

STATE OF RHODE ISLAND

SUPREME COURT

WILLIAM FELKNER

v.

CHARIHO SCHOOL COMMITTEE

:
:
:
:
:

No. 2009-23

BRIEF of PETITIONER

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

Chariho School Committee

Submitted February 17, 2009 by:

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Introduction

The issue in this case is whether petitioner's duties as a member of the Hopkinton town council are so inconsistent with his duties as a member of the Chariho school committee that the people's will in the 2006 and 2008 elections, electing him to both, must be set aside by removing him from office. Petitioner's duties to his constituents engendered by his election to both offices may at times be redundant, duplicative and even superfluous, but never "revisory," "repugnant," "inherently inconsistent" or "incompatible." *Advisory Opinion to Governor*, 121 R.I. 64, 70, 394 A.2d 1355, 1358 (R.I. 1978).

Black's Law Dictionary, 5th Ed. (1979) defines "constituency" as "the inhabitants of an electoral district." An office holder owes undivided loyalty to his constituents. The law of incompatibility provides that a person cannot hold two offices if to do so results in a "conflict of duties" between the two and makes such undivided loyalty impossible. Petitioner serves only one constituency, the people of Hopkinton, in two offices that pertain to different matters, education and municipal government. There isn't, nor can there be, any inconsistency between the two offices.

Careful review of the Chariho charter leads inescapably to the conclusion that the intent was to safeguard *independent representation* of the constituency of each member town. If the will of the electors of Hopkinton electing petitioner to the school committee is subverted to the will of the school committee (all of whom voting to oust petitioner, but one, were from Richmond and Hopkinton), then the whole premise of independent

representation for each town will be lost. The Court should order the school committee to forthwith seat and recognize petitioner.

Facts

Petitioner is a resident of Hopkinton and was elected by the voters of Hopkinton:

- to a four year term on the school committee in November 2006.
- to a two year term on the Hopkinton town council in November 2008.

Neither the Chariho charter nor any statute prohibits holding both offices. The Hopkinton Town Charter (section 1240) provides that “No elected member of the Town Government shall hold more than one (1) elective position in the Town Government at the same time.” Chariho is not “Town Government” and, in any event the same charter section says “[m]embership on boards or commissions that act as representation of the Town of Hopkinton in regards to the School District shall not disallow that elector from serving on another board, committee or commission in Town Government.”

The Chariho Act (as amended)¹ creates a regional school committee composed of 11 members: four elected by the voters of Hopkinton, four elected by the voters of Richmond, and three elected by the voters of Charlestown.

The school committee, in two divided votes (6 to 3 on November 18, 2008 and 7 to 2 on January 13, 2009) voted to disqualify the petitioner. This was wrong.

The budget process² undertaken each year in Chariho and Hopkinton, and what impact the Caruolo Act [G.L. 16-2-21.4] has on the process is essential to understanding why petitioner cannot possibly have a “conflict of duty” to his constituents.

¹ P.L. 1958 Ch. 55, as amended by 1986 P.L. ch. 286, 1988 P. L. ch. 40, 1995 P.L. ch. 285 and ch. 359, 1997 P.L. ch. 279, P.L. 2002 ch. 298 and ch. 368, 2006 P.L. ch. 490.

In all three towns, as well as in the district itself, the only way to raise funds to operate the school district or town government is by appropriation from the people at a duly warranted school district or town financial meeting. This fact alone severely undercuts all of the supposed conflicts so far offered by Chariho and Richmond. But a full understanding of the process reveals even more fatal flaws in their supposition and arguments.

Chariho Charter

The school committee must approve and submit a regional school district budget by February 15 each year. *Chariho Charter §15(2)*. In April, the voters of the three towns decide whether the budget shall pass, by way of three, separate all day referendums in each of the three towns on one single day. *Chariho Charter §15(3A)*. An aggregate majority of voters from the three member towns is sufficient to approve the budget. If such a majority is lacking, the school committee must meet and adopt a “revised” budget within 15 days, “the minimum amount necessary to allow the [district] to operate for the ensuing fiscal year in compliance with its contractual obligations and mandates of applicable federal and state laws.” *Chariho Charter §15(3A)* The revised budget is then submitted to the people, again, for another three-town, single-day referendum. “This process shall be repeated until a budget is adopted by the [committee] and approved by the voters at referendum.” *Id.* Once a regional budget is adopted, the three member towns “shall then pay to the treasurer of the district” their *pro-rata* based on Chariho pupil enrollment from October 1 of the previous year. *Chariho Charter §15(6)*.

