THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

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NOTICE OF DECISION

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Case Name: **City of Keene v James Cleaveland, et al**
Case Number: **213-2013-CV-00098**

Enclosed please find a copy of the court's order of December 03, 2013 relative to:

Order on hearing

December 03, 2013

James I. Peale
Clerk of Court

(555)

C: Peter Eyre; Charles P. Bauer, ESQ; Erik G. Moskowitz, ESQ

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 Eyre

ORDER

The Petitioner, the City of Keene (the "City"), brings these actions claiming tortious interference with contractual relations, negligence, civil conspiracy, and seeking 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 Eyre to not interfere, harass, or intimidate members of the Parking Enforcement Office ("PEO"). Five of the defendants, through counsel, have filed a motion to dismiss, which the sixth Respondent, Pete Eyre, joins. An evidentiary hearing was held on the preliminary injunction request on August 12, September 30, and October 1, 2013, and the Court heard extensive legal argument from counsel on both the motion to dismiss and the motion for preliminary injunctive relief. After consideration of the arguments presented, as well as the evidence at the hearing, the Respondents' motion to dismiss is **GRANTED**. Further, in light of this decision, the more recently filed action, 2013-CV-0241, is also **DISMISSED.**

I. Factual Background

The Petitioner employed three at-will Parking Enforcement Officers (collectively the "PEOs"), Linda Desruisseaux ("Desruisseaux"), Alan Givetz ("Givetz"), and Jane McDermott ("McDermott"), whose duties included 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.

A. Allegations Made by PEOs

PEO McDermott testified that she has been a PEO since September 2012 and beginning in December 2012, Cleaveland, Ean, Colson, Freeman, and Ager have all followed her on foot. McDermott testified that this causes her stress because she has to constantly monitor where the Respondents are and feels like she cannot get away. Even on her breaks, the Respondents sit and wait outside her car or follow her into the library or city hall.

McDermott testified that she carries a radio that allows her to contact the dispatcher at the Keene Police Department. On three occasions she has needed to contact the police: (1) when there was an altercation between Graham and Colson and persons against the Respondents' activities at Wells Garage; (2) when Cleaveland would not let her pass, and (3) when Ean's friend was carrying a gun on his side. McDermott further testified that on April 27, 2013, Cleaveland objected to her giving tickets in an area where a funeral was being held. Cleaveland raised his voice and said, "Don't you know these people are at a funeral." Cleaveland then referred to her as a "fucking thief." McDermott went to the Keene Police Department thereafter. In regard to

the April 27, 2013 exchange, Cleaveland testified that McDermott told him she was giving the funeral patrons tickets because the Respondents had been preventing her from ticketing cars downtown. In addition, Cleaveland testified that McDermott called him a "terrorist" and "anarchist."

At one point, 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 and Colson grabbed her wrist. McDermott testified that initially she felt threatened until she realized what was happening. McDermott was not hurt and the situation resolved peacefully.

McDermott testified that Freeman and Cleaveland told her they would help her find a new job. Moreover, the Respondents have called her 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; however, the Respondents continued to follow.

McDermott testified that regardless of what the Respondents are saying the close proximity makes it hard to focus on her job. She refuses to work Saturdays because she does not feel safe with Cleaveland's and Colson's presence, and she has contemplated quitting and inquired about other employment.

On cross examination, McDermott testified that part of her job involves dealing with public confrontation and the City has never provided her with such training. With respect to the distance of the Respondents, five feet would be appropriate but two feet is too close.

PEO Givetz testified that he started 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 referred to Givetz's military service, suggesting he would "drone brown babies," as well as calling him a "racist," "bitch," and "coward," and following him on his day off.

Givetz testified that Colson would follow him closely so that if he turned around they would bump into each other. Moreover, Ean would walk with Colson while videotaping. Eyre worked behind the scenes, radioing the Respondents after passing him and on one occasion asked Givetz whether the Respondents' actions were boosting morale.

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

PEO Desruisseaux testified that while on patrol Cleaveland and Colson attempt to stop her from doing her job by engaging her in conversation. On one occasion Colson told her that she was vandalizing cars by chalking the tires. Moreover, Ean, Eyre, and Cleaveland made comments to Desruisseaux that she should not be doing her job because she was stealing from the citizens of Keene. Desruisseaux testified that Cleaveland has come within close proximity of her, about a foot away. Desruisseaux asked Cleaveland to stay away and stop talking to her, but he continued. Desruisseaux testified that the constant videotaping is intimidating no matter what distance it is done

because there is no peace. However, she has never observed any of the Respondents being violent.

Desruisseaux explained that she can hear the footsteps of the Respondents following. She tenses up and becomes very distracted, which impacts her job performance. She becomes angry and frustrated by the Respondents' actions and has contemplated filing a grievance with her union, filing a workers compensation suit for stress, or taking a mental health day.

