THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

CHESHIRE, SS. **No. 213-2013-CV-00098;**
213-2013-CV-0241

THE CITY OF KEENE

v.

JAMES CLEAVELAND,

GARRETT EAN,

KATE AGER,

IAN BERNARD A/K/A IAN FREEMAN,

GRAHAM COLSON,

AND

PETE EYER

ORDER

The Petitioner, the City of Keene (the "City"), originally brought actions claiming tortious interference with contractual relations, negligence, and civil conspiracy. The City also sought preliminary and permanent injunctive relief ordering the Respondents, James Cleaveland, Garret Ean, Kate Ager, Ian Bernard a/k/a Ian Freeman, Graham Colson, and Pete Eyer to not interfere, harass, or intimidate members of the Parking Enforcement Office ("PEO"). This Court granted Respondents' motions to dismiss. The New Hampshire Supreme Court affirmed this Court's decision in all respects except as

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J. Meyer, C. Bauer

to the requested injunctive relief, which it remanded to this Court for a decision on the merits. A hearing was held on October 2, 2015.[1] After consideration of the arguments presented, injunctive relief is DENIED.

I. Factual Background

The City currently employs Parking Enforcement Officers (collectively the "PEOs"), Linda Desruisseaux ("Desruisseaux") and Jane McDermott ("McDermott"). The Petitioner also formerly employed Alan Givetz ("Givetz") as a PEO before he resigned in 2013. The PEOs' duties include enforcing motor vehicle parking laws by monitoring parking meters and writing parking tickets. The PEOs patrol on foot and move throughout downtown Keene. Beginning in December 2012, the Respondents began following, videotaping, and talking with the PEOs on almost a daily basis. Since October 2013, the frequency of this conduct has decreased significantly.

A. Robin Hooding

Robin Hooding is done by identifying and filling expired parking meters before a PEO locates the expired meter and issues a ticket. When this is done, it is referred to as a "save." After a car has been saved, the Robin Hooders place cards on the windshield that inform the driver that they have been saved from a ticket and refer them to FreeKeene.org for donations. On occasion, Robin Hooding participants videotape while Robin Hooding, typically ten feet away from the PEOs. Garret Ean ("Ean") and Ian Freeman ("Freeman") have published videos on YouTube, FreeKeene.com,

[1] The focus of the hearing was on events after October 1, 2013, the final date of the last evidentiary hearing. This order considers the facts and evidence from the evidentiary hearings in 2013 and, more recently, on October 2, 2015.

FreeConcord.org, and Facebook detailing the Robin Hooding efforts. A video filmed on February 26, 2013, depicts former PEO Givetz being followed, turning around, and saying, "is that close enough coward." Another video filmed in 2014 shows PEO Desruisseaux being followed and spoken to by Freeman while she attempted to do her job.

The named Respondents have participated in Robin Hooding over different periods of time and at different frequencies. Freeman has participated in "Robin Hooding" since 2009 and continues to do so in a reduced capacity. Ean has been involved in Robin Hooding for several years and remains the most active Robin Hooding participant. He currently goes out to Robin Hood several days per week for several hours per day. James Cleaveland ("Cleaveland") was formerly a more involved participant, but has only Robin Hooded on a few, infrequent occasions since October 2013. One specific instance involved demonstrating how to Robin Hood to participants in a "Keene-vention." Kate Ager ("Ager") participated in Robin Hooding from December 2012 to March 2013, but has not been Robin Hooding since. Pete Eyer ("Eyer") did not actually Robin Hood himself, but on occasion before October 2013 alerted the Robin Hooders to the location of a PEO. Graham Colson ("Colson") participated in Robin Hooding in the past, but has not engaged in Robin Hooding activities since October 2013.

The nature of Robin Hooding requires the participant to get in front of the PEO in order to feed expired meters before the PEO reaches them. A Robin Hooder will have to pass by the PEO if the PEO changes direction from their anticipated path. When a Robin Hooder tries to get ahead of a PEO, the layout and dimensions of the sidewalks

and meters in downtown Keene require that the Robin Hooder pass within a few feet of the PEO. This is further compounded by pedestrians, bystanders, bikes, trash cans, pets, and other impediments in the path of the PEO and the Robin Hooder.