² It is the budget process that apparently forms the core of Chariho’s objection to petitioner’s service on both panels.

Hopkinton Charter

As for the approval of appropriations in Hopkinton, inclusive of the funds due Chariho, only the people of Hopkinton can appropriate, not the town council. *Hopkinton Charter §§2311, 2320, 2370.*

Hopkinton's appropriation process consists of two parts: an informational "financial meeting" and a subsequent "financial referendum." The "financial meeting" takes place on the first Tuesday in May each year to "receive and discuss" the town council's proposed budget, but not vote on it. Changes can be made to the proposed budget. Then, an all day "financial referendum" is held on the council's adopted budget, with any changes from the "financial meeting," on the second Tuesday in June. If a majority of voters approve the budget, the process is complete. If voters reject the budget, the town council may accept a "flat" municipal budget, identical in all respects to the previous year's budget, except that it "will thus include the Chariho school budget as approved at the at the most recent Chariho Financial District Meeting." *Hopkinton Charter §2370.*

A "special financial meeting" can also be called, but only "in the case of an emergency," by resolution of the town council or a petition of 400 voters. No accompanying "financial referendum" is necessary; the "special meeting" *is*, in effect, the referendum. If the purpose of the "special meeting" is for any matter already addressed by the voters by "financial referendum" in the previous six months, a vote of four council member is necessary. Hopkinton Charter §2314.

Caruolo Act

Chariho’s charter allows the school committee to “take all actions it deems necessary under the provisions of G.L. 16-2-21.4 [the Caruolo Act]” notwithstanding all other provisions of the district charter. The Caruolo Act, in turn, provides that if the school committee believes it received an insufficient district-wide appropriation (from the people), and if the district is unable to obtain any relief from state or federal mandates from the Commissioner of Education, then the school committee can ask the voters of each town to appropriate more money. The procedure is thus:

“in a regional school district, the chairperson of the school committee may, within ten (10) days of receiving the commissioner's response, submit a written request to the chief elected official of each of the municipalities to request that the city or town council in each of their respective towns meet to decide whether or not to increase the appropriation for schools to meet expenditures. The decision to increase any appropriations shall be conducted pursuant to the local charter or the public law controlling the approval of appropriations within the municipality.” G.L. 16-2-21.4. [emphasis added].

In Chariho and Hopkinton, since only the voters can appropriate—at the town level and the district level—the only issue is asking the voters to appropriate.

If the voters of Chariho fail to appropriate the money required to run Chariho’s school, then the Caruolo Act provides a final solution:

(b) In the event of a negative vote by the appropriating authority, the school committee shall have the right to seek additional appropriations by bringing an action in the superior court for the county of Providence and shall be required to demonstrate that the school committee lacks the ability to adequately run the schools for that school year with a balanced budget within the previously authorized appropriation or in accordance with §§ 16-2-21, 16-2-23, 16-7-23, and 16-7-24.....[G.L. 16-2-21.4(b).

From this point on only the “chief elected officials” from each of the member municipalities have any involvement:

Upon the bringing of an action in the superior court by the school committee to increase appropriations, the chief executive officer of the

municipality, or in the case of a regional school district the chief elected officials from each of the member municipalities, shall cause to have a financial and performance audit in compliance with the generally acceptable governmental auditing standards of the school department conducted by the auditor general, the bureau of audits, or a certified public accounting firm qualified in performance audits. The results of the audit shall be made public upon completion and paid for by the school committee to the state or private certified public accounting firm. G.L. 16-2-21.4(b).

It is noteworthy that “[t]he auditor general shall select the auditor if the audit is not directly performed by his or her office.” G.L. 16-2-21.4(c).

