

IN THE COURT OF COMMON PLEAS  
FRANKLIN COUNTY, OHIO

Dr. Carlo M. Croce,	:	Case No. 18CV010788
	:	
Plaintiff,	:	Judge Karen Held Phipps
	:	
V.	:	Magistrate Jennifer Hunt
	:	
The Board of Trustees of	:	
The Ohio State University.	:	
	:	
Defendant.	:	

**MAGISTRATE’S DECISION ON TEMPORARY RESTRAINING ORDER**

This matter is before the Court on Plaintiff Dr. Carlo M. Croce’s motion for a temporary restraining order to enjoin Defendant the Board of Trustees (the “Board”) of The Ohio State University (“Ohio State”) from removing him as Chair of the Department of Molecular Virology, Immunology, and Medical Genetics n/k/a the Department of Cancer Biology and Genetics (the “Department”). Pursuant to Civil Rule 53 and Local Rule 99.02, the motion was referred to this Magistrate for a hearing on January 10, 2019. The hearing, however, was continued until January 18, 2019, at which time a hearing was conducted in Courtroom 7D and was recorded by electronic means.

This Magistrate has considered the instant motion and supporting memoranda, affidavits and exhibits, the Board’s memoranda, affidavits and exhibits in opposition to the motion, the arguments of counsel, and applicable law. Having reviewed and weighed the foregoing, and having applied the required law, this Magistrate finds that Dr. Croce is not entitled to a temporary restraining order under Civil Rule 65 and that his motion should be denied. This Magistrate hereby renders the following Findings of Fact and Conclusions of Law.

### FINDINGS OF FACT

1. This matter arises from Dean K. Craig Kent's determination that Dr. Carlo M. Croce would cease to serve as Chair of the Department in Ohio State's College of Medicine effective January 1, 2019.

2. In 2004, Dr. Croce was appointed by the Board to serve a four-year term as Chair of the Department effective October 1, 2004 through September 30, 2008. *See* Ex. A to Affidavit of Jeff M.S. Kaplan, at 2.

3. Dr. Croce was subsequently reappointed by the Board to a second four-year term as Chair effective October 1, 2008 through September 30, 2012. *See* Ex. B to Affidavit of Jeff M.S. Kaplan, at 4.

4. Despite these prior appointments by the Board to a four-year position as Chair, Dr. Croce presented no evidence that he was nominated to the Board to another four-year term as Chair, or that was he reappointed by the Board to another four-year term during the operative time period, including in 2012 or 2016.

5. While serving as Chair, Dr. Croce was subject to an annual review conducted by Dr. Peter Mohler and Dr. Robert Bornstein. Through a letter dated October 25, 2018, Dr. Bornstein and Dr. Mohler identified eight areas of deficiency in Dr. Croce's performance as Chair, including the mismanagement of Department funds as well as continuing non-compliance in clinical trials that resulted in the suspension of a project. *See* Oct. 25, 2018 Letter, attached as Ex. A to Affidavit of K. Craig Kent.

6. In November 2018, Dr. Croce was informed he would cease serving as Chair effective January 1, 2019. *See* Pl.'s Compl., at ¶ 12; Affidavit of K. Craig Kent, at ¶ 5.

7. Dean K. Craig Kent determined Dr. Croce no longer would serve as Chair, and in

doing so, Dean Kent was serving as the president's designee pursuant to the College of Medicine Pattern of Administration. *See* Affidavit of K. Craig Kent, at ¶ 5; Ex. B to Affidavit of K. Craig Kent.

8. Between November 29, 2018 through December 12, 2018, administrators within the College of Medicine, including Dean Kent, met individually with twelve members of the Department faculty regarding Dr. Croce. *See* Affidavit of K. Craig Kent, at ¶ 9.

9. Dr. Croce received additional faculty input and feed-back regarding Dr. Croce through a December 21, 2018 letter from the Department faculty and through other communications, including from Dr. Richard Fishel. *See* Ex. 3 to Pl.'s Compl; *see also* Affidavit of K. Craig Kent, at ¶ 10.

10. Dean Kent considered and gave substantial weight to the input and feed-back he received from Department faculty members. *See* Affidavit of K. Craig Kent, at ¶ 11.

11. Regarding Dr. Croce's role as Chair, Dean Kent arrived at a determination which differed from the views expressed by the Department faculty in the December 21, 2018 letter. *See* Affidavit of K. Craig Kent, at ¶ 11. Dean Kent did, however, receive advice and guidance from the Department faculty, which he considered and gave substantial weight. *See id.* at ¶¶ 9-11.

