IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CIVIL ACTION

PAULA HUSAR,	:	
Plaintiff	:	
	:	
vs.	:	NO. 18-0783
	:	
PALMERTON AREA SCHOOL DISTRICT,	:	
Defendant	:	

Civil Law – Public School Code - Dismissal of Professional Employees – Employee's Right to a Hearing Before the School Board – Claimed Denial of Right to Public Hearing - Redress by Mandamus - Applicability of the Sunshine Act to a Public Hearing - Distinguishing Between a Meeting Under the Sunshine Act and an Adjudicatory Hearing

1. Mandamus is an extraordinary writ which will only issue as a last resort to compel performance of a purely ministerial act or mandatory duty where there exists a clear legal right in the plaintiff, a corresponding duty in the defendant, and want of any other adequate and appropriate remedy. A party challenging administrative decision-making must exhaust all adequate and available administrative remedies before mandamus will lie.

2. Mandamus will not lie to review or compel the undoing of action taken by an administrative or judicial tribunal in good faith and in the exercise of legitimate jurisdiction, nor to perform the function of an appeal or writ of error. A litigant who does not exercise his statutory appeal rights cannot later reclaim those rights under the guise of a petition for mandamus.

3. Under the Public School Code, all hearings pertaining to the dismissal or the termination of contracts of professional employees shall be public, unless otherwise requested by the party against whom the complaint is made. As a professional employee, here as the principal of a public high school, Plaintiff was entitled to a public hearing before the Defendant's School Board on written charges and specifications she received seeking her dismissal and was entitled, as an aggrieved party, to have her claim that she was deprived of a public hearing reviewed on appeal.

4. Given the statutory and administrative remedies available to the Plaintiff to review her claim that she was denied her right to a public hearing and her failure to exhaust and/or establish the inadequacy of such remedies, Plaintiff is not entitled to judicial review by mandamus.

5. The Sunshine Act requires that "official action" and "deliberations" by a quorum of the members of an agency shall take place at a meeting open to the public, subject to enumerated exceptions.

6. An administrative adjudicatory hearing before a school board at which testimony is taken and evidence received on the issue of whether a professional employee should be terminated is not synonymous with a meeting, as that term is defined in the Sunshine Act: “Any prearranged gathering of an agency which is attended or participated in by a quorum of the members of an agency held for the purpose of deliberating agency business or taking official action.” However, the review, discussion and deliberations by the board for the purpose of making a decision after all the evidence has been submitted and the parties have concluded their presentations, and the decision which follows, must be taken at an open meeting, subject, nevertheless, to the necessary qualification that when an agency is acting as a quasi-judicial body, its deliberations for purposes of rendering a decision are the proper subject of an executive session pursuant to Section 708(a)(5) of the Sunshine Act from which the public can be lawfully excluded.

7. The requirement that an adjudicatory hearing respecting the dismissal or termination of the contract of a professional employee be held in public is one imposed by the School Code, not the Sunshine Act, with the procedure on dismissal set by the School Code. Absent a showing of any “deliberations” or the taking of any “official action” in contravention of the Sunshine Act, Plaintiff has failed to establish a violation of the Act or any basis for equitable relief.

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vs.	:	NO. 18-0783
PALMERTON AREA SCHOOL DISTRICT, Defendant	:	

Mark W. Bufalino, Esquire — Counsel for Plaintiff
Mark J. Kozlowski, Esquire — Counsel for Defendant

MEMORANDUM OPINION

Nanovic, P.J. – July 23, 2019

Plaintiff Paula Husar's ("Husar") right to a public hearing before the Palmerton Area School Board ("Board" and/or "School Board") on written charges and specifications she received seeking her dismissal as principal of the Palmerton Area Senior High School is not in dispute in these administrative proceedings. What is in dispute, is whether Husar was denied this right under the Public School Code when access to the hearing room by the public was barred after the hearing began, with members of the public who arrived beforehand being freely admitted; whether a claim for mandamus filed with the court of common pleas against the Defendant School District is appropriate, where the responsibility for holding and conducting the hearing in accordance with the School Code is upon the School Board, acting in a quasi-judicial capacity, and any impropriety in the manner in which the hearing is conducted is subject to appeal and a de novo review; and whether the Sunshine Act provides a legal basis separate and apart from the School Code for the hearing to be held in public, with a broader array of remedies in the event a violation is founded.

