

**APPROVED**

**POLICE COMMISSION MEETING  
DEFINA HEARING**

**Minutes of the Meeting of Monday September 27, 2010**

---

The Hooksett Police Commission held a public meeting on Monday September 27, 2010, at the Safety Center. Present were Chairperson Joanne McHugh, Commissioner Clark Karolian, Chief Stephen Agrafiotis, Attorney Elizabeth Bailey, Thomas Noonan, Attorney William Cahill, and Attorney Lefevre,

Commissioner Henry Roy recused himself.

**Chairperson McHugh:** Meeting called to order at 6:00pm, proof of posting.

The Pledge of Allegiance was held.

**Chairperson McHugh:** This evening we have a grievance hearing that has been scheduled from 6:00 to 9:00 p.m. this evening and it won't go any later than 9:00pm. If we do need additional time, we'll resume again tomorrow on Tuesday, September 28 from 7:00 to 9:00 p.m.

Although this is a grievance hearing and the employee has requested that it be held in public, there will be no opportunity for public input. If the employee has changed his mind in having it public and wishes to go into non-public, we will ask the public to leave the room. Is that still your choice?

**Jason Defina:** Yes, it is.

**Chairperson McHugh:** Since this is a grievance hearing, it involves the rights of specific parties, and decisions made as a result of such hearing must be based upon, and supports the record developed in this hearing. The Police Commission reserves the right to recess the grievance hearing if the Commission needs to confer with counsel.

We expect the public to maintain a sense of decorum. If that does not happen, I will ask the offending parties to leave the room. I ask the public to refrain from any comments during the hearing, and only those people who are taking part in the proceedings will be allowed to speak.

We have rules for the grievance hearing. The hearing does not follow rules of

evidence procedures, the hearing will be based on offers of proof by the attorneys and their clients. The hearing will be divided into two parts. First, we'll take up the issue of due process, and then the issue of just cause. Each lawyer will be permitted to make an argument, uninterrupted, as to why their client should prevail in this dispute. While the Police Commission will not set any time limits on each presentation, we will ask that each side not be repetitive, and we reserve the right to cut off presentations if we feel they are redundant.

After each presentation, the Commission reserves the right to ask questions of any person who has knowledge of the issues in this dispute. The Commission will first hear only the employee claim that he was terminated without being afforded an opportunity for due process. The lawyers are instructed to address only the issue during that initial presentation. The Commission will then deliberate and announce its decision on just that limited issue.

**Attorney Cahill:** I am Attorney Bill Cahill for the Teamsters and also Jason Defina. And thank you, Attorney Bailey, for the sharing of exhibits, and the Chief for also attending.

This grievance that was filed was filed after a Hooksett Police Commission hearing that happened on September 8, 2009. It was a meeting that lasted eight minutes. That meeting consisted of the Pledge of Allegiance; a reading of a document prepared by a former commissioner; an objection by yours truly as to due process; a request for, in writing, what the reason for the termination was for. And I was told, at the time, there was nothing in writing that could be given to me at that meeting. I was informed that my option was to grieve it, and there would be a grievance before a secondary Hooksett Police Commission, to be determined.

And as I sat there, not aware of any previous hearing as to the status of Officer Defina where just cause was going to be, I was wondering when all these deliberations took place that led to the motion to dismiss, to the legal opinion that a secondary commission appointed instead of the Commission that heard the actual termination, why they wouldn't be having a hearing to go over the just cause? It was 273 of the Labor Relations Act that was put in place for the harmonious relationship between public employers and employees. Within that Act, is that the contract must have a grievance procedure that's workable. And the only way that that grievance procedure is workable is if there is notice and communication between the employer and the employee.

Still not knowing if one of Jason Defina's supervisors had a charge against him or it was the Chief, or the Chief was going off the opinions of one of the supervisors. The Hooksett Police Department Form P-250, which is what the Department uses for anything from a commendation to termination, which sets up a notice that something's going to be put in his personnel file, was never filed in this case.

On August 26, the Chief wrote a memo to the Hooksett Police Commission, that when we were sitting there on September 8, 2009, we did not have a copy of that, nor did we have knowledge of that being produced for the Commission. We did not even get a copy of that particular memo until after the Unfair Labor Practice, which was some time later it was filed.

The concern about the due process was the fact that there was no communication between the employer and the employee as to the fact, what the charge was that he was going to be terminated for. He didn't have an opportunity to defend himself or give testimony or evidence or offers of proof before the Commission prior to them taking the vote.

And this is not the first time that the Hooksett Police Department has terminated a police officer. The way this particular proceeding went down was nothing akin to my 26 years in the Mass. State Police, my 14 years as a labor attorney. I have never seen a process where an officer would be blindsided at the appointing authority's hearing.

I ask that Officer Defina be reinstated because he was not afforded due process. This should be brought back to Step 2, to go to the person that, if there is a charge against

him, under the contract, he has the right to sit down with that person and talk about it and grieve it, and then it goes up through the stages.

If the Department's position is "We didn't fire him. The Commission did." You'll have to look at the law, and the law states that a due hearing has to take place prior to termination for cause, and I have no record of any hearing that took place that would justify the termination of Officer Defina.

I have more questions than I have facts, it is our position, that there was no hearing on the facts. There was no due process, no notice. He was notified approximately a week before that he had the right to appear at a meeting, a non-public meeting that the Hooksett Police Commission was holding. He wasn't ordered to show up. He wasn't told that there were charges pending against him. He wasn't told what the charges were. We did show up to that meeting and we left as we came in, empty-handed, because there was nothing. We asked for documentation, we received none. In a normal hearing procedure, the parties, including the attorney for the Hooksett Police Commission and Attorney Bailey, we generally have a lot of interaction and exchange of exhibits. That never took place.

**Chairperson McHugh:** I have a couple of questions. When you talk about you were never notified about the meeting, how did you know to go to that meeting?

**Attorney Cahill:** I just stated that Officer Defina was notified by the Chief that he had a right to go to a Hooksett Police meeting, a non-public meeting, for 9/8/2009. If that was going to be a hearing, public or non-public was actually up to him; not up to the Commission. He called the Union stating that "They're going to talk about whether I'm going to be terminated or not," and that's all the information he had.

When someone's going to get terminated, charges have been preferred by someone: A supervisor; it's been endorsed by the Chief, or there are charges put forth by the Commission. If the Hooksett Police Commission wants to prefer charges, then they have to hold a hearing and give him an opportunity to discuss what charges specifically are being lodged against him.

**Chairperson McHugh:** When he was told about the meeting that he could attend, was he told that the meeting had to do with his termination, or it was after that?

**Attorney Cahill:** I hope he wasn't told it had to do with his termination because that means there was no deliberation done.

**Chairperson McHugh:** What were you told specifically about that meeting that day?

**Jason Defina:** I was called into a 45-second meeting with Chief Agrafiotis. Officer Lori Stowell was there and Lieutenant Cline. The Chief came in and sat down. He said, "I am supposed to give you this. It's a copy of a non-public meeting on the September 8th at 5:30," and handed me. The notice said "A non-public meeting of the Hooksett Police Commission is scheduled to be held on Tuesday, September 8, 2009 at 5:30 for the purpose of discussing a personnel matter pursuant to RSA 91." Then he said, "I'm supposed to tell you that the Commission is going to be meeting that night to discuss your possible termination, and you that you have the right to attend the meeting. Tom Noonan will be informed. If you have any questions, Tom would be the person to contact." Then he got up and he left the room.

**Commissioner Karolian:** What was the date of that?

**Jason Defina:** 8/31/09.

**Commissioner Karolian:** On 8/31/09, when you were informed by the Chief, were you informed of what charges that are being brought against you?

**Jason Defina:** Nothing. Exactly what I read is the only communication.

**Chairperson McHugh:** Were there any forms given to you?

**Jason Defina:** It's just the notice that was posted.

**Chairperson McHugh:** Attorney Cahill, given your experience with these types of things, how do you feel it should have gone with regard to this process?

**Attorney Cahill:** In order to give all parties an opportunity to present their case, all parties have to be informed of what the problem is. There was a memo to the Hooksett Police Commission penned by the Chief on the 26th. The contract, states that, if the Chief or his designee has an issue, a complaint, either external or internal, he will investigate same and then notify the officer within seven business days.

