



Hooksett Police Department

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POLICE COMMISSION MEETING DEFINA HEARING

Minutes of the Meeting of Tuesday September 28, 2010

The Hooksett Police Commission held a public meeting on Tuesday September 28, 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 excused himself.

Chairperson McHugh: I neglected to make a statement about one of the commissioners at last night's public meeting who had already given notice that he was recusing himself, Mr. Henry Roy, and I neglected to say that. The other thing is that we were able to get a hold of those redacted minutes last night, and I'm going to need a motion to unseal those minutes.

Commissioner Karolian: I'm going to make a motion to unseal the redacted portion of the minutes of the meeting of August 18 non-public session.

Chairperson McHugh: I'm going to second that motion. All those in favor of the motion, signify by saying, I.

Commissioner Karolian: I.

Chairperson McHugh: I'm going to call this grievance hearing to order, at 7:30 pm. I have a copy of the proof of posting.

The Pledge of Allegiance was held.

Chairperson McHugh: Where we left this last night was we were at a point that we were looking at the minutes of August 18, and there was a certain portion of the minutes that had been redacted. We did obtain the unredacted minutes, and you have them there.

I guess I would ask at this point for both the grievant and the attorney representing the Department, if you have statements you would like to make?

I'm sure you recall the statements that I made last night about the portion we're dealing with. We're dealing with the procedural?

Attorney Bailey: I have no comment to make as to the unredacted minutes that you just provided the parties. I would ask that the Commission review the memorandum of law that we

provided to you and to Attorney Cahill as a part of the record in this matter.

And if you could put that in your deliberations, we'd appreciate that.

Attorney Cahill: There appears to be nothing with regards to due process. As far as the additional condition, if I knew that the brief was going to be accepted, I would have made a brief, but I thought we were into deliberation stage, and I must strongly object to new information being brought to the Commission after you've already started deliberation. I was just handed that legal fiction prior to the Commission starting up. Either the Chief had an opinion about what happened last night and has now changed overnight, or the lawyer has misrepresented what the Chief stated last night. Make a motion that you not use that in deliberation because it is a legal fiction and doesn't represent the live testimony.

We gave a lot of leeway last night. Attorney Lefebvre was involved in three-way conversations, and any document that was going to be provided and introduced as evidence, the author of same was supposed to be present. Now, we gave a lot of leeway and allowed Attorney Bailey to read some of the motion from Commissioner Roy, who was not here. That wasn't part of the ground rules, but in order to make it not seem like we were trying to do a stop and go, we allowed that to happen. But those were the ground rules.

Attorney Bailey: I didn't understand what your concern was.

Attorney Cahill: Attorney Lefebvre, correct me if I'm wrong, but I believe the ground rules were that if documents were to be entered into evidence that the people who offered them had to be available in case the Commission or someone else wanted to question them on the actual document itself.

Commissioner Karolian: You're making reference to the ground rules about witnesses being present and available.

Attorney Cahill: And about documents that were being submitted, such as the motion. The Department is trying to put in more information; you've already started deliberation. It's another illustration about how due process is not adhered to in fair play and the whole idea of this is to have a harmonious relationship between employers and employees who are on even ground here and knowing what the rules are.

Attorney Bailey: I'd like the opportunity to address what Attorney Cahill just argued about. This is simply a memorandum law. We talked about the evidence last night. We talked about the Loudermill standard this memorandum attempts to summarize that legal standard. We ask that you take that into account in your deliberations as you deliberate about whether due process has been applied here.

Commissioner Karolian: You're talking about the Loudermill rule?

Attorney Bailey: Yes. That's what this memorandum is about. We simply summarized the evidence as best we could that was heard last night and applied it to that law. But the purpose of this memorandum is to assist the Commission as it makes its decision about due process, to understand the HPD's position that there was pre-termination and post-termination process applied. We ask that you consider this three-page memorandum that talks about the applicable law in your deliberations.

Commissioner Karolian: Why is that being brought up now instead of yesterday when you were giving your presentation?