B. Allegations Made by PEOs About Activities Prior to October 1, 2013

McDermott has been a PEO since September 2012. Beginning in December 2012, Cleaveland, Ean, Colson, Freeman, and Ager followed her on foot. Several Respondents told the PEOs that they would help them find new jobs. The Respondents called McDermott a "liar," "thief," and asked her how she could sleep at night. McDermott originally tried to thwart the Respondents by running away and crossing streets, but the Respondents continued to follow.

The Robin Hooding caused McDermott stress because she had to constantly monitor where the Respondents were and felt like she could not get away. Even on her breaks, the Respondents sat and waited outside her car or followed her into the library or City Hall. The Respondents' close proximity made it hard to focus on her job. She refused to work Saturdays because she did not feel safe with Cleaveland's and Colson's presence. She contemplated quitting and inquired about other employment.

McDermott carried a radio that allowed her to contact the dispatcher at the Keene Police Department. On three occasions, she did need to contact the police. Once, Keene Police radioed McDermott to check on her when the group surrounding her was so large that they could not see her. On another occasion, McDermott was taking the Respondents' cards off a windshield when Colson grabbed her wrist. Initially,

she felt threatened until she realized what was happening. McDermott was not hurt and the situation resolved peacefully.

PEO Desruisseaux also experienced Robin Hooding before October 2013. While on patrol, Cleaveland and Colson attempted to stop PEO Desruisseaux and engage her in conversation to prevent her from doing her job. The Respondents told her she was vandalizing cars by chalking the tires. Moreover, Ean, Eyer, and Cleaveland made comments to Desruisseaux that she should not be doing her job because she was stealing from the citizens of Keene. On at least one occasion, Cleaveland came within about a foot of her. Desruisseaux asked Cleaveland to stay away and stop talking to her, but he continued. Desruisseaux felt the constant videotaping was intimidating no matter from what distance it was done. She never observed any of the Respondents being violent.

Desruisseaux would hear the footsteps of the Respondents following. When she heard them, she would tense up and become very distracted, which impacted her job performance. She became angry and frustrated by the Respondents' actions. She contemplated filing a grievance with her union, filing a workers compensation suit for stress, or taking a mental health day.

Givetz started working as a PEO in September 2012 and resigned in July 2013 due to the hostile work environment caused by the Respondents. Specifically, Colson made it hard for Givetz to do his job by standing in front of him and asking what Givetz was going to do. Colson also referenced Givetz's military service, suggesting he would "drone brown babies," called him a "racist," "bitch," and "coward," and followed him on his day off. Colson would follow him so closely that if Givetz turned around they would

bump into each other. On some occasions, Ean would walk with Colson and videotape. Eyer worked behind the scenes, radioing the Respondents after locating Givetz. On one occasion, Eyer asked Givetz if the Respondents' actions were boosting morale.

Colson, Ean, and Cleaveland told Givetz that they could help him find a real job that does not hurt people, and that he should quit. Givetz experienced an anger he had never experienced before because of the Respondents' constant activities. Givetz felt like he was "backed into a corner" and had to quit before he did something "stupid."

C. Allegations by PEOs About Activities Since October 1, 2013

Since October 1, 2013, PEOs Desruisseaux and McDermott have experienced continued Robin Hooding activities by Ean and Freeman. These activities have been reduced in frequency from pre-October 2013 levels. PEO Desruisseaux has been followed by Ean, sometimes accompanied by a female, three to four days per week, but has not been followed by large groups or for her full work day. She maintains that she spends most of her time while Ean is Robin Hooding trying to get away from him and that she feels panicked. Freeman has followed PEO Desruisseaux less frequently since October 2013. On one videotaped occasion, Freeman followed her with a camera and impeded her from doing her job. She responded to his videotaping and statements with "I asked you not to speak to me" and "I've had enough." She has not seen Ager, Colson, or Eyer Robin Hooding since October 2013 and has seen Cleaveland only once.

PEO McDermott has also experienced Robin Hooding since October 2013. She sees Ean most days while she tries to work. She assumes that she has been filmed

since October 2013 because she says Freeman always films, but she has not seen it. She remains apprehensive of the Robin Hooders coming up to her and feels stressed and anxious about running into someone Robin Hooding. She has not seen Ager, Colson, Eyer or Cleaveland while she was working since October 2013.