Why the officer was not notified of some complaint, I have no idea. But the due process of notifying the officer of the complaint was not complied with when he sent that forward, and he's referring to issues that were two weeks prior to that. If he committed an offense, in the Chief's mind, or Lieutenant Cline's mind or Captain Cecilio, normally they would write up a charge. The employee signs that; not admitting he did it, but admitting that he's been informed that this charge is pending. And that sets forth the process for him to contact the Union and for us to start gathering evidence.

**Commissioner Karolian:** And that wasn't done in this case; is that what you're saying?

**Attorney Cahill:** There was no P-250 filed in this case.

**Commissioner Karolian:** He was terminated when?

**Chief Agrafiotis:** September 8.

**Attorney Cahill:** We showed up 9/8. We were there for eight minutes. Commissioner Gagnon, read a document, a vote was taken. I objected; I was told I could grieve it, and the vote was passed two-to-one, and he was dismissed.

**Commissioner Karolian:** The document that he read, did it state what the charges were against the officer?

**Attorney Cahill:** It referred to the memo that the Chief sent to the Commission.

**Attorney Cahill:** It's on department stationery, dated August 26, 2009, and it's just addressed to the Hooksett Police Commission, and it's signed by the Chief.

**Commissioner Karolian:** Did he say what the recommendations of the Chief were in regards to any discipline for him, and what the charges might be?

**Attorney Cahill:** It's on page 30. It talks about the FTO training that he was in. If we knew that this was an issue that he was going to be terminated for, then we would have had a hearing, and he had the right to a hearing, to talk to the field-training officers, and see who in fact was stating he wasn't cooperating. Tab 12, has all the daily observations reports of Officer Defina done by the field-training officers, but that's going beyond the scope of the due process.

**Chairperson McHugh:** Yes, I was going to stop you.

**Attorney Bailey:** It's my privilege to represent the Hooksett Police Department. I thank Attorney Cahill, as he has thanked me for sharing evidence in advance of this hearing. I am mindful that you have ordered the attorneys to confine themselves to the due process issue. I would ask, the Commission please be open to hearing all the evidence in this case for a couple of reasons. The due process argument entails, the Union saying they should be heard by this Commission as to the substance of this issue, whether or not Officer Jason Defina should be reinstated. We ask that you hear all the evidence because it's an issue that, to understand thoroughly the due process issue, you will need to have a greater understanding of the background between the parties.

The other reason that I do ask that you hear evidence related to issues concerning Officer Defina's performance is that it goes directly to one aspect of the due process grievance, and that is the issue of reinstatement. I ask the Commissioners' indulgence to be able to hear out the Police Department tonight and its presentation of evidence. And I'd like to just start out by going backward and framing the issue, if I could?

**Chairperson McHugh:** For the Commission's point of view, that before we came here this evening, we had already decided, and you understood, the direction that we were going to

take with regard to the hearing this evening. In spite of what you just said, I think there still is the same feeling; that we want to continue and do the procedural first, so, we're going to go in that direction.

**Attorney Bailey:** In my presentation, I would like to take a step backwards, and try to give you a context because it is important for the due process issue just to understand the context of how the parties found themselves at the September 8 meeting.

**Commissioner Karolian:** The context is going to be just about the process of what was brought forward by the Police Department? Because if you go backwards into any other prior discipline, any other actions, that would be inappropriate at this time because we want to look at just the due process issue.

**Chairperson McHugh:** We were very specific about how we were going to go about this. From the Police Commission's point of view, and in order to set aside the issues and to completely understand, we've chosen to go in that direction.

**Attorney Bailey:** The due process grievance, you will see at our exhibits, pages 39 and 40. It's Hooksett Police Department Exhibit G, and that is the second grievance action. The first grievance was about just cause. This is the second grievance filed by the Union.

**Commissioner Karolian:** Why are we hearing this? We're hearing the grievance at this point about due process. That's not what you just said. At least that's not what I understood.

**Chairperson McHugh:** You said the second page.

**Attorney Bailey:** This was the second grievance. In fact, it came second in time, but it is the due process grievance.

**Chairperson McHugh:** I don't think it came second in time. I think they both came together.

**Attorney Bailey:** Okay. I'm just referring to the sequential numbers.

**Chairperson McHugh:** I think that's the way this all went down.

**Attorney Bailey:** Pages 39 and 40, that is the due process grievance that you're being asked to hear tonight. It does ask, as you've seen, for the Commission to find that there has been a violation of Article 18 of the contract.

**Commissioner Karolian:** We're moving into just cause according to this exhibit. It talks about discipline and discharge, and about the just cause issue, as opposed to the due process issue. So, when I look at that, and you ask us to look at that, it seems that we're moving into the just cause aspect, which is discipline, as opposed to due process. Was due process afforded the employee?

**Attorney Bailey:** I was referring you to the underlying grievance that the Union initiated concerning the due process issue. This grievance is in the words that the Union has chosen to write concerning that grievance, and I was simply trying to direct your attention to it. In HPD 40, you will see that the Union alleged that Hooksett Police Commission violated Article 18 by terminating Officer Defina with lack of due process and a failure to follow Article 18 of the Collective Bargaining Agreement.

Article 18 does deal with discipline and discharge and just cause. The Commission needs to make a determination about whether or not that article of the agreement has been violated or not. The Commission is not able to make that determination without looking at the language of the contract.

**Commissioner Karolian:** We're on a due process issue, and whether it's in the contract or not, or was in the Collective Bargaining Agreement or not, it's my understanding that due process still has to be followed.

**Attorney Bailey:** What you do need to determine is if Article 18 has been violated or not?"

**Commissioner Karolian:** I'm looking at whether due process was followed. Regardless of what the charges are, the employee still has to have due process afforded by the employer.

**Commissioner Karolian:** Are you aware of the Loudermill decision?

**Attorney Bailey:** I'm aware of that.

**Commissioner Karolian:** That's what I'm looking at.

**Attorney Bailey:** And perhaps Attorney Cahill can clarify that I've correctly stated the nature of the grievance that you've just cited in the file?

**Attorney Cahill:** I filed it.

**Attorney Bailey:** Have I correctly stated the grievance report?

**Attorney Cahill:** As filed by the aggrieved party.

**Attorney Bailey:** I would direct your attention to Article 18 of the Collective Bargaining Agreement. You're going to find that in Exhibit A of our materials, and Article 18, which is referencing this agreement, is found at HPD page 19. That sets forth what you need to take into account to determine whether or not there's been a violation of Article 18, which is ultimately the question set forth in this agreement.

If you look to the language of Article 18, it has been complied with; Article 18 envisions that just cause for discharge shall exist if the Chief determines that there is unsatisfactory performance or misconduct by Officer Defina. We have heard evidence that the Chief did make that determination that just cause existed for Officer Defina's discharge in his August 26, 2009 recommendation. Exhibit HPD E, HPD 36. In that recommendation Chief Agrafiotis found, based on the totality of Officer Defina's personnel history over the years, the results of his latest evaluation and his failure to cooperate with the Department's.

**Chairperson McHugh:** We continue to go to the just cause and not the due process, the Commission has said repeatedly that we want to deal with that, and I know you're saying, or at least I surmise what you're saying, that the fact that he did this means that he has followed the due process.

**Attorney Bailey:** That is a part of it, if I would be able to discuss that document briefly, it's in your exhibit books, and it has been referred to by Attorney Cahill. One of the concerns I have is that you are going to be in a position to understand the context of things. We've heard reference to that recommendation. I was simply trying to elaborate on what you have already heard offered by the Union.

**Commissioner Karolian:** You correctly, you want us to look at HPD 36, which is the letter dated August 26, 2009 from the Chief of Police to the Police Commission, making his recommendation for termination?

**Attorney Bailey:** Yes.

**Commissioner Karolian:** We're concerned about is the due process. It's the due process of how the employee was terminated.

**Attorney Bailey:** I'm trying to tell you about the same evidence that you were at least referred to by the Union's attorney. To understand due process, you can see that letter and you can see the Chief's recommendations and the nature of them. I do need to talk about how we did get to that September 8 meeting. The statute that pertains to the Police Commission, the Commission has the power to remove police officers for just cause. HPD Exhibit B, pages HPD 32 of your materials, under the Police Department's own rules, the Police Commission has the right to immediately discharge a police officer's employment at any time for just cause, and to discharge employees without resorting to prior disciplinary measures, HPD Exhibit C, page HPD 33.

