THE STATE OF NEW HAMSPHIRE
THE GOVERNOR AND THE EXECUTIVE COUNCIL

Docket #10-001

In Re: Mark Bodi

MOTION TO EXCLUDE TESTIMONY OF SENATOR HASSAN AND SENATOR D'ALLESANDRO

NOW COMES Attorney General Michael A. Delaney, by and through counsel, the Office of the Attorney General, and respectfully moves to exclude testimony from Senators Hassan and D'Allesandro. In support thereof, the Attorney General says the following:

1) Commissioner Bodi has listed Senator Maggie Hassan and Senator Lou D'Allesandro on his list of potential witnesses.

2) Upon information and belief, undersigned counsel assert that neither witness has personal knowledge about the events for which the commissioner's removal is being sought. Accordingly, they should be excluded as witnesses.

3) The Petition for Removal alleges that Commissioner Bodi engaged in malfeasance or misfeasance by interfering with an on-going law enforcement investigation for political reasons, warranting removal from office. Specifically, the petition alleges that Commissioner Bodi ordered Enforcement Director Edwards to return physical evidence to a tavern owner—evidence that had been lawfully seized pursuant to a search warrant as part of an on-going investigation—in an effort to placate Representative Dan Eaton. Further, it alleges that as a result of the commissioner's interference, Director Edwards made a decision to issue a charge against the Railroad Tavern prematurely, to avoid being ordered by Commissioner Bodi to forego enforcement action against the tavern in a further effort to mollify Representative Eaton.

4) As will become evident at the hearing, there is little dispute about the operative facts in this case. Commissioner Bodi has acknowledged, under oath, that in response to a telephone call from Representative Dan Eaton, he ordered Director Edwards to release evidence that had been seized pursuant to a search warrant and return it to the Railroad Tavern, at a point when the investigation was of the tavern was still on-going. Further, he has acknowledged that he met with Representative Eaton and the tavern owner just days after an administrative notice had been issued against the owner, and gave some assurances to the owner about how the case would proceed.

5) The request for the commissioner's removal is based solely on his conduct during that specific time period. The petition does not allege that the commissioner's performance in other aspects of his job, such as marketing or operations, has been deficient. The sole issue before the Governor and Council is whether a liquor commissioner who injects himself into, and directs, an on-going law enforcement investigation for political purposes should remain in a position with law enforcement oversight.

6) To the knowledge of undersigned counsel, neither Senator Hassan nor Senator D'Allesandro can offer any insight into the events surrounding the return of the property to the Railroad Tavern or the handling of the enforcement action against the Tavern. Upon information and belief, counsel anticipates that the two senators may be called to testify about Commissioner Bodi's general character or the legislation that he advanced beginning in 2009.

7) Such testimony would be irrelevant to the narrow issue before this body--whether it is appropriate to allow a public official, in a position of control over a law enforcement agency, to remain in office after he injected himself into an on-going law enforcement investigation to advance political interests. For that reason, the commissioner should be precluded from calling

either senator as a witness. *See* RSA 541-A:33, II (an officer presiding over an adjudicative hearing may exclude evidence that is irrelevant, immaterial, or unduly repetitious); Jus 813.04 (receipt of evidence is governed by RSA 541-A:33). There is no evidence that any former liquor commissioner engaged in the type of conduct alleged in the petition, and thus their performance as commissioners makes it no more or less likely that removal should be ordered in this case. *See* N.H.R. Ev 401 ("Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence.).

8) If, however, this body is inclined to permit testimony by either of the senators, Commisioner Bodi should be required to make an offer of proof to counsel for the Governor and Council prior to the hearing on the petition and allow undersigned counsel the opportunity to respond.

WHEREFORE, the Attorney General respectfully requests that the Governor and Executive Counsel:

(a) Preclude Commissioner Bodi from calling either Senator Hassan or Senator D'Allesandro as a witness; or in the alternative;

(b) Require Commissioner Bodi to make an offer of proof consistent with paragraph 8 above; and

(c) Grant such further relief as may be deemed just.

Respectfully submitted,

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September 10, 2010

I hereby certify that a copy of the foregoing was mailed this day, postage prepaid, to Philip T. McLaughlin, counsel of record.

Ann M. Rice