

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 MOTION TO CLARIFY/AMEND PETITION

NOW COMES, the City of Keene ("Petitioner"), by its co-counsel, Gallagher, Callahan and Gartrell, P.C., and submits this Motion to Clarify/Amend Petition, and says as follows:

1. On May 1, 2013, Petitioner filed a Verified Petition for Preliminary and Permanent Injunctive Relief ("Petition") which named six individuals as Respondents: James Cleaveland, Garret Ean, Kate Ager, Ian Bernard a/k/a Ian Freeman, Graham Colson, and Pete Eyre ("Respondents"), all of whom were timely served on May 1, 2013 and all of whom have filed Answers.

2. Although the Petition refers to Respondents collectively as "Respondents," the Petition did not specifically state Petitioner's claim that the individuals were and are acting both in their individual capacities and in a collective capacity to interfere with the City's Parking Enforcement Officers ("PEO"). The Respondents sometimes refer to themselves as "Robin Hooders." This issue was raised with the Court at a prior hearing and this pleading is

to clarify/amend the pleadings. The clarification/amendment does not substantially change the initial Petition; it clarifies the issue of concerted effort.

3. Petitioner seeks to clarify/amend the Petition to specifically allege that the Respondents were and are acting both in their individual capacities and in concert with each other so as to be jointly and severally liable with respect to the Petitioner's underlying legal claim of tortious interference with contractual employment relationships of the City's PEOs.

4. Superior Court Rule 135, provides that: "[a]mendments may be made to the bill, answer or pleadings, in proper cases, upon the order of the court, at any time on such terms as may be imposed." Amendment of pleadings is liberally permitted, and the decision to grant or deny a motion to amend rests in the sound discretion of the trial court." Kalil v. Town of Dummer Zoning Bd. of Adjustment, 159 N.H. 725, 729 (2010)(citation omitted). Amendment may be denied by the Court where the amended pleading seeks to create an entirely new cause of action. See Coan v. New Hampshire Dept. of Environmental Services, 161 N.H. 1 (2010). Petitioner does not seek to amend the Petition to state an entirely new cause of action, but seeks only to clarify that the Petition was intended to include the Respondents in their individual capacity and also as joint actors within a civil conspiracy. "A civil conspiracy is a combination of two or more persons by concerted action to accomplish an unlawful purpose, or to accomplish some purpose not in itself unlawful by unlawful means. Its essential elements are: (1) two or more persons (including corporations); (2) an object to be accomplished (i.e. an unlawful object to be achieved by lawful or unlawful means or a lawful object to be achieved by unlawful means); (3) an agreement on the object or course of action; (4) one or more unlawful overt acts; and (5) damages as the proximate result

thereof.” Jay Edwards, Inc. v. Baker, 130 N.H. 41, 47 (1987)(interior quotations and citation omitted).

5. Petitioner moves to clarify/amend the Petition to specifically allege the elements of civil conspiracy. The evidence will show that the Respondents act individually and together in a concerted effort regarding their actions and conduct directed at the City’s PEOs. One of the collective and individual objectives of the Respondents is to tortuously interfere with the employment relationship between Petitioner and its Parking Enforcement Officers by causing the PEOs to quit or stop their jobs for the City by causing them undue stress, anxiety, and emotional and physical distress while trying to perform their employment duties. Respondents are attempting to cause PEOs so much stress, anxiety, and distress so to cause the unlawful interference with their employment. See also Exhibits E and F attached to the Petition.

6. Respondents are participating as individuals and as a concerted effort through an expressed or implied agreement to accomplish the unlawful purpose through specific conduct directed at the PEOs.

7. If Respondents are permitted by this Court to continue their actions against the PEOs, Petitioner will be damaged through the loss or inability of the PEOs to perform as Parking Enforcement Officers. The PEOs are experiencing stress, anxiety, and distress, which can lead to claims of worker’s compensation, emotion distress, disability, or resignation.

8. Accordingly, Petitioner submits with this Motion and attached Clarified/Amended Petition inserting immediately after Paragraph 32, of the Petition the allegation that Respondents are acting not only in their individual capacities but as part of a

civil conspiracy to commit the unlawful act of tortious interference with contractual employment relationships. With the exception of the amendment to include the allegation of civil conspiracy, and with the exception of the renumbering of Paragraphs 33 through 39, of the Petition, the attached Clarified/Amended Petition restates and incorporates all factual allegations and legal claims previously filed with the Court and served on Respondents.