Attorney Bailey: You brought it up and we wanted to assist the Commission in providing the applicable legal standard for you to look at as you did your review.

Commissioner Karolian: Why now and not yesterday?

Attorney Bailey: It's in response to the issues that you raised. You discussed the Loudermill standard, and we wanted to address that standard further with the Commission and have the Commission have its ability to review the applicable law. So, this is simply a recitation of the law concerning Loudermill that was discussed yesterday.

Chairperson McHugh: I guess my only comment with regard to that is it's unfortunate that -- to

hand someone a document at this late date and to have to try to read it. There's no way possibly that, you know, I'm going to be able to read it, except for perhaps that we would need to properly recess again in order to read it and to understand it. That's part of my issue.

Attorney Bailey: It is a three-page document. We feel we tried to be very brief, understanding that the Commission is deliberating tonight and is applying the law to its deliberations. It is a straightforward recitation of the law that Commissioner Karolian had discussed last night. We do not believe it would take an undue amount of time for the Commission to review it, and we hope that you do so and take it into account in your deliberations.

Commissioner Karolian: Do you think I had previewed the law before talking about it yesterday?

Attorney Bailey: I don't know your background, sir, in terms of the Loudermill law, but all I'm saying is that you did discuss it, and our point was to make that law applicable and available to you to review in your deliberations.

Commissioner Karolian: For the record, I did review it prior to bringing it up yesterday, and that's one of the reasons why I brought it up yesterday.

Attorney Cahill: I hate to delay the deliberation any further you didn't just start deliberating tonight. You started last night. I did read that just as it was handed to me tonight, and once again, within it, it goes outside the bounds of due process and talks about just cause. In fact, it did go over the live testimony of the Chief and the Department, and I would strongly object to that being used as anything. The law was discussed last night. People had an opportunity to present their evidence and their witnesses, and I think at this point, you have what you need in order to know whether or not Officer Defina was allowed due process prior to his termination on September 8, 2009.

Commissioner Karolian: I guess for the record, the face sheet that I looked at discusses the Loudermill decision. I think it was in 1985 it was handed down by the Supreme Court. I have not gone through it. We both made it very clear that we do not want to hear any just cause issues.

Chairperson McHugh: Is it necessarily something that we need for this part of our deliberation, or is it probably more appropriate; something that we might need for the second part of this?

Attorney Bailey: The Loudermill decision goes directly to your deliberations in the procedural aspect of this case.

Attorney Bailey: Commissioner Karolian, you haven't looked beyond the first page of this memorandum, but it does not address just cause issues. Commissioner McHugh has not come to this process with the same appreciation of the Loudermill case as you have, Commissioner Karolian, based on your background. We ask that both of you review this memorandum, because if you're going to be applying the law, we believe it's important that you understand what the law is.

Commissioner Karolian: How about I give it back to you.

Chairperson McHugh: I did take the time to go and research what it was, online today.

Commissioner Karolian: What I'm hearing from both of you is you have one opinion on saying that in this memo that you're giving us, that it does not concern just cause, there's nothing in there that says just cause, and we have another attorney, Attorney Cahill that's saying that there is. We have two different opinions. If I delve into these other pages, that would put me in a compromising position to learn things that pertain to just cause, as opposed to due process.

Attorney Bailey: We do disagree on this issue. I do believe it's important for the Commissioners to appropriately apply the law. What I would suggest is that you do undertake to review the document. I you feel that there is some issue raised about just cause, of course you're within your bounds to not take that into consideration, but we do ask that you take this law into consideration in your review.

Commissioner Karolian: I certainly will.

Attorney Bailey: Commissioner McHugh, Could I ask for a point of clarification about what your intention would be as to this memorandum?

Chairperson McHugh: The only way that I could possibly understand what you have here and what you've presented is to ask to recess and go and read it and. We had closed the portion of the hearing where we were taking any kind of testimony like that. I do not have the expertise, as Commissioner Karolian has, with regard to that particular case. I did take the time Monday, when it was said to me, to go on and read about it, I understand that case. I concur with Commissioner Karolian that it's something that I don't think that we need to deal with.