Article 18, the parties' Collective Bargaining Agreement, which provides that "For purposes of the agreement between the Union and the Police Department, that just cause is what the Chief determines to be unsatisfactory behavior or misconduct." We've talked about how he made that determination in this case.

**Commissioner Karolian:** I understand the point that you're trying to make. We're not arguing the just cause. The Chief should not recommend anybody for termination without just cause. We understand what our role is. There has to be due process in order to do that.

**Attorney Bailey:** The September 8, 2009 meeting, it's important that you understand how people got there.

**Commissioner Karolian:** I understand that we have to follow due process to get to the termination phase.

**Attorney Bailey:** The September 8th meeting happened as a consequence of the fact on August 18, 2009 Officer Defina at his request met with the police commission to discuss the evaluation that you received, and what happened at the August 18th meeting was that the police commission heard from Officer Defina, Lt Cline, Captain Cecilio, and from Chief Agrafiotis about Officer Defina's evaluation. They asked questions of him, they asked questions of Officer Dyrkacz who was his field training officer, who was there at that meeting. What happened as a consequence of that was that the police commission was concerned that they felt that there was an issue that needed to be addressed concerning Officer Defina, his performance, his cooperation in the training program that he had become part of, following his July 9, 2009 evaluation.

**Chairperson McHugh:** Do you have those minutes?

**Attorney Bailey:** Union Exhibit 16, page Union 110, in the binder. The Commission learned information that was brought directly to its attention about Officer Defina's performance, about whether or not he was cooperative in the field-training officer program, and you'll see in the minutes as well that it was indicated that he was playing games with staff. He would not sign off on the FTO program.

**Chairperson McHugh:** When you were speaking about the Chief's statements, I don't see any statements by the Chief at that meeting.

**Attorney Cahill:** It was redacted.

**Attorney Bailey:** There was a meeting at which information was relayed to the Police Commission, and they were trying to address that information.

**Commissioner Karolian:** Was the officer present at that meeting?

**Attorney Bailey:** Yes, he was.

**Commissioner Karolian:** The entire meeting?

**Attorney Bailey:** Not for the entire meeting.

**Commissioner Karolian:** How come?

**Attorney Bailey:** He was asked to excuse himself by the Commission so that his FTO officer could be questioned.

**Chairperson McHugh:** Did the Chief make any statements or were there questions from him, or it was only the statements of the lieutenants and the captain?

**Attorney Bailey:** I believe the crux of the meeting was Officer Defina addressing his personnel evaluation, line-by-line; Lieutenant Cline providing a chart to the Commission concerning the year in review with Officer Defina was he asked questions about that; Captain Cecilio also making statements.

**Attorney Cahill:** I'm going to have to respectfully object.

**Attorney Cahill:** The due process would dictate if something came out of that meeting: Who made the charge? How did the officer learn about the charge? We don't have to go into the "what was said and by whom," . Officer Defina was not there when the lieutenant, the captain, and some other people testified. He had no way to defend himself. That would go to due process, but I don't think that's the point that they're trying to make.

**Attorney Bailey:** The Chief was asked for his recommendation concerning the situation that was discussed at that meeting. See HPD Exhibit E, the August 26, 2009 recommendation.

**Chairperson McHugh:** In the minutes, there doesn't seem to be any statement by the Chief at all here, but then you're saying that subsequent to that, that's when he wrote the letter?

**Attorney Bailey:** Yes.

**Chairperson McHugh:** But he made no statements at the meeting? There's a section that's redacted, but I don't think it is the Chief speaking there.

**Attorney Bailey:** The minutes I don't think are a verbatim recitation of what was said.

**Chairperson McHugh:** I would think that something like that would certainly be included.

**Attorney Bailey:** I can't discuss the substance of that meeting, but the evidence will reveal that Officer Defina's performance was discussed at great length at that meeting by Officer Defina himself and by Lieutenant Cline.

The Chief was asked for his recommendation because the Commission was concerned about the information that it had received. And the Chief gave that recommendation.

Officer Defina was, as you've already heard, afforded due notice to be heard. The Commission noticed the meeting for September 8. It was clearly as to a personnel issue. The Commission, in fact, provided ample notice to the Union and Officer Defina that the hearing was going to take place. You've heard the testimony from Officer Defina that Chief Agrafiotis provided him with notice, face-to-face, that the meeting was going to address his potential termination. That happened a week in advance of the September 8 meeting taking place.

**Chairperson McHugh:** I'd like to go back to these minutes of August 18.

**Attorney Bailey:** That was an exhibit that was prepared by the Union or a joint exhibit by the Union and the Police Department at the PELRB hearing.

**Chairperson McHugh:** Are there any other statements.

**Attorney Cahill:** Anything that I have for exhibits, except for the contract, came from the Police Department.

**Attorney Bailey:** The document was used as a joint exhibit at a related PELRB hearing. That's how it appeared at that hearing.

**Chairperson McHugh:** I need some clarification. We're talking about the grievance exhibits for the meeting of August 18, on that Page 111, there's a certain section that's redacted.

**Attorney Bailey:** That is the exhibit submitted by the Union tonight, and that was how that document was submitted at the PELRB, by agreement of the parties. The original minutes would be on file with the Hooksett Police Department would be without redaction.

**Chairperson McHugh:** You referred several times to the fact the Chief was asked, at this meeting, when they were talking about the evaluation, and the Chief certainly had some comments, and then he came back subsequently and produced that letter of August 26. I don't see any statements in there at all from the Chief. Why was there a certain section redacted.

**Attorney Bailey:** The September 8 meeting, Officer Defina is on notice of the meeting. He was invited to attend. His union representation was invited to attend. And he did understand that it related to his potential termination, and he understood that a week in advance of the meeting. He was provided notice to be there, and he had ample opportunity to be heard about a potential termination.

**Attorney Cahill:** I have to object he was able to be heard. When I was sitting at the Police Commission hearing and I was told at that meeting I wasn't allowed to say anything, and I was told by Attorney Higgins I could grieve it for the Union.

**Commissioner Karolian:** When was the employee notified as to that he's subject to possible termination by the Department? What was the date?

**Attorney Bailey:** He was notified that he was subject to possible termination by the Department on August 31, 2009, when he met with Chief Agrafiotis.

**Commissioner Karolian:** Was he told at that time by the Chief what the charges are against him? After that, there was another meeting?

**Attorney Bailey:** The September 8 meeting.

**Commissioner Karolian:** The Chief, on August 31, 2009, notified the employee that he was subject to termination?

**Attorney Bailey:** There would be a discussion by the Commission of his potential termination at the September 8, 2009 meeting.

**Commissioner Karolian:** But he wasn't told what the charges would be?

**Attorney Bailey:** He was not. The charges were not detailed because, the motion came from the Police Commission, and that motion the charges were very detailed.



**Commissioner Karolian:** I wanted to make sure that we followed the pre-termination hearing that he's entitled to. At what stage and what date was he provided a pre-termination hearing? The informal hearing that he knows what the charges are and he's told what the charges are, and that he gets to refute those charges? Not a full evidentiary hearing, but the grievance process as, under Loudermill, where he gets some sort of letter/notification of what his charges are and that he's entitled to have a pre-termination hearing?

**Attorney Bailey:** That occurred on September 8, 2009.

**Attorney Cahill:** Could we please see the notification in writing that notified the employee what he was about to walk into? I haven't seen it to this day.

**Chairperson McHugh:** Well, I believe, if I'm correct, that you said he was told by the Chief, and you said there was someone else there?

**Attorney Bailey:** Yes.

**Chairperson McHugh:** Who else was there?

**Attorney Bailey:** Chief Agrafiotis, Lieutenant Cline, Officer Defina, and as I understand it from Officer Defina, Officer Stowell.

**Commissioner Karolian:** And what was the date that he initially went to the Commission because he was complaining about his evaluation?

**Attorney Bailey:** Yes, August 18, 2009.

**Commissioner Karolian:** He was asked to leave the room.

**Attorney Bailey:** He stayed for the vast majority of that meeting.

**Commissioner Karolian:** He was told to leave the room as witnesses were brought in to the room?

**Attorney Bailey:** He was asked to leave the room, and Officer Dyrkacz was brought in, and there were questions asked of Officer Dyrkacz.