Desruisseaux, along with the other PEOs, meet with Therapist Mary Kimmel. Dr. Kimmel testified that Desruisseaux is suffering from stress and the inability to trigger flight or fright reactions due to the Respondents' activties. Dr. Kimmel testified that she has never seen this type of persistence and the constant close proximity and stress does not allow Desruisseaux, Givetz, or McDermott the ability to flee the Respondents. Dr. Kimmel testified that a 30 foot buffer zone would be helpful because it would relieve the PEOs from the Respondents' actions.

Elizabeth Fox, the City's director of finance testified that the loss of Givetz has resulted in staffing hours of the PEOs being reduced from 108 to 74. This reduction has resulted in a loss of PEO ticket revenue. Furthermore, the counseling sessions and costs to replace Givetz have or will cost the City additional revenue. In addition, the City hired a private investigator, Peter Thomas, to follow the Respondents and the PEOs.

B. <u>Respondents' Activities</u>

Freeman testified that he is a minister with the Shire Free Church, as well as a talk show host with Free Talk Live, and Program Director of LRN.FM. He testified that he has participated in "Robin Hooding" since 2009 to prevent people from receiving

parking tickets. Freeman testified that Robin Hooding is done by identifying and filling expired parking meters before a PEO locates an expired meter and issues a ticket. When this is done it is referred to as a "save." Freeman testified that Robin Hooding is more effective if two people participate together; one staying ahead of the PEO and filling meters and another placing cards on saved car's windshields.

Freeman testified that he views parking tickets as a threat against people and the ultimate goal of Robin Hooding is to shut down the City's parking enforcement. Freeman testified further that his political philosophy is that people should interact consensually, without threats and violence. He believes the government parking policy is in contravention of his political philosophy because it is based on stealing cars or a ransom. Freeman believes parking should be handled in the marketplace where each owner determines his or her own policy.

Cleaveland is a participant in Free Keene, which he stated was a movement without an organized head. Cleaveland testified that Robin Hooding is based on the idea that parking is not a criminal act and the City should not be charging citizens to park. In his view, Robin Hooding is done to protest this injustice and the goal is to phase out the PEO over three years. Cleaveland testified that after a car has been saved, the Robin Hooders place cards on windshields informing the driver that they have been saved from a ticket and referring them to FreeKeene.org for donations.

Cleaveland testified that he videotapes while Robin Hooding, typically ten feet away from the PEOs. He claims videotaping is important for three reasons: (1) in case something interesting happens downtown; (2) to get the word out; and (3) accountability in case there is an incident between a PEO, the Respondents, or the public. Cleaveland

testified that a distance limitation or safety zone around the PEOs would frustrate the goal of Robin Hooding because Robin Hooders would not necessarily be saving meters that the PEOs are issuing tickets.

Cleaveland testified that he communicates with other Robin Hooders through radios and cellphones, alerting the location of the PEOs. Generally, verbal interactions with PEOs is limited, however Cleaveland testified that PEO McDermott will engage in conversation asking the Respondents' views on religion and politics.

Ean testified that he has been involved in Robin Hooding and the goal is to shut down the PEO by filling meters and bringing everyone in compliance with the parking laws. Ean said he finds it rewarding to protect people from the government and believes that the municipal corporation of Keene is a legal fiction. He believes in self-ownership and anarchism—people should be their own masters to the extent that they do not infringe on others and should voluntarily pay for government services. Ean testified that he has been involved in three altercations with the public objecting to the Robin Hooding, but citizens have also approached him and approved of the movement.

Ean testified that videotaping from 30 feet away is possible but would make it harder to converse with the PEOs, result in poorer audio, and greater risk of interfering with private citizens. Ean testified that beginning in May he has published episodes on YouTube, FreeKeene.com, FreeConcord.org, and Facebook detailing the Robin Hooding efforts and PEO Givetz is the top commenter. A video filmed on February 26, 2013, depicts Givetz being followed, turning around, and saying, "is that close enough coward."

Ager testified that she has participated in Robin Hooding from December 2012 to March 2013 for approximately eight hours a week. She joined the movement because she thought it would be a good way to help the community and converse with people she would not normally speak. Since March 2013, Ager has focused on charity work and has not been Robin Hooding.

Eyre testified that he is not a part of the Robin Hooding movement. Nevertheless, Eyre testified that on one occasion he called the Robin Hooders to alert them that Givetz was driving around the rotary. Eyre testified that he set up KeeneCopBlock.org a year ago as a police accountability movement and does not believe that the City of Keene as a municipal corporation is legitimate.

