

THE STATE OF NEW HAMPSHIRE
SUPREME COURT
Case Number 2019-0135

Seacoast Newspapers, Inc.
Plaintiff - Appellant

v.

City of Portsmouth
Defendant - Appellee

BRIEF FOR DEFENDANT – APPELLEE
CITY OF PORTSMOUTH

Attorney for Defendant – Appellee
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Oral Argument By: Thomas M. Closson

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SUMMARY OF ARGUMENT

Based on the legal arguments raised by the Appellant in its brief, the City of Portsmouth (“the City”) continues to agree that the arbitration decisions should be released to the public. This case should ultimately turn on a balancing test between Goodwin’s alleged privacy interests, and the interest of the citizens of Portsmouth in the public release of the arbitration decisions. That balance tips decidedly in favor of public release.

Even though the City agrees with the Appellant that the arbitration decisions should be released to the public, the Appellant is not entitled to recover its attorney’s fees. If Judge Messer’s decision stands on appeal (and thus, if there is never a predicate finding either by the Superior Court or by this Court that the Appellant’s lawsuit was necessary to make the arbitration decisions public) then clearly the Appellant has no basis to recover its attorney’s fees. Even if Judge Messer’s decision is reversed by this Court, the Appellant is still not entitled to recover its attorney’s fees because there is no evidence to suggest that the City’s decision to withhold the arbitration decisions was an obvious, deliberate, or willful violation of NH RSA 91-A.

ARGUMENT

1. The Arbitration Decisions Should Be Released To The Public.

The Appellant has raised compelling legal arguments in support of releasing the arbitration decisions to the public. The City agrees with, and hereby joins in those legal arguments. As the Appellant correctly argues, this case should ultimately turn on a balancing test between Goodwin's alleged privacy interest, and the interest of the citizens of Portsmouth in public release. For the reasons set forth in the Appellant's brief, that balance tips decidedly in favor of public release.

"The purpose of the Right-to-Know Law is to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people." N.H. Civil Liberties Union v. City of Manchester, 149 N.H. 437, 438 (2003). The Goodwin/Webber debacle, including the arbitration decisions at issue in this case, cuts to the very core of public confidence in its police force. The citizens of Portsmouth have a right to know how Goodwin conducted himself. By contrast, any competing privacy interest that Goodwin could possibly have raised was waived the moment he chose not to disclaim Mrs. Webber's bequests.

2. The Appellant Is Not Entitled To Recover Its Attorney's Fees.

In the case below, and now on appeal, the Appellant has requested an award of its attorney's fees (see Appellant's Brief at page 26). Although the City continues to agree with the Appellant's claim that the arbitration decisions should be released to the public, there is no basis for an award of attorney's fees.

As originally enacted, New Hampshire's Right-to-Know Law mandated the award of attorney's fees in every case. See Voelbel v. Town of Bridgewater, 140 N.H. 446, 447-448 (1995). Subsequent amendments to the statute have significantly limited the availability of attorney's fees. NH RSA 91-A:8, I, currently provides as follows:

If any body or agency or employee or member thereof, in violation of the provisions of this chapter, refuses to provide a public record or refuses access to a public proceeding to a person who reasonably requests the same, such body, agency, or person shall be liable for reasonable attorney's fees and costs

incurred in a lawsuit under this chapter provided that the court finds that such lawsuit was necessary in order to make the information available or the proceeding open to the public. Fees shall not be awarded unless the court finds that the body, agency or person knew or should have known that the conduct engaged in was a violation of this chapter or where the parties, by agreement, provide that no such fees shall be paid. In any case where fees are awarded under this chapter, upon a finding that an officer, employee, or other official of a public body or agency has acted in bad faith in refusing to allow access to a public proceeding or to provide a public record, the court may award such fees personally against such officer, employee, or other official. (emphasis added)

This Court has further clarified that an award of attorney's fees under New Hampshire's Right-to-Know Law requires two findings: (1) that the plaintiff's lawsuit was necessary to make the information available; and (2) that the defendant knew or should have known that its conduct violated the statute. See New Hampshire Challenge, Inc. v. Commissioner, New Hampshire Department of Education, 142 N.H. 246, 249 (1997); see also Goode v. New Hampshire Office of the Legislative Budget Assistant, 145 N.H. 451, 455 (2000).

