

THE STATE OF NEW HAMPSHIRE

GRAFTON, SS

SUPERIOR COURT

University System of New Hampshire

v.

Bradley Jardis and Tommy Mozingo

Docket No.:

**PETITIONER'S MEMORANDUM OF LAW IN SUPPORT OF *EX PARTE* MOTION
FOR TEMPORARY RESTRAINING ORDER**

Petitioner University System of New Hampshire (“USNH”) submits this Memorandum of Law in Support of *Ex Parte* Motion for Temporary Restraining Order and requests that the Court enter a Temporary Restraining Order as set forth herein and in accordance with the Proposed Temporary Restraining Order submitted with this Memorandum.

I. INTRODUCTION

USNH brings this action to enjoin Respondents Bradley Jardis and Tommy Mozingo, and anyone acting in active concert or participation with the Respondents, from bringing loaded rifles onto the Plymouth State University campus in direct violation of the USNH Weapons, Firearms and Explosives policy, which prohibits the possession, use, sale or transfer of firearms on the Plymouth State University campus. Mr. Jardis issued a “press release” on December 5, 2011, on www.freekeene.com stating that he and his “associate,” Mr. Mozingo, would both be “carrying unconcealed, loaded, slung rifle[s]” onto the Plymouth State University campus on December 9, 2011, in order to challenge the validity of the USNH weapons policy. Since the “press release” was issued, several other individuals have stated that they intend to join Mr. Jardis and Mr. Mozingo on December 9th, and “bring [their] weapons.”

The Respondents actions constitute not only a knowing and willful violation of the USNH weapons policy, but also create a significant risk of danger, and a likelihood of irreparable harm, to the students, faculty and others at Plymouth State University. The presence of loaded firearms at a protest that is controversial, likely to be tense, and which could result in multiple arrests is a recipe for disaster. This is particularly true where, as here, the Respondents have other less dangerous options available to challenge the validity of the USNH weapons policy, including filing a declaratory judgment action seeking a judicial declaration as to the validity of the weapons policy. In short, there is no need for an armed protest, and the Respondents' actions seem geared towards using conflict as a means to make a point—a point which could very easily have tragic results.

Given that the Respondents' proposed actions constitute a clear violation of the USNH weapons policy and the volatile and dangerous situation the Respondents' conduct will create, USNH requests that the Court enter a Temporary Restraining Order which provides as follows:

1. The Respondents; their officers, agents, servants, employees, and attorneys; and any person acting in active concert and participation with the Respondents, are enjoined from carrying firearms or any other weapons prohibited by the USNH Weapons, Firearms and Explosives policy on the Plymouth State University campus, or any other campus administered by the USNH Board of Trustees, including the University of New Hampshire, Keene State College, and Granite State College;
2. The Respondents are ordered to post a copy of the Temporary Restraining Order on the blog/website www.freekeene.com in order to provide notice of the enjoined activities to any individuals who plan to bring firearms or other prohibited weapons to the Plymouth State University campus, or any other campus administered by the USNH Board of Trustees, in response to the Respondents' "press release."
3. Any person found to be in violation of the USNH Weapons, Firearms and Explosives policy after receiving notice of the Temporary Restraining Order shall be in contempt of the Court and subject to arrest for said contempt.

II. STATEMENT OF RELEVANT FACTS

USNH is an entity created pursuant to RSA 187-A:1, the main purpose of which is to provide a well-coordinated system of public higher education in New Hampshire. See RSA 187-A:1. USNH is governed by the USNH Board of Trustees which, by statute, is authorized to manage and control all of the property and affairs of USNH and its divisions, including the University of New Hampshire, Plymouth State University, Keene State College, and Granite State College. See RSA 187-A:16. The New Hampshire legislature “has delegated broad authority to the board of trustees who shall be responsible for managing the university system in a manner which promotes academic excellence and serves the educational needs of the people of New Hampshire.” See RSA 187-A:2-b. The legislature has similarly mandated that the institutions administered by USNH, like Plymouth State University, “are to be permitted to operate with the highest measure of autonomy and self-governance, subject to the supervision of the board of trustees.” See RSA 187-A:16.