Attorney Bailey: The commissioners have stated you are willing to review the three-page memorandum. For the record, could I please have that marked as "HPD Exhibit S" for identification, just so that we're clear as to what you decided not to review? And if I've misunderstood you, please let me know.

Commissioner Karolian: No. We've started our deliberation. If this was an issue, it should have been brought up prior to this.

The only reason this is being brought up now is because I made mention of it yesterday. There was ample opportunity then to bring in the evidence that they wanted to at that time, but we're in deliberation now. If it's just to review, it's not like something that is coming up at the eleventh hour that is so shocking that it's going to change what the deliberation status is. I don't see that now all of a sudden becoming an exhibit when we're done with the evidence that's being brought in.

Attorney Bailey: And my request was to have it marked so that it was clear what you decided not to review, if the issue came up. Just to make the record clear, that was my request.

Chairperson McHugh: Are we ready to go on with the deliberation?

Commissioner Karolian: I think we should go over the timeline again, chronologically, just so we're both understanding what the chronological aspect as to this and what was done, when, and see if it satisfies the due process timeline.

Commissioner Karolian: When the first indication of possible disciplinary action was going to be had against the employee by the employer, what the date of that was and we can go through, and if we need to ask the witnesses that are present to clarify, then I think we should.

Chairperson McHugh: I think the date of that is when they met regarding the evaluation.

Commissioner Karolian: It was stated that there was no pre-termination hearing for the officer. I asked the Chief that specifically, and he indicated that there was none. We know what the timeline is.

One side says that the hearing on the 8th was the opportunity for the employee to have his pre-termination hearing, but I think what we found out was that there were no charges read against him. He was not informed as to what his charges were. He was not afforded adequate time to prepare for that. He wasn't afforded the opportunity to refute that in a pre-termination hearing. Was the hearing due process?

Chairperson McHugh: August 31, Is when the Chief advised him that he could be at the meeting on September 8th, and that's all he said to him.

Commissioner Karolian: He was told that he could attend that meeting. At that meeting he was terminated without a hearing, a pre-termination hearing. And I don't think that you can have your pre-termination hearing coupled with the termination.

Chairperson McHugh: There was no opportunity for rebuttal.

Commissioner Karolian: The Chief, on the 31st of August, informed the employee that there was going to be a hearing on the 8th of September, and that his pre-termination hearing, if he was instructed and told that, I think that the employee would then have an understanding that that is going to be his pre-termination hearing. And should have come "These are the charges that we have against you. This is the evidence that we are going to stand by to

prove and request your termination,” and I didn’t see that happen.

Chairperson McHugh: I asked the attorney for the grievant whether or not there was any form was given to him, and he said, “No.” I asked him whether or not that was customary and how you go about that normally. I heard that the way this happened was totally unusual.

Commissioner Karolian: It was an unusual circumstance and it was almost to sound that there was something that needed to be addressed immediately, but yet the employee was still maintained and was not put on any administrative suspension. Was he afforded to know what the charges are; there’s going to be termination recommended; he’s entitled to have a pre-termination hearing, and that he’s entitled to have a hearing.

Chairperson McHugh: Right.

Commissioner Karolian: There was nothing that was compelling, and I think it’s on the record that it did not happen.

Chairperson McHugh: From the testimony that we heard, I didn’t hear anything that spoke to that.

Commissioner Karolian: We argued back and forth about the just cause aspect, we made it clear that we’re going to address the due process only, they were addressed by both sides, and through that offer of proof and questioning by the Commission of both sides, due process was not followed.

Chairperson McHugh: Based on some of the statements when the Chief was asked the question whether or not a pre-termination hearing the Chief said, “No.”