Argument

It is helpful to place this case in its proper historical context. This is the first Rhode Island case for *quo warranto* where the official seeking to vindicate his claim to public office has actually been elected, in successive general elections, by the exact same constituency, to the offices alleged to be “incompatible.” See e.g. Whitehouse v. Moran, 808 A.2d 626 (R.I. 2002) (public school teacher and part-time park ranger for DEM to serve as member of town Board of Canvassers). In every other case for *quo warranto*, the Court has dealt with situations where at least one of the offices—and often both of them—are appointive and not elected. Advisory Opinion to Governor, 121 R.I. 64, 394 A.2d 1355 (R.I. 1978); McCabe v. Kane, 101 R.I. 119, 221 A.2d 103 (R.I. 1966) (appointment of state senator to post of Clerk of the Supreme Court by Governor)

It is the first time this Court will consider a *quo warranto* case where the claim of “incompatibility” (i.e. the justification for ouster) came from the membership of a body politic (the Chariho school committee) comprised almost entirely of members elected by constituencies different from the ousted official’s constituency. The elected school

committee members from Charlestown—with one exception, member Deborah Carney—and Richmond voted to “oust” petitioner.

In short, this case presents the first opportunity for the Court to decide the issue of “incompatibility” where the same constituency successively and knowingly elected the officeholder to both posts. Because Chariho has anchored its case in the common law doctrine of “incompatibility,” the Court is thus at the crossroads of a profound question of policy: in this unique situation, who is best able to decide what is best for the constituents who elected petitioner?

The Chariho school committee?

The Courts?

Or the constituents themselves?

I. The Offices of Hopkinton Town Council and Hopkinton Representative to Chariho Are Compatible

A. The Standard for Incompatibility

This Court has laid out the standards to be applied when evaluating the potential for incompatibility between two public offices:

The standards by which to judge common-law incompatibility in the absence of a controlling statutory or constitutional provision were supplied long ago and have been reaffirmed often over the years.

“In cases where the question of incompatibility of offices has arisen independently of statutory or constitutional provision, two rules are generally recognized: First. That incompatibility does not depend upon the incidents of the offices, as upon physical inability to be engaged in the duties of both at the same time.

* * *

Second. The test of incompatibility is the character and relation of the offices, as, where one is subordinate to the other, and subject in some degree, to its revisory power; or where the functions of the two offices are

inherently inconsistent and repugnant. In such cases it has uniformly been held that the same person cannot hold both offices.” *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).

Thus, there are three criteria to evaluate:

First, it is of no concern whether there are physical or temporal impediments to holding both offices. This is not at issue in the instant case;

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

Third, incompatibility will exist “where the functions of the two offices are inherently inconsistent *and* repugnant.” *Id.* at 1357 (emphasis added).

It is this third standard that the Chariho School Committee clings to.

B. Careful Examination of the Chariho and Hopkinton Charter Demonstrates There Is No Incompatibility

1. There is No Incompatibility Deriving from School and Municipal Finances

Here, it is possible that the duties of the two offices may require addressing the same subject matter: school district financing. But careful examination of the process delineated in the Chariho and Hopkinton charters demonstrates there is no incompatibility. In fact, the two are complementary.

Nearly 25 years ago this Court noted that a regional district financial meeting in a regional school district has the effect of creating a non-discretionary, mandatory obligation on the part of member towns to fund the schools:

The appropriating body for the district is the regional school-district financial meeting that is open to all voters of Exeter and West

Greenwich. We use the phrase “appropriating body” advisedly because the financial district meeting does not actually appropriate the money in the same sense that a financial town meeting does.... [N]o discretion is left to the town within the regional district as to the amount of funding to be raised or expended. ...[T]he town must make a part of its budget the amount necessary to meet the budget approved by the district financial meeting. *Exeter-West Greenwich Regional School Dist. v. Exeter-West Greenwich Teachers' Ass'n*, 489 A.2d 1010, 1012 (R.I. 1985); *Accord Ure v. Chariho School Committee*, 705 A.2d 1381 (R.I. 1997). [emphasis added].

Chariho and Hopkinton have actually incorporated the principle decided in *Exeter-West Greenwich* directly into their respective charters, making it clear beyond debate that Hopkinton must honor the appropriation due Chariho. Chariho’s charter provides that upon approval of the district’s annual budget (by Chariho voters at the district financial meeting), each member town “shall then pay to the treasurer of the district” their *pro-rata* share. *Chariho Charter §15(6)*. Likewise, Hopkinton’s charter explicitly provides that even if the voters of Hopkinton fail to approve a *town* budget, the provisional (or “flat”) budget “will thus include the Chariho school budget as approved at the at the most recent Chariho Financial District Meeting.” *Hopkinton Charter §2370*. [emphasis added].