USNH has promulgated a Weapons, Firearms and Explosives policy (“Weapons Policy”) which prohibits the possession, use, transfer or sale of dangerous items on the campuses administered by the USNH Board of Trustees, including Plymouth State University. The policy states as follows:

Weapons, Firearms and Explosives

This policy pertains to items that would generally be considered dangerous on a university campus and/or illegal such as but not limited to: Firearms; guns (pellet, air, paint ball, tranquilizer, stun, spear, dart); slingshots; switchblades; knives with a blade longer than 4 inches; combat and martial art type weapons (metal knuckles, throwing stars, clubs, metal swords); bows; arrows; explosive devices or substances (grenades, bombs, fireworks, ammunition).

1. The possession of any item referenced above is not allowed on campus property except with the expressed permission of the Chief of University Police.
2. Use of any item referenced above is not permitted on campus property.

3. Transfer or sale of any of the items referenced above is not permitted on campus property.
4. If a replica/toy version of any weapon will be used for an on-campus class presentation, project, or activity, the faculty/staff member overseeing the event and University Police must be alerted prior to the event occurring.

Authorized items may be stored in the University Police Office.

Exceptions to this policy include pocket knives, general tools, utensils, or items not designed as weapons unless the object is used in a way that would be considered dangerous.

See Verified Petition for Temporary Restraining Order and Preliminary and Permanent Injunctive Relief (“Verified Petition”) at ¶ 8.

On or about December 5, 2011, Respondent Bradley Jardis posted a “press release” on a blog/website at www.freekeene.com. See Verified Petition at ¶ 9 and Ex. A. The “press release” states that Mr. Jardis and his “associate,” Tommy Mozingo, plan to be present on the Plymouth State University campus on Friday, December 9, 2011, and that both will “be carrying an unconcealed, loaded, and slung rifle.” Id. at ¶ 10 and Ex. A. The “press release” has generated numerous electronic comments from other individuals, some of whom have stated that they intend to join the Respondents at Plymouth State University on December 9, 2011, “with [their] weapons.” Id. at ¶ 11 and Ex. A.

The possession of firearms and/or other prohibited weapons on the Plymouth State University campus by the Respondents, or any other individuals responding to the “press release,” constitutes a knowing and willful violation of the Weapons Policy as set forth in paragraph 8. The presence of firearms, particularly the loaded firearms the Respondents have stated they plan to carry at Plymouth State University, creates a substantial risk of immediate and irreparable injury, loss or damages to Plymouth State University students, faculty and others. While Respondents represent in the “press release” that they plan to fully cooperate with law enforcement if they are arrested, the mere presence of the loaded firearms creates a potentially

explosive and dangerous situation. This is particularly true given the comments indicating that other individuals intend to join the Respondents at Plymouth State University “with [their] weapons.”

III. STANDARD OF REVIEW

Granting injunctive relief is within the sound discretion of the Court depending on the facts and circumstances of the particular case. Gauthier v. Robinson, 122 N.H. 365, 368 (1982); Poisson v. Manchester, 101 N.H. 72, 75 (1957). The New Hampshire Supreme Court has set forth a four part test to determine whether the issuance of injunctive relief is warranted. Under this formulation, trial courts must consider the following factors: (1) petitioner’s likelihood of success on the merits; (2) the potential for irreparable harm if the injunction is denied; (3) the balance of relevant impositions, namely, the hardship to the non-movant if enjoined as contrasted with the hardship to the movant if no injunction issues; and (4) the effect, if any, of the Court’s ruling on the public interest. UniFirst Corp. v. City of Nashua, 130 N.H. 11, 14-15 (1987).

