

THE STATE OF NEW HAMPSHIRE
THE GOVERNOR AND THE EXECUTIVE COUNCIL

Docket No. 2010-002

In re: Peter Hildreth

PROVISIONAL ORDER RE MOTION FOR
PAYMENT FOR LEGAL COSTS AND FEES

This Provisional Order is issued in response to Commissioner Peter C. Hildreth's Motion for Constitutionally Fair and Equal Treatment as to Legal Costs and Fees which was filed on October 19, 2010, and pursuant to the authority granted to the undersigned by way of an Order entered by the Governor and Council on October 11, 2010.

Commissioner Hildreth, relying principally on *King v. Thomson*, 119 N.H. 219 (1979), has suggested that the state and federal constitutions create a constitutionally protected right to legal counsel at state expense during the pendency of a removal proceeding brought pursuant to RSA 4:1. He further contends that this authority entitles him to reimbursement of his attorney's fees and costs incurred to date and during the pendency of the present removal proceeding.

Special Counsel for the Governor and Council opposes Commissioner Hildreth's motion on the basis that neither of the removal statutes at issue, RSA 4:1 and RSA 383:3, require counsel for a removal proceeding, and the current version of RSA 4:1 precludes the payment of counsel fees for a respondent unless and until the respondent is deemed to be a "prevailing party."

Because the Supreme Court's decision in *King v. Thomson, supra*, awarding legal fees to respondent King is grounded solely upon the language of RSA 4:1, in effect at that time, and because the legislature has subsequently amended RSA 4:1 to restrict the

award of legal fees in removal proceedings under RSA 4:1 to a respondent who is deemed to be a “prevailing party,” we believe that the Governor and Executive Council is statutorily barred from ordering the prospective payment of legal fees in a removal proceeding under RSA 4:1.

In *King*, the Supreme Court held that the Executive Council should have provided counsel to King at the expense of the State. *King, supra* at 222. The Court, however, based its decision in that case solely on the language of RSA 4:1 as it was then codified. Neither in *King* nor in any subsequent decision has the New Hampshire Supreme Court found that the New Hampshire or Federal constitutions compel the provision of paid counsel to a state official during the pendency of a removal proceeding under RSA 4:1. *See King v. Thomson*, 119 N.H. at 221 (“Several statutes demonstrate a legislative intention that counsel fees and expenses of a state official who defends a state interest must be paid by the State.”)

At the time that the *King* removal hearing was pending, RSA 4:1 was silent with respect to the payment of legal fees and costs. By the time the Supreme Court issued its 1979 decision in *King*, the legislature had amended the statute to include for the first time a provision for the payment of “equal and reasonable legal fees for all parties.” *King, supra*, at 222.

Significantly, Commissioner Hildreth’s motion completely overlooks the more recent amendments of RSA 4:1 by the Legislature in 1981 and 2001. In its current iteration; which was in effect at the time the Governor and Executive Council voted to accept the removal petition against Commissioner Hildreth, the statute explicitly provides that “No official [subject to removal of petition before the Governor and

Executive Council] shall be entitled to have any legal fees paid by the state unless the Attorney General determines that he or she is the prevailing party.” 2001 Chapter Laws 192:1 (HB 719) (codified at RSA 4:1,IV). Implicit in this provision is the requirement that the removal proceedings not only be concluded, but that there be a determination by the Attorney General that the party seeking legal fees has, in fact, prevailed. In the face of such direct and proscriptive language from the legislature, Commissioner Hildreth’s reliance upon earlier versions of this statute is misplaced.

Commissioner Hildreth’s motion also suggests that RSA 7:12 may serve as authority for the payment of counsel during a removal proceeding. RSA 7:12 authorizes the Attorney General, upon the prior approval of the joint legislative fiscal committee and the governor and council, to employ counsel “in case of reasonable necessity” and pay them reasonable compensation. In light of the proscriptive language of the more specific statute, RSA 4:1, which limits the payment of counsel fees to a prevailing party, the payment of such fees under the more general statute, RSA 7:12, on a prospective basis, even if sanctioned by the Attorney General, is inconsistent with the legislative intent of RSA 4:1.

In light of the plain language of RSA 4:1(IV), and in the absence of any authority establishing a state or federal constitutional right to paid legal counsel during the pendency of a removal hearing under RSA 4:1, Commissioner Hildreth’s motion for legal costs and fees is denied.

HON. JOHN H. LYNCH

By 
Jeffrey A. Meyers, Esq.

HON. MEMBERS OF THE NEW
HAMPSHIRE EXECUTIVE COUNCIL

By 
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.