STATE OF RHODE ISLAND | SUPREME COURT

WILLIAM FELKNER :
:
v. : No. 2009-23
:
CHARIHO SCHOOL COMMITTEE :

REPLY BRIEF of PETITIONER

On the Issuance of a Statutory Petition in Equity in the Nature of Quo Warranto to the

Chariho School Committee

Submitted March 5, 2009 by:

Nicholas Gorham #4136
Christopher Anderson #6647
GORHAM & GORHAM, Inc.
P.O. Box 46, (25 Danielson Pike)
Scituate, RI 02857-0046
Ph. 401.647.1400 fax 401.647.1446

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Chariho cites the case of McMann v. State Ethics Com'n, 590 N.E.2d 693, 697 (Mass. App. Ct., 1992) in support of its argument that Chariho is an instrumentality of Hopkinton and that, therefore, the Hopkinton Town Charter's proscription of dual office holding applies to petitioner's service on the school committee. Careful examination of McMann and Massachusetts law on regional school districts leaves little doubt that Chariho's argument is not only wrong, but actually supports petitioner's claim to office in Rhode Island.

In McMann, the appellate court found that a member of a regional school district had violated the Commonwealth's ethics law, which pertained only to "municipal agenc[ies]," by voting on school district matters in which he had a financial interest or other conflict of interest 337 times.

The appellate court held that the regional school district was a "municipal agency," even though it wasn't specifically defined as such under any Massachusetts statute. In so finding, the court said, as Chariho argues at page 11 of its brief, that regional school districts (in Massachusetts) are "instrumentalities" of their member municipalities. Likewise, it is true that Massachusetts' laws [Mass. Gen. L. ch. 71 §§14B-16I] providing for the creation of regional school districts is similar, in *some but not all* respects, to Rhode Island Title 16, chapter 3 "Establishment of Regional School Districts" and the Chariho Act [P.L. 1958 Ch. 55, as amended by P.L. 1986 ch. 286].

But there are also major differences between Massachusetts' and Rhode Island regional school district law (including the Chariho Act itself). In particular, the McMann court discussed one such difference in detail. Member municipalities in Massachusetts regional school districts have "veto power" over all of the school district's financial decisions. As the court noted in McMann:

> The RSD [regional school district] is dependent upon the member municipalities for financial support. The RSD committee determines an annual budget and submits the budget to the member municipalities for approval. The budget must be approved by two-thirds of the member municipalities. If the necessary approval is not received, the RSD committee must amend the budget and resubmit it for approval. The member municipalities also have control over the amount of debt the RSD may incur. Each member has veto power over major costs not normally funded in the annual budget. G.L. c. 71, §§ 14D and 16(d)[1]. [citation omitted] What is abundantly clear is that the municipalities involved use the school district as the means to carry out their educational responsibilities and that their participation in formative and financial matters is substantial. *Id.* at 697 [emphasis added].

Such "veto" power of any member municipality is notably absent from both the Chariho charter and Title 16 chapter 3 of Rhode Island's General Laws. There simply isn't any such municipal "veto power" in Hopkinton, or anywhere else in our state. Chariho's attempt to equate itself with Massachusetts' school districts via ***McMann*** is misleading, as are many other of Chariho's citations in its brief.[2]

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[1] Mass. Gen L. ch. 71 §16(d) provides that with regard to any "extraordinary repairs" or other major expenditures involving debt obligations of ten years or less:

> "written notice of the amount of the debt and of the general purposes for which it was authorized shall be given to the board of selectmen in each of the towns comprising the district not later than seven days after the date on which said debt was authorized by the district committee; and no debt may be incurred until the expiration of sixty days from the date on which said debt was so authorized; and prior to the expiration of said period any member town of the regional school district may hold a town meeting for the purpose of expressing disapproval of the amount of debt authorized by the district committee, and if at such meeting a majority of the voters present and voting thereon express disapproval of the amount authorized by the district committee, the said debt shall not be incurred….Mass.Gen.L. ch. 71 § 16

[2] For example, on page 16, and after the section titled **II. The Doctrine of Incompatibility Precludes Mr. Felkner from Sitting on Both the Hopkinton Town Council and the Chariho School Committee**, Chariho's brief states "authorities from without the state have found that the offices of member of the school committee and member of a town council or comparable office are incompatible as a matter of law." This quote, together with its position in the memorandum, suggests to the reader that the four cases thereafter cited would contain a common law incompatibility analysis between the offices in question. However, examination of the cases