On March 1, 2018, Husar filed a complaint in mandamus and for equitable relief requesting the court to direct and enjoin the Palmerton Area School District ("District") from infringing upon her right to a public hearing. Before us at this time is the District's motion for summary judgment seeking to deny such relief for the reasons discussed below.

PROCEDURAL AND FACTUAL BACKGROUND

On or about September 7, 2017, Paula Husar, principal of the Palmerton Area Senior High School, was suspended without pay and provided with a detailed written statement of charges and specifications in conjunction with her recommended dismissal by the District's Superintendent for alleged acts of insubordination, dereliction of duty, harassment and intimidation. (N.T., 5/8/18, pp.5, 38). The "Loudermill Dismissal Notice and Opportunity to Respond" Husar received from the Superintendent further advised that the District School Board would conduct a hearing to determine the veracity of the charges and whether her conduct warranted termination. The Public School Code of 1949, 24 P.S. §§ 1-101 -- 27-2702 (the "School Code"), provides that all hearings pertaining to the dismissal or the termination of contracts of professional employees[1] shall be public, unless otherwise requested by the party against whom the complaint is made. 24 P.S. §§ 11-1122 (Causes for termination of contract), 11-1126 (Public hearings; exceptions), 11-1127 (Procedure on dismissal; charges; notice; hearing).

The first of what ended being a thirteen-day hearing before the Board, spanning a period of one and a half years, began on January 31, 2018, commencing at 6:00 P.M. in

[1] As principal, Husar was a professional employee of the District who had attained permanent tenure. (N.T., 5/8/18, pp.73-74); see also 24 P.S. § 11-1101(1) (defining the term "professional employee" as including those who are certified as principals).

the District's Administration Building. Present for this hearing were the nine members of the School Board, Husar, counsel for the parties, the hearing officer (Robert T. Yurchak, Esquire), a number of witnesses, two Palmerton Borough Police Officers for security, various members of the public - the exact number being unclear, and a local newspaper reporter. (N.T., 5/8/18, pp.5-9, 33-35, 38, 56, 60, 69; Motion for Summary Judgment, Exhibit "B" (Opinion of Independent Hearing Officer)). The hearing lasted approximately three to three and one-half hours with the only testimony taken on this first day being the start of direct examination of the District's Superintendent, Scot Engler, presented by counsel for the District. (N.T., 5/8/18, p.10).

The second day of hearing was scheduled for February 21, 2018, commencing at 6:00 P.M., however, no evidence was received on this date, Husar raising at the outset that she was deprived of a public hearing on January 31, 2018 because the doors to the Administration Building were locked soon after the hearing began. With the parties being unable to agree on how to proceed, the Board requested legal memoranda from counsel before ruling on Husar's objection.

What prompted Husar's complaint was her discovery, a day or two after the first day of hearing concluded, that several members of the public who wanted to attend the hearing, but arrived after 6:00 P.M., were unable to attend because the door to the Administration Building was locked, and no one was present to allow access for late arrivals. (N.T., 5/8/18, p.11). A sign posted on the door stated: "Capacity has been reached and/or the hearing has begun. No further admittance." Among those excluded from the hearing were Serena Russo, who arrived at approximately 6:05 or 6:10 P.M., and Ann Cronk, who arrived at approximately 7:00 P.M. (N.T., 5/8/18, pp.12-13, 20-21).

Husar later learned that the door was locked and posted at 6:00 P.M. by an employee of the District on instructions from the District Superintendent.

On March 1, 2018, Husar filed a two count complaint against the District: Count 1 in mandamus claiming she had been deprived of her right to a public hearing under Section 1126 of the School Code, 24 P.S. § 11-1126, and seeking an order, *inter alia*, to compel the District to comply with this statutory provision and invalidate the January 31, 2018 hearing before the Board; and Count 2 claiming a violation of Pennsylvania's Sunshine Act, 65 Pa.C.S.A. §§ 701-716 (the "Sunshine Act" and/or "Act"), and requesting, *inter alia*, that the District be enjoined from depriving Husar of her right to a public hearing, that the January 31, 2018 hearing be invalidated, and that Husar be awarded all litigation costs, expenses and attorney's fees recoverable under the Act. On March 1, 2018, Husar also filed a motion for a preliminary injunction which was heard by the court on May 8, 2018. By order dated May 9, 2018, Husar's request for a preliminary injunction was denied.

