petitioners are entitled to the same relief this Court granted the Petitioner in *McCord*.

49. Petitioners have no adequate remedy at law.

50. Greater injury will occur to Petitioners from refusing the requested injunction than would occur to the ICA in granting the requested injunction.

51. The wrong alleged herein is manifest and the injunction is reasonably suited to abate it.

52. The relief requested herein will not negatively impact Pennsylvanians' interests.

53. In fact, the public interest is best served by ensuring preservation of principles of transparency and openness. *See, e.g., Lukes v. Department of Public Welfare*, 976 A.2d 609, 617 (Pa. Cmwlth. 2009).

WHEREFORE, Petitioners respectfully request that this Honorable Court enter judgment in their favor and grant the following relief:

a. An injunction permanently enjoining the ICA from taking any action to prohibit, impede, discourage or otherwise prevent Director Weber or his designee from fully participating in all public and executive sessions of the ICA; and

b. Such other and further relief as this Honorable Court deems just and proper.

Count II – Declaratory Judgment

54. Paragraphs 1 through 53, above, are incorporated herein by reference as if set forth in full here at length.

55. A party may obtain a declaration of existing legal rights, duties or status by filing a petition under the Declaratory Judgments Act, 42 Pa.C.S. §§ 7531, *et seq.*

56. The purpose of the Declaratory Judgments Act is to "settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and is to be liberally construed and administered." *Bayada Nurses, Inc. v. Department of Labor & Indus.*, 8 A.3d 866, 874 (Pa. 2010) (citing 42 Pa.C.S. § 7541(a)).

57. The ICA has prohibited Director Weber from participating in executive sessions, notwithstanding the fact that he is a member of the ICA by statute.

58. Under Pennsylvania law, only the Legislature has the power to make, alter or repeal laws.

59. The ICA's actions excluding Director Weber from executive sessions stands to unlawfully increase the power of other board members of the ICA, while diminishing the authority of Director Weber, in direct contravention of the statute.

60. Accordingly, there exists a genuine, justiciable controversy between Petitioners and Respondent as to whether the ICA has lawful authority to exclude Director Weber from all executive sessions.

61. A declaratory judgment from the Court would resolve the present controversy between the parties.

62. Therefore, Petitioners are entitled to a declaratory judgment to resolve the present dispute.

WHEREFORE, Petitioners respectfully request that this Honorable Court enter judgment in their favor and grant the following relief:

a. Judgment declaring that the ICA has violated Act 124 of 2018's enabling legislation by precluding Director Weber from attending executive sessions;

b. Judgment declaring that the ICA has no lawful authority to exclude Director Weber from ICA executive sessions; and,

c. Such other and further relief as this Honorable Court deems just and proper.

Respectfully submitted,

LAMB McERLANE PC

By: /s/ Maureen M. McBride

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VERIFICATION

I, Eric Papenfuse, hereby verify that the facts set forth in the foregoing Petition for Review are true and accurate to the best of my knowledge, information and belief. I understand that any false statements made herein are subject to the penalties of 18 Pa. C.S.A. § 4904 relating to unsworn falsifications to authorities.



Eric Papenfuse

Dated: February 14, 2020

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.

Signature: /s/ Maureen M. McBride
Maureen M. McBride
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