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STATE OF NEW HAMPSHIRE

CHESHIRE, SS. SUPERIOR COURT

CITY OF KEENE

vs.

JAMES CLEAVELAND
GARRET EAN
KATE AGER
IAN BERNARD A/K/A IAN FREEMAN
GRAHAM COLSON
PETE EYRE

Docket No. 213-2013-CV-00098

PETITIONER'S MEMORANDUM OF LAW

NOW COMES the Petitioner, City of Keene, by and through its counsel, Thomas P. Mullins, Esq., and submits the following Memorandum of Law in connection with the above-captioned matter:

FACTUAL BACKGROUND

This matter is before the Court on a Petition for Preliminary and Permanent Injunctive Relief, filed by the City of Keene ("City"), seeking preliminary and permanent injunctive relief from the Court ordering Respondents to not interfere, harass, or intimidate the City's three Parking Enforcement Officers (PEOs), and to remain at a distance of not less than fifty (50) feet (a "safety zone") from the PEOs during the performance of their employment duties for the City. Contrary to Respondents' assertions, the requested relief is necessary to prevent Respondents from intentionally and improperly interfering with the City's employment contract with the PEOs, and has nothing to do with Respondents inserting money into City parking meters.

Beginning in or around December 2012, and continuing through the date of the filing of this Memorandum, Respondents have regularly, repeatedly, and intentionally taunted, interfered with, harassed, and intimidated the PEOs in the performance of their employment duties by following, surrounding, touching or nearly touching, and otherwise taunting and harassing the PEOs at very close proximity in groups of one, two, or more; communicating with the PEOs in a taunting and intimidating manner; and video recording the PEOs at very close proximity from the back, front, and sides as they perform their assigned duties. This concerted and coordinated activity involves multiple individuals using automobiles and radio communication which is scheduled and planned by the Respondents and others, occurs on an almost daily basis, and for which some of the Respondents actually receive a payment at the rate of $5.00 per hour. The activity is intentional and manifestly injurious to the PEOs and the PEOs' continued employment contract with the City, and a preliminary and permanent injunction is necessary to protect the City from immediate irreparable damages resulting from the probable breach of the employment contract with the PEOs as a result of the Respondents' actions.

ARGUMENT

1. Through their harassing behavior, Respondents have intentionally interfered with the City's contractual relationship with the PEOs.

Intentional interference with contractual relations may be shown, where: "(1) the plaintiff had an economic relationship with a third party; (2) the defendant knew of this relationship; (3) the defendant intentionally and improperly interfered with this relationship; and (4) the plaintiff was damaged by such interference." Hughes v. New Hampshire Div. of Aeronautics, 152 N.H. 30, 40 – 41 (2005) quoting Demetracopoulos v. Wilson, 138 N.H. 371, 373 – 74 (1994).

There is, or should be, no dispute that the City has an economic employment relationship under a collective bargaining agreement with PEOs Givetz, McDermott, and Desruisseaux, providing salary, benefits, and other conditions of employment in exchange for the PEOs' satisfactory performance of their employment duties. Additionally, it is clear that Respondents are aware of the employment contract between the City and the PEOs, based upon the distinctive uniforms worn by the PEOs identifying them as City of Keene employees, the clearly marked City supplied vehicles driven by the PEOs, and the public job duties performed by the PEOs. Respondents' awareness of the employment relationship and contract between the City and the PEOs is further evidenced by the Respondents' statements that the PEOs should terminate their employment relationships with the City. See Affidavits of PEOs Givetz, McDermott, and Desruisseaux. Further, and more troubling, it is evident to the City that the PEOs have been subjected to the harassment and interference for no other reason than that they are employees of the City performing a task that the Respondents' object to.

The Respondents have waged a concerted, organized, and intentional campaign of harassment against the PEOs, which has interfered with the City's contractual relationship with the PEOs. In determining whether intentional interference with a contractual relationship is improper, the courts have considered the following factors: (a) the nature of the actor's conduct, (b) the actor's motive, (c) the interests of the other with which the actor's conduct interferes, (d) the interests sought to be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (f) the proximity or remoteness of the actor's conduct to the interference, and (g) the relations between the parties. See Roberts v. General Motors Corporation, 138 N.H. 532 at 540 (1994).