**Commissioner Karolian:** Do you know why or can the Chief explain to us why he was asked to leave the room?

**Attorney Bailey:** I believe that it was at the Commission's request.

**Chief Agrafiotis:** That's correct.

**Commissioner Karolian:** The Commission requested him to leave?

**Attorney Cahill:** It wasn't just the FTO that was asked to come in. Lieutenant Cline and Captain Cecilio also made statements after Officer Defina was asked to leave the meeting.

**Chairperson McHugh:** Isn't it customary that someone be handed something in paper form, as opposed to just verbally?

**Attorney Bailey:** There was a written motion made at the September 8<sup>th</sup> 2009 meeting.

**Chairperson McHugh:** When he was told by the Chief about the upcoming meeting? Isn't it customary that you hand someone a notice advising them, as opposed to, verbally making that known?

**Attorney Bailey:** There have been times in the past where paperwork has been provided to the employee. There have been times where people have been subject to verbal counseling. I was trying to explain the background of this and to put it into some context because, due to the fact that this information that prompted the September 8 meeting was something that came about at the August 18 meeting -- information that was presented to the Commission -- this was somewhat of an unusual situation. This was a situation that was different from what had happened in the past, in that, in the general sense, information hadn't been made directly to the Commission, including meeting with the employee, as it happened on August 18.

What happened on September 8, after Officer Defina was notified a week earlier that that meeting was going to address his potential termination, the meeting occurred, and at that meeting, there was a detailed motion that was read into the record, and a copy of that motion was later given to the Union. That would appear at HPD Exhibit D of your materials, HPD 34 and HPD 35. That motion was very detailed as to what the basis was for why the Commission was moving to terminate his employment.

**Commissioner Karolian:** Going back to that Commission meeting where Officer Defina was asked to leave, and that you had presented evidence to the Commission, isn't it customary to present the evidence to the Commission at the proper time of the grievance, as opposed to presenting the evidence to the Commission prior to the termination? Because the Commission would make a recommendation for termination for just cause. That would go to the Commission and go through the proper steps, and then that evidence would be approved by the Commission for just cause, as opposed to doing it backwards and presenting information to the Commission.

**Chief Agrafiotis:** Commissioner, you're correct. However, that's not the way the sequence, the meeting that you're talking about was not a termination hearing. It was a meeting where Officer Defina had requested to speak to the Commission to voice his displeasure at the evaluation he had received.

**Commissioner Karolian:** And that was on the 18th?

**Chief Agrafiotis:** Yes.

**Chairperson McHugh:** Why does it say "Evaluation for termination"? Why does it say that in the minutes? That Captain Cecilio stated that Officer Defina was given the evaluation for termination? I don't understand that verbiage.

**Attorney Bailey:** I was trying to talk about things in more detail and was trying to put some of these things into context for you so that they would be more understandable. The August 18 meeting was at Officer Defina's request, and to address his performance evaluation that had taken place in July of 2009.

**Commissioner Karolian:** He was told to leave the meeting?

**Attorney Bailey:** He was asked to excuse himself.

**Commissioner Karolian:** He was ordered to leave. Was he ordered to leave the room?

**Attorney Bailey:** Commissioner Gagnon asked Officer Defina to leave the meeting.

**Commissioner Karolian:** And he was ordered to leave the meeting, and then information was brought forth to the Commission?

**Attorney Bailey:** Yes.

**Commissioner Karolian:** It's the Commission's job to sit and listen to whatever the procedure is, and make sure that due process is followed as well as the grievance steps are being followed, and from what I'm hearing from you and from the Chief, that doesn't seem to be what did happen. And I want to clarify that before I come to a judgment on that.

**Attorney Bailey:** That meeting was not a grievance hearing. The Chief was not there making any recommendation. The August 18 meeting was for the purpose of hearing information at Officer Defina's request about his evaluation.

**Commissioner Karolian:** He wasn't allowed to hear all the information. He was asked to leave and then more information was brought in by Lieutenant Cline and Captain Cecilio, I'm assuming at the request of the Chief. Did you ask them to come in and give this information?

**Chief Agrafiotis:** Commissioner Dave Gagnon, had asked that the people involved in preparing that evaluation, which were Lieutenant Cline and Captain Cecilio, be at that meeting to potentially answer any questions that the Commission may have of them reference the evaluation. After Officer Defina gave his input as far as his displeasure with the evaluation, the Commission, at that time, with Officer Defina present, started asking the people that prepared the evaluation their input as far as the points of disagreement with the evaluation.

The Commission at some point became concerned about the answers they were receiving. They were hearing information, as I was, for the first time about Officer Defina's behavior. The Chair asked Officer Defina to excuse himself from the room, and Officer Dyrkacz, who was the primary field-training officer, was brought into the room and the Commission started asking Officer Dyrkacz questions. Which they received the answers to.

**Commissioner Karolian:** Did you object at any time and notify the Commission that "What you're doing is improper" at that point?

**Attorney Cahill:** No, they were trying to vet out, the comments that were made by Officer Defina, by the officer, the supervisors that had prepared the evaluation, and what they were reading in the evaluation.

I had information about what was in the evaluation. There was other information that came out during that meeting that I did not have information and would not have been included in the evaluation. That information came to the Commission's light as responses to the Commission's questioning of the people that had put the evaluation together.

**Chairperson McHugh:** So, you knew of the evaluation but there was some other information that you weren't aware of?

**Attorney Cahill:** Yes.

**Chairperson McHugh:** That was from the officer that they asked to come in?

**Attorney Cahill:** It was from the field-training officer was primary information, and other information given, and you were there, from the captain and the lieutenant, that was not in the evaluation, that would not normally be in the evaluation.

**Commissioner Karolian:** Why was that allowed to occur?

**Attorney Bailey:** This was not a grievance hearing the Chief had said, people were there to try to answer questions about the performance. The Commission, sitting at that point, did want to hear from the officer and they did, and stated simply, that was how that gathering went that night.

**Commissioner Karolian:** I'm just questioning as to why the Commission had heard that?

**Attorney Bailey:** That was not a grievance hearing. There was no recommendation pending concerning Officer Defina. He wanted a discussion about his evaluation.

**Commissioner Karolian:** But it was a disciplinary action?

**Attorney Bailey:** No. That meeting was not a disciplinary action taking place. That meeting was to discuss, at Officer Defina's request, his evaluation.

**Attorney Bailey:** In trying to inform the Commission about the July 2009 evaluation about the events between then and the August 18 meeting, about the events leading up to the September 8 meeting.

**Commissioner Karolian:** The August 18 meeting with the Police Commission if it didn't involve any type of discipline, why do the minutes read that Captain Cecilio stated that Officer Defina was given the evaluation for termination by Lieutenant Cline?

**Attorney Bailey:** That's a simple recitation of the evaluation that Officer Defina wanted to review with the Commission. You have not allowed me to discuss that with you tonight, so I haven't been able elaborate on that evaluation for you.

**Commissioner Karolian:** There was a recommendation for termination before the 18th, and that Officer Defina to go forward to the Police Commission in regards to his possible termination?

**Attorney Bailey:** I wanted to address the evaluation of July 13 with you.

**Commissioner Karolian:** Does the evaluation of July 13 involve a termination recommendation by Lieutenant Cline?

**Attorney Bailey:** Exhibit M in your materials.

**Commissioner Karolian:** The Commission would know that the officer is coming forward with regard to possible termination?

**Attorney Bailey:** No.

**Commissioner Karolian:** I don't understand.

**Commissioner Karolian:** If the employee was given an evaluation recommending termination, how does he go in front of the Commission on August 18, and we say that it's not a discipline hearing, but he wants to come forward and discuss his possible termination? I don't understand.

**Attorney Bailey:** The confusion is created here by the Commission's unwillingness to review the personnel evaluation itself. You will find HPD Exhibit M, HPD pages 393 through 402, and what had happened, and you'll find it at pages 401 and 402, Lieutenant Cline had

recommended termination. Captain Cecilio had recommended termination on account of performance problems that Officer Defina had demonstrated over the past years that he had performance problems.