As noted in petitioners brief, this Court has established the standards by which to evaluate the existence of an incompatibility such to invalidate the holding of two offices simultaneously:

> **1:** incompatibility will be found when one office is subordinate to the other, or is to some degree subject to revision by the other. This cannot be at issue in this case. As separate bodies politic and corporate, neither the Hopkinton Town Council nor the Chariho

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reveals something far different. Matthews v. Morris, 151 S.E. 391, 392 (Ga. 1930), State ex rel. Barnhill v. Thompson, 29 S.E. 720, 721 (N.C. 1898) and State ex rel. Griffiths v. Superior Ct., 33 P.2d 94, 95 (Wash. 1934) were cases wherein a blanket statutory or Constitutional prohibition on dual office holding existed. These courts never addressed incompatibility. Further, the only case cited by Chariho that actually dealt with incompatibility of two offices (Thomas v. Abernathy Cty. Line Indep. Sch. Dist., 290 S.W. 152, 153 (Tex. Comm'n App. 1927) did so pursuant to a finding that the city council had "directory or supervisory powers" over the school department. In Thomas, the court stated:

> In our opinion the offices of school trustee and alderman are incompatible; for under our system there are in the city council . . . various *directory or supervisory powers* exertable in respect to school property located within the city or town and in respect to the duties of school trustee performable within its limits . . .. If the same person could be a school trustee and a member of the city council . . . at the same time, school policies, in many important respects, would be subject to direction of the council . . . instead of that of the trustees. Id. (emphasis added).

While it impossible to ascertain precisely what "directory and supervisory powers" the Texas court was referring to in 1927, it is clear that the court found them to exist. As previously argued, as a matter of law, the Hopkinton Town Council has no directory, supervisory or other power over the Chariho Regional School Committee.

On page 26 under the heading, **E. The Hopkinton Town Council Fills Vacancies on the Chariho School Committee.**, Chariho states "Where one body can appoint the members of the other, the two offices are inherently incompatible." Chariho sites LaGrange City Council v. Hall Bros. Co. of Oldham Cty. Inc., 3 S.W.3d at 770 (Ky. App. Ct. 1999) in support of this proposition. Again, one would expect, based upon the substance of the argument presented, that the factual background of LaGrange would bear some similarity to the instant matter. It does not. LaGrange is a Kentucky case involving the incompatibility of simultaneously holding positions on a Town Council and Planning Board. In Kentucky, the Town Council appoints ***all*** the members of the Planning Board; further, the Town Council has direct veto power over any recommendation made by the Planning Board. These were the factors used to find incompatibility by the Kentucky Appellate Court. None of these factors are present in the instant case. Chariho's quote is a gross oversimplification of the reasoning in LaGrange.

School Committee is inferior to the other and neither can exercise revisory power over the other;

2: incompatibility will exist "where the functions of the two offices are inherently inconsistent *and* repugnant." State ex rel. Metcalf v. Goff, 9 A. 226, 226-27 (R.I. 1887), Quoted in, e.g., McCabe v. Kane, 221 A.2d 103, 106 (R.I. 1966). Further citing, Cummings v. Godin, 377 A.2d 1071, 1075 n.2 (R.I. 1977); Opinion to the Governor, 21 A.2d 267, 270 (R.I. 1941) (emphasis added).

Part II of Chariho's Brief seeks to create inherent inconsistencies that satisfy this second criterion. Chariho posits seven arguments: 1) Conflicting duties to the constituencies of the Chariho Regional School Department and the people of Hopkinton; 2) Co-equal power to enter into contracts, possibly with each other; 3) Police power as exercised by the Hopkinton Building Inspector over Chariho; 4) Chariho's Power of Eminent Domain over Hopkinton; 5) Power of Hopkinton Town Council to fill a vacancy on the Chariho School Committee; 6) Withdrawal by Hopkinton from the Regional School District; 7) Conflict between Hopkinton and Chariho under the Caruolo Act. In each case, the best Chariho can offer is the possibility that the two offices might interact from time to time. However, upon closer examination of each argument offered, there is always an answer to alleged conflict. In some cases State law provides the solution, and in no instance can it be shown that one entity has any semblance of control or revisory power over the other. Arguments number 1, 6 and 7 have been addresses at length in Petitioner's Brief at pages 10, 17 and 12 respectfully, and will not be repeated here.