II. Procedural Posture

On May 1, 2013, the Petitioners brought this action alleging that the Respondents, acting individually and in concert, tortiously interfered with contractual relations in that the Respondents created a hostile work environment for the PEOs and forced Givetz to resign. (See Pet.'s Clarified/Amended Verified Pet. Preliminary Permanent Inj. Relief 1.) On September 23, 2013, the Petitioners filed another action against the Respondents also alleging negligence and civil conspiracy. (Pet.'s Compl. Decl., 213-2013-CV-00241.) The City sought preliminary and permanent injunctive relief "against the six Respondents, enjoining them from interfering with the PEOs' employment relationship with the City, either through the City's proposed 30 foot injunction, or through any other reasonable injunction that the Court deems appropriate." (Pet.'s Supp. Mem. Law 4.) This Court dismissed all of the Petitioner's claims in both actions. The New Hampshire Supreme Court affirmed this Court's decision on the civil claims, but remanded the equitable claim for injunctive relief for a determination on the merits. City of Keene v. Cleaveland, __ N.H. ___, 118 A.3d 253, 263 (2015). On remand, the Petitioner, the City, argues that injunctive relief is constitutional and proper given the facts here and balancing the governmental interests of the City and the First Amendment rights of the Respondents.

III. Analysis

On remand, the question for this Court is "whether the governmental interests and factual circumstances asserted by the City in its petition are sufficient to warrant properly tailored injunctive relief." Cleaveland, __ N.H. ___, 118 A.3d at 263. "It is within the trial court's sound discretion to grant an injunction after consideration of the facts and established principles of equity." Town of Atkinson v. Malborn Realty Trust, 164 N.H. 62, 66 (2012). To be granted injunctive relief, the "plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006). Here, the balance of hardships and the examination of the public interest require this court to examine both the Respondents' First Amendment rights and the Petitioner's governmental interests.

Preliminarily, the Court addresses the request for injunctive relief against four of the six Respondents: Eyer, Cleaveland, Ager, and Colson. In the recent hearing, no evidence was introduced that Eyer, Ager, and/or Colson have been involved in this activity in over two years. Cleaveland has only had a minimal role, engaging in limited Robin Hooding on one or two occasions. Considering all of the evidence presented in the 2013 hearings and most recent hearing, the Court finds that injunctive relief is not justified against these four Respondents and dismisses the claims against them.

A. First Amendment Right to Free Speech

The Respondents contend that a permanent injunction would infringe upon activities that are constitutionally protected:

1. Filling expired meters before cars were ticketed to protest against the City's parking enforcement function as well was a means to protect motorists from getting tickets.
2. Verbal communication with PEOs on various subjects, including defendants' political theories and their connection to parking enforcement.
3. Videotaping Parking Enforcement Officers as they perform their duties as a means of assuring government accountability.
4. Placing a Robin Hood card on the windshield of cars which had been spared from parking tickets in order to communicate a political message and secondarily to raise funds.

(Def.s' Post Hearing Mem. 5) "The Free Speech Clause of the First Amendment—Congress shall make no law . . . abridging the freedom of speech—can serve as a defense in state tort suits. . . ." Snyder v. Phelps, 562 U.S. 443, 451 (2011) (citation and quotation omitted).

On appeal and now, the City does not challenge that the content of the Respondents' speech is protected under the First Amendment as speech on a matter of public concern taking place in a traditional public forum. Cleaveland, __ N.H. ___, 118 A.3d at 260. Speech is of public concern if "it can be fairly considered as relating to any matter of political, social, or other concern to the community." Snyder, 562 U.S. at 453. Such speech "occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." Id. at 452 (quotations and citations omitted). Respondents' speech is on a matter of public concern --- the legitimacy of the City government and parking enforcement. Cleaveland, __ N.H. ___, 118 A.3d at 260. Public forums are public areas "used for public assembly and debate, the hallmarks of a

traditional public forum." Frisby v. Schultz, 487 U.S. 474, 480 (1988). Respondents' speech also takes place in a traditional public forum --- public sidewalks and streets. Cleaveland, __ N.H. ___, 118 A.3d at 260. The Respondents' speech is protected.