A temporary restraining order may be granted on an *ex parte* basis where the facts shown by affidavit or verified petition indicate that immediate and irreparable harm will result before the adverse party or his or her attorney can be heard in opposition. See Super. Ct. R. 161(a).

IV. ARGUMENT

A. USNH Will Prevail On The Merits

The *sine qua non* of the preliminary injunction standard is whether plaintiff is likely to succeed on the merits. Weaver v. Henderson, 984 F.2d 11, 12 n.3 (1st Cir. 1993). As set forth above and in the Verified Petition, the Respondents are aware of the Weapons Policy and have nevertheless manifested a clear, unequivocal intention to violate the Weapons Policy by bringing loaded rifles onto the UNH campus. The Weapons Policy is and will remain valid and

enforceable unless and until a court declares that the policy is invalid.¹ Since that has not occurred (and is unlikely to occur for the reasons explained below), USNH has demonstrated that it will prevail on its claim that the Respondents actions constitute a violation of the Weapons Policy.

The Respondents, on the other hand, maintain that they are not bound by the Weapons Policy, which they claim is rendered null and void by RSA 159:26. That statute states:

I. To the extent consistent with federal law, the state of New Hampshire shall have authority and jurisdiction over the sale, purchase, ownership, use, possession, transportation, licensing, permitting, taxation, or other matter pertaining to firearms, firearms components, ammunition, firearms supplies, or knives in the state. Except as otherwise specifically provided by statute, no ordinance or regulation of a political subdivision may regulate the sale, purchase, ownership, use, possession, transportation, licensing, permitting, taxation, or other matter pertaining to firearms, firearms components, ammunition, or firearms supplies in the state. Nothing in this section shall be construed as affecting a political subdivision's right to adopt zoning ordinances for the purpose of regulating firearms or knives businesses in the same manner as other businesses or to take any action allowed under RSA 207:59.

II. Upon the effective date of this section, all municipal ordinances and regulations not authorized under paragraph I relative to the sale, purchase, ownership, use, possession, transportation, licensing, permitting, taxation, or other matter pertaining to firearms, firearm components, ammunition, firearms supplies, or knives shall be null and void.

RSA 159:26.

The Respondents' argument, however, ignores the statutory law granting the USNH Board of Trustees broad discretion to "manage[] and control all of the property and affairs of the university system of New Hampshire, the university of New Hampshire . . . and all of its

¹ Respondents' contention that the Weapons Policy is invalid is ripe for adjudication through a declaratory judgment action. See RSA 491:22, I; 5 R. Weibush, New Hampshire Practice, Civil Practice and Procedure §36.04, at 125–26 (2d ed. 1998). USNH has advised Mr. Jardis of this fact in an effort to persuade Mr. Jardis not to bring weapons onto the campus and to protect public safety . Mr. Jardis has rejected this option.

divisions and departments, the Keene state college, the Plymouth state university, and the Granite state college.” See RSA 187-A:16 (emphasis added). The right to manage and control “all property and affairs” necessarily involves the authority to promulgate policies necessary to protect the safety of students and faculty at the USNH colleges and universities, including the right to regulate the possession or use of weapons on those campuses. To the extent there could be any dispute regarding the broad grant of plenary powers the legislature intended to confer on the USNH Board of Trustees to manage and controls it property and affairs, the legislature resolved that dispute by stating that in order to meet its educational purpose, “institutions are to be permitted to operate with the highest measure of autonomy and self-governance, subject to the supervision of the board of trustees.” Id. (emphasis added).

The legislature further clarified USNH’s authority to manage and control its property and affairs in RSA 187-A:2-b, stating that:

The general court also recognizes the need to protect the institutions of the university system from inappropriate external influence which might threaten the academic freedom of faculty members or otherwise inhibit the pursuit of academic excellence. To this end, the general court has delegated broad authority to the board of trustees who shall be responsible for managing the university system in a manner which promotes academic excellence and serves the educational needs of the people of New Hampshire.