In this case, the Respondents' conduct is particularly egregious and blatantly designed to interfere with the employment relationship between the City and the PEOs. See Affidavits of PEOs Givetz, McDermott, and Desruisseaux. Respondents' stated motive of causing the closure of an entire City department are inapposite to legitimate forms of interference with contractual relations and further, are against public policy. See Kyle Jarvis, City Investigating 'Harassing Behavior' Toward Parking Officers, *The Keene Sentinel*, April 11, 2013, attached to the City's Petition, wherein Respondent Ian Bernard a/k/a Freeman states that "if they [the City] don't like it [referring to the harassing behavior], they should shut down the parking enforcement department." See also Michele Bowman, 'Robin Hood' Parking Meter Activists Sued By City, Lawyers.com, May 28, 2013 at http://blogs.lawyers.com/2013/05/robin-hood-meter-activists-sued/, wherein Respondent Freeman makes a similar statement. Should this Court allow the Respondents' actions to continue unabated, individuals and/or groups dissatisfied with any division or legitimate activity of government could systematically harass employees of said division or activity until they resign thereby circumventing the legitimate legislative process and causing the direct closure of any division of government they choose. Obviously, this is not in the interest of the City or the public; and if it is in the interest of the public to eliminate the parking function, a legitimate legislative process exists to implement such interest. In addition, the PEOs have repeatedly expressed their request not to be harassed or interfered with to the Respondents, and there is no legitimate reason for the Respondents to continue interfering with the contractual relationship between the City and the PEOs over those objections.

The City has suffered and will continue to suffer harm due to the PEOs' inability to perform their job duties effectively because of the interference of Respondents. See

Restatement (Second) of Torts, § 766 (1977); see also Donovan v. Digital Equip. Corp., 883 F. Supp. 775 (1994); Montrone v. Maxfield, 122 N.H. 724, 726 (1982). Without injunctive relief, the PEOs will continue to suffer anxiety and distress caused by Respondents' behavior. Without injunctive relief, the City will continue to suffer damages by way of the inability of the PEOs to properly perform their assigned job duties, and may suffer further damage by way of the voluntary resignations by one or more PEOs for intolerable working conditions caused by Respondents' intentional harassing behavior.

2. The granting of a preliminary injunction is within the discretion of the court and is an appropriate remedy where the City stands to suffer immediate and irreparable harm due to the Respondents' harassing behavior.

The granting of an injunction is within the sound discretion of the Court exercised upon a consideration of all the circumstances of each case and controlled by established principles of equity. Unifirst Corp. v. City of Nashua, 130 N.H. at 11, 14 (1987)(citation omitted). An injunction will issue where the petitioner establishes: (1) that it has no adequate remedy at law; (2) that it will suffer immediate irreparable harm if the injunction is denied; (3) that, in the absence of injunctive relief, the hardship to the petitioner will be greater than that suffered by the respondent should an injunction be issued; (4) that there is a likelihood of success on the merits and, (5) that the public interest will not be adversely affected should an injunction be issued. See UniFirst Corp., 130 N.H. at 13-14 (citations omitted); See also Thompson v. N.H. Bd. of Med., 143 N.H. 107, 108 (1998); 4 R. WIEBUSCH, NEW HAMPSHIRE PRACTICE, CIVIL PRACTICE AND PROCEDURE §§ 19.05, 19.15(a) (1997).

The City is likely to succeed on the merits. Respondents have no legal authority to taunt, interfere with, harass, and intimidate the PEOs in the performance of their

employment duties, or legal authority to intentionally interfere with or cause the termination of the employment contract between the City and the PEOs.

There is an immediate and ongoing danger of irreparable harm. Respondents have repeatedly video recorded, interfered with, taunted, and intimidated PEOs during the performance of their employment duties. All of the PEOs have expressed distress and anxiety caused by Respondents' actions, altered their approach to their duties, and at least one PEO has threatened to voluntarily terminate employment with the City. See Affidavit of PEO Givetz. Should Respondents' actions be allowed to continue, the City will continue to be damaged by the inability of the PEOs to properly perform their duties, and is in danger of losing its PEOs.

The loss of the PEOs would cause considerable damage to the City of Keene, forcing it to hire and train new PEOs – a time-consuming and money-intensive prospect. Such damage is irreparable and cannot be adequately compensated by money damages. In addition, it is possible, and likely probable, that the City may not be able to replace the PEOs if Respondents' actions are allowed to continue, and the City would not be able to fulfill its statutory authority with respect to public parking. This is precisely the damage that the Respondents seek to cause.