Presently before us is the District's motion for summary judgment filed on March 4, 2019. For the reasons which follow, this motion will be granted.[2]

[2] A motion for summary judgment is based upon an evidentiary record which entitles the moving party to judgment as a matter of law, and which is one of two types: (1) the record shows the material facts are undisputed, and hence no issue exists to be submitted to a jury; or (2) the record contains insufficient evidence of facts to make out a *prima facie* cause of action or defense, and hence there is no issue to submit to a jury. Pa.R.C.P. 1035.2. In examining the record in ruling upon a motion for summary judgment, the court must view all of the evidence included in the record in a light most favorable to the non-moving party; this includes any reasonable inferences that may be drawn from the evidence in the record. Hess v. Fuellgraf Electric Co., 504 A.2d 332, 333-34 (Pa.Super. 1986) (citation and quotation marks omitted). A material fact is one that directly affects the outcome of the case. Fortney v. Callenberger, 801 A.2d 594, 597 (Pa.Super. 2002).

DISCUSSION

As a professional employee under contract with the District, Husar had a legitimate claim to continued employment and was entitled to notice of the charges and a public hearing prior to her termination, 24 P.S. §§ 11-1122, 11-1126, 11-1127; as well as a limited pre-termination hearing under Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985).[3] In addition, Husar demanded that the hearing relative to her suspension and termination charges be held in public. Whether locking the exterior door of the Administration Building after the scheduled start of the termination hearing denied Husar her right to a "public hearing" is a legal question which, for the reasons stated in our order dated May 9, 2018 denying Husar's motion for a preliminary injunction and explained below, need not be answered by us.[4]

MANDAMUS

Mandamus is an extraordinary remedy that is used as a last resort rather than as an alternate mode of redress. Kaufmann Const. Co. v. Holcomb, 55 A.2d 534, 537 (Pa. 1947). A writ of mandamus may be used only to compel the performance of a purely ministerial or mandatory duty. "[I]t cannot be used to control the exercise of discretion or

[3] Under Loudermill, a public employee having a property right to continued employment is entitled to receive as a matter of due process prior to termination oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity to respond and tell her side of the story.

[4] The District's Superintendent, Scot Engler, testified at the preliminary injunction hearing held on May 8, 2018, that at a previous hearing involving Husar in the summer of 2017, members of the public in attendance were disruptive and unruly and that, several years earlier, a security protocol or study had been performed for the District which recommended that the door to the Administration Building be locked at the beginning of a hearing or meeting of the Board and that security be posted in the hearing/meeting room. (N.T., 5/8/18, p.40). Consistent with this protocol and for safety purposes, Superintendent Engler testified that the exterior door to the Administration Building was locked and notice posted on his instructions shortly after the 6:00 P.M. termination hearing began. (N.T., 5/8/18, pp.39-42).

judgment on the part of a public official or an administrative or judicial tribunal; nor to review or compel the undoing of action taken by such an official or tribunal in good faith and in the exercise of legitimate jurisdiction, even though, in fact, the decision rendered may have been wrong; nor to influence or coerce a particular determination of the issue involved; nor to perform the function of an appeal or writ of error even though no appeal or writ of error may be permitted by law." *Id.* at 537.

More recently, in Dotterer v. School Dist. of City of Allentown, 92 A.3d 875 (Pa.Cmwlth. 2014) (*en banc*), the Commonwealth Court stated:

> Mandamus is an extraordinary writ which will only issue to compel performance of a ministerial act or mandatory duty where there exists a clear legal right in the plaintiff, a corresponding duty in the defendant, and want of any other adequate and appropriate remedy. . . It remains the plaintiff's burden to establish the inadequacy of any available remedies, as well as the other requisites to mandamus relief.
>
> Litigants are required to exhaust adequate and available administrative remedies prior to resorting to judicial remedies. A party challenging administrative decision-making who has not exhausted available administrative remedies is precluded from obtaining judicial review by mandamus. An individual who does not exercise his statutory appeal rights cannot later reclaim those rights under the guise of a petition for mandamus.