12. Dean Kent is not required to give conclusive weight to the input of Department faculty. Dean Kent is vested with the authority under the College of Medicine Pattern of Administration to determine whether Dr. Croce should continue to serve as Chair, and he concluded Dr. Croce will cease serving as Chair effective January 1, 2019. *See* College of Medicine Pattern of Administration, attached as Exhibit B to Affidavit of K. Craig Kent; *see also* Affidavit of K. Craig Kent, at ¶¶ 5, 9-11.

13. Dr. Croce claims he has lost the honor and prestige associated with serving as Chair.

See Jan. 17, 2019 Pl.’s Reply, at 6.

**CONCLUSIONS OF LAW**

**I. STANDARD OF REVIEW.**

Ohio courts recognize that the purpose of injunctive relief “is to preserve the status quo of the parties pending final adjudication of the case upon the merits.” *Yudin v. Knight Indus. Corp.*, 109 Ohio App. 3d 437, 439 (6<sup>th</sup> Dist. 1996); *Escape Enterprises, Ltd. v. Gosh Enterprises, Inc.*, 2005-Ohio-2637, ¶ 22 (10<sup>th</sup> App. Dt.) (same). Courts analyze four factors to determine whether to issue a TRO or injunction under Ohio R. Civ. Pro. 65:

- (1) whether the plaintiff has shown a strong or substantial likelihood or probability of success on the merits;
- (2) whether the plaintiff has shown that irreparable injury will result if the injunction is not granted;
- (3) whether issuance of an injunction would cause substantial harm to others; and
- (4) whether an injunction would serve the public interest.

*Escape Enterprises* at ¶ 22; *Charles Penzone, Inc. v. Koster*, 2008-Ohio-327 at ¶ 9 (10<sup>th</sup> App. Dt.).

A temporary restraining order is an extraordinary remedy. *Perkins v. Village of Quaker City*, 165 Ohio St. 120, 125, 133 N.E.2d 595 (1956). Therefore, the moving party bears the burden of proving entitlement by clear and convincing evidence. *Brookville Equip. Corp. v. Cincinnati*, 1st Dist. Hamilton, No. C-120434, 2012-Ohio-3648, ¶ 11 (Aug. 15, 2012). The granting of a temporary restraining order rests within the sound discretion of the Court. *Perkins v. Village of Quaker City*, 165 Ohio St. 120, 125, 133 N.E.2d 595 (1956).

**II. LIKELIHOOD THAT PLAINTIFF WILL PREVAIL ON THE MERITS.**

The Magistrate finds that Dr. Croce has failed to establish by clear and convincing evidence a substantial likelihood that he will prevail on the merits. Dr. Croce claims Ohio State failed to

abide by the removal provisions in O.A.C. 3335-3-35(B). The first inquiry is whether he was entitled to those removal provisions. The Ohio Administrative Code makes clear that the removal provisions apply only when removing a Chair who is serving a four-year term at the time of removal. As a predicate to his claim, Dr. Croce has failed to prove by clear and convincing evidence that he was appointed to, and is currently serving, a four-year term under O.A.C. 3335-3-35(A).

The Ohio Administrative Code provides, in relevant part:

Upon the nomination of the President or his or her designee, the board of trustees shall appoint each chair and director for a term of four years subject to the annual review provisions of the office of academic affairs. A chair or director shall be eligible for reappointment.

O.A.C. 3335-3-35(A). Accordingly, based on the plain language of O.A.C. 3335-3-35(A), this Magistrate finds it is Dr. Croce's burden to prove by clear and convincing evidence that (1) he was nominated to a four-year term by the President, or his designee and (2) he was appointed by the Board to, and is currently serving, a four-year term. Dr. Croce has not produced any sufficient evidence, let alone clear and convincing evidence of any such nomination or reappointment in either 2012 or 2016.

Setting aside that Dr. Croce has failed to produce any evidence of entitlement to the review provisions of O.A.C. 3335-3-35(B), based on the evidence produced by the Board, this Magistrate finds Dean Kent, as the President's designee, did in fact comply with the removal provisions of the Ohio Administrative Code. Once again, the plain language controls and provides:

The president or his or her designee may remove a chair or director during a four-year term after consultation with the voting faculty and dean of the unit involved. The views of the faculty shall be given substantial weight in arriving at any decision to remove a chair or director from office.

