



STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

JEFFREY T. CLAY

CASE NO. E-0092-2

v.

DECISION NO. 2010-040

NEWMARKET TEACHERS ASSOCIATION
And NEWMARKET SCHOOL DISTRICT

ORDER ON PENDING MOTIONS

The Association's Motion for Enlargement of Time to File Affidavits is granted. Affidavits shall be filed on or before March 12, 2010.

The Association's Request for Enhanced Security Measures is denied. The undersigned hearing officer reviewed the hearing process with parties and counsel at the pre-hearing conference, and it is expected and anticipated that all parties and representatives will comport themselves accordingly.

The Association and the Town's Request for Reconsideration concerning the use of affidavits at hearing is denied. This request relates to the following portions of the pre-hearing order:

5. As discussed and agreed at the pre-hearing conference, the parties shall submit all evidence to support their position in these proceedings by affidavit with the exception of testimony from witnesses who cannot reasonably be expected to cooperate in the preparation of an affidavit because they can fairly be considered an unfriendly or hostile witness. All affidavits shall be filed on or before **March 5, 2010** and shall be titled "Affidavit of (Name) filed on behalf of (Jeffrey Clay or The Association or The District)". Information contained within an affidavit shall be presented in numbered paragraphs in a chronological manner, shall be specific as to date, place, and individuals

involved, shall reference exhibits with specificity but shall not reproduce the content of exhibits, and shall be limited to factual material to the greatest extent possible. Affidavits are not to be used to provide argument about the merits of the parties' respective positions in these proceedings as the parties will be otherwise afforded the opportunity to provide oral or written argument during the course of the proceedings as necessary.

6. This process for submission of testimony into the record by affidavit means, for example, that Mr. Clay is not expected to submit testimony from the District Superintendent by affidavit nor are the Association and District expected to submit testimony from Mr. Clay by affidavit. However, Mr. Clay is required to submit his own testimony by affidavit, and the District and the Association are expected to submit testimony from their own witnesses, like the Superintendent or Association representatives, by affidavit.

7. At hearing all duly prepared affidavits shall be made part of the record subject to any objections any party may have to the relevance or content of any affidavit in whole or in part. All such objections shall be filed in writing on or before **March 19, 2010**.

8. As discussed and agreed at the pre-hearing conference, all parties will be provided with the opportunity to call and examine witnesses who have filed affidavits or from whom it was not possible to obtain an affidavit. For example, the District and the Association will be provided with the opportunity to cross-examine Mr. Clay as to any points they wish to make not already discussed in his affidavit and to impeach or question witness credibility as appropriate. Mr. Clay will likewise be provided with the same opportunity as to any witness whose affidavit is filed on behalf of the Association or the District.

9. The District's Motion filed on **February 5, 2010**, after the completion of the pre-hearing conference, and before the preparation and issuance of this pre-hearing order, and which seeks to eliminate the submission of testimony by affidavit in this matter as discussed and agreed at the pre-hearing conference is denied.

The use of affidavits to submit direct testimony was discussed and agreed to by all parties at the pre-hearing conference, and neither the Association nor the Town has identified a sufficient basis for altering the process described in the pre-hearing order. The submission of evidence into the record by affidavit at PERLB proceedings is not inconsistent with or contrary to laws or rules governing the PELRB adjudicatory process, particularly when it has been agreed to by the parties in advance of hearing. The use of affidavits is also consistent with Pub 202.01 (a)-(g) and is specifically contemplated under Pub 201.08 (c)(1). Further, nothing mandates that evidence

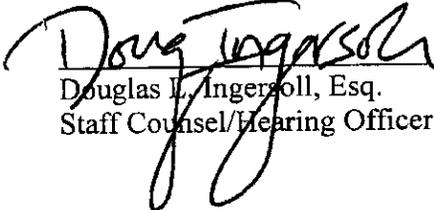
must be submitted into the record in a contested PERLB adjudicatory proceeding by live testimony.

The Association and the Town's Request for Reconsideration concerning the amount of time set aside for hearing is also denied. The main reason the parties agreed to the use of affidavits at pre-hearing was to address statements in the Joint Pre-Hearing Worksheet that three days of hearing would be required in this case. The filing of affidavits in advance of hearing will shorten the amount of time required to receive testimony from witnesses, should eliminate duplicative testimony, and should also have the benefit of assisting the parties in the preparation and presentation of their cases.

No action is taken on the Association and the Town's pending Motions to Dismiss at this time.

So ordered.

February 23, 2010


Douglas L. Ingersoll, Esq.
Staff Counsel/Hearing Officer

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