Argument 2, Co-equal power to enter into contracts, possibly with each other.

Chariho correctly points out that both Chariho and the Town of Hopkinton have the power to enter into contracts. Chariho points to only one instance where Chariho and Hopkinton have entered into a "contract", which happens to be in the form of a lease for the Ashaway and Hope Valley Schools. While Chariho cites the Chariho Act, 1986 R.I. Pub. L. ch. 286, §2(5),

Chariho fails to explain the significance of that law to the matter at hand. Far from being co-equal entities entering into a lease transaction at arms length, negotiating for the best possible outcome, the terms of the lease relied on by Chariho are completely dictated by state law via the enactment of the Chariho Charter. Charter section 2(5) states:

> The regional school district herein shall be authorized to lease from the respective towns, Charlestown, Richmond and Hopkinton, for the sum of one dollar ($1.00) per year, existing school buildings and the land upon which they are sited presently owned by the respective towns, and the said towns shall retain title to said buildings and land. The regional school district will assume and pay for all maintenance, upkeep and operation of the buildings leased by it from the respective towns.

The "contract" cited by Chariho is little more than a memorialization of the terms set by the State. Hopkinton has no choice but to provide the school buildings to Chariho, and Chariho has no choice but to maintain them and pay the associated expenses plus $1.00.

In further support of its "contract" argument, Chariho states "The Chariho School Committee also purchases water from the Town of Hopkinton." One would assume from the context of Chariho's statement, and the substance of the legal opinions cited, that Chariho is arguing it has a contract with Hopkinton to purchase water. One might also presume that there is some room to negotiate the rate charged for the water it purchases from Hopkinton. Of course, the entire argument is predicated on the assertion that Chariho purchases water from Hopkinton . . . it does not.[3] There are two school buildings in Hopkinton. Water for the Ashaway School is supplied by a well and is not connected to the one line municipal water system. The Hope

[3] According to the Hopkinton Town Treasurer, Hopkinton functions as a "pass-through" billing entity for the Richmond Water Supply Board (RWSB). RWSB sends the bills for Hopkinton customers to the Hopkinton Town Treasure for collection. Hopkinton sends the bills out, collects the money and sends the money back to the RWSB. Hopkinton receives a small stipend that goes into a "lock-box" type fund for maintenance and repair of water system infrastructure in Hopkinton. However, Hopkinton has no say over the rates charged to the users even if the maintenance costs incurred by Hopkinton exceed the "lock-box" balance.

Valley School gets its water from the ***Richmond Water Supply Board***. Hopkinton has no control what-so-ever over the rate charged by the ***Richmond Water Supply Board*** for the water supplied to Chariho via the Hope Valley School. There is no possibility of a contract between Chariho and Hopkinton for water as *Hopkinton has no water to sell*. Chariho's contract arguments are predicated on false assumptions and should be dismissed.

Argument 3, Police power as exercised by the Hopkinton Building Inspector over Chariho

Chariho posits that Hopkinton, via its Building Inspector, can exercise police power over Chariho. The fatal flaw with this argument is that Building Inspectors across this state derive their authority from State Law, not Town Ordinance. See R.I.G.L. § 23-27.3-107.5, Local Building Official – Powers and Duties. The Hopkinton Town Council does not exercise any authority over the performance of the Building Inspector's duties, nor can the Hopkinton Town Council establish the terms of the Building Code enforced by the Building Inspector. See R.I.G.L. § 23-27.3-100.1.7 (establishing the state building code as *the* building code and abolishing any local codes). The Building Inspector is autonomous from the Town Council.[4]

Argument 4, Chariho's Power of Eminent Domain over Hopkinton

There are at least two reasons why Chariho's eminent domain argument will never ripen into an actual controversy between Chariho and Hopkinton. First, the power of eminent domain involves the taking of *private* land for a public purpose. Chariho's legal authority to take public land otherwise belonging to Hopkinton is dubious at best. Second, the Chariho Act seems to

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[4] Chariho, citing §§ 1490(3) and 3170(1) of the Hopkinton Charter, lastly insinuates that the Hopkinton Town Council could blackmail the Building Inspector into harassing the Chariho School Committee by toying with the Building Inspector's pay. This suggestion is not worthy of a response.

make it clear that title to the land used for school purposes shall remain with the member Town. See Chariho Act Section 2(5) "The regional school district herein shall be authorized to lease . . . existing school buildings and the land upon which they are sited . . . and the said towns shall retain title to said buildings and land." The Legislature could have transferred title for said buildings and land to Chariho if it so wished. This seems to suggest Legislative intent that land of the member towns used for school purposes shall remain land of the member towns and not transfer to Chariho. While Chariho's legal right to exercise eminent domain power over the public lands of Hopkinton is interesting in the abstract, it has nothing to do with Mr. Felkner's right to hold the offices he was elected to.