Id. at 880-81 (citations and quotation marks omitted).

Here, Husar was actively involved in an administrative adjudicatory hearing before the School Board pursuant to Sections 1126 and 1127 of the School Code, 24 P.S. §§ 11-1126, 11-1127, presided over by a hearing officer. To the extent Husar claims irregularities occurred in the conduct of this hearing, it was incumbent upon Husar to protect the record and to bring these irregularities to the attention of the hearing officer. The record which accompanies the District's motion for summary judgment evidences

that Husar did in fact address this issue with the hearing officer at the start of the next scheduled day for the hearing, February 21, 2018, before any testimony was taken. (N.T., 2/21/18, pp.3-25). No ruling was made at the time or until after we denied Husar's motion for a preliminary injunction.

Following our May 9, 2018 order denying Husar's motion for a preliminary injunction, the hearing officer issued an opinion finding that Husar was not deprived of her right to a public hearing when the door to the District's Administration Building were locked after the hearing had begun. Specifically, the hearing officer found that members of the public as well as the local press were present for the hearing, that the rationale for having a public hearing was satisfied, that the hearing held materially complied with the dictates of the School Code's requirement that the hearing be open to the public, and that Husar failed to establish that she was in any manner prejudiced or "irreparably harmed" when the exterior door to the Administration Building was locked after the hearing began. (Motion for Summary Judgment, Exhibit "B" (Opinion of Independent Hearing Officer)). The hearing officer further held that going forward, while the District could lock the door for safety reasons, a person was required to be stationed at the door to permit entrance to any latecomers to the proceedings and further, that the District make available at its own cost the transcript of the proceedings for the first day of the hearing to anyone who might request it without cost to the requester. *Id*.

To the extent Husar believes the hearing officer and/or the Board erred in this ruling, as an aggrieved party, had she been dismissed or demoted, she was entitled to appeal the issue to the Secretary of Education for a *de novo* review of the record under

Section 1131 of the School Code, 24 P.S. § 11-1131,[5] and in the event of a disciplinary suspension, as occurred here, to the local court of common pleas,[6] with further automatic review by the Pennsylvania Commonwealth Court. As of this date, with the hearing before the School Board having concluded and a decision reached, Husar in effect seeks to invoke mandamus in lieu of an appeal to remedy what she claims was an erroneous ruling by the hearing officer and/or the Board as to the propriety of the hearing process and to grant remedial relief. This cannot be countenanced. *See* Kaufmann Const. Co., 55 A.2d at 537. Given the statutory and administrative remedies available to Husar, and the need for her to exhaust those remedies, Husar is not entitled to mandamus relief.

SUNSHINE ACT

Pursuant to the Sunshine Act, "official action" and "deliberations" by a quorum of the members of an agency - which term encompasses a school board - shall take place at a meeting open to the public, subject to enumerated exceptions. 65 Pa.C.S.A. § 704; Dusman v. Bd. of Dirs. of the Chambersburg Area Sch. Dist., 123 A.3d 354, 362 (Pa.Cmwlth. 2015), *appeal denied*, 132 A.3d 460 (Pa. 2016). The terms "official action" and "deliberation" are specifically defined in the Act as follows:

> "Official Action."
>
> (1) Recommendations made by an agency pursuant to statute, ordinance or executive order.
>
> (2) The establishment of policy by an agency.
>
> (3) *The decisions on agency business* made by an agency.

[5] Flickinger v. Lebanon School Dist., 898 A.2d 62, 66 n.6 (Pa.Cmwlth. 2006).

[6] The final hearing was held on March 26, 2019 and a decision rendered by the School Board on April 16, 2019 to uphold Husar's suspension without pay, but not to terminate her employment as the District's high school principal. That decision is the subject of a separate appeal filed by Husar with this court on May 20, 2019 and docketed to No. 19-0978. *See* Rike v. Com., Secretary of Educ., 494 A.2d 1388 (Pa.Super. 1985) (holding that after conducting a dismissal hearing, the school board had the power to suspend, instead of dismissing, a tenured teacher, and that an appeal from a suspension was vested in the courts of common pleas where the district is located, 42 Pa.C.S.A. § 933(a)(2), not to the Secretary of Education).