Commissioner Karolian: I think if the Chief believed that there was pre-termination hearing, he would have said, “Yes, there was a pre-termination hearing.” And then we would have gone into asking him, “When was that pre-termination hearing? When did that occur?” If it would have been maintained that it occurred on the 8th, the day that the officer was terminated, I think there’s a problem there, so. But he did. He was very clear. I was very matter of fact with the Chief, and he was honest with his answer, and I use that heavily in weighing/ deliberating, along with the other items.

Chairperson McHugh: I think the other thing is when you go back and read those minutes, and if you follow them chronologically, you can see where they are at a particular point, where the Chief’s mindset is at a particular point. At one point when he’s asked what his feeling is, he makes the statement to the effect that he’s not inclined to go in that direction the thought of having the pre-termination hearing is not in his mind.

And then you move forward to that meeting on the 8th of September. There’s nothing that was said at that meeting or any question, from his standpoint, to either the attorney that was present there of “Did he dot all the I’s and cross all the Ts?” So, that leads me to believe that he wasn’t afforded his due process.

Commissioner Karolian: It’s clear-cut that the procedure wasn’t followed. He was not given due process in this particular case.

Chairperson McHugh: Is that all that we want to consider at this point with regard to the question of whether or not he was afforded his due process? Or, is there anything else that you feel that needs to be taken into consideration?

Commissioner Karolian: We need to come up with an official decision and notify both sides what that decision is, and move forward.

I’ll make a motion that we find that Officer Defina was not afforded due process, and therefore should be reinstated immediately and made whole financially to include back pay back to the date of termination, with the understanding that we have only addressed the due process, and not the just cause, and that as long as the officer understands that and the Department understands that, that we’re talking strictly due process.

Chairperson McHugh: Second that, but I’m going to ask you to clarify when you say “made whole.” Would you please clarify that?

Commissioner Karolian: What I mean “made whole” is that the finding shows that he was not afforded due process, that his reinstatement goes back to September 8 of ’09, the date of

his termination, and that he be made -- when I say he be "made whole," financially, I'm talking about giving him back pay, back from September 8 until now, whatever he's due in pay, whatever he would have earned working at the Hooksett Police Department between then and now, that he be reimbursed ASAP/next pay period.

Attorney Cahill: When you said "make whole," that includes benefits and his back pay?

Commissioner Karolian: Yes. In other words, make it so that the termination is no longer in effect; that he goes back to September 8. And when I say, "made whole," that includes any benefits that he would have. In other words, the termination did not happen, he went back to September 8, and he's been reinstated.

Attorney Bailey: I am not certain what the Police Standards and Training requirements are involved here in terms of reinstatement and subject to your motion, I would certainly ask that the Hooksett Police Department be able to determine what issues need to be addressed. You motioned for reinstatement at this point the Department had asked you to defer that issue until after the just cause hearing so that you could be informed of evidence that would assist you in understanding what reinstatement entails. I take it you are not going to hear any further evidence as to this issue of due process, but could you clarify what the status of the just cause hearing will be?

Commissioner Karolian: I don't think that there is a just cause hearing that's going to be heard at this point. I'm making the motion that the determination be made that there was no due process, and it's up to the Police Department to do what they want. We're not certainly prejudicing any decisions that the Department wants to follow up or move forward with. There was no due process, and reinstatement should be made until such time that that situation were to change.

Attorney Bailey: Is there going to be a just cause hearing going forward?

Chairperson McHugh: We have had our deliberation with regard to the procedural aspect of it, and we've come to the final piece of that, and we're about ready to vote on the motion, whether or not that's what we want.

As far as the other, I think that's another issue for another day that has to be taken up. Right now, we're specifically dealing with that.

Attorney Bailey: I just wanted to understand the Commission's position was that Grievance #0908 about just cause did, in fact, remain pending following your decision tonight?

Commissioner Karolian: I don't know how we could go forward and hear just cause and have a just cause hearing against the employee, knowing that there was no due process. Because if we were to do that we'd be violating due process all over again by determining that there was no due process. I can't go forward with that because: I feel that I would be party to a lawsuit; I would be exposing the town and the taxpayers of Hooksett to a lawsuit if we determine that this is no due process; he was not afforded that, and then we turn around and we hear just cause. And if we heard just cause and came to the conclusion that he should be terminated, and we terminate him, where does that leave us? That leaves us in the position of having violated his due process, the 14th Amendment, all over again. We're not preventing anything from going forward from here in the future.