The relevant facts in this case are not in dispute. On or about October 25, 2018, the Appellant requested copies of the arbitration decisions. The Union immediately objected. The City found itself in a Catch-22. On one hand, the City recognized its obligation under NH RSA 91-A:4, I, to produce to the Appellant all responsive governmental records in its possession, custody, or control. On the other hand, the City also recognized that the Union had at least a colorable argument that releasing the arbitration decisions publicly would violate NH RSA 91-A:5, IV. In an effort to resolve this dilemma, the undersigned legal counsel for the City suggested that the Appellant seek clarification and direction from the Superior Court. Much to the chagrin of both the Appellant and the City, Superior Court Justice Messer found the Union's argument more than colorable, ruling that the City's release of the arbitration decisions would in fact violate NH RSA 91-A:5, IV.

If Judge Messer's decision stands on appeal (and thus, if there is never a predicate finding either by the Superior Court or by this Court that the Appellant's lawsuit was necessary to make the arbitration decisions public) then clearly the Appellant has no basis to recover its attorney's fees. However, as a matter of New Hampshire law, even if Judge Messer's decision is reversed by this Court, the Appellant is still not entitled to recover its attorney's fees.

In Voelbel, this Court overturned an award of attorney's fees under the New Hampshire Right-to-Know Law. The Supreme Court based its decision on findings that the defendant-Selectmen had followed the direction of legal counsel; and that the Selectmen's violation of the Right-to-Know Law had not been obvious, deliberate, or willful. 140 N.H. at 448. In the present case, the City's decision to withhold the arbitration decisions and to steer the matter toward Superior Court was likewise at the direction of legal counsel. Further, and perhaps more important, in the face of Judge Messer's precise and thoughtful decision in the case below, it is simply impossible now to second guess the City and find that its decision to withhold the arbitration decisions was an obvious, deliberate, or willful violation of NH RSA 91-A. See, Goode, 145 N.H. at 455 (Supreme Court reverses Superior Court and finds a violation of NH RSA 91-A, but refuses to award attorney's fees absent evidence that the defendant knew or should have known that its interpretation of an exception to the Right-to-Know Law was incorrect).

CONCLUSION

For the foregoing reasons, including particularly those legal arguments raised by the Appellant in its brief, the City agrees that the arbitration decisions should be released to the public. The Appellant is not, however, entitled to recover its attorney's fees, even if the Superior Court's decision is reversed.

REQUEST FOR ORAL ARGUMENT

The City respectfully requests to participate in oral argument to address the Appellant's claim for attorney's fees. The City believes that five (5) minutes of oral argument is sufficient for this purpose. Attorney Thomas M. Closson will present the City's oral argument.

Respectfully submitted,
City of Portsmouth
By its attorneys,
Jackson Lewis P.C.

Dated: August 7, 2019

/s/ Thomas M. Closson
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STATEMENT OF COMPLIANCE

I hereby certify that this brief complies with Supreme Court Rule 16(11) and that the brief contains 1647 words. I also hereby certify that this brief complies with Supreme Court Rules 26(2)-(4).

Dated: August 7, 2019

/s/ Thomas M. Closson
Thomas M. Closson
NH Bar #9966

CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2019, I provided a true and exact copy of this brief to Gilles R. Bissonnette, Richard C. Gagliuso, and Peter Perroni, all counsel of record, via first class mail postage prepaid and through the New Hampshire Supreme Court's electronic filing system.

Dated: August 7, 2019

/s/ Thomas M. Closson
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