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.) The City seeks 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.) The Respondents object and move to dismiss, contending that the Petitioner's tortious interference claim fails to state a claim and violates the Respondents' free speech rights under the First Amendment of the Federal Constitution and Part I, Article 22 of the New Hampshire Constitution, as well as the

right to government accountability under Part I, Article 8 of the New Hampshire Constitution. On September 23, 2013, the Petitioner filed an additional complaint against the Respondents alleging intentional interference with employment contractual relations and negligence. The Court agrees with the Respondents that their free speech rights under the First Amendment of the Federal Constitution will be violated by permitting the City to move forward on any of the claims in this action or the more recent action or by granting the requested preliminary and permanent injunctive relief. Thus, the Respondents' motion to dismiss is **GRANTED**.

III. Standard of Review

In ruling on a motion to dismiss, the Court must determine "whether the plaintiff's allegations are reasonably susceptible of a construction that would permit recovery." Harrington v. Brooks Drugs, 148 N.H. 101, 104 (2002) (quotations and citation omitted). The Court must analyze the facts contained on the face of the writ to determine whether a cause of action has been asserted. Williams v. O'Brien, 140 N.H. 595, 597 (1995). In rendering such a determination, the Court must "assume the truth of the facts alleged in the plaintiff's pleadings and construe all reasonable inferences in the light most favorable to him." Harrington, 148 N.H. at 104 (quotations omitted). The Court need not accept as true, however, statements in the writ "which are merely conclusions of law." Karch v. BayBank FSB, 147 N.H. 525, 529 (2002) (quotation and citation omitted).

IV. Analysis

A. Tortious Interference with Contractual Relations

To establish a claim for tortious interference with contractual relations, otherwise known as intentional interference with contractual relations, a plaintiff must show: (1) he

"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) he "was damaged by such interference." Hughes v. N.H. Div. of Aeronautics, 152 N.H. 30, 40–41 (2005) (citation omitted) (emphasis added). The Respondents contend that "there is no bar under any tort theory against trying to persuade an employee at will to exercise his right to seek alternative employment." (Resp'ts' Post Hearing Mem 2.) The Court is skeptical that a claim for tortious interference with contractual relations exists in circumstances such as those presented here. Notably, the Court and parties cannot find any applicable case law where the tort has been applied to private citizens protesting governmental employees. Nevertheless, the Court need not reach this issue as the enforcement of such a tort is an infringement on the Respondents' right to free speech and expression under the First Amendment of the Federal Constitution.

B. First Amendment Right to Free Speech

The Respondents contend that the Petitioner's tort claim infringes 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, 131 S.Ct. 1207, 1215 (2011) (citation and quotation omitted).

1. Public or Private Speech

Whether the Respondents' speech is protected under the First Amendment requires an analysis of whether it is of a public or private concern.

> Speech on matters of public concern is at the heart of the First Amendment's protection. The First Amendment reflects a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. That is because speech concerning public affairs is more than self-expression; it is the essence of self-government. Accordingly, speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.

Snyder, 131 S.Ct. at 1215 (quotations, citations, brackets and ellipses omitted).

> Speech is of public concern:
>
> when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public. The arguably inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern.

Id. at 1216 (quotations and citations omitted). On the other hand, matters of "purely private significance" are given "less rigorous" First Amendment protections. Id.

"Whether . . . speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." Connick v. Myers, 461 U.S.138, 147–48 (1983). "[N]o factor is dispositive, and it is necessary to evaluate all the circumstances of the speech, including what was said,

where it was said, and how it was said." Snyder, 131. S.Ct. at 1216. Here, the Respondents' speech and expressive protest of the City's parking regulation through filling meters, placing cards on windshields, telling the PEOs they should quit, calling the PEOs "thieves" "fucking thieves," and "liars," and attacking PEO Givetz for his military service are clearly matters of public concern. "While these messages may fall short of refined social or political commentary," the issues involve the political authority of the City as a sovereign and its regulation of the citizens, as well as the United States' military actions abroad. Snyder, 131 S.Ct. at 1217.

The Respondents' activities occur on streets and sidewalks throughout downtown Keene. Such public area "used for public assembly and debate, [constitute] the hallmarks of a traditional public forum." Frisby v. Schultz, 487 U.S. 474, 480 (1988). "Traditional public forums are fundamental to the continuing vitality of our democracy, for 'time out of mind, [they] have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" Doyle v. Commissioner, New Hampshire Dept. Resources and Economic Development, 163 N.H. 215, 223 (2012) (quoting Boos v. Barry, 485 U.S. 312, 318, (1988). "Such space occupies a special position in terms of First Amendment protection." Snyder, 131 S.Ct. at 1218 (citation and quotation omitted).