While some conduct accompanying speech can be curtailed within the bounds of the First Amendment, peaceful conduct should not be curtailed even if offensive. Cleaveland, __ N.H. ___, 118 A.3d at 260-61. "[T]he activity of peaceful pamphleteering is a form of communication protected by the First Amendment." NAACP v. Claiborne Hardware Co., 458 U.S. 886, 910 (1982). "The videotaping of public officials is an exercise of First Amendment liberties." Glik v. Cunniffe, 655 F.3d 78, 83 (1st Cir. 2011). While violent conduct accompanying speech is not protected, such violence must "color[ ] the entire collective effort to take an otherwise non-violent activity outside the realm of constitutional protection." Cleaveland, __ N.H. ___, 118 A.3d at 261 (citing Claiborne Hardware Co., 458 U.S. 886, 933 (1982)). Protected speech does not become unprotected merely because someone disagrees with the message being disseminated, if the dissemination is being done peacefully. Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971). With the exception of a single incident occurring more than two years ago when a PEO's wrist was grabbed and the PEO was unhurt, the Respondents' conduct has been non-violent.

Reasonable Time, Place or Manner Restrictions

Despite the significant protections for First Amendment rights, the Respondents' choice of when, where, and how to Robin Hood "is not beyond the Government's regulatory reach—it is subject to reasonable time, place, or manner restrictions." Snyder, 562 U.S. at 456. Content-neutral injunctions must burden no more speech than

necessary to serve a significant government interest. Cleaveland, __ N.H. ___, 118 A.3d at 263-64 (citing Madsen v. Women's Health Center, Inc., 512 U.S. 753, 765 (1994). "[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976). "Temporary restraining orders and permanent injunctions — i.e., court orders that actually forbid speech activities — are classic examples of prior restraints." Alexander v. United States, 509 U.S. 544, 550 (1993). Therefore, a high standard applies to allowing a prior restraint on speech.

To determine if a prior restraint on speech is constitutional, the Court must first determine if the proposed injunctions are content-neutral. If either injunction is content-based, the standard of review applied to the potential injunction rises to strict scrutiny. Boos v. Barry, 485 U.S. 312, 321 (1988) (noting that content-based restrictions on political speech must be subjected to the most exacting scrutiny.) A restraint on speech is content-neutral if it "serves purposes unrelated to the content of expression . . . even if it has an incidental effect on some speakers or messages but not others." Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). Even though the Petitioner seeks injunctive relief only against the named Respondents (who share similar political views and Robin Hood to spread those similar views), the purposes of the proposed injunction is to protect the PEOs and the public from the effects of disruptive conduct on the streets of Keene. These purposes are unrelated to the content of the Respondents message and the proposed injunctions are content-neutral.

In general, content-neutral time, place, or manner restrictions "need not be the least restrictive or least intrusive means of doing so, . . . so long as the . . . regulation

promotes a substantial government interest that would be achieved less effectively absent the regulation." Ward, 491 U.S. at 798-99 (internal quotations omitted). However, as noted, injunctions require greater scrutiny than legislatively-enacted statutes or regulations and require "more stringent application of general First Amendment principles." Madsen, 512 U.S. at 765. Injunctive relief, in general, "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." Califano v. Yamasaki, 442 U.S. 682, 702 (1979). In the First Amendment context, the Court considering injunctive relief must consider "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." Madsen, 512 U.S. at 765.

On remand, the City contends that two proposed injunctions would be reasonable time, place, and manner restrictions and would satisfy a proper balancing of the City and the Respondents' interests.

Solution One: Defendants must remain 10-feet away upon request.

Upon oral request of a PEO engaged in his or her official duties, Defendants Ian Freeman and Garret Ean (and anyone acting in concert with them) must step back, and remain, at least 10-feet away from such PEO.

This requirement would apply whenever a PEO is engaged in his or her official duties patrolling the City of Keene, and a PEO specifically requests Defendants to remain at such distance. Once the request is made, it would remain in effect for the duration of the PEO's work day.

As an exception to the above requirement, Defendants may approach within 5 feet of a PEO while the PEO is on a sidewalk in Keene for the limited purpose of navigating past the PEO. Defendants, however, may not use this exception to encircle, confine, or otherwise impede the movement of the PEO, and must immediately continue past the PEO until a separation of 10 feet is resumed.