See RSA 187-A:2-b (emphasis added). The legislature, thus, has specifically provided by statute that the USNH Board of Trustees has broad authority to manage and control the property and affairs at Plymouth State University (and the other colleges and universities in the USNH system), including the authority to regulate the possession and use of dangerous weapons on the Plymouth State University campus to the extent the Board of Trustees deems the regulation necessary to accomplish its educational purposes.

This conclusion is further bolstered by the New Hampshire Supreme Court’s recognition of the legislature’s broad grant of authority and independence to the trustees of the New Hampshire Retirement System in New Hampshire Retirement System v. Sununu, 126 N.H. 104 (1985). The issue in the Retirement System case was whether the New Hampshire Retirement System, which like USNH is governed by a board of trustees, was within the executive department and required the approval of the Governor and the Executive Counsel for contracts. Id. at 105. The Court answered the question in the negative, finding that the statutes relating to the Retirement System evidenced a delegation of broad authority to the board of trustees to administer the Retirement System without executive control. Id. at 107. Those statutes provided, among other things, that the trustees had “full authority to invest and reinvest such funds,” subject to applicable reinvestment laws; “full power to hold, purchase, sell, assign, transfer and dispose of any of the securities and investments in which any of the funds . . . have been invested. . . .”; and “full power and authority” to delegate to any agent their power and discretion to make decisions and actions regarding investments. Id. at 107. The Court concluded that these statutes granted “the board of trustees significant latitude in the administration of the System” and “supports the conclusion that the legislature intended the board to have the power to administer the System independently of the executive branch.” Id. at 108-109.

The Court further concluded that “the System’s independence is further underscored by its status as a trust” and that under the common law of trusts “the board of trustees owes the System’s members and beneficiaries a fiduciary obligation to manage the System for the benefit of its members and beneficiaries.” Id. at 109. By vesting authority in a board of trustees, the legislature evidenced an intent that the Retirement System would operate largely independent of the executive branch so that it could fulfill its fiduciary obligations to its members. Id.

RSA 187-A grants the USNH Board of Trustees similar latitude, and perhaps greater latitude, in the management and control of the property and affairs of its member institutions and supports the conclusion that the legislature did not intend RSA 159:26 to limit or proscribe USNH's broad authority to fulfill its educational purpose by enacting policies designed to protect the safety and welfare of its students and faculty, including enacting the Weapons Policy. In addition, by vesting authority in the USNH Board of Trustees, the legislature intended to create fiduciary obligations running from the Board to its member institutions to enact policies that promote the academic experience and serve the education needs of those institutions. Those obligations necessarily involve enacting policies to protect the safety and welfare of the students and faculty, including the Weapons Policy.

The Respondents' reliance on RSA 159:26 is misplaced for two additional reasons: (1) USNH is not a "political subdivision" within the meaning of RSA 159:26; and (2) even assuming otherwise, Paragraph II nullifies only "municipal ordinances and regulations," and not USNH's policy.

In the first instance, USNH is not bound by RSA 159:26 because USNH is not a "political subdivision" within the meaning of RSA 159:26, I. Rather, the term "political subdivision," as used in the statute, refers to local governmental authorities such as towns, cities and counties. The legislative history confirms that the aim of RSA 159:26 is to prevent patchwork regulation by local government. See N.H.H.J. 2011 (HB 544; "If one were to pass from jurisdiction to jurisdiction with conflicting laws you could easily find yourself in conflict with a town ordinance that is different than your destination or place of origin." (available at http://www.gencourt.state.nh.us/house/caljournals/calendars/2011/houcal2011_22.html)). Indeed, the Judiciary Committee heard testimony about ordinances from the City of Laconia and the

Town of Deerfield purporting to ban concealed weapons. See Judiciary Committee Minutes of Hearing May 27, 2003 (HB 415; “This bill was amended in the House to add the piece regarding the ability of local towns and municipalities to pass ordinances relative to carrying guns.”) (http://www.gencourt.state.nh.us/bill_Status/sos_archives.aspx?lsr=490&sy=2003&sortoption=chapterno&txtsessionyear=2003&txtchapternumber=0283).