**Commissioner Karolian:** The August 18 meeting was not, involving any type of discipline when you have a recommendation for termination prior to that, and the employee is coming forward asking to speak to the Commission about his evaluation? If you're telling me that in his evaluation was not a recommendation for termination, then there's something wrong. If there was a recommendation for termination, then that meeting that was held on the 18th would be a disciplinary hearing. It would be a disciplinary meeting, and the Commission would have heard disciplinary issues about the employee without having, the employee there, other than to give his objection, and then ordered to leave. And then, the Commission turning around and deciding, without the hearing for the officer, to have a due process hearing. Explain it to me without going into just cause.

**Attorney Bailey:** You'll see at page HPD 402, Lieutenant Cline made that recommendation and although Captain Cecilio agreed with it, the Chief Agrafiotis declined to accept that recommendation and ordered, instead, Officer Defina to undergo a modified training program.

The August 18, 2009 meeting was at Officer Defina's request. There was no pending termination recommendation at that point, because Chief Agrafiotis had decided not to agree with that recommendation, and that meeting was to discuss Officer Defina's personnel evaluation. When you look at that personnel evaluation, it does contain all of that information that I just discussed.

It was not a disciplinary hearing in any way.

**Commissioner Karolian:** When was Officer Defina advised of his charges, offered a pre-disciplinary hearing, and being given the charges? When did that occur?

**Attorney Bailey:** Officer Defina was notified of the September 8 meeting concerning potential termination on August 31. The September 8 meeting, there was a written motion read into the record which set forth in great detail the basis that the Commission took for determining that it thought that Officer Defina should be immediately terminated.

**Commissioner Karolian:** That's where I want to focus a little bit on, is that 9/8/09 meeting where the Commission has already decided that they're going to terminate him; is that correct

**Attorney Bailey:** There was a motion read, which I'm directing your attention to, at pages HPD 34 and 35, and Officer Defina was given an opportunity to say anything he wanted as to the substance of that motion. Attorney Cahill objected on the basis of due process, but there was no other information given by Officer Defina or the Union to that motion.

**Commissioner Karolian:** Was it the Commission's opinion at that time that they were terminating him at that meeting?

**Attorney Bailey:** The motion was made.

**Commissioner Karolian:** Motion was made for what?

**Attorney Bailey:** For a termination.

**Commissioner Karolian:** So, there was a termination decided by 9/8?

**Attorney Bailey:** Yes.

**Commissioner Karolian:** Prior to that, was he read what his charges were?

**Attorney Bailey:** There was no writing exchanged to Officer Defina concerning the basis of this motion. There was nothing in writing provided to Officer Defina concerning the Commissioner's analysis about whether or not termination was warranted prior to September 8. On September 8, that information was fully read into the record.

**Commissioner Karolian:** Was he told prior to 9/8 what the charges are against him, and was he afforded a pre-termination hearing? That's all we want to discuss.

**Attorney Bailey:** He was told on September 8 what the basis was for the motion for termination. At that hearing, he was given an opportunity to say whatever he wanted in rebuttal to that.

**Commissioner Karolian:** What did the motion say?

**Attorney Bailey:** The Hooksett Police Commission will now take up the matter of Officer Jason Defina and specifically determine whether or not he should be terminated pursuant to the authority conferred on the Commission by state statute and recognized under the Department's Standard Operating Procedures. This matter has been duly noticed for a non-public meeting pursuant to RSA 91-A:3, II(a). Officer Defina is represented by the Teamsters Union, Local 633, which is a party to the Collective Bargaining Agreement with the Department. Article 18 of the agreement provides for discharge for just cause. Those words are defined to include, in part: Unsatisfactory performance as determined by the police chief. We have recently met with Officer Defina at his request to review with him, and other members of the Department, his performance evaluation for the period June 1, 2008 to July 1, 2009.

**Commissioner Karolian:** Do you know when they recently met with him, what the date was?

**Attorney Bailey:** Yes, August 18 meeting, Commissioner Karolian.

**Commissioner Karolian:** I'm concerned with the due process.

**Attorney Bailey:** This is the notice that you were trying to understand that was given to him at the September 8 meeting.

**Commissioner Karolian:** And at that meeting, he was terminated?

**Attorney Bailey:** He was terminated at that meeting, yes.

**Commissioner Karolian:** Okay.

**Attorney Bailey:** Yes, following a two-to-one vote.

**Commissioner Karolian:** Prior to that meeting, was he given a pre-termination hearing? Chief can you answer?

**Chief Agrafiotis:** No.

**Commissioner Karolian:** Thank you.

**Chairperson McHugh:** I just have a couple of things with regard to September 8, and the statement that was read. But I'm also looking at the minutes of Tuesday, September 8, 2009, and that the Chairman at that time read the statement, the enclosed statement, which was the attachment #1, which is the one that you're referring to. It's the motion. The attorney states that he objects to the whole proceeding because of proceeding due to a lack of due process, and then the other attorney that was there, said that he would be able to grieve this, but he doesn't say anything about the fact, "Does he have anything to add? Does he want to speak?" It doesn't say anything like that. And in fact, he read the motion, stated the motion. I can't even see that a vote was taken. It showed one who was on the opposite side but it doesn't specifically state who was on the prevailing side if there was a motion taken.

**Attorney Bailey:** The motion was taken, it was seconded and there was a two-to-one vote in favor of Officer Defina's termination.

**Chairperson McHugh:** At 107 you see "Personnel Issues" there, "A," the chairman read the enclosed statement, and it refers to the attachment #1. Then it goes on to say that the attorney objected to the whole proceeding due to the lack of process, and then it goes on to say that the other attorney that was there said he will be able to grieve it. It doesn't say anything about the fact that the individual was allowed to speak or to refute. And then it says a motion was seconded by the other Commissioner, and I guess I'm looking at it now, and it doesn't even sound there was a vote, but then it says one of the other Commissioners was opposed. It just says at a later date you can come back and grieve it, and that's where I'm having some difficulty, along with the other one where it's been redacted, and I would like to get the original for the ones that were redacted.

**Attorney Bailey:** This has been a matter that the Union and the Police Department have been addressing over the past year with one another, including at the PERLB which was done at the Union's request, and I don't think it's ever been at issue that there was a two-to-one vote taken at that meeting in favor of Officer Defina's termination.

The basis for the motion was set forth in great detail and read into the record. There was an opportunity for Officer Defina to provide whatever information he wanted. And in taking himself up on that opportunity, Attorney Cahill made the objection about due process.

Officer Defina and the Union had known for a week that this was going to relate to a termination issue, but if I could return to the motion I think that what would help us clarify what the issue was pending at the time.

**Commissioner Karolian:** When you say that he had known for a week, are you maintaining that the employee was to request a pre-termination hearing? Or, was the employer supposed to notify the employee of a pre-termination hearing?

**Attorney Bailey:** The employee was, notified of the September 8 hearing.

**Commissioner Karolian:** Which is what this meeting was?

**Attorney Bailey:** Yes, it was.

**Commissioner Karolian:** So, are you saying that they had a pre-termination hearing where he was given the charges; he was allowed to refute any charges against him, and that there was a decision made by the Commission to terminate him after that hearing?

**Attorney Bailey:** I'm saying is when you were asking questions about what notice was the Union afforded? What notice was Officer Defina afforded? The only way I can answer that, and the best way to describe it is the written motion that was read to him at the hearing the Union did have a chance to say anything it wanted.

**Commissioner Karolian:** And that motion, was it a recommendation for termination?

**Attorney Bailey:** It was a motion for termination that did reference the Chief's recommendation as such. May I continue?

**Commissioner Karolian:** You can as soon I get the sequence down. But, the Chief has already said that there was no pre-termination hearing. I want to know what the facts are with regards to due process.

**Attorney Bailey:** I need to explain to you, and why I seek to read into this record this motion, is that was information that was provided to Officer Defina in advance of the motion hearing for his termination.

**Chairperson McHugh:** Would you specifically state how that was provided to him or he had knowledge of it?

**Attorney Bailey:** It was provided to him at the September 8, 2009 hearing. It was read into the record.

**Chairperson McHugh:** Only at that point when he got there?

**Attorney Bailey:** Correct.

**Commissioner Karolian:** That's the termination?

**Attorney Bailey:** The motion, yes.

**Commissioner Karolian:** That's when he was notified?

**Chairperson McHugh:** At the September 8, that's when he saw it?

**Attorney Bailey:** I've tried to read in this information into the record tonight. That information was read into the record by Commissioner Gagnon on September 8, 2009, to your question.

