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COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss

SUPERIOR COURT DEPARTMENT  
OF THE TRIAL COURT  
CIVIL ACTION NO. 2006-02328D

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WILLIAM M. LONERGAN and  
DIANE WHITNEY-WALLACE,  
ON BEHALF OF THEMSELVES AND  
ALL OTHERS SIMILARLY SITUATED,  
Plaintiffs and Defendants-in-Counterclaim

Plaintiffs,

v.

JAMES W. FOLEY,  
PETER A. FOOTE,  
ALEXANDER B. C. MULHOLLAND, JR.,  
DONALD F. WHISTON,  
ELIZABETH A. KILCOYNE,  
PATRICK J. MCNALLY AND  
EDWARD B. RAUSCHER,  
FEOFFEEES OF THE GRAMMAR SCHOOL  
IN THE TOWN OF IPSWICH,  
Defendants and Plaintiffs-in-Counterclaim

v.

DISTRICT ATTORNEY FOR THE ESSEX  
DISTRICT, ATTORNEY GENERAL OF THE  
COMMONWEALTH OF MASSACHUSETTS,  
ET ALS.  
Defendants-in-Counterclaim

Defendants.

**FILED**  
IN THE SUPERIOR COURT  
FOR THE COUNTY OF ESSEX

MAY 27 2008

*Thomas H. Marshall*  
CLERK

**PLAINTIFFS' OPPOSITION TO MOTION OF  
DEFENDANT JAMES W. FOLEY FOR A PROTECTIVE ORDER**

### **i. Introduction**

Plaintiffs hereby oppose the Motion of Defendant James W. Foley (“Mr. Foley”) for a Protective Order (the “Motion”). The Motion seeks to protect evidence that is plainly discoverable under Mass. R. Civ. P. 26 and which Mr. Foley previously agreed to produce under oath at his deposition. Specifically, Mr. Foley is seeking to keep Plaintiffs from discovering the contents of his personnel file from when he worked at the Wenham Police Department. On information and belief, the contents of that file will directly contradict the statements that Mr. Foley made under oath at his deposition as to the reasons he left the department. Thus, his personnel file is directly relevant to the credibility of Mr. Foley, who will be called to testify at trial. Therefore, for the reasons more fully set forth below, the Court should deny the Motion in its entirety.

### **ii. Factual Background**

Plaintiffs filed this case – on behalf of themselves and others similarly situated – largely as an effort to seek an adjudication of their property rights and other legal rights *vis-à-vis* the Defendants, each of whom are “Feoffees” under a 1660 grant of the land in Little Neck in Ipswich, Massachusetts (“Little Neck”) for the benefit of the Ipswich Grammar School. Specifically, the Feoffees are alleged to be owners of Little Neck and, accordingly, to be lessors of approximately 200 parcels of land on Little Neck to the several residents (the “Little Neck Residents”) who own cottages there. In other words, the Little Neck Residents own their own cottages but not, supposedly, the land underneath the cottages. The Feoffees have purported to lease this land to each of the Little Neck Residents and their predecessors for several hundred years.

In recent years, the Feoffees have engaged in a campaign to extract money, to which they are not entitled, from Plaintiffs. Most recently, the Feoffees have drastically escalated rent well-beyond the fair market value. Further, the Feoffees have attempted to force a completely inequitable lease on Plaintiffs in which their rents would continue to rise at an unfair rate, threatening that Plaintiffs must remove their homes from the land or the Feoffees will take ownership of them if Plaintiffs do not accept the proposed lease terms. Mr. Foley is the Chairman of the Feoffees and, upon information and belief, is the primary actor behind the Feoffees' scheme to extract unfair rents and other concessions out of the Little Neck Residents. Left with no other alternative, Plaintiffs ultimately filed this lawsuit and commenced discovery.

Given the centrality of Mr. Foley to Plaintiffs' case against the Feoffees, on April 4, 2008, Plaintiffs took Mr. Foley's deposition. During his deposition, as part of the questioning of his background, the following exchange occurred concerning Mr. Foley's departure from the Wenham Police Department:

Q: Now, were there any disciplinary reasons involved in your leaving the job as police officer in Wenham?

A: I've never been disciplined, no.

Q: My question to you, were there any disciplinary reasons involved in your leaving the police department of the Town of Wenham?

A: No, I resigned from the Town of Wenham.

Q: And there were no disciplinary reasons?

A: I resigned.

Q: No?

A: No, I resigned.

(Foley Dep. p. 16, attached hereto as Exhibit A.).

Therefore, Mr. Foley was expressly asked – with his counsel, Attorney William Sheehan III present – whether he had a problem with Plaintiffs subpoenaing his personnel file from the Wenham Police Department, in the following exchange:

Q: Do you have any objection if we request a copy of your personnel file with the Wenham Police Department?

...

A: I don't think I have a problem with producing a file.

...

Q: My question to you was whether you had an objection to our asking the Wenham Police Department to produce a copy of your personnel file?