> (4) The vote taken by any agency on any motion, proposal, resolution, rule, regulation, ordinance, report or order.
>
> "Deliberation." *The discussion of agency business* held for the purpose of making a decision.

See 65 Pa.C.S.A. § 703 (Definitions) (emphasis added). The term "agency business" which appears within each of these definitions is further defined as follows:

> "Agency business." The framing, preparation, making or enactment of laws, policy or regulations, the creation of liability by contract or otherwise or *the adjudication of rights, duties and responsibilities*, but not including administrative action.

Id. (emphasis added).

We reject Husar's claim that the public hearing required by Section 11–1126 of the School Code is concurrently a "meeting" within the meaning of the Sunshine Act and subject to its provisions, such that the Act serves as a separate, independent legal basis to find that Husar was deprived of her right to a public hearing when the doors to the District's Administration Building were locked.[7] The taking of testimony and the receipt of evidence in an adversarial proceeding before an adjudicative body, as occurred before the Board at the hearing held on January 31, 2018, was not in any true sense a "discussion of agency business." It was more precisely the receipt of evidence which, after the parties concluded their presentations, would be discussed, evaluated, deliberated and relied upon by the Board in reaching a decision. *Cf.* Smith v. Township of Richmond, 82 A.3d 407, 415-16 (Pa. 2013) (discussing the difference between "discussion" and "deliberation" by an agency).[8] It is this deliberation and the resulting

[7] Under the Act, a "meeting" is "[a]ny prearranged gathering of an agency which is attended or participated in by a quorum of the members of an agency held for the purpose of deliberating agency business or taking official action." 65 Pa.C.S.A. § 703 (Definitions).

[8] In Smith, the Pennsylvania Supreme Court stated:

adjudication, *i.e.*, the "official action" taken, which the Sunshine Act requires be held in public, subject, nevertheless, to the necessary qualification here that when an agency is acting as a quasi-judicial body, its deliberations for purposes of rendering a decision are the proper subject of an executive session pursuant to Section 708(5) of the Sunshine Act, 65 Pa.C.S.A. § 708(a)(5), from which the public can be lawfully excluded. Kennedy v. Upper Milford Tp. Zoning Hearing Bd., 834 A.2d 1104, 1117-1119 (Pa. 2003).

In The Patriot-News Co. v. The Empowerment Team of the Harrisburg School Dist. Members, 763 A.2d 539 (Pa.Cmwlth. 2000), an *en banc* panel of the Commonwealth Court in discussing the distinction between what is a meeting and what is a hearing stated:

> According to Webster's Third New International Dictionary 1044 (3d ed.1986), a "hearing" is defined as:
>
> > (1) a trial in equity practice (2) a listening to arguments or proofs and arguments in interlocutory proceedings (3) a preliminary examination in criminal procedure (4) a trial before an administrative tribunal [or] a session (as of a congressional

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> Making a decision implies the exercise of judgment to determine which of multiple options is preferred. Thus, a discussion of agency business may be said to have taken place "for the purpose of making a decision" — and therefore, to have comprised "deliberations" — where the discussion consisted of debate or discourse directed toward the exercise of such judgment. This would occur, for example, where agency members weigh the "pros and cons" of the various options involved, or otherwise engage in comparisons of the different choices available to them as an aid in reaching a decision on the topic, even if the decision is ultimately reached at a later point.
>
> Gatherings held solely for the purpose of collecting information or educating agency members about an issue do not fit this description, notwithstanding that the information may later assist the members in taking official action on the issue. To conclude that such information-gathering discussions are held for the purpose of making a decision would amount to a strained interpretation not reflective of legislative intent. In this regard, it bears noting that, although the [Sunshine] Act is designed to enhance the proper functioning of the democratic process by curtailing secrecy in public affairs, the legislative body has expressly cabined the openness directive by reference to a specific discussional purpose ("making a decision"), thereby leaving room for closed-door discussions held for other purposes.