Moreover, "the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process." NAACP v. Claiborne Hardware Co., 458 U.S. 886, 907 (1982) (quotation and citation omitted). "[T]he activity of peaceful pamphleteering is a form of communication protected by the First Amendment," id. at 910, and "the videotaping of public officials is an exercise of

First Amendment liberties." Glik v. Cunniffe, 655 F.3d 78, 83 (1st Cir.2011). With these principles in mind, it is clear that the Respondents' activities are protected under the First Amendment.

The Petitioner, citing Glik, contends that the Respondents' speech is not protected because it harasses and interferes with the PEOs' duties and aims to shut down the PEO. As explained above, the Respondents' speech is given special protection because it is at a public place on a matter of public concern. Merely because many people disagree with the Respondents as to the role of parking enforcement in Keene does not subject their speech and expressive conduct to lesser protections. See Snyder, 131 S.Ct. at 1215 ("The arguably inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern.") (quotation omitted); Texas v. Johnson, 491 U.S. 397, 414, (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

Furthermore, the Court finds Glik unsupportive of the Petitioner's position. In Glik, Boston police officers arrested the plaintiff under the Massachusetts' wiretap statute and two other state-law offenses for videotaping an arrest in Boston Commons. The issue before the First Circuit Court of Appeals, *inter alia*, was whether the plaintiff's 42 U.S.C. §1983 claim, alleging a violation of his First Amendment rights, was barred by qualified immunity. The Court found that the plaintiff's First Amendment rights had been clearly violated as he had a right to videotape the officers in a public place on a matter of public concern. The Court opined that because videotaping occurred from a peaceful remove

and did not impair the officers' duties, the plaintiff's videotaping could not be restricted. Glik, 655 F.3d at 84 ("Such peaceful recording of an arrest in a public place that does not interfere with the police officers' performance of their duties is not reasonably subject to limitation.") The Court in Glik did not hold that interference with public employees' duties removes speech of public concern from its First Amendment protections. Instead, the holding only reaffirmed its prior position that videotaping in a public place on a matter of public concern was clearly protected by the First Amendment. See id. at 83 ("[W]e have previously recognized that the videotaping of public officials is an exercise of First Amendment liberties.").

2. Reasonable Time, Place or Manner Restrictions

The next issue is to what extent the government may regulate this speech and activity. The Respondents' choice of where and when to engage in this activity "is not beyond the Government's regulatory reach—it is subject to reasonable time, place, or manner restrictions." Snyder 131 S.Ct. at 1218. The Court finds that the Petitioner's tortious interference with contractual relations and civil conspiracy claims against the Respondents unreasonably prevent the Respondents' from exercising their right to free speech. As explained above, whether a tortious interference claim exists depends on whether a jury finds the Respondents' conduct "improper." Hughes v. N.H. Div. of Aeronautics, 152 N.H. at 40–41. Such a subjective standard creates an unreasonable risk that the jury will find liability "on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression." Snyder, 131 S.Ct. 1218 (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988)). Accordingly, the Respondents' motion to dismiss is **GRANTED**. See Snyder, 131 S.Ct. at 1219

(overturning state tort of intentional infliction of emotional distress based on the defendant's First Amendment right to free speech); see NAACP, 458 U.S. at 934 (reversing malicious interference with business verdict based on the defendant's First Amendment right to free speech).[1]

Throughout its pleadings and at the preliminary injunction hearing the Petitioner contends that even if the tortious interference with contractual relations claim was dismissed, it would seek the Court's equitable powers in limiting the Respondents' activities through an injunction. Specifically, the Petitioner contends that a 30 foot floating buffer zone around the PEOs is a reasonable time, place, and manner restriction. Given the dismissal of the tortious interference claim, the Court **DENIES** the Petitioner's request for a preliminary and permanent injunction and **DISMISSES** its second complaint against the Respondents for intentional interference with employment contractual relations and negligence.

By this decision, the Court does not mean to suggest that the targeting of hard-working PEOs in the manner described above is appropriate or laudable. Each of the PEOs is to be commended for the composure and civility they have shown. The Court notes that the PEOs are not without remedy to the extent that the Respondents violate applicable criminal laws. Nothing in this decision is meant to suggest that conduct that rises to the level of an assault, criminal threatening, or otherwise violates other provisions of the criminal code constitutes protected speech. Further, the City may, provided it does not run afoul of constitutional protections, enact an ordinance addressing some of its concerns.

[1] As the Court finds under the Federal Constitution, it need not address the Respondents' remaining defenses under the New Hampshire Constitution.

For the foregoing reasons, the Court **GRANTS** the Respondents' motion to dismiss. Both of the pending cases are **DISMISSED**.

SO ORDERED.

12/3/13
Date

John C. Kissinger, Jr.
Presiding Justice