WHEREFORE, Petitioner respectfully requests that this Court:

- A. Grant this Motion to Clarify/Amend Petition by inclusion of the claim that Respondents are acting concertedly in a civil conspiracy; and
- B. Substitute the Amended Verified Petition for Preliminary and Permanent Injunctive Relief for the Petition previously filed and served on Respondents in connection with this matter.
- C. Grant such other and further relief as is just and equitable.

Respectfully submitted,

CITY OF KEENE

By Its Attorneys,

GALLAGHER, CALLAHAN & GARTRELL, P.C.
214 N. Main St., P.O. Box 1415
Concord, NH 03302-1415
(603) 228-1181

Dated: July 11, 2013


By: 

Charles P. Bauer, Esquire (#208)
Erik G. Moskowitz, Esq. (#18961)

RULE 57-A CERTIFICATE

I, Charles P. Bauer, hereby certify that I made a good faith attempt to gain assent from Jon Meyer, Esquire and Peter Eyre, *Pro Se*, all to no avail.

Dated: July 11, 2013

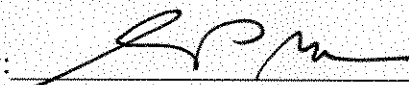
By: 

Charles P. Bauer, Esquire (#208)

CERTIFICATE OF SERVICE

I hereby certify that I have this date forwarded a copy of the foregoing to Jon Meyer, Esquire, Counsel for Thomas Mullins, Esquire, Ian Bernard f/k/a Ian Freeman, Garrett Ean, James Cleaveland, Kate Ager, Graham Colson, and Peter Eyre, and Peter Eyre, *Pro Se*.

Dated: July 11, 2013

By: 

Charles P. Bauer, Esquire (#208)

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Docket No. 213-2013-CV-00098

**CLARIFIED/AMENDED VERIFIED PETITION FOR PRELIMINARY
AND PERMANENT INJUNCTIVE RELIEF**

NOW COMES Petitioner, the City of Keene, of 3 Washington Street, Keene, New Hampshire, by its attorney, Thomas P. Mullins, Esq., and respectfully petitions the Court for Preliminary and Permanent Injunctive Relief against Respondents James Cleaveland, of 173 Washington Street, Apt. 9, Keene, New Hampshire; Garrett Ean of 75 Leverett Street, Keene, New Hampshire; Kate Ager, of 6 Mystic Place, Keene, New Hampshire; Ian Bernard a/k/a Ian Freeman, of 73 Leverett Street, Keene, New Hampshire; Graham Colson, of 34 Walnut Street, Keene, New Hampshire; and Pete Eyre, of 29 North Lincoln Street, Keene, New Hampshire. In support of this Petition, Petitioner states as follows:

INTRODUCTION

1. The City of Keene ("City") contractually employs three (3) Parking Enforcement Officers (collectively PEOs), who are also members of the Keene City Employees Union, AFT-NH Local #6288, and who are tasked with enforcing motor vehicle parking laws and regulations by patrolling City streets. The PEOs have no arrest powers.

They are primarily responsible for checking parking meters and writing parking tickets in and around the downtown area. The PEOs are identified as Linda A. Desruisseaux (“Desruisseaux”), Alan E. Givetz (“Givetz”) and Jane E. McDermott (“McDermott”).

2. Beginning in or around December 2012, and continuing through the date of the filing of this Petition, 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 in groups of one, two, or more; communicating with the PEOs in taunting and intimidating manners; and video recording the PEOs at very close proximity as they perform their duties. This activity is injurious to the PEOs and the PEOs’ continued employment relationships with the City.

3. Through this Petition, Petitioner seeks preliminary and permanent injunctive relief from the Court ordering Respondents to not interfere, harass, or intimidate the 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.

4. Importantly, Petitioner does not seek an Order to prevent Respondents from exercising their constitutional rights to video record the PEOs from a comfortable remove or otherwise to express their opinion; rather, Petitioner seeks only to prevent Respondents from taunting, interfering with, harassing, and intimidating the PEOs by establishing a safety zone between the PEOs and Respondents while the PEOs are performing their duties.