A: I don't know.

MR. SHEEHAN: You may answer.

A: No, no.

(Id. at 61-62, attached hereto as Exhibit A.). Following the deposition, Plaintiffs subpoenaed the records from the Wenham Police Department. Upon reflection, however, Mr. Foley apparently reconsidered his decision to allow Plaintiffs to contrast his testimony with the actual contents of his personnel file which would reveal the actual reasons for his departure. Mr. Foley, therefore, has filed the Motion.

### iii. Argument

**THE COURT SHOULD DENY THE MOTION FOR PROTECTIVE ORDER BECAUSE MR. FOLEY'S PERSONNEL FILE WILL EITHER CONFIRM OR CONTRADICT HIS SWORN TESTIMONY UNDER OATH AND, THEREFORE, GOES DIRECTLY TO THIS WITNESS' CREDIBILITY**

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Under Mass. R. Civ. P. 26, a party may obtain discovery concerning any matter not privileged that is likely to lead to the discovery of admissible evidence. See Mass. R. Civ. P. 26(b)(1). Citing this rule, Massachusetts courts have routinely held that “discovery, by its

nature, is quite broad.” Sullivan v. Chief Justice for Admin. and Mgmt. of Trial Court, 448 Mass. 15, 35, n. 11 (2006); see also In re Subpoena Duces Tecum, 445 Mass. 685, 691 (2006).

As with most discovery and evidentiary issues, judges in this Commonwealth have wide latitude in deciding the relevance and admissibility of evidence that bears on the credibility of a party or a witness. Specifically, as the Supreme Judicial Court of Massachusetts has repeatedly held, “[a] judge, in his discretion, may permit impeachment by extrinsic evidence on collateral matters.” Commonwealth v. Ferguson, 425 Mass. 349, 355 (1997) (citations omitted). Likewise, “it is not error to admit such testimony.” Commonwealth v. Zezima, 365 Mass. 238, 242 n. 5 (1974) (citations omitted).

The case of Commonwealth v. Fleury-Ehrhart, 20 Mass. App. Ct. 429 (1985), although a criminal case, bears similarity to the evidentiary issues presented by the Motion and, therefore, is instructive. In Fleury-Ehrhart, the defendant, a physician, appealed his conviction for indecent assault and battery of a minor on several grounds, including that the trial court improperly allowed the impeachment of the defendant by cross-examination concerning why the defendant left a previous, unrelated employer. See id., 20 Mass. App. Ct. 429, 432-35 (1985). At trial, the defendant explained that he left because he felt it was time for a change. See id. at 432-33. The trial court, however, permitted the prosecutor to impeach the defendant with information obtained from the defendant’s personnel file which showed that his employer decided not to renew the defendant’s hospital staff privileges because of an allegation of having abused a patient. See id. at 433. The Court of Appeals held that the trial court’s ruling was not an abuse of its discretion even though the information from the personnel records concerned a matter unrelated to the issues of the case *and* even though the information was potentially prejudicial. See id. at 433-34. As the Appeals Court held, “[t]he impeachment evidence tended to cast doubt

on the defendant's credibility because it created a basis from which the jury might infer that because the defendant's testimony as to why he left [his old, unrelated employer] was not accurate, other portions of his testimony also might be inaccurate." Id. at 434.

Here, as in Fleury-Ehrhart, information concerning Mr. Foley's employment with the Wenham Police Department is relevant because that information can be used to impeach Mr. Foley during his testimony at trial. During his deposition, Foley repeatedly alleged that there were no disciplinary reasons involved in his leaving the Wenham Police Department. (Foley Dep. p. 16, attached hereto as Exhibit A.) Upon information and belief, however, Mr. Foley was asked to leave the Wenham Police Department for disciplinary reasons. Consequently, Mr. Foley's answers under oath were untruthful. Moreover, given the fact that the Feoffees are a governmental body and Mr. Foley is, thereby, a governmental official,<sup>1</sup> and given the fact that this suit is based upon the unlawful and inequitable actions of Mr. Foley and his fellow Feoffees, any evidence establishing that Mr. Foley lied under oath is especially relevant to the Little Neck Residents' allegation that Mr. Foley made misrepresentations to them and otherwise acted inequitably and wrongfully. Thus, Mr. Foley's Motion should be denied and Plaintiffs should be permitted to continue with their subpoena of his employment records.

#### iv. Conclusion

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Mr. Foley's Motion for a Protective Order and allow Plaintiffs to subpoena his employment records from the

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<sup>1</sup> See December 11, 2006 Opinion of the District Attorney, holding that the Feoffees are a governmental body, attached hereto as Exhibit B.

Wenham Police Department.

Respectfully submitted,

WILLIAM M. LONERGAN and  
DIANE WHITNEY-WALLACE

By their attorneys,



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May 15, 2008

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the above document  
was served upon the attorney of record for each of the  
party by (hand) (mail) on 5-15-08