**Attorney Cahill:** I just have to object and I'm not trying to interrupt you except for the fact that when you misstate what I did. I did not have hands-on to this motion until weeks after the hearing. And the motion was provided to me by Attorney Higgins. I asked for it at the night of September 8.

**Attorney Cahill:** I asked for a copy that night and I was told there was nothing to give me in writing, and that was the time I was also told there would be a subsequent Commission hearing the grievance. But we left there with no paperwork whatsoever. And how can you ask someone to respond to something that they have no notice of what's going to be said?

**Commissioner Karolian:** Is the Department aware that you have to notify the employee of what: what the charges are that you're bringing against them; and what the evidence that you have against him is?

**Attorney Cahill:** In a normal situation, yes.

**Commissioner Karolian:** You're saying this was abnormal?

**Attorney Cahill:** Yes, it was. Because the Commission learned information about Officer Defina's behavior at the same time I did during the meeting on August 18 when he was before the Commission to discuss his displeasure with his evaluation.

**Attorney Bailey:** May I continue with the motion, Commissioner Karolian?

**Commissioner Karolian:** I just don't want to get into the full motion because it looks like the full motion has -- it starts to spell out just cause.

**Attorney Bailey:** If you would like to know the substance of what was read to the Union and to Officer Defina on September 8, and that discussed in detail the reasons for the Commissioner's position, then that is found in Hooksett Police Department Exhibit 8, pages 34 and 35. If you do not wish me to read all of that, then I will respect your wishes, but to have a full understanding of what he was provided for by way of reasons, that would need to be consulted.

**Commissioner Karolian:** My question is: Isn't it the Commission's role to not to terminate without a recommendation from the Chief, and not to terminate without giving the employee due process for, (1) to satisfy Loudermill, and (2) to satisfy the CBA, because it appears to me, that this motion, the employee was terminated on September 8, and I haven't found out where the employee was given an opportunity to get a pre-termination hearing in, and to understand what the charges were. The Chief has said that this was an abnormal situation. It happened a month prior, at that meeting? And that's when the Commission became aware of what the circumstances are?

**Commissioner Karolian:** What happened with the notification of the employee between the time the Commission and the Police Chief found out this new information and September 8 when he was terminated? Why wasn't he notified within that time what the charges are, that he's entitled to have a Loudermill hearing, a pre-termination hearing, and what the evidence is that the Department has against him to back up their reason for termination?

**Attorney Bailey:** What I can tell you is that the reason for termination, he was notified of on September 8, 2009. At the conclusion of it, it was made very clear that Officer Defina -- the decision of the Commission, after he did have an opportunity to say what he wanted to say, its decision is subject to his right to grieve this decision pursuant to Article 25 of the Collective Bargaining Agreement.

**Commissioner Karolian:** I think that's where they erred. I think what happened there was that they knew he could have had full evidentiary hearing according to the CBA and Step #3, that allows him to come forward. And then if they want to decide to terminate based on what they have heard at that hearing, then they're allowed to terminate.

**Attorney Bailey:** They did envision that Officer Defina would be able to grieve this decision, as he is trying to do now to you.

**Commissioner Karolian:** But they can't do that. He can't do that after he's been terminated by the Commission.

**Attorney Bailey:** He can do that. That's subject to the grievance procedure of the Collective Bargaining Agreement. And that's actually what one of the grievances is that is to be before you, whether or not there was just cause for his termination, and I know you have asked that we not discuss the reasons for just cause in this proceeding.

**Commissioner Karolian:** Can you show me where in what step does it show that the Police Commission can terminate? Where in the Collective Bargaining Agreement say that the Commission ultimately terminates?

**Attorney Bailey:** We were trying to read into the record earlier under Article 18-B. We have a statute that applies to you, where you have the right to hire or fire. The Collective Bargaining Agreement provides, which you did not wish me to read into the record, was that for purposes of that discharge has to be supported by just cause, and under the Collective Bargaining Agreement that the parties agreed to, the Union and the Police Department, that

defines just cause as what the Chief shall determine as unsatisfactory performance or misconduct.

**Commissioner Karolian:** Is that Step 3 that we're talking about? That happened on September 8, his termination?

**Attorney Bailey:** No. The September 8 motion made that process subject to the grievance procedure. The grievance pending before you concerning just cause that you asked to defer, that is the Step 3 grievance process. He has gotten more due process than the Collective Bargaining Agreement requires. He's had an opportunity to be heard on September 8, and he does have an opportunity to be heard before this Commission concerning whether or not Article 18 has been violated concerning just cause.

**Commissioner Karolian:** If I read Step 3 correctly, "If the grievant is not satisfied with disposition of the grievance by the Chief of Police, or if no decision has been reached within five working days after filing with the Police Chief, the grievant, together with the Union, may file the grievance with the Police Commission within five working days after said grievance was filed by the Chief of Police."

**Attorney Bailey:** Following the September 8 motion, which was seconded voted on for Officer Defina's termination, which was always subject to the grievance procedure, Officer Defina, as we've seen, did file two grievances. They are now pending before this Commission.

**Commissioner Karolian:** The authorization for the Police Commission at that point in time to terminate that employee without having gone through the proper grievance step.

**Attorney Bailey:** The Commission sought Chief Agrafiotis's recommendation, consistent with Article 18, and it has a statutory right to terminate employees. If the Commission has evidence brought to its attention, as it did on August 18, it does have the right to terminate by statute, and it did so here consistent with the Collective Bargaining Agreement.

**Commissioner Karolian:** Where's your argument that that's where they're allowed to do that? What step?

**Attorney Bailey:** This is a situation that is unusual.

**Commissioner Karolian:** The Chief has the right to take a badge and gun away from somebody for something that's egregious and take that person off the street. There's nothing in here that says, under unusual circumstances can we bypass this. There's nothing that allows the Police Commission -- And if the Police Commission erred back then, so be it. That's where we're at now. And I don't see in this procedure, Steps 1, 2, 3, or 4, where we're at with the Police Commission in terminating Officer Defina at the right time. He's got to have a hearing; then they can terminate. They've got all the right in the world to terminate as long as there's just cause.

**Attorney Bailey:** The motion on September 8 was subject to the grievance procedure; the grievances were filed, and those grievances are pending at the Commission level. That grievance process has been followed here.

**Chairperson McHugh:** Can we go back to the fact of the "Unusual circumstances"? Can I ask you, Chief, what was so unusual about that that caused it to be an unusual circumstance that it was done in that fashion?

**Chief Agrafiotis:** Looking in detail at the facts that are contained in the September 8 Police Commission motion.

**Attorney Bailey:** If the Commission could read that motion in its entirety. It does set forth the Commission's reasoning in why it acted as it did.

**Commissioner Karolian:** If their reasoning and their actions were flawed, then we have to go with due process. They should not have terminated him at that point in time, and if they terminated him after due process; we probably wouldn't be here now.

**Attorney Bailey:** The motion that was made contemplated all along that Officer Defina would have, not only on September 8, but going forward in the grievance process, have a full and fair opportunity to talk about the termination and why he felt there was or wasn't just cause



for it. I understand you have decided not to hear that matter until the procedural issue is addressed, but that is now pending before you.

I think I have talked with you as best I can about the issues that happened on September 8, about the motion. If you don't want me to read that into the record, I do ask that you consider it. If Officer Defina or the Union thought on September 8 that they needed more time or that they needed some other situation to further address the information that was being read to them, we believe they did have that opportunity. The due process argument was made. We believe Officer Defina has been afforded all the due process required to him, including under the contract, and he now has an opportunity to go before you and talk about just cause.

The other issue that's part of the grievance that has been stated before you, and I tried to review that grievance with you, does require you to reinstate Officer Defina. I would ask that if you are inclined to address the due process issue, that you differ any analysis concerning whether reinstatement is warranted. Before you can order reinstatement, I think it's very important that you do understand the issues concerning Officer Defina's performance that you've asked me not to address tonight. I would ask there be a deferral of any analysis of remedy if you are not inclined to hear the evidence that would go pro or con for his reinstatement.