PARTIES

5. Petitioner, City of Keene, is a New Hampshire municipal corporation with a principal place of business located at 3 Washington Street, Keene, New Hampshire.

6. Respondent, James Cleaveland, is an individual who resides at 173 Washington Street, Apt. 9, Keene, New Hampshire.

7. Respondent, Garrett Ean, is an individual who resides at 75 Leverett Street, Keene, New Hampshire

8. Respondent, Kate Ager, is an individual who resides at 6 Mystic Place, Keene, New Hampshire.

9. Respondent, Ian Bernard, is an individual who resides at 73 Leverett Street, Keene, New Hampshire.

10. Respondent, Graham Colson, is an individual who resides at 34 Walnut Street, Keene, New Hampshire.

11. Respondent, Pete Eyre, is an individual who resides at 29 North Lincoln Street, Keene, New Hampshire.

JURISDICTION

12. This Court has jurisdiction over this matter pursuant to RSA 491:7 and RSA 498:1. Venue is appropriate because Petitioner is located in Cheshire County.

FACTS

13. The City has been granted extensive authority by the State of New Hampshire to regulate and enforce public parking in the City under RSA 47:17, XVIII, including but not limited to the installation of parking meters under RSA 231:130, and the adoption of parking enforcement ordinances under RSA 231:132-a.

14. In furtherance of the above-described parking regulatory scheme, the City has adopted ordinances regulating public parking and employs three (3) PEOs to enforce the

City's parking laws and regulations, among other duties. *See* Parking Enforcement Officer Job Description attached hereto as Attachment A.

15. Since December 2012, and continuing through the date of the filing of this Petition, Respondents have intentionally taunted, interfered with, harassed, and intimidated the PEOs by closely following them on foot and in automobiles in groups of one, two or more¹, often with video camera equipment and coordinating their activities using radio communication. To relay each separate instance of interference would be prohibitively time consuming; rather, Petitioner provides the following examples of Respondents' activity:

- A. PEO Givetz has been crowded, bumped into, and taunted by the Respondents, including profanities and derogatory statements relative to his military service. In addition, PEO Givetz has also been followed and harassed on his day off and through the Internet, all in an effort to intimidate and interfere with his employment relationship with the City. *See* Affidavit of PEO Givetz attached hereto as Attachment B, and incorporated herein by reference.
- B. PEO McDermott has been pursued and crowded by groups of seven or eight, bumped into, grabbed by Respondent Colson, and repeatedly taunted and encouraged to find alternative employment. In addition, as a result of the Respondents' harassing behavior, PEO McDermott has had to alter her work duties, to the detriment of the City. *See* Affidavit

¹ Frequently, as the video examples will illustrate, a single PEO will be surrounded by four or more Respondents while that PEO performs his/her job duties for Petitioner.

of PEO McDermott attached hereto as Attachment C, and incorporated herein by reference.

- C. PEO Desruisseaux has been harassed, intimidated, and video recorded on a regular basis since December 2012. In addition, Respondents frequently run up behind PEO Desruisseaux very quickly, startling her and making it difficult for her to concentrate on her job and her personal safety. *See* Affidavit of PEO Desruisseaux attached hereto as Attachment D, and incorporated herein by reference.

16. As the above examples illustrate, Respondents frequently and constantly follow, taunt, interfere with, harass, and intimidate the PEOs' during the performance of their duties.

17. In addition, Respondents repeatedly tell the PEOs to terminate their employment relationship with the City, going as far as offering to assist the PEOs in finding alternative employment. *See* Affidavits of PEOs Givetz, McDermott, and Desruisseaux.

18. PEO Givetz has considered resigning from his position citing the adverse working conditions created by Respondents' incessant actions during the performance of his job duties, and which have resulted in adverse physical effects due to the stress and anxiety caused by Respondents. *See* Affidavit of PEO Givetz.

19. In addition, PEO McDermott fears for her job security, as the Respondents have stated an intention to shut down the City's parking department. *See* Kyle Jarvis, *City Investigating 'Harassing Behavior' Toward Parking Officers, The Keene Sentinel*, April 11, 2013, attached hereto as Attachment E.

