IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRUCE D. SCHOBEL, Plaintiff, v. AMERICAN ACADEMY OF ACTUARIES, Defendant.	Civil Action No.: 1:09-cv-01664-EGS

PLAINTIFF'S SUPPLEMENTAL MEMORANDUM IN FURTHER SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Plaintiff Bruce D. Schobel submits this brief supplemental memorandum for three reasons: (1) to respond to the Court's request for additional legal authority, especially at the Circuit Court level, to justify the issuance of an immediate injunction here; (2) to inform the Court of an upcoming change in the governing Illinois law that Plaintiff's counsel learned about only after the September 3, 2009 hearing; and (3) to provide additional legal authority, relevant to the application of 805 ILCS § 105/108.35 here, that further demonstrates that one of the rights of officer/directors, such as Mr. Schobel, for purposes of 805 ILCS § 105/108.60(c), is the right to be allowed to serve his or her complete term of office and to be protected against improper removal.

ARGUMENT

I. ADDITIONAL CASELAW RECOGNIZES THE EXISTENCE OF IRREPARABLE HARM TO JUSTIFY INJUNCTIVE RELIEF IN SITUATIONS SUCH AS THESE

While the Academy relies on *Sampson v. Murray*, 415 U.S. 61, 83 (1974), in challenging the irreparable harm that Mr. Schobel will experience if the Court does not enjoin the Academy from further interfering with Mr. Schobel's exercise of his position as President-Elect/Director (Def. Opp.

at 17 n.7), the *Sampson* Court recognized that "cases may arise in which the circumstances surrounding an employee's discharge, together with the resultant effect on the employee may so far depart from the normal situation that irreparable injury might be found." 415 U.S. at 92 n.68. This is such a case—although Mr. Schobel was never actually discharged because of the invalidity of the Academy's actions, and therefore remains the President-Elect/Director to this day.

Other courts have found irreparable harm in similar circumstances to those presented here. Among other things, courts have found the "stigma" associated with a wrongful discharge will often support a finding of irreparable injury. *See, e.g., J.W. Schwartz v. Covington,* 341 F.2d 537, 538 (9th Cir. 1965) (holding that "the injury and the stigma attached to an undesirable discharge are clear" in finding irreparable injury to justify injunction restraining Army officials from giving plaintiff undesirable discharge). In *Robinson v. District of Columbia*, No. 97-787 (GK), 1997 WL 607450, at *8 (D.D.C. July 17, 1997), Judge Kessler of this district found "the stigma of dismissal of a law enforcement agent with the charge of insubordination" demonstrated sufficient irreparable harm to justify an injunction.[1]

In *Gately v. Commonwealth,* 2 F.3d 1221, 1234 (1st Cir. 1993), the court found that state police officers had demonstrated sufficient irreparable harm to support injunctive relief where any future reinstatement would be ineffective in light of the department's retirement policy, thus depriving the plaintiffs of "their twilight years of employment." Similarly, unless the Court enjoins the Academy now, Mr. Schobel will lose the unique opportunity to serve as President-Elect/Director and President/Director, beginning October 26, 2009. *Id.* (recognizing "the broad discretion afforded

[1] That court noted that "[m]any courts applying *Sampson* have found that injunctive relief should issue." *Id.* at *7 (citing *Gately v. Massachusetts,* 2 F.3d 1221 (1st Cir. 1993) (upholding grant of injunctive relief), *cert. denied,* 511 U.S. 1082 (1994); *Gonzalez v. Chasen,* 506 F. Supp. 990, 998 (D.P.R. 1980); *Schrank v. Bliss,* 412 F. Supp. 28 (M.D. Fla. 1976); *Keyer v. Civil Serv. Comm'n,* 397 F. Supp. 1362 (E.D.N.Y. 1975); *Assaf v. University of Tex. Sys.,* 399 F. Supp. 1245 (S.D. Tex. 1975); *American Fed. of Gov't Employees, Local 1858 v. Callaway,* 398 F. Supp. 176 (N.D. Ala. 1975)).

a district court in weighing irreparable harm").

Likewise, in *Assaf v. University of Texas System,* the court found irreparable harm in the termination of a university employee, noting the situation involved "much more than a temporary loss of income … but also academic prestige." 399 F. Supp. 1245, 1251 (S.D. Tex. 1975), *dismissing appeal,* 557 F.2d 822 (5th Cir. 1977), *vacating as moot,* 433 U.S. 992 (1978). The court further observed, "Clearly, money damages would be wholly inadequate to compensate plaintiff for his loss of standing in the academic community." *Id.* The same is true as to Mr. Schobel's standing and prestige in the actuarial community, where he has been a leader for many years.