Chairperson McHugh: The issue that we were dealing with was the due process, whether or not he was afforded his due process? We came to a conclusion based on the evidence that was presented to us. That it wasn't afforded to him, and based on the responses that came both from the Chief and from the other attorney, and that's what we just said we were basing our decision on as far as the due process, that procedural aspect of it. With regard to whether or not there is just cause that would be something for the Department.

Attorney Bailey: There is a pending grievance now for the Commission to determine concerning whether or not his termination was for just cause. We would ask the Commission to determine that grievance. There is a second grievance pending. We were of the understanding that this grievance would be pursued first and addressed first by the

Commission, but that the Hooksett Police Department would ultimately have its day to be able to explain its decision about this termination proceeding. And as a result, we were given no ability at all to provide you with any information about why Officer Defina was terminated and why the Police Department believes they had just cause to do it. And there are two parties to this proceeding, the Union and the Police Department. We asked that the Police Department be given a fair opportunity to address reinstatement and to address just cause in a further proceeding. We understand you voted this proceeding, but it is critical that the Police Department has a say in this process and be able to explain to you why they had just cause to terminate Officer Defina.

Chairperson McHugh: Do you understand the statements that were made by Commissioner Karolian that he felt by doing that, that he was going down a path that eventually the Commission could be sued for doing something that they shouldn't? I have some questions about some of the statements or some of the things that you brought up that I think we should recess.

Attorney Cahill: There's a motion on the floor. And this is a grievance hearing that was requested by the grievant. And the Department talked about fairness. The whole reason we're here is because fairness wasn't afforded the grievant. I'd like to see the motion acted upon, and then I think depending on the vote, we'll give the Union's position on the grievance that was submitted by the grievant, and the grievance was not submitted by the Department.

Attorney Bailey: Can I ask if what Commission McHugh has indicated, does she feel she needs a recess to fully address this issue? I ask the Commission to do what it feels is necessary.

Commissioner Karolian: I'd like to table that motion, or I'll retract it if I have to, if that can be done. If not, then we'll just recess at this point and return after recess and address the issue.

Chairperson McHugh: We're going to recess at 8:12 pm.

Reconvene at 8:27 pm

Commissioner Karolian: The motion that I'm making is to find that due process was not afforded to Officer Defina, and based on that, we have him reinstated, and he be made whole financially back to the date of termination. And that in this, we do not prejudice the Department from their ability to pursue just cause on these same charges that they have, the information that they have now, and that he be reinstated. That clarifies to the Department what the motion is. It clarifies to the employee what the motion is. And I think we should move forward. I'd like to have some discussion afterwards, after the clarification.

Chairperson McHugh: I'll second the motion.

Chairperson McHugh: All those in favor of the motion, signify by saying, I.

Commissioner Karolian: I

Chairperson McHugh: What did you want to clarify?

Commissioner Karolian: There's a clarification that I didn't make earlier.

I'm assuming both sides here understand what the motion is. What I didn't have a chance to do during our deliberations for clarification purposes, when we were deliberating, is the fact that at one of those meetings, the officer was asked to leave and was ordered out of the room; then more evidence was brought forth. That comes into play into my motion on the decision that I'm making on the motion to go forward.

Attorney Bailey: There is a lawsuit pending by Officer Defina against the Town and Chief Agrafiotis. For purposes of your "make whole" remedy, to clarify, that does come from the Town's budget, correct?

Commissioner Karolian: It should come out of the police budget.

Chairperson McHugh: The police budget.

Commissioner Karolian: Motion to adjourn.

Chairperson McHugh: Second the motion. All those in favor of the motion, signify by saying, I.
Commissioner Karolian: I.
Meeting adjourned at 8:33 pm

Amended by Recording Clerk Dawn McDonald