20. At various times, PEOs Givetz, McDermott, and Desruisseaux have felt intimidated and harassed and have been unable to perform their job duties. *See* Affidavits of PEOs Givetz, McDermott, and Desruisseaux.

21. Respondent Colson has stated that both he and other participants are being paid to conduct the complained of activity, with the purpose and intention of preventing the PEOs from doing their jobs. *See* Affidavits of PEOs Givetz, McDermott, and Desruisseaux.

22. Respondents, in conducting the above-described activity, place the PEOs and the public in danger, both by their distracting behavior and also as a result of their disregard for rules of the road. *See* Affidavits of PEO Givetz, McDermott, and Desruisseaux.

23. Further, the within described activity agitates the public, often creating hostile exchanges between members of the public and Respondents that place the PEOs, the public, and the Respondents in danger. Specifically, on one occasion PEO McDermott was witness to a physical altercation between Respondent Cleaveland and a member of the public. *See* Affidavit of PEO McDermott.

24. Upon hearing, the City will provide the Court with further video evidence depicting multiple instances of the above-described conduct.

TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONS

Petitioner incorporates by reference the allegations of Paragraphs 1 through 24, above.

25. 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, 39 – 41 (2005) quoting *Demetracopoulos v. Wilson*, 138 N.H. 371, 373 – 74 (1994).

26. Petitioner maintains an economic employment relationship with PEOs Givetz, McDermott, and Desruisseaux, providing salary and benefits in exchange for the PEOs' satisfactory performance of their employment duties.

27. PEOs wear distinctive uniforms to inform the public of their status as City employees and parking enforcement personnel. Respondents are aware of the PEOs' economic employment relationship with the City of Keene and of the employment duties the PEOs are required to perform.

28. Respondents intentionally and improperly interfere with this economic employment relationship and with the PEOs' ability to perform their employment duties by following, communicating with, taunting, intimidating, harassing, and video recording PEOs at close proximity. Respondents frequently follow and surround individual PEOs in groups of one, two, or more, an inherently intimidating act. *See* Affidavits of PEOs Givetz, McDermott, and Desruisseaux.

29. PEOs have expressed anxiety and distress caused by Respondents' behavior. PEOs have expressly requested, on multiple occasions, that Respondents stop their interference and intimidation. *See* Affidavits of PEOs Givetz, McDermott, and Desruisseaux.

30. Petitioner 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).

31. Without injunctive relief, the PEOs will continue to suffer anxiety and distress caused by Respondents' behavior. Without injunctive relief, Petitioner 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 voluntary resignations by one or more PEOs for intolerable working conditions caused by Respondents' intentional harassing behavior.

32. Based on knowledge and belief, Respondents do not intend to suspend their activities. Respondents are publicly advertising the opportunity for others to participate in this harassing activity to occur the weekend of November 1st – 3rd, 2013. See *Keenevention* advertisement dated April 23, 2013, attached hereto as Attachment F.

CIVIL CONSPIRACY

Petitioner incorporates by reference the allegations of Paragraphs 1 through 32, above.

33. The actions of Respondents, acting individually and jointly, and concertedly, constitute a civil conspiracy to accomplish the unlawful act of tortious interference with the Petitioner's contractual relationship with its PEOs. See *Jay Edwards, Inc. v. Baker*, 130 N.H. 41, 47 (1987).

34. "A civil conspiracy is a combination of two or more persons by concerted action to accomplish an unlawful purpose, or to accomplish some purpose not in itself unlawful by unlawful means. Its essential elements are: (1) two or more persons (including corporations); (2) an object to be accomplished (i.e. an unlawful object to be achieved by lawful or unlawful means or a lawful object to be achieved by unlawful means); (3) an agreement on the object or course of action; (4) one or more unlawful overt acts; and (5) damages as the proximate result thereof." *Id.*, at 47 (interior quotation and citations omitted). "For a civil conspiracy to exist, there must be an underlying tort which the alleged

conspirators agreed to commit.” *Sheeler v. Select Energy and NEChoice, LLC*, 2003 WL 21735496 (2003)(D.N.H.).