There simply cannot be incompatibility between Hopkinton and Chariho as to school district funding because the duties of the offices are complementary; fulfillment of funding for Chariho’s schools is assured as a matter of law. There is no other way to read the charters. The only way one could possibly find incompatibility is to impute bad faith on the part of the district or the town into fulfillment of their respective legal obligations. But this would be improper, if not unfair:

The incompatibility standard applied by the courts does not depend upon the good faith or bad faith of the official. Rather, incompatibility is determined by the character of the offices and their relation to each other, in the subordination of the one to the other, and in the nature of the duties

and functions which attach to them. *Belleville Tp. v. Fornarotto*, 549 A.2d 1267, 1271 (N.J. Super.L. 1988).

Here again, under both the Hopkinton and Richmond charters, the people are the appropriating authority—not the town council or school committee. All funding decisions under both the Chariho and Hopkinton charters are ultimately in the hands of the people (of Hopkinton in the case of Hopkinton, and of Hopkinton, Charlestown and Richmond in the case of Chariho). The role of petitioner in the budget process, together with the rest of the town council and school committee, is precatory.

2. The Chariho Charter Contemplates Allegiance of School Committee Members to the Constituencies of the Towns Who Elected Them

Chariho repeatedly suggests that Mr. Felkner cannot serve on the school committee because his loyalty and allegiance—or his “fiduciary duty”—is to ‘Hopkinton,’ because he serves on Hopkinton’s town council. With great metaphor and hyperbole, Chariho attacks petitioner:

Mr. Felkner can don and doff his hats daily, even hourly, depending on the ebb and flow of litigation, always blithely ignoring the fact that both his statutory duties to the Town Council and the School Committee differ, as do the constituencies he serves. *Respondent’s Memorandum in Support of Motion to Dismiss* at p. 2.

Chariho is wrong. Mr. Felkner serves only one constituency: the people of Hopkinton. His loyalty is to them, and those school committee members elected by the people of Richmond and Charlestown may properly be loyal to their elective constituencies. This is not only the essence of a typical representative democracy, it is the obvious intent of the Chariho Act that can be gleaned from even a cursory reading of it. For example:

- The regional school committee shall be composed so that “each member town shall be represented in the committee in direct proportion to its population” *Chariho Charter §10(1)(a)*.
- The president of the school committee, while elected by the members, must be rotated from town to town so that “each member town shall have the opportunity of having one of its members serve as chairperson in a fixed order of selection.” *Chariho Charter §10(2)*.
- The “school district finance committee” must consist of “the town treasurers of each of the member towns,” three members of the school committee, “one (1) from each town” and three residents “one (1) from each of the member towns to be appointed by the respective town councils” of the member towns. *Chariho Charter §12*.
- The moderator of the annual district financial meeting must be the appointed or elected moderator of one of the three member towns, alternating from town to town from year to year. *Chariho Charter §9(1)*.

The constituencies of the member towns are recognized, again and again, as being separate and warranting separate representation, even though the district itself is styled as a “regional” school district. The district may be regional in its operations, but in its representation it is clearly parochial, if not factional by town and town constituencies.

To suggest, as Chariho does, that Chariho school committee members cannot do what every elected official does (i.e, stay loyal to the constituencies who elected them) defies the most basic tenets of representative democracy and is entirely unrealistic. Here, Mr. Felkner’s duties on making education policy will rarely if ever overlap with his duties engendered by service on the town council. The constituencies are the same for both. But even if they do overlap, it is hard to fathom how they will actually *conflict*.

There is not a single case reported anywhere in this country³ where an elected official, representing the same constituency in two offices, was found to have a “conflict of duties” or an “inherent conflict” that required him to vacate one of the offices.

C. The Relationship Between Hopkinton and Chariho Pursuant to the Caruolo Act Does Not Create ‘Incompatibility’

Chariho suggests that under G.L. 16-2-21.4 (the ‘Caruolo Act’) Hopkinton and Chariho may, at any given time, be on a collision course for school financing that will ultimately place them in Superior Court. Here again, careful examination reveals that, while Caruolo clearly contemplates that school funding issues involving Chariho and Hopkinton (as well as Richmond and Charlestown) may ultimately be resolved in Superior Court, this would not be the result of petitioner carrying out—or failing to carry out—any duty to either entity. Rather, it can result *only* from the refusal of the people of Chariho or its member towns to appropriate the funds necessary to operate Chariho’s schools.