O.A.C. 3335-3-35(B). Based on the plain language of O.A.C. 3335-3-35(B), Dean Kent is not required to give conclusive weight to the opinion of the faculty, but rather, to consult. The ordinary meaning of the term “consult” is “to have regard to: consider,” or “to ask the advice or opinion of[.]” *See Merriam Webster*, available at <http://www.merriam-webster.com/dictionary/consult>.

The evidence before this Magistrate demonstrates Dean Kent received faculty input regarding Dr. Croce’s removal on several occasions, including through one-on-one faculty meetings held from November 29, 2018 through December 12, 2018, and through a December 21, 2018 letter from the faculty. The affidavit of Dean Kent further provides he considered the faculty opinion, gave it substantial weight, but nevertheless proceeded with the determination to remove Dr. Croce based on overriding concerns of Dr. Croce’s administrative and leadership failures. Because Dean Kent was required only to consult, this Magistrate finds Dean Kent, acting as the President’s designee, did further comply with the removal provisions of O.A.C. 3335-3-35(B).

### **III. NO ADEQUATE REMEDY AT LAW & NO IRREPARABLE HARM TO PLAINTIFF.**

The Magistrate finds that Dr. Croce has failed to establish by clear and convincing evidence that he will suffer irreparable harm, or that he lacks an adequate remedy at law, if the temporary restraining order is not issued. “Irreparable harm consists of the substantial threat of material injury which cannot be compensated with monetary damages.” *Agrigeneral Co. v. Lightner*, 127 Ohio App. 3d 109, 115 (3rd Dist. 1998). The harm Dr. Croce claims here is harm to his reputation, and Dr. Croce may seek money damages as an appropriate remedy for reputational harm. Because he has an adequate remedy at law, this factor weighs against a temporary restraining order here.

### **IV. HARM TO THIRD PARTIES AND THE PUBLIC INTEREST.**

The Magistrate finds that third parties and the public interest will be harmed if a temporary restraining order is granted and Dr. Croce is reinstated as Chair. As set forth in the October 25,

2018 letter from Dr. Bornstein and Dr. Mohler, which reviewed Dr. Croce's performance as Chair, Dr. Croce has been found to have mismanaged funds and engaged in non-compliance in clinical trials. It cannot reasonably be disputed that this conduct will certainly cause harm to the public and to third parties, including cancer victims. Accordingly, this final factor weighs against a temporary restraining order.

Dr. Croce has failed to prove by clear and convincing evidence that any of the factors for equitable relief weigh in favor of a temporary restraining order here. Based on the foregoing, the Magistrate finds and concludes Dr. Croce's motion for a temporary restraining order is not well founded and should be denied.

#### **DECISION**

It is the Magistrate's decision that Plaintiff's motion for a temporary restraining order is **DENIED**. Plaintiff additionally has requested a hearing on his motion for a preliminary injunction and expedited discovery prior to any such hearing. The parties shall provide written responses to written discovery requests within fourteen calendar days after service of the requests. Due to the expedited nature of discovery, each party shall be limited to twenty interrogatories and thirty requests for production of documents. A hearing on plaintiff's motion for a preliminary injunction shall be held on March 7-8, 2019.

**A PARTY SHALL NOT ASSIGN AS ERROR ON APPEAL THE COURT'S ADOPTION OF ANY FACTUAL FINDING OR LEGAL CONCLUSION, WHETHER OR NOT SPECIFICALLY DESIGNATED AS A FINDING OF FACT OR CONCLUSION OF LAW UNDER CIV.R. 53(D)(3)(a)(ii), UNLESS THE PARTY TIMELY AND SPECIFICALLY OBJECTS TO THAT FACTUAL FINDING OR LEGAL CONCLUSION AS REQUIRED BY CIV.R. 53(D)(3)(b).**

IT IS SO ORDERED.

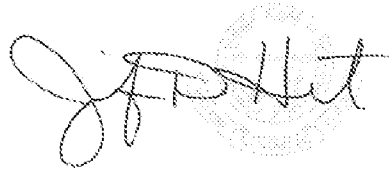
Copies electronically to all counsel of record



Franklin County Court of Common Pleas

**Date:** 01-23-2019  
**Case Title:** CARLO M CROCE DR -VS- OHIO STATE UNIVERSITY  
TRUSTEES BOARD  
**Case Number:** 18CV010788  
**Type:** MAGISTRATE DECISION

So Ordered

A handwritten signature in black ink, appearing to read "J. D. Hunt", is written over a faint, circular official seal or stamp.

/s/ Magistrate Jennifer D. Hunt