**Attorney Cahill:** Although due process was not given Officer Defina, he worked up until September 7 in a cruiser and was evaluated every day and there were no problems. So, I don't want people hearing this, thinking that some egregious, horrendous act took place. At any time, they could have notified Officer Defina and the Union that they had charges pending, and set forth a pre-termination hearing, and that wasn't done.

**Attorney Bailey:** I ask that if the Police Department is not allowed to talk about performance issues or issues concerning Officer Defina, that the same rule applies to the Union.

**Chairperson McHugh:** We're going to take a recess. Does the Union have anything else they want to say before we go to recess?

**Attorney Cahill:** If you find that due process was not afforded and he was unjustly terminated, the Union would ask you to please reinstate him. He's been out since September 8, 2009. He was not afforded due process in any measure. And that's exactly why he went forward with the Unfair Labor Practice. We objected to the replacement commission, I'm very pleased to see that the substitute replacement commission is not hearing this case but the actual commission.

**Attorney Cahill:** But as far as reinstatement, I would say that if you do find that due process was not afforded, that just like any other proceeding before a quasi judicial, we wouldn't even get to the next phase, which would be, you can't be dragging someone into court without a warrant or without a charge and then while they're there, discuss their life.

**Attorney Bailey:** We would ask that no decision be made on reinstatement. You have indicated the way you would like to proceed in this matter. But in order to evaluate further reinstatement as an appropriate remedy, you do need to understand the evidence, and that has not been provided tonight, at your request. We ask that you not make any decision concerning reinstatement because you simply have not had the background information to help you in that decision.

**Commissioner Karolian:** Are you asking us that if we were to find that there was no due process, that we are to set that aside and then go forward and hear the rest of the case?

**Attorney Bailey:** As I understand it, Commissioner Karolian, and this is my understanding of the Union's grievances, what they have indicated is that if there is a finding of a violation of Article 18, due to the due process issue, that they would believe the remedy would be to have a hearing before this Commission. I would ask that because there's no evidence that has been allowed concerning issues directly related to reinstatement -- that no decision about reinstatement be made at this juncture. You have not taken any evidence concerning that. And we do ask that that decision be deferred.

**Commissioner Karolian:** But you're in agreement that we've heard evidence in regards to the due process issue?

**Attorney Bailey:** Yes. There is a potential for confusion as a result of the presentations tonight. I would have liked to have put things in better context for you, so that you could understand these due process issues a little bit more. But I understand that you have tried to confine the proceeding to issues related to due process. And my point is: Have you done that? You have excluded all evidence directly related to reinstatement. So, I know that if you're making a decision about reinstatement, you would want to be fully informed, of the facts before you. I'm asking that you defer a reinstatement decision until that time can come.

**Chairperson McHugh:** We're going to recess until a little bit after 8 o'clock, probably around five past 8:00.

**Returned from Recess at 8:05 pm**

**Chairperson McHugh:** We're at the portion of this grievance hearing where we need to debate whether or not due process was afforded the grievant. And we're going to debate in public. The simple reason is that the grievant has asked that the hearing be held in public and therefore, according to the right-to-know law, that any deliberations that take place need to take place in public.

We need to decide whether or not the officer has been afforded his due process based on what we've just heard. I do have some concerns that I would like to relay with regard to this. I'd like to know what you think about it.

When the presentations were being made and Exhibit 11 in reviewing the minutes of that evening, on the second page, there's a section of it where the minutes have been redacted. And I'm very curious as to what has been left out, to the point that I think some important information we're not being made aware of, and I certainly would like to have that information. We ought to consider seeing if we can get the original set of minutes from the August 18, 2009, and find out exactly what is missing.

**Commissioner Karolian:** I'd like to know why it's redacted. This is the meeting or the minutes of August 18, 2009, the non-public session?

**Chairperson McHugh:** That was the meeting where the evaluation was discussed, and on the second page, there appears to be a section that has been redacted. I'm really concerned that it relates to this and I want that information.

**Commissioner Karolian:** Before a decision is rendered in regards to whether there is due process or not?

**Chairperson McHugh:** Right. That's one of the questions that I have.

**Commissioner Karolian:** I don't know why it's redacted to begin with, unless it has something to do with somebody other than Officer Defina. If there was another employee could be the only reason I would see as to why there'd be something redacted.

**Commissioner Karolian:** I'm concerned as well as you in regards to why it's being redacted, unless it has something to do with another employee that has nothing to do with Officer Defina. But yet, in here, it clearly -- it's not redacted about the evaluation for termination. I don't know how that would play into whether there would be due process or not. Again, without knowing exactly what it is, I'm trying to imagine how it would impact the due process.

**Chairperson McHugh:** Reading these minutes of August 18, there's a part of the discussion that goes to the fact of the evaluation for termination. It doesn't paint a complete picture. It's important to me to know what that specifically states there.

**Commissioner Karolian:** Do you think that something could possibly be in there that would help you decide or make a determination as to whether due process was given, or not, based on everything that we've heard from both sides here?

**Chairperson McHugh:** In some ways, yes. But in the other, I think that it also probably speaks to the fact that it that something was determined that evening.

**Commissioner Karolian:** One argues that due process is being done. The other side argues that it's not due process. We can't get away from the fact that it appears that on the September 8 meeting, that the employee wasn't given due notice in accordance with following the due process requirements. I didn't hear that there was a letter stating what the charges were what was being brought forward, that the employee has a right to go forward and have a pre-termination hearing and get to refute any of that.

From what I've heard tonight is this was convinced into September 8, where he was notified by the Chief that there was going to be a non-public session. He wasn't told what the charges are. He wasn't told what the evidence that the Chief and the Department was going to bring forward against him to uphold their just cause termination. And to say that it was done on September 8, doesn't afford the employee time to look at the charges, notify, and try to refute what's going on.

**Chairperson McHugh:** I agree. I think you can clearly see that in the minutes of September 8, you know, that didn't happen in a manner that it normally would.

**Commissioner Karolian:** There's a culmination of things. I mean, this goes back to the notes that I have, this goes back prior months in regards to them believing they have just cause. If they thought that there was just cause back then, and it was so egregious, why wasn't it acted upon then as opposed to coming down to September 8.

**Chairperson McHugh:** Right. And not giving him prior notice of that at the September 8 meeting.

**Commissioner Karolian:** It's my understanding that you need to notify the employee with a letter, spelling out what the problems were, spelling out what the charges are; what you're telling him, this is what you plan on doing, that you plan on terminating; that they have the opportunity. It's the employer's responsibility and duty to notify the employee, and it's the employer's duty to know how to terminate someone as opposed to the employee knowing how to be terminated.

**Chairperson McHugh:** That's right.

**Commissioner Karolian:** I think, is very, very substantial.

**Chairperson McHugh:** I think when they speak about the fact that this was an unusual circumstance that, perhaps indeed, this certainly was a departure from that.

**Commissioner Karolian:** If the circumstances were so unusual, I think the process could or should have gone in a different way. I don't think the Commission should have terminated without affording the employee due process, a pre-termination hearing and a hearing in front of the Commission. And if there's just cause, then terminate. But to come up with this information, and then the Commission deciding over what the Chief may have recommended in the past, and he indicated that there was new information to him that came out. It's incumbent upon them. They're the ones that are bringing the action against the employee. The employee is not bringing the action, the termination.

Termination is a serious thing. It affects not just the employee, but it affects a full range of other people, including affecting the employer.

**Chairperson McHugh:** Before we issue any kind of an opinion on this, is to get those minutes. Are you in agreement with that?

**Commissioner Karolian:** I think to err on the side of caution here and to satisfy what you want to do, then I would say let's get that non-redacted portion of those minutes. In order to satisfy your wanting to look at it, I think that we should get a copy of that, and that will satisfy you and it would be fair to both sides.

We should reserve our decision until tomorrow when we find that redacted portion and then make a decision.

**Chairperson McHugh:** You're in agreement to reserve giving our opinion on the due process until we get that information about the minutes, the redacted portion, and then we'll go from there?

**Commissioner Karolian:** I think we probably have to. And as long as we don't get into the just cause aspect of it; if we just look at the redacted, deliberate in public again in regards to the

redacted portion, and if you have other views or other thoughts about it, then we can do that during deliberation.

**Chairperson McHugh:** These are non-public minutes, and if these minutes did contain something about -- or somebody else that was private, they certainly would have been, held private.