The Caruolo Act specifies the method by which a School Committee can seek extra money in the event the amount originally appropriated proves to be insufficient. In Hopkinton, the Town Council has no say as to whether or not the Town will appropriate

³ Although there is an apparent dearth of cases directly on point, at least one Illinois Appellate Court seems to agree Mr. Felkner can serve his constituency, i.e. both offices:

Moreover, we see no conflict or incompatibility between membership on a school board and a village board of trustees. The duties and responsibilities of these two boards are entirely different and unrelated. The potential problems suggested by the State's Attorney of revenue sharing and intergovernmental cooperation have not occurred in fact during defendant's tenure and the likelihood of their occurring are purely speculative. *People ex rel. Black v. Dukes*, 439 N.E.2d 1305, 1307 (Ill.App. 3 Dist. 1982).

the money requested by Chariho under Caruolo. This decision is left solely with the people of Hopkinton. But Chariho’s argument is at least four degrees of supposition removed from the normal course of school funding in Chariho and Hopkinton,⁴ and it is wrong.

Chariho argues for construction of the Caruolo Act that would take appropriating decisions *away* from the people of Hopkinton and would require —ironically—that any Chariho request for additional funding first be approved by a “super majority” of the Hopkinton town council. Chariho points to Hopkinton’s charter §2314, which provides:

2314 Restriction on Special Financial Town Meetings.

A special Financial Town Meeting shall only be called in the case of an emergency involving the health, welfare and/or safety of the public. Four of the Town Council members must approve of such a meeting if any subject to be considered has been acted upon by a Financial Town Referendum or a special Financial Town Meeting within six (6) months previous to the time of such proposed call.

⁴ It is undisputed that this scenario suggested by Chariho has *never occurred*. While the law of incompatibility generally provides that the Court may focus on *potential* conflicts, *People ex rel. Barsanti v. Scarpelli*, 862 N.E.2d 245, 251 (Ill.App. 2 Dist. 2007), there is a limit as to how far Courts should go in supposing what chain of events can lead to a conflict of duty. Michigan’s highest court, for example, has construed that state’s “incompatibility” statute as requiring “actual,” as opposed to “potential” conflicts of duty before court review is appropriate:

Under the statute, incompatibility exists only when the performance of the duties of one of the public offices “results in” one of the three prohibited situations. By using the phrase “results in,” the Legislature clearly restricted application of the statutory bar to situations in which the specified outcomes or consequences of a particular action actually occur.[footnote to *Webster’s* dictionary omitted] That a breach of duty *may* occur in the future or that a *potential* conflict exists does not establish incompatible offices. The official's performance of the duties of one of the offices must actually result in a breach of duty. *Macomb County Prosecutor v. Murphy*, 627 N.W.2d 247, 255 (Mich. 2001).

According to Chariho (in its Motion to Dismiss this proceeding), this section of Chariho's charter would make Mr. Felkner the "gatekeeper on the [Hopkinton] town council..." to call a special meeting for additional funding requested by Chariho under the Caruolo Act. In placing such great weight on Hopkinton Charter §2314, Chariho points to the last sentence of Caruolo, G.L. 16-2-21.4(a) which provides (as noted, *supra*) that in a regional school district:

The decision to increase any appropriations shall be conducted pursuant to the local charter or the public law controlling the approval of appropriations within the municipality." G.L. 16-2-21.4. [emphasis added]

But Chariho's juxtaposition of Hopkinton Charter §2314 with Caruolo is chock full of assumptions about statutory construction. Chariho's argument to disqualify Mr. Felkner includes, as it must, a construction of Caruolo that is remarkably unfavorable for Chariho and the people of Hopkinton. Chariho's proposed construction of Caruolo also cuts against the obvious intent of Caruolo, which is to assure that school committees will obtain funding from their local appropriating authority. Ordinarily, a school district would adopt the construction of Caruolo proffered by the petitioner: that no local charter can supersede Caruolo's mandate that funding requests shall be submitted *directly* to the appropriating authority designated in the town's charter i.e., the appropriating request will go to the people.⁵ Petitioner urges the following, proper construction of the Caruolo Act in Hopkinton:

⁵ Chariho relies upon the case of *Coventry Comm. v. Coventry Town Council*, 1996 WL 936874, 3 (R.I. Super. 1996) in support of its position that it is possible for a town council to refuse to allow the people an opportunity to approve the additional funds requested by a school committee. However, what Chariho fails to explain is that under Coventry's legislatively-approved charter, the Town Council, not the school committee,

- Hopkinton’s Charter §2314 does not serve to give town councils “veto” power over the obvious legislative intention to place all appropriation questions directly before the appropriating authority (i.e. the people).
- application of Hopkinton charter Section 2314 is limited to “an emergency involving the health, welfare and/or safety of the public” and simply doesn’t apply to Caruolo Act requests for additional education funding.⁶
- the drafters of G.L. 16-2-21.4 apparently assumed that every city or town council *is the appropriating* authority as, in many cities and towns, it is. But in Chariho, this isn’t true; only the *people* of the member towns can appropriate funds locally or district wide, and therefore the only *reasonable* construction of Caruolo is that all decisions about appropriations must be submitted to the people, not the town council, because under every charter in Chariho and its member towns, the people are the appropriating authority.

In its attack on Mr. Felkner, Chariho argues to construe G.L. 16-2-21.4 as being *subject to* Hopkinton’s charter, even though this is *against* Chariho’s own interests, and the interests of the people of Hopkinton, Richmond and Charlestown!

always has the final say as to the “total amount” to be submitted to Coventry voters when seeking the appropriation for education in Coventry. *Coventry Charter* §4.07(b). Here, the opposite is true: Hopkinton’s charter provides, in the first instance that Chariho’s budget must be included in the town’s budget. (Hopkinton’s budget “will thus include the Chariho school budget as approved at the at the most recent Chariho Financial District Meeting.” *Hopkinton Charter* §2370.) The Hopkinton town council has no control, as does the Coventry town council, of the amount of money that may be requested for school funding from the appropriating authority (i.e. the people of Hopkinton, Richmond and Charlestown), even *without* the application of Caruolo. To suggest that Caruolo would *change* this, so that a town council was given “*veto power*” is the wrong way to construe Caruolo.

⁶ Chariho’s absurd “upside down” arguments in this case demonstrate why the decision to remove elected officials from office should not be made by inherently factional regional school committees. The potential for unfair, if not mischievous results is real. As discussed *infra*, sound policy suggests such decisions be vested in the Department of Attorney General.

Stated differently, whether Mr. Felkner *actually* has a “conflict” really depends on how one construes that aforementioned “last sentence” of Caruolo, G.L. 16-2-21.4(a). Here, Chariho argues for a construction vesting any two members of the Hopkinton town council with “veto” or “gatekeeper” powers that is decidedly against Chariho’s interests, against the people of Hopkinton, Charlestown and Richmonds’ interests and just plain wrong.

The irony here could not be more acute than Chariho itself has made it. Were Chariho *actually* arguing proper application of the Caruolo Act—instead of arguing its *potential* meaning in order to succeed in disqualifying Mr. Felkner from serving — Chariho might join in petitioner’s argument.

Petitioner urges the Court to adopt the only proper construction of Caruolo that gives the people of Hopkinton, Richmond and Charlestown the to right decide all funding issues for Chariho, even decisions engendered under Caruolo.

Finally, since the Caruolo Act specifically provides that the Superior Court, and not any particular Town Council, will be the final authority in determining the amount of money necessary to operate Chariho’s schools, there is not even potential for Petitioner to have a conflict of duty. In regard to such Court proceedings, only the “chief elected officials” (petitioner is not one) “shall cause to have a financial and performance audit in compliance with the generally acceptable governmental auditing standards of the school department conducted by the auditor general, the bureau of audits, or a certified public accounting firm qualified in performance audits.” G.L. 16-1-21.4(b).

The statute then provides that “[t]he results of the audit shall be made public upon completion and paid for by the school committee to the state or private certified public

accounting firm.” G.L. 16-2-21.4(b). The council does not even choose the auditor; because the statute even provides that “[t]he auditor general shall select the auditor if the audit is not directly performed by his or her office.” G.L. 16-2-21.4(c).

The town council exercises no discretion. It does not even choose or pay for the auditor who reviews the school district’s finances. The auditing process, properly viewed, is not adversarial between the school committee and the town councils. Rather, it is simply a process to determine, through an independent third party, whether an additional appropriation is necessary. The role of the town council in such a proceeding is *de minimis* and should not serve to remove disqualify petitioner from serving his constituents.