82 A.3d at 415-16.

> committee) in which witnesses are heard and testimony is taken....
>
> *See also* Commonwealth v. Davis, 531 Pa. 272, 612 A.2d 426 (1992). The term "meeting," however, is defined in Section 703 of the Sunshine Act as "[a]ny prearranged gathering of an agency which is attended or participated in by a quorum of the members of an agency held for the purpose of deliberating agency business or taking official action." It simply cannot be logically argued that the word "hearing" and the word "meeting" are interchangeable, and we reject Appellants' assertion that the public hearing requirement of Act 16 conflicts with the open meeting requirement of the Sunshine Act. Because the word "hearing" in Act 16 and the word "meeting" in the Sunshine Act are both clear and free from ambiguity, we will not disregard the letter of the law under the pretext of pursuing its spirit. *See* Section 1921(b) of the Statutory Construction Act, 1 Pa.C.S. § 1921(b).

Id. at 546.[9]

As final support for our decision that the Sunshine Act was not violated and that Husar is not entitled to relief on this basis, the presumption of regularity and legality that obtains in connection with proceedings of local agencies requires that a challenger bear the burden of proving a violation of the Sunshine Act. Smith, 82 A.3d at 416. In this case, Husar has failed to provide us with a transcript of the proceedings of the hearing held before the Board on January 31, 2018, and has failed to establish or identify any "official action" or "deliberation" by the Board which occurred at the January 31, 2018 hearing.[10]

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[9] It is also worth noting that whereas previously "hearings" before an agency at which formal action was scheduled or taken were included within the meaning of what constitutes a public meeting, the current version of the Sunshine Act does not include similar language. *See* Clapsaddle v. Bethel Park School Dist., 520 A.2d 537, 540 (Pa.Cmwlth. 1987) discussing Section 2 of the Act of July 19, 1974 (Old Sunshine Act) which provided, *inter alia*, that the "meetings or hearings of every agency at which formal action is scheduled or taken are public meetings and shall be open to the public at all times." *Cf.* 65 Pa.C.S.A. § 708(c) which requires that any "official action" taken on discussions held in executive sessions authorized by Section 708(a) of the Sunshine Act must be taken at an open meeting.

[10] Husar's claim that the locking of the door to the District's Administration Building and posting the sign signifies "official action" or "deliberations" (*see* Husar's Answer to the District's motion for summary judgment, paragraph 14) is belied by the record which indicates only that a security study had occurred years earlier, but reveals nothing about this subject being discussed by the Board on January 31, 2018. In fact, those Board members who testified at the preliminary injunction hearing on May 8, 2018 knew nothing

CONCLUSION

As to Husar's request for relief in mandamus, Husar has failed to meet her burden of establishing the inadequacy of other available remedies, specifically her right to appeal her claim that she was deprived of a public hearing when the door to the Administration Building was locked after the hearing began, a claim which the hearing officer has since addressed and found without merit,[11] especially now that the hearings before the hearing officer have concluded and she has appealed to this Court the Board's decision sustaining her suspension. As to Husar's claim that the Sunshine Act was violated when the door to the Administration Building was locked, the requirement that the hearing be held in public is one imposed by the School Code, not the Act, and Husar has in any event failed to establish that the Board took any official action or engaged in any deliberations at the January 31, 2018 hearing which were in contravention of the Act. Accordingly, the District's motion for summary judgment has been granted.

BY THE COURT:

_____

P.J.

about the doors being locked. (N.T., 5/8/18, pp.52-54, 57-58, 61, 69). Husar's further contention that the hearing itself was "official action" (*see* Husar's Answer to the District's motion for summary judgment, paragraph 14) is nonsensical and fails to distinguish between the hearing as a proceeding, and the adjudication which follows. The requirement that a public hearing be held is mandated by Section 1126 of the School Code, with Sections 1127 and 1129, 24 P.S. §§ 11-1127, 11-1129, imposing duties and responsibilities on the Board as to how the hearing is to be conducted and a vote taken. This notwithstanding, it is neither the taking of testimony nor the receipt of evidence which constitutes "deliberation" or "official action," but the discussion which follows for the purpose of making a decision and the decision made.

[11] At the time of the preliminary injunction hearing, the hearing officer had yet to rule on Husar's objection on this issue which was promptly brought to the hearing officer's attention nearly three months earlier, at the outset of the second day of hearing held on February 21, 2018. With this in mind, Husar appeared to argue at the preliminary injunction hearing, at least in part, that because the hearing officer was unwilling or unable to address the issue, this avenue of relief was inadequate.