**Commissioner Karolian:** At this point, I'd like to ask if the Chief knows what is in that redacted portion, and if he assures us that it has nothing to do with the Defina case, and it has to do with something outside of that, then maybe we can move forward. If he knows that there's something else in there that's been redacted and has not been provided to the employee, then that's a different story.

**Chairperson McHugh:** Chief, could I ask you?

**Chief Agrafiotis:** I do not know what's contained in the redacted areas.

**Commissioner Karolian:** Do we know who forwarded this information, this copy, and who redacted it?

**Chief Agrafiotis:** I do not know.

**Commissioner Karolian:** Attorney Bailey, do you know?

**Attorney Bailey:** My understanding is that that exhibit, which is offered by the Union, was something that both the Union and the Police Department submitted as a joint exhibit at the PELRB, so I didn't prepare it myself. Perhaps, as you've suggested, the best way to confirm this is to look at the un-redacted copy.

**Commissioner Karolian:** Attorney Cahill, do you know what redacted there, or did you receive this redacted?

**Attorney Cahill:** I received it redacted. I have no idea. And my only concern about putting this off is whether or not the tape still exists and there is a non-redacted copy even available.

**Commissioner Karolian:** I understood that it was August 18, 2009. Chief, do you know if the minutes in regards to this non-public has been preserved?

**Chief Agrafiotis:** Francine's the custodian of the minutes, so she would have those minutes.

**Chairperson McHugh:** I'd ask you, Francine?

**Exe Asst. Swafford:** Non-public minutes are not recorded.

**Chairperson McHugh:** But you have the original sets of minutes?

**Exe Asst. Swafford:** The original typed minutes, I do.

**Commissioner Karolian:** Do you know who redacted this?

**Exe Asst. Swafford:** I don't know who redacted it.

**Commissioner Karolian:** Well, there's a section in here -- I mean, both sides understand it, so if you're the keeper of the records or keeper of the minutes, how would this get redacted if this gets sent out to the attorneys for Defina? Do you know how it would get redacted?

**Exe Asst. Swafford:** I don't.

**Attorney Bailey:** I think perhaps the original minutes would be with the Hooksett Police Department, as they should be, under the right-to-know law. And again, this was an exhibit prepared for the PELRB hearing. I would suggest that perhaps the best way to address your question is to look at the minutes that are maintained at the Police Department.

**Commissioner Karolian:** If there was something in here, do you think that would change or help you form an opinion? It would have to be something that would be fairly out-of-scope of what has been already offered. I mean, proof has been offered from both sides and I've heard, you know the evidence from one side and I've heard the evidence from the other side. I can't imagine what is redacted would have an impact on the due process aspect. It may have an impact on the just cause, that if there was something that was spoken to about just cause. But for due process purposes of whether the employee actually received what he was supposed to receive.

**Chairperson McHugh:** I guess my only concern is, the fact that something has been redacted, there's a reason for it.

**Commissioner Karolian:** But if it was about another employee or if it involves someone else that is not involved with the Defina case, they would have to redact it because it's non-public

minutes. And if they're giving it to the Defina attorney and Defina in regards to his case, then they would have to redact if it involved another employee. Because they still have to follow RSA 91, which would come into play for that other person.

But so far as the evidence has been presented, I think it's really clear-cut. I mean, I specifically asked the Chief questions about "Was there a pre-termination hearing?" He answered, "No." That weighs, you know, heavily. We talked with Attorney Bailey and got the sequence, and developed information from that. We talked to Attorney Cahill and got information with that, but the timelines don't go away. The timelines are still there, in my opinion.

**Chairperson McHugh:** I agree with you that the timelines are still there. But if you look at this and you read it, you just didn't go in there and put some information about some other employee. There's clearly something missing.

**Commissioner Karolian:** Who would have the authority to redact this portion and send that out to the defense, so to speak, the Defina side?

**Chief Agrafiotis:** Not knowing how that was prepared, if we were providing those to an attorney to prepare for some type of hearing, that attorney would then take what we provided them and format them properly for the venue that they were going forward in.

**Commissioner Karolian:** Attorney Cahill, you received this from the Hooksett Police Department?

**Attorney Cahill:** Yes.

**Attorney Cahill:** I don't change anything. All my exhibits are from the Department. The only thing I did was add the page number. If something is missing from there, I don't see how it could do anything but either help the due process violation, or it would just be part of the just cause situation, which we're not talking about.

**Commissioner Karolian:** Attorney Bailey, did you redact this and send this forward to the PERLB?

**Attorney Bailey:** No. As I explained, I was not part of any proceeding before the PERLB, if you do have a question about the minutes that you feel you need to address before you make a decision, and then I think the best source is to consult what is on hand at the Police Department. If you feel that you can proceed without that information because you feel you have completed your analysis, then I guess you can proceed. But I think the best source of information is where they are maintained at the Police Department in the normal course.

**Commissioner Karolian:** Chief, you did not send this out this way? Francine is the keeper of the minutes?

**Chief Agrafiotis:** Correct.

**Commissioner Karolian:** She did not, you did not, and she did not send it forward to Attorney Cahill, and Attorney Bailey didn't. We need to know who did.

**Chief Agrafiotis:** The Department would have sent it out to the attorney that put together the paperwork, the presentation for the PERLB.

**Commissioner Karolian:** All right. And do we know who that attorney is that put together that presentation?

**Chief Agrafiotis:** Attorney Higgins represented the Department at the PERLB.

**Commissioner Karolian:** Attorney Higgins also represented the Department or the Police Commission in the termination of Defina?

**Chief Agrafiotis:** Correct.

**Chairperson McHugh:** Are you saying that the attorney that made the presentation to the PERLB had not only the ability, but was able to redact those minutes?

**Chief Agrafiotis:** You would have to ask him that. We don't put that together. The attorney put the presentation together for the PERLB.

**Chairperson McHugh:** But if minutes were redacted, don't you think you would have knowledge of that?

**Chief Agrafiotis:** I wouldn't, no. The attorney would be putting together a public presentation for the PERLB.

**Commissioner Karolian:** If this was presented to the PERLB, which has absolutely nothing to do with Officer Defina's termination, why would this non-public session that specifically goes to Officer Defina's termination, why would that be sent or given to the attorney that is going in front of the PERLB in a redacted form? And when you say, "Going in front of the PERLB," you're talking about going in front of the PERLB on the matter that Defina went forward with, going up to the PERLB?

**Attorney Bailey:** Yes. I think that the best source of information, should you decide to look at this, would be how these records are maintained in their original form at the Hooksett Police Department. I'm just trying to explain that this information, as it appears before you, was in the form that it was submitted as an exhibit at that PERLB proceeding. If you have a question about what those materials look like in their original format, then I think the best source to consult with would be the Hooksett Police Department where they are housed, as you would normally maintain records.

**Commissioner Karolian:** If you feel that if there's something in there that may assist you in your decision-making process, then it would be wrong for me to not allow us to look at that or take that into consideration and afford you the opportunity to settle it in your mind. I'm in agreement with you, let's look at these minutes, see what's in there, and if there's something that's going to change the due process, then we'll be doing our due diligence.

**Chairperson McHugh:** I think we agree on that point that before we can go forward and arrive at a decision with regard to the due process by tomorrow evening, we need to have a copy of those original minutes that are un-redacted to make sure what is stated there.

**Attorney Cahill:** If by chance, because I got those from Attorney Higgins, if they cannot be found, are we still going to move forward?

**Commissioner Karolian:** Are you saying if these minutes cannot be found within the Commission files for non-public minutes?

**Attorney Cahill:** It's something that Officer Defina and I have no control over and yet, it could hold up a decision.

**Commissioner Karolian:** Right.

**Attorney Cahill:** I'm stating that although I agree with you, make sure you're comfortable with the due diligence and making sure that you have all the information you need, but if no fault of the employee who's been terminated, you cannot get these by tomorrow night, are we still moving forward?

**Commissioner Karolian:** Yes.

**Chairperson McHugh:** Yes.

We'll resume again the grievance hearing again tomorrow evening, and the meeting will start at 7 o'clock. The hearing will start at 7:00 p.m., and we have until 10:00 p.m.

**Chairperson McHugh:** We're going to adjourn this meeting.

Hearing was adjourned at 8:41 PM.