A violation of this order will not occur absent a knowing and purposeful invasion of the 10-foot separation after request of a PEO. Defendants may otherwise continue to engage in filling expired meters, video recording, and

speaking to the PEOs, provided that they do so in conformance with the above described requirements.

Solution Two: Defendants must remain 10-feet away when in fixed areas.

Within 15-feet of a parking meter, metered parking space, or crosswalk, Defendants may not knowingly approach within 10-feet of a PEO while he or she is engages in performing his or her official duties patrolling the City of Keene.

As an exception to the above requirement, Defendants may approach within 5 feet of a PEO while the PEO is on a sidewalk in Keene for the limited purpose of navigating past the PEO. Defendants, however, may not use this exception to encircle, confine, or otherwise impede the movement of the PEO, and must immediately continue past the PEO until a separation of 10 feet is resumed.

A violation of this order will not occur absent a knowing and purposeful invasion of the 10-foot separation. Defendants may otherwise continue to engage in filling expired meters, video recording, and speaking to the PEOs, provided that they do so in conformance with the above described requirements.

(Pet. Memo. of Law, 2-3.) The City argues that the proposed injunctions are narrowly-tailored, protect the City's governmental interests, burden Respondents' speech no more than necessary, and preserve adequate alternate channels for Respondents' speech. (Pet. Memo. of Law, 2).

The decision to grant injunctive relief involving First Amendment protected speech requires an evaluation of competing interests: the government's interest in getting the injunction and the speakers' interest in being able to speak freely. To be constitutional, the injunction must burden speech no more than necessary to serve a significant government interest. This Court must determine if the City has a governmental interest in seeking the injunction that is "significant." The City clearly has an important interest in protecting its employees from harassment or impediment while doing their jobs. The City also has an interest in protecting the public from disturbance in the public streets and promoting the free flow of people and traffic in those streets. See Madsen, 512 U.S. at 768. Even with ongoing, important government interests at

stake, injunctive relief should be granted only with consideration of the nature of the conduct in question.

The frequency, duration, and severity of Respondents' Robin Hooding activities have decreased markedly since October 2013, the date of the last order. Several of the previous participants, namely Colson, Ager, and Eyer, have stopped Robin Hooding altogether, and another, Cleaveland, has participated maybe once or twice in the intervening two years. Freeman's conduct, while arguably more offensive in style than Ean's, has notably dropped off. Ean is the only named Respondent who continues to Robin Hood on a fairly regular basis, but when he does so he is generally non-combative and unobtrusive.

Even though the City has significant governmental interests at stake, the proposed injunctions are not sufficiently narrowly-tailored to protect those interests while not overburdening speech. The Court cannot conceive of any more narrow or alternative relief that would provide any meaningful protection to the PEOs without running afoul of the Respondents' First Amendment rights. An injunction related to First Amendment speech is narrowly-tailored if it burdens the speech "no more than necessary" to protect the identified significant governmental interests. Madsen, 512 U.S. at 765. As noted above, the government interests here are not sufficient to warrant an infringement on the Respondents' First Amendment rights. Any injunction requiring a buffer zone of any meaningful distance would require a significant change in the method used by the Respondents to disseminate their protected speech.

Conclusion

Much has changed in the past two years. Only two of the six named Respondents are still involved in Robin Hooding activity beyond a very minimal role. The Court agrees that the City has a significant interest in protecting the safety and well-being of its employees. The PEOs are hard-working, loyal employees. To the extent conduct of the Respondents rises to the level of violating criminal statutes, there is a remedy available to the City and the PEOs. It is not the role of this Court to weigh the relative value or worth of the constitutionally-protected activity of the Respondents. The ability of the Respondents to exercise their constitutional rights requires a careful examination of how the proposed injunctive relief would impair their speech rights. The Court has considered all of the evidence and the testimony of all of the witnesses both from 2013 and in the last two years. In the exercise of its equitable discretion, the Court finds that the City has not met its burden to warrant any injunctive relief against the Respondents.

For the foregoing reasons, the injunctive relief requested by the City is **DENIED.**

SO ORDERED.

11/20/15
Date

John C. Kissinger, Jr.
Presiding Justice