The Court should rule petitioner has no conflict of interest or duty under the Caruolo Act.

D. Petitioner Has No Other Conflicts of Interest or Duty in Discharging His Duties

1. Withdrawl by Hopkinton From the Region

Chariho points to the provision in its Charter authorizing any member Town to withdraw from the Regional District as an insurmountable conflict that proves “inherent inconsistency and repugnancy.” between the Chariho School Committee and the Hopkinton Town Council. Chariho Charter §18 (1).

In fact, there is no possible way in which this provision could create a conflict between the position of School Committee Member and Member of the Hopkinton Town Council due to the absolute lack of any role of the School Committee to authorize or otherwise prevent (or encourage) the withdrawal of any Town from the District. The

School Committee is utterly powerless to stop a Town from withdrawing from the District if said Town comes forward with the money necessary to retire said Town's portion of any debt owed to the Chariho School District.

Thus, for the sake of argument, assume the absolute worst of Mr. Felkner; that he is single mindedly dedicated to removing Hopkinton from the District.⁷ There is still no incompatibility in the two offices because not one of Mr. Felkner's alleged beliefs could possibly be put into action by the School Committee. The School Committee does not vote to approve withdrawal by a Town. Even if the School Committee (excluding Mr. Felkner) thinks that withdrawal by Hopkinton would be the worst result, or the best result for the School District, there is no action or vote the School Committee could take to stop it or advance it.

Further, even as a member of the Hopkinton Town Council, Mr. Felkner cannot vote to remove Hopkinton from the School District. That power rests solely with the people of Hopkinton. Even on the issue of potential withdrawal, there is nothing inconsistent, much less repugnant between the two offices at issue.

Chariho equates even the thought of withdrawl from Chariho as an act of heresy that alone justifies ouster of petitioner. This is wrong. In fact, withdrawl of any member town from Chariho is part of Chariho's charter and a statutory right that every elector in each member town, has the right to consider and vote upon. Far from being "incompatible," withdrawl from Chariho by Richmond, Charlestown or

⁷ Nothing herein should be assumed to represent any position of Mr. Felkner. This argument is offered in the extreme to prove the point that even if the worst fears dreamed up by the School Committee are true, incompatibility still could not exist.

Hopkinton is among the rights accorded to Chariho’s member towns—and the electors who reside therein—by the General Assembly when it created Chariho.

2. The Duties of the School Committee and Town Council are Otherwise Compatible As A Matter of Law

In *Royal v. Barry*, 91 R.I. 24, 30-31, 160 A.2d 572, 575 (R.I. 1960), this Court noted the independent and autonomous nature of school committees as agents of the state:

“[N]o provision affecting education contained within a home rule charter, so called, can effectively regulate the conduct of school committees as agents of the state unless expressly validated by an act of the general assembly. In other words a school committee's exercise of its powers cannot be regulated by local legislation whether by ordinance or charter.”

As the Court further observed in *Royal*, school committees derive their authority from RI Constitution Article 12, by delegation from the General Assembly:

“Article [12] of the constitution expressly and affirmatively reserves to the legislature sole responsibility in the field of education and nothing contained in article [13 “Home Rule”] is in derogation thereof...”

Chariho’s effort to disqualify Mr. Felkner is a quest for something that simply doesn’t exist. Any purported “conflict” between Chariho’s and Hopkinton’s respective powers or charters can be resolved as a matter of law; the jurisprudence of our state, as stated in *Royal*, could not be clearer: school committees perform an entirely different function than do cities and towns, and that function cannot be usurped without General Assembly approval.

II. The Hopkinton Charter Does Not Proscribe Petitioner's Service to the School Committee

The only way in which the Hopkinton Charter's prohibition on dual office holding in *Hopkinton* 'Town Government' could be relevant, is to find that the three-town Chariho Regional School Committee is actually a part of Hopkinton's Town Government. Hopkinton Charter § 1240. This is a notion prohibited under the Rhode Island Constitution.