Chariho's supposition that there might be a difference of opinion between the School Committee and The Hopkinton Town Council over whether or not to build a new school versus rehabilitating an existing school is not only overly speculative, but fails to take into account the fact that the Hopkinton Town Council has absolutely no say in the matter. While Hopkinton may have an opinion, it has absolutely no control over when, where or how a new school might be built. Mr. Felkner has no ability to use his authority as a Councilman to influence or otherwise persuade Chariho to do anything since the Town Council has no power what-so-ever over the School Committee.

Argument 5, Power of Hopkinton Town Council to fill a vacancy on the Chariho School Committee

As previously noted in footnote 2, Chariho's support for this argument is questionable, relying on a case where the Town Council appoints all of the members of the Board in question. This clearly is not the case in the case at bar. The suggestion of course is that the opportunity to fill an unexpected vacancy on the Chariho School Committee equates to Hopkinton having

revisory power over the School Committee. The argument would make sense if the appointed member served at the pleasure of the Hopkinton Town Council, or if the Council could influence the appointed member after the appointment. The best analogy to dispel the suggestion of "revisory power via vacancy appointment" would be the appointment of this State's judges by the Governor. As the members of this Court know first hand, once appointed, the Executive branch retains no control over the performance of the appointed judge. Chariho's argument only makes sense if this court feels its members retain a duty or loyalty to the appointing authority. Just as with the judiciary of this state, once appointed, the replacement member on the Chariho School Committee owes no duty to the appointing authority, nor can said authority remove them. The efficiency and cost saving in avoiding a special election to fill an unexpected vacancy should not be confused with Town Council revisory power over the School Committee.

It should also be noted that Chariho's arguments are internally inconsistent. Chariho directly contradicts itself in parts I and III of its brief. In Part I, Chariho argues that the school district, as noted *supra* (citing *McMann*) is an "instrumentality" of its member towns. But later, in Part III (at page 33) of its brief, Chariho argues that:

> . . . the Town of Hopkinton, a body politic, is a constituent of the Chariho Regional School District . . . but the transitive, that the Chariho Regional School District is part of the Town of Hopkinton, is false.

While Chariho eagerly criticized Mr. Felkner for "donning and doffing his hats daily" [*Respondent's Memorandum in Support of Motion to Dismiss* at p. 2], at least Mr. Felkner changes only his hat. Chariho's best "donning and doffing" appears to be in the way it spins its arguments about whether Chariho is, or is not, a part of the town of Hopkinton.

Finally, Chariho has created at least some question about the votes taken to oust petitioner that requires clarification. On November 18, 2008 the vote to oust petitioner from the

Chariho Regional School Committee was 6-3-1. All six votes to oust petitioner came from Richmond (Members Cole, Day and Serra) and Charlestown (McQuaide, Polouski, Eaves), and the three voting against ousting petitioner were from Hopkinton (Members Vecchio and George Abbott) and Charlestown (Member Carney). The abstention was Member Petit (from Hopkinton) [5]

On January 13, 2009 the vote was 7-2, with the same six voting to oust petitioner, plus member Petite (from Hopkinton) voted to oust petitioner. Member Abbott, who was absent, did not vote. Members Vecchio and Carney voted to allow petitioner to remain on the school committee.