If any doubt remained regarding the proper construction of “political subdivision,” the text of Paragraph 2 of RSA 159:26 resolves the meaning of the term. That paragraph preempts only regulations enacted by “municipalities.” In other words, the legislature, by using the term “municipalities” elsewhere in the statute, has confirmed the legislative history: the intent to preclude local governments from enacting patchwork laws.

It bears noting the functional dissimilarities between USNH and local governments. Unlike local governments, USNH is the sole public corporation charged with overseeing public higher education. See generally The Trustees of Dartmouth College v. Woodward, 1 N.H. 111 (1817) (explaining nature of public corporations). To that end, USNH has been delegated broad power to accomplish its educational mission, see RSA chapter 187-A, which is charitable in nature, see, e.g., RSA 292:1, II (identifying education as permissible purpose of non-profit). Unlike a local town or city, which is governed by elected officials, USNH, like the New Hampshire Retirement System, is a public trust governed by a board of trustees. See New Hampshire Retirement System v. Sununu, 126 N.H. 104 (1985). In short, USNH bears few, if any, of the hallmarks of a local government. Indeed, USNH has enacted the weapons policy for several years without interference from the legislature. See id. at 109-110 (discussing administrative gloss doctrine).

It also bears noting the absurdity of the construction likely to be posited by the Respondents. If the term “political subdivision” is construed as broadly as the Respondents will likely contend (i.e., to capture any state-chartered institution), then all governmental agencies and authorities would be precluded from enacting no-weapons policies, including prisons and county nursing homes. Plainly, however, these institutions have a compelling need to prohibit the possession or use of firearms on the premises, just as USNH does.

Even if the Weapons Policy violates the proscription within RSA 159:26, I, USNH is still likely to succeed on its claim because its policy is not statutorily preempted. The preemptive clause of RSA 159:26 extends only to “municipal” ordinances and regulations. See RSA 159:26, II. The legislature, therefore, has chosen to reserve the drastic remedy of preemption only where the statute is violated by a “municipality.” By the terms of the statute, then, the Weapons Policy remains enforceable against the Respondents.

B. There Is A Substantial Likelihood Of Immediate And Irreparable Harm Unless The Temporary Restraining Order Issues

There are two distinct varieties of irreparable harm substantially likely to occur unless a temporary restraining order issues. In the first instance, the Respondents declared their unequivocal intention to violate the USNH policy by entering the campus while possessing a firearm. This would, as discussed above, be an unauthorized entry on USNH property. In legal parlance, the Respondents would be trespassing. “Repetition of trespasses is a common ground for finding the legal remedy to be inadequate.” State v. Linsky, 117 N.H. 866, 876 (1977) (involving criminal violation of injunction).

This irreparable harm is compounded by the presence of deadly weapons. Not only does this detract from the educational mission of USNH, it also introduces an element of volatility and

risk of harm into student life. Introducing life-threatening weapons into a demonstration is like holding a match close to the proverbial powder keg. Indeed, even if the Respondents harbor no present intention to use their firearms, there exists a substantial possibility for accidents and other misfortune.

Allowing weapons on campus, moreover, would subject students and faculty to irreparable harm even if no incident, altercation or accident occurs since most of these individuals would not know why the weapons were present on campus or have knowledge of the Respondents stated intent to cooperate with law enforcement if arrested. They would simply see two individuals with rifle slung across their backs. Given the numerous, publicized incidents of gun violence at educational institutions throughout America, including the Virginia Tech shootings, Columbine, and the faculty shootings at the University of Alabama-Huntsville, the mere presence of weapons on the Plymouth State University campus is likely to instill fear and anxiety in the students and faculty, causing irreparable (and unnecessary) harm.

