THE STATE OF NEW HAMPSHIRE

THE GOVERNOR AND THE EXECUTIVE COUNCIL

Docket No. 2010-02

In re: Peter Hildredth

PROVISIONAL ORDER RE MOTION FOR DISCOVERY

The following Provisional Order is issued in response to Commissioner Peter C. Hildreth's Motion for Discovery, Etc., which was filed on October 15, 2010. This Provisional Order is being issued pursuant to the authority granted to the undersigned by way of an Order entered by the Governor and Council on or about October 11, 2010. This order does not address Commissioner Hildreth's request for the Governor's deposition. A separate ruling on that request will issue for the reasons stated in that ruling.

PRODUCTION OF DOCUMENTS

Commissioner Hildreth, through his counsel, has moved the Governor and Executive Council to "order" the discovery and production of 11 categories of documents, which may or may not be in the control and custody of the Governor and Council, state agencies and/or entities. In addition, Commissioner Hildreth has requested an "order authorizing and requiring" the depositions of several individuals, most of whom are either current or former State employees and many of whom are not specifically named (e.g. "Members of the Attorney Generals staff.", "Staff of the New Hampshire Banking Department").

Commissioner Hildreth has provided no authority to support his contention that the Governor and/or Executive Council have the authority, explicit or otherwise, to

"order" the production of the documents requested and/or the attendance of individuals at the depositions requested.

In addition, other than a representation that these same documents were requested in July 2010, months prior to the filing and acceptance of the petition for removal, the Motion for Discovery fails to address what efforts, if any, were undertaken by the Commissioner and/or his counsel to obtain copies of the documents from their custodians voluntarily in accordance with the administrative rules adopted for this removal proceeding. See Jus. 811.01. Similarly, Commissioner Hildreth has not indicated that he or his counsel have contacted any of the proposed deponents to determine whether or not they would voluntarily submit to the requested depositions.

Attorney Peter Krupp, Special Counsel to the Governor and Executive Council has indicated a willingness to produce most, if not all, of the documents in his possession in response to Commissioner Hildreth's Motion. The Governor's office has also indicated that it will voluntarily produce documents that are responsive to Paragraph No. 5 of the discovery request. In addition, Commissioner Hildreth's counsel has been advised that the request for documents contained in Paragraph 3 of the discovery request would be brought to the attention of the Governor and Council at its next regularly scheduled meeting.

With respect to those documents not in Attorney Krupp's possession, or otherwise agreed to be produced, counsel was also advised that Assistant Environmental Services Commissioner, Michael Walls, had been designated by the Attorney General to represent the Banking Department with respect to discovery request for documents from that department. Commissioner Hildreth should in the first instance submit the request for the

documents and information to the agency or individual with custody over the information. We note that a request for voluntary production of documents is not the only option for Commissioner Hildreth to obtain discovery from third parties in this matter. Under New Hampshire law, a party to a proceeding before a tribunal without the power to order discovery is not foreclosed from obtaining that discovery. A court, sitting in equity, has jurisdiction to order that discovery may be obtained from a third party in certain circumstances; even when no proceeding is pending. *Robbins v. Kalwell Corporation*, 120 N.H. 451, 453 (1980). This jurisdiction may be invoked when there "is no plain, adequate and complete remedy at law." *Id.* at 452 (citing RSA 498:1).

In light of the fact that the Governor and Council have neither statutory nor inherent authority to compel the production of the requested documents not in their custody and/or control, Commissioner Hildreth's Motion for Discovery as it relates to the production of such documents is denied.

## REQUEST FOR DEPOSITIONS

Commissioner Hildreth has also requested an Order authorizing and requiring the depositions of several listed individuals.[1] No authority for the issuance of such an Order has been provided. A reasoned reading of RSA 516:4, which allows a Justice of the Peace to issue a writ for a deposition "in any manner or cause in which the same may be lawfully taken" compels the conclusion that there must be some other authority authorizing the deposition before a subpoena may issue. In the absence of such other authority, RSA 516:4 does not provide blanket authorization for the issuance of

[1] Included among the individuals requested to be deposed is Governor John H. Lynch. A separate ruling with respect to this request has been entered for the reasons stated in that ruling.

subpoenas to compel the attendance of witnesses for their depositions. Commissioner Hildreth's motion does not provide any other authority for the issuance of subpoenas for discovery depositions in a removal proceeding. In the absence of such authority, an order authorizing or compelling the depositions which are being requested would be unenforceable.

Here again, we believe that the absence of such authority by the Governor and Executive Council does not foreclose Commissioner Hildreth's ability to seek these depositions from the Superior Court. *Robbins v. Kalwell Corporation*, 120 N.H. 451, 453 (1980).

Because we conclude that the Governor and Council have no inherent authority to compel such testimony, the request for an order authorizing and requiring discovery depositions is denied.

HON. JOHN H. LYNCH

By Donald J. Perrault
for Jeffrey A. Meyers, Esq.

HON. MEMBERS OF THE NEW
HAMPSHIRE EXECUTIVE COUNCIL

By Donald J. Perrault
Donald J. Perrault, Esq.

Dated: October 29, 2010

## NOTICE TO PARTIES AND COUNSEL

This provisional order is issued by Attorneys Jeffrey A. Meyers and Donald J. Perrault pursuant to the Order issued by the Governor and Executive Council dated October 11, 2010. Under the terms of that Order, any decision that we render in this proceeding is subject to immediate appeal to the Governor and Executive Council. Any party aggrieved by this provisional order, may appeal this order to the Governor and Executive Council.