The membership of the Chariho committee is clearly factional along town lines, and town constituencies. To suggest that petitioner will fall short of the weighty, almost pious role envisioned by Chariho (at least in its brief, if not in its voting) for each of its members, simply because he was elected to the Hopkinton Town Council is purely fanciful. The Town Councils of Richmond and Charlestown, through their amicus briefs have had their say in this matter and their arguments are, not surprisingly, perfectly aligned with the votes cast by their school committee representation. But perhaps the most candid, cogent and unambiguous message in this case came from Hopkinton's town council, who adopted a resolution[6] (enclosed with this reply brief) at their last town council meeting which reads in part:

"As members of the Hopkinton Town Council we would like to clearly state we fully support William Felkner's efforts to obtain reinstatement to his seat on the Chariho School Committee. We commend Mr. Felkner for his tireless commitment to vindicating the rights of

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[5] In any event, this initial "ouster" vote was set aside by Judge Thompson due to lack of proper notice under the Open Meetings Act.G.L. 42-46-1 *et. seq.,* which, in turn led to the vote of January 13, 2009.

[6] The vote was 3-1, with member Kenney voting in opposition, and member Felkner recusing.

the people of Hopkinton in order to have the representative they elected, represent them on the school committee."

Conclusion

The Court should rule that petitioner may serve on the Chariho School Committee and Hopkinton Town Council.

WILLIAM FELKNER,
by his attorneys,

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Nicholas Gorham #4136

____
Christopher Anderson #6647
GORHAM & GORHAM, Inc.
P.O. Box 46, (25 Danielson Pike)
Scituate, RI 02857-0046
Ph. 401.647.1400 fax 401.647.1446

CERTIFICATION

I hereby certify that a copy to the above Reply Brief was sent via first class mail, to the counsel delineated below on this 5th day of March 2009.

____

Jon Anderson, Esq.
Edwards, Angell, Palmer & Dodge
2800 Financial Plaza
Providence, RI 02903

The Honorable Patrick C. Lynch
Thomas Palumbo, Esq., Assistant Attorney General
Attorney General, State of Rhode Island
150 South Main Street

Providence, RI 02903

Peter D. Ruggiro, Esq.
RUGGIERO ORTON & BROCHU
20 Centreville Road
Warwick RI 02886

Karen R. Ellsworth, Esq.
180 Matunuck School House Road
Wakefield RI 02879-6559

Letters to the Editor

School Committee's treatment of Felkner is way off base

As members of the Hopkinton Town Council we would like to clearly state we fully support William Felkner's efforts to obtain reinstatement to his seat on the Chariho School Committee. We commend Mr. Felkner for his tireless commitment to vindicating the rights of the people of Hopkinton in order to have the representative they elected, represent them on the School Committee. No matter how one feels about Mr. Felkner or his views, the high-handed and despotic way in which the School Committee has treated the issue of his dual representation imperils the rule of law and the rights of all of us.

It should be apparent to the most casual observer that the actions of [illegible] of the School Committee [illegible] declaring Mr. [illegible] vacant arose from the long-standing animosity that this body has shown him since the day he originally took his seat. His efforts to promote transparency, accountability and the interests of his constituency have been met with open hostility, personal insult and obstruction at every turn. Clearly, some of the School Committee members saw an opportunity to rid themselves of a thorn in their side and jumped at the chance without considering or caring about the ramifications. As a consequence, our town does not have its duly elected representative, Mr. Felkner was forced into a battle that he never sought, and has not been able to devote his time to the betterment of the Chariho School District.

The Hopkinton Charter is clear: Mr. Felkner may hold positions as both School Committee and Town Council Member. The arguments to the contrary offered by Chariho and the other two member towns are convoluted and unsound. Surely Hopkinton's interpretation of its own Charter should be accepted over the interpretation of parties whose objective is simply to silence Mr. Felkner's voice for responsible stewardship of the School District. We have every confidence that the Rhode Island Supreme Court will see through the charade engaged in by the School Committee and issue a decision that is truly in the best interests of the people of the Town of Hopkinton and the citizens of this state.

Mr. Felkner has indicated repeatedly that he would not allow his fight for his School Committee seat to become a drain on the Town or a sideshow detracting from the dignity and effectiveness of the Council. He has kept his word. He has personally retained able counsel who has advanced his cause skillfully. While we applaud the integrity he has shown in honoring this commitment, we wish to clearly indicate our support for his efforts and express our awareness of the critical nature of the dispute that will be before this state's highest court on March 9, 2009.

The people of Hopkinton have twice voted for Mr. Felkner to represent them. We hope and expect that our votes matter, the Rhode Island Supreme Court will recognize this and restore our duly elected representative to the Chariho School Committee.

Thomas E. Buck
Sylvia K. Thompson
Barbara Capalbo
Hopkinton Town Council

WESTERLY SUN MARCH 5, 2009