Petitioner has no adequate alternate remedy at law to prevent the ongoing interference, harassment, taunting, and intimidation of the PEOs. Respondents' assertions that the City should instead pursue criminal action is misplaced and beside the point. Respondents' line of reasoning assumes that the City has independent prosecutorial discretion over this matter, which it does not. Further, the New Hampshire Supreme Court has clearly established that, notwithstanding a criminal statute barring a damaging activity, a damaged party may nevertheless seek injunctive relief to prevent further damages. See

State v. Saunders, 66 N.H. 39 at 43 (1889). Such a right to injunctive relief in cases of intentional interference with contractual relations has been recognized by other state courts, especially where there is the threat of immediate and irreparable harm, such as there is here. See Unisys Corporation v. Entex Information Services Inc., 45 Pa. D. & C.4th 405 at 411, 2000 WL 1479064 (Pa.Com,Pl.)(2000)("That cause of action exists against a person who intentionally and improperly interferes with the performance of a contract between another and a third party by inducing or otherwise causing the third party not to perform the contract.")(interior citation omitted).

The sole purposes of the requested preliminary injunctive relief are to preserve the City's right to maintain its economic relationship and contract with its PEO workforce, maintain its statutory authority to regulate and control public parking, and continue collecting parking revenue necessary to provide and maintain adequate public parking. Petitioner does not seek to limit Respondents' right to express their opinion or otherwise restrict the exercise of Respondents' constitutional rights. See Hill v. Colorado, 530 U.S. 703 at 718 (2000) (internal citation omitted), wherein in upholding a Colorado statute that created a 100-foot buffer zone around healthcare clinics in which protesters could not come within 8-feet of any other person moving through the buffer zone for the purpose of protest, education, distribution of literature or counseling, the U.S. Supreme Court noted the "enduring importance of 'a right to be free' from persistent 'importunity, following and dogging' after an offer to communicate has been declined." See also Gericke v. Begin, No. 11–CV–231–SM, 2012 U.S. Dist. WL 4893218, at 7 (D.N.H. October 15, 2012), where the Court stated that the non-peaceful, disruptive recording of a police officer, under the circumstances of a late night motor vehicle stop, was not constitutionally protected conduct (distinguishing the facts of the case from those of Glik v. Cunniffe, 655 F.3d 78 at

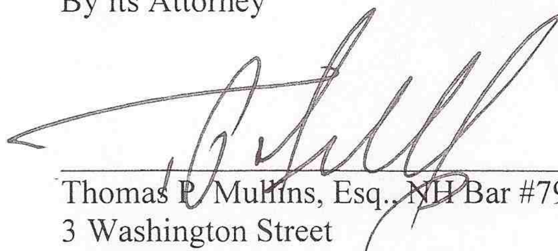
84 (2011), where that Court found that the "peaceful recording of an arrest in a public space" from a "comfortable remove" and that "does not interfere with the police officers' performance of their duties" is not "subject to limitation.")

In the request before this Court, Petitioner seeks only to place a 50-foot zone of safety around the PEOs so that they may perform their employment duties free of direct interference and intimidation. The creation of such a zone does not otherwise interfere with any of the rights of the Respondents. Further, the 50-foot safety zone is easily measured and enforceable as it constitutes either the width of five, ten-foot angled parking spaces or just under the length of three, eighteen-foot parallel parking spaces. Preliminary injunctive relief is required because Respondents would likely accelerate their efforts to interfere with, taunt, and intimidate the PEOs prior to the Court hearing on the merits of the matter, greatly increasing the immediate risk of the loss of employment of one or more of the PEOs.

CONCLUSION

Based upon the foregoing, the City requests that the Court grant its request for preliminary injunction and order the immediate creation of the 50-foot safety zone around the PEOs in order to prevent the tortious interference of the City's contractual relations with its PEOs caused by Respondents' intentionally harassing behavior.

Respectfully submitted,
City of Keene
By its Attorney



Date 6/11/13

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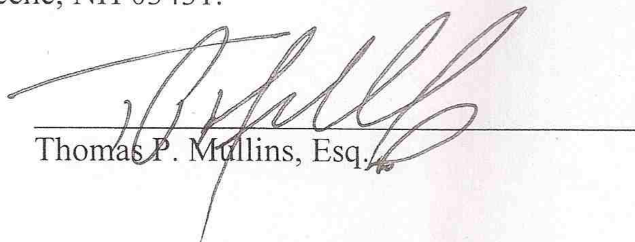
CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of June 2013, I hand-delivered a true and correct copy of the within Memorandum of Law to Respondents Ian Bernard f/k/a Ian Freeman, Keene, NH 03431; Garret Ean, Keene, NH 03431; James Cleaveland, Keene, NH 03431; Kate Ager, Keene, NH 03431; Graham Colson, Keene, NH 03431; and Pete Eyre, Keene, NH 03431.



Thomas P. Mullins, Esq.