Of particular importance to the case at hand, where injunctive relief is sought to address the improper removal of an officer/director, many courts have likewise assessed the unique facts of the cases presented and found injunctive relief warranted. In *Forbes v. Board of Directors for the NAACP*, 65 Fed. Appx. 517, 518 (6th Cir. 2003), the NAACP was enjoined from removing plaintiffs, who were officers and directors of the organization, where the Board had failed to comply with its Constitution and procedures before attempting to remove them. This is precisely what the Academy has attempted here in its quest to remove Mr. Schobel as an officer/director without following its procedures and governing Illinois law.

In *Wahyou v. Central Valley Nat'l Bank*, 361 F.2d 755, 756-57 (9th Cir. 1966), the Ninth Circuit upheld the district court's granting of an injunction to prevent alleged new directors, elected in a special election that was improperly called and noticed, from replacing existing directors.[2] *See Tullos v. Parks*, 915 F.2d 1192, 1196 (8th Cir. 1990) (affirming injunction that restored director to board, based on finding that board acted without authority and proper notice in removing director).

[2] The court also took issue with improper voting by individuals who "lacked authority to vote," *id.* at 756, which is akin to the voting of Academy Directors by telephone in contravention of the August 5 meeting notice, which prohibited telephone voting. The majority of Directors attending the meeting in person voted *against* removal of Mr. Schobel.

As in these other cases, Mr. Schobel has sufficiently demonstrated irreparable harm to warrant immediate injunctive relief here.

II. A FUTURE AMENDMENT BY THE ILLINOIS LEGISLATURE CONFIRMS THAT 108.35(a) CURRENTLY PROHIBITS REMOVAL OF DIRECTORS

Section 108.35(a) states, in pertinent part, that "no director may be removed except for cause if the articles of incorporation or the bylaws so provide." As pointed out previously, this means that, in the case of the Academy, whose Articles and Bylaws are silent on director removal, no director may be removed, period.[3] While the Academy has argued for a more expansive reading of this provision (*see* Def. Opp. at 11), recent action by the Illinois legislature confirms that Mr. Schobel's reading, which comports with the clear language of the statute, is the correct reading.

The Illinois legislature recently approved a change to § 108.35(a), effective January 1, 2010. *See* IL Legis. 96-649, at 11 (attached as Ex. 1). The legislature indicated that one purpose of the change is to "[d]elete[] provision that prohibits the removal, except for cause, of directors of different classes with non-uniform terms." *See* 2009 IL S.B. 1390, at 1 (attached as Ex. 2). The new law depicts the change as follows:

> § 108.35. Removal of directors. (a) One or more of the directors may be removed, with or without cause. In the case of a corporation having a board of directors which is classified in accordance with subsection 108.10(e) of this Act, **the articles of incorporation or bylaws may provide that such directors may only be removed for cause** ~~no director may be removed except for cause if the articles of incorporation or the bylaws so provide~~.

Id. at 7. Thus, until the law changes on January 1, 2010, Directors of Illinois not for profit corporations, such as the Academy, cannot be removed unless the corporation's articles and bylaws so provide, and in that case only for cause. Because the Academy's Bylaws and Articles are silent, at the time of the August 5 meeting, no Academy Director could have been removed, unless the

[3] The exceptions, noted before, would come from amending the Bylaws or Articles to permit removal for cause, or petitioning an Illinois Circuit Court for relief in certain limited circumstances, pursuant to § 108.35(d).

Academy had sought removal from an Illinois Circuit Court under § 108.35(d), which the Academy did not and could not do as to Mr. Schobel.

II. ILLINOIS COURTS RECOGNIZE THE "RIGHT" OF DIRECTORS TO SERVE

With further regard to 805 ILCS 105/108.50(c), which provides that officer/directors like Mr. Schobel "have the same rights, duties and responsibilities as other directors," the court in *Laughlin v. Geer*, 121 Ill. App. 534 (1905), in enjoining an improper attempt to remove a director, recognized the right of an individual to serve out a duly-elected term as director. As stated by the court:

> We entertain no doubt that a court of equity has jurisdiction to prevent the illegal action of the board of directors contemplated in the proceedings to remove complainant. If carried out to its final conclusion it would result in a continuing injury to complainant and a continuing deprivation *of his right in the future to sit as a member of the board of directors*. A court of equity has the authority to interpose by its restraining power, and to give the preventive relief proper in such cases.

Id. (emphasis added). The court also noted that "a director having been elected is *entitled to hold his position* until the expiration of his term of office." *Id.* (emphasis added).

Likewise, Mr. Schobel has an enforceable right to serve as President-Elect/Director, which cannot be abrogated except by strict adherence to the law. In this case, that required the Academy to follow the provisions on removal of directors under § 108.35—something it acknowledges it did not do.

CONCLUSION

For these additional reasons, Mr. Schobel respectfully requests that the Court immediately enjoin the Academy, as specified in the accompanying Motion and proposed Order.

Respectfully submitted,

Dated: September 7, 2009

/s/David S. Wachen

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