35. Respondents, acting in concert with one another and sometimes referring to themselves as “Robin Hood” and/or “Robin Hooders,” jointly seek through their actions as specifically described in the factual statements contained in the attached Affidavits, and as further stated in Exhibit E, and under and implied or express agreement among them and others, to accomplish the unlawful purpose of the tortious interference with the contractual employment relationship among the Petitioner and its PEO’s, causing damage to the Petitioner by causing stress, anxiety, and physical and emotional distress to the PEOs, which can lead to claims of workers’ compensation, emotional distress, disability, or resignation from employment.

36. Accordingly, where the Respondents are acting in concert pursuant to a civil conspiracy, each is jointly and severally liable for the potential tortious damage to the Petitioner, either based on their own individual actions or for the actions of a concerted effort, even if a Respondent’s own actions did not cause the damage. See N.H. Civil Jury Instructions, sec. 14.16.

PRELIMINARY AND PERMANENT INJUNCTION

Petitioner incorporates by reference the allegations of Paragraphs 1 through 36, above.

37. 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. 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).

38. Petitioner 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 the employment relationship among Petitioner and the PEOs.

39. 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 of Keene. Should Respondents' actions be allowed to continue, the Petitioner is damaged by the inability of the PEOs to properly perform their duties, and is in danger of losing its PEOs.

40. 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.

41. Petitioner has no adequate alternate remedy at law to prevent the ongoing interference, harassment, taunting, and intimidation of the PEOs. A preliminary and permanent injunction will prevent further interference with and intimidation of the PEOs, preserve the parties' economic relationship, and preserve Petitioner's statutory authority to regulate public parking.

42. The sole purpose of the preliminary and permanent injunctive relief is to preserve the City's ability to maintain its economic relationship with its PEO workforce, maintain its authority to regulate public parking, and continue collecting parking revenue necessary to provide adequate public parking. Petitioner does not seek to limit Respondents' right to express their opinion or otherwise restrict the exercise of Respondents' constitutional rights.

43. Preliminary injunctive relief is required because Respondents would likely accelerate their efforts to interfere with, taunt, and intimidate the PEOs prior to this Court hearing the merits of the matter, greatly increasing the immediate risk of the loss of employment of one or more of the PEOs.

WHEREFORE, Petitioner respectfully requests that this Court:

- A. Issue appropriate Orders of Notice for service upon the Respondents;
- B. Schedule a hearing on the within Amended Petition and request for preliminary and permanent injunction;
- C. After hearing, issue a preliminary injunction restraining Respondents, or anyone under their direction, supervision, employment, or control, from

coming within a safety zone of fifty (50) feet of any PEO while that PEO is on duty performing his or her employment duties as required by the City of Keene;

- D. Issue a preliminary injunction restraining Respondents, or anyone under their direction, supervision, employment or control, from video recording, within a safety zone of fifty (50) feet, any PEO while that PEO is on duty performing his or her employment duties as required by the City of Keene;
- E. Issue a preliminary injunction temporarily restraining Respondents, or anyone under their direction, supervision, employment or control, from communicating with any PEO in a manner which seeks to taunt, harass, or intimidate the PEO while that PEO is on duty performing his or her employment duties as required by the City of Keene;
- F. Enter a permanent Order restraining Respondents, or anyone under their direction, supervision, employment or control, from coming within a safety zone of fifty (50) feet of any PEO while that PEO is on duty performing his or her employment duties as required by the City of Keene;
- G. Enter a permanent Order restraining Respondents, or anyone under their direction, supervision, employment or control, from video recording, within a safety zone of fifty (50) feet, any PEO while that PEO is on duty performing his or her employment duties as required by the City of Keene;
- H. Enter a permanent Order restraining Respondents, or anyone under their direction, supervision, employment or control, from communicating with any

PEO in a manner which seeks to taunt, harass, or intimidate while that PEO is on duty performing his or her job duties as required by the City of Keene;

- I. Grant such other and further relief as is just and equitable.

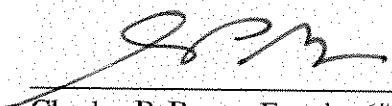
Respectfully submitted,

CITY OF KEENE

By Its Attorneys,

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Dated: July 11, 2013



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