C. The Balance Of Impositions Weighs In Favor Of Issuance Of The Temporary Restraining Order

The balance of relevant impositions favors injunctive relief in this case because any hardship to the Respondents, if enjoined, does not outweigh the hardship to USNH if no injunction issues. See generally New Hampshire Donuts, Inc. v. Skipitaris, 129 N.H. 774, 781 (1987). The temporary restraining order which USNH seeks simply preserves the status quo pending a more formal hearing on a preliminary injunction. The only imposition to the Respondents is the inability to undertake the armed protest that is currently planned for Friday, December 9. That activity, however, is merely a form of self-help, discussed more below, designed to create the precise conflict which the availability of judicial process is designed to

avert. In short, issuing a temporary restraining order will be little or no burden at all because it simply forces the Respondents to bring their dispute to the Court for resolution.

Conversely, the harm to USNH if no injunction issues is, as discussed, irreparable. Not only will the Respondents disrupt educational activities, they will also present a very real threat of physical harm, either intentionally or otherwise, by creating conflict while armed with dangerous weapons. Whatever remedy USNH might achieve later will not be adequate in view of the serious consequences likely to flow from the Respondents' actions.

D. Public Policy Favors The Issuance of the Temporary Restraining Order

A temporary restraining order serves public policy in a number of ways. As discussed, a temporary restraining order will avert the brewing conflict and force the Respondents to test the legal merit of their arguments in this Court, rather than on a college campus. A temporary restraining order is also in the public interest because it will preserve the safety of students and police officers.

A temporary restraining order will also serve public policy as embodied in Part II, Article 83 of State Constitution, which speaks to the duty of state government to foster education. It bears noting that the Respondents' protest will occur during students' final exam period. The Respondents' intention appears to be causing the maximum educational disruption possible through the creation of a spectacle. This is plainly violative of other students' rights to engage in learning and academia without unnecessary interference.

E. USNH Has Provided Respondents With Notice Of This Filing

As required by Superior Court Rule 161(a), USNH has, prior to filing this action, provided notice of this action and the request for a temporary restraining order to Mr. Jardis by emailing a copy of the Verified Petition, Ex Parte Motion for Temporary Restraining Order, and

this Memorandum of Law to Mr. Jardis's email address. USNH does not have an email address for Mr. Mozingo and has requested that Mr. Jardis forward the email and attached documents to Mr. Mozingo. In addition, USNH's general counsel has informed Mr. Jardis that that the planned armed confrontation is not necessary to challenge the validity of the weapons policy and informed Mr. Jardis that he could file an action for declaratory judgment seeking a judicial determination of the validity of the Weapons Policy. Mr. Jardis has declined to pursue this option and instead indicated he intends to proceed with his plan to bring prohibited firearms onto the Plymouth State University campus in violation of the Weapons policy.

V. CONCLUSION

For the reasons explained herein, USNH respectfully requests that the Court issue a Temporary Restraining Order that provides as follows:

1. The Respondents; their officers, agents, servants, employees, and attorneys; and any person acting in active concert and participation with the Respondents, are enjoined from carrying firearms or any other weapons prohibited by the USNH Weapons, Firearms and Explosives policy on the Plymouth State University campus, or any other campus administered by the USNH Board of Trustees, including the University of New Hampshire, Keene State College, and Granite State College;
2. The Respondents are ordered to post a copy of the Temporary Restraining Order on the blog/website www.freekeene.com in order to provide notice of the enjoined activities to any individuals who plan to bring firearms or other prohibited weapons to the Plymouth State University campus, or any other campus administered by the USNH Board of Trustees, in response to the Respondents' "press release."
3. Any person found to be in violation of the USNH Weapons, Firearms and Explosives policy after receiving notice of the Temporary Restraining Order shall be in contempt of the Court and subject to arrest for said contempt.

Respectfully Submitted,

UNIVERSITY SYSTEM OF NEW HAMPSHIRE

By its attorneys.

DEVINE, MILLIMET & BRANCH,
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