The Hopkinton Town Charter exists under the umbrella of RI Constitution Article 13, 'Home Rule for Cities and Towns.' The Home Rule Charter encompasses all of the power and authority available to the Town of Hopkinton.⁸ Noticeably absent from Article 13 (and thus Hopkinton's charter) is any reference to the power to "secure to the people the advantages and opportunities of education and public library services." This power was expressly reserved to the General Assembly under RI Constitution Article 12, and could not have been delegated to the Towns under R.I. Constitution Article 13. Since the Chariho Regional School Committee is not an entity created under Article 13, it simply cannot be part of the Town of Hopkinton.

Further, the mere fact that the Town of Hopkinton and the Chariho Regional School Committee were created by the General Assembly as separate bodies politic and corporate, ought give this Court great pause before finding that one could possibly be within the governmental structure of the other. Had the General Assembly wished to

⁸ Together with what the General Assembly delegates by statute.

make Chariho part of the Hopkinton Town Government, it could have done so. It did not.⁹

Chariho's last-ditch reliance on the wording of Mr. Felkner's Certificate of Election merely attempts to exalt form over substance.

Petitioner also questions whether Chariho has standing to 'enforce' Hopkinton's charter §1240. This is addressed generally in the succeeding section, but petitioner wishes to note, specifically, that he has been unable to find a single reported case (anywhere, nationwide) holding that a body politic may invoke and enforce the charter of another body politic to remove one of its own elected members. Moreover, there is something just plain mischievous in allowing a *foreign* body politic—particularly one that is factional by design, as is Chariho—to enforce a municipal charter to remove an elected official. It would seem that all of the sound reasoning employed by this Court in limiting issuance of writs of *quo warranto* to proceedings brought by the attorney general would apply with *particular emphasis* in this very context:

[W]e will not exercise our discretion to allow proceedings to vindicate a public right to be brought without the intervention of the Attorney General, and we affirm the continuing vitality of this well-founded rule. *State ex rel. Webb v. Cianci* 591 A.2d 1193, 1197 (R.I.,1991)

⁹ In case there is any doubt that the General Assembly took any and all educational duties away from the Town of Hopkinton and placed them in the separate body politic of Chariho, see Chariho Charter §1, paragraph 3 which reads:

To acquire, take over, operate and control all regional schools including lands, buildings, equipment, furnishings and supplies for the same, for the joint and common use of the member towns incorporated into the said regional school district, for the education of pupils attending grades kindergarten through 12 inclusive, *and with all the powers and duties pertaining to education and school conferred by law in this state upon towns generally*, including the power of eminent domain to take lands for school site purposes, provided, that the amount of the same at any one (1) taking may be more than five (5) but not more than thirty (30) acres.

Petitioner urges the Court to hold that it does, and restore petitioner to his post on the school committee.

III. The School Committee Lacked the Power to Remove Petitioner

A. As a Creature of Statute, Chariho Has No Inherent Authority

This Court has noted on a number of occasions that other legislative creations, such as municipal zoning boards, the Public Utilities Commission and the Workers' Compensation Commission have no inherent powers of self-government:

- “Zoning boards are creatures of statute; hence they possess only the powers, rights, duties, or responsibilities conferred upon them by the Legislature.” *Zeilstra v. Barrington Zoning Bd. of Review*, 417 A.2d 303, 309 (R.I. 1980).
- “The Public Utilities Commission is a creature of statute and, as such, it possesses only those powers, duties, responsibilities and jurisdiction conferred upon it by the General Assembly.” *Bristol County Water Co. v. Public Utilities Commission*, 363 A.2d 444, 449 (R.I. 1976).
- “We have repeatedly declared that the [workers'] compensation commission is a creature of statute and it can exercise only those powers expressly given it by the Legislature.” *Peloquin v. ITT Hammel-Dahl*, 292 A.2d 237, 240(R.I. 1972).

In *Lynch v. King*, 120 RI 868, 391 A.2d. 117 (R.I. 1978), the Supreme Court said that even municipalities were creations of the legislature “having no inherent right to self-government but deriving all of their authority and power from the legislature”. *Id.* at 876.

The Home Rule Article altered the traditional rule that cities and towns were creatures of the Legislature, that they had no inherent right to self-government but rather derived all their authority and power from the Legislature. *Lynch v. King*, 391 A.2d 117 (R.I. 1978). The article becomes effective in a city or town **only when** a charter is presented and accepted by the town. *Capone v. Nunes*, 132 A.2d 80 (R.I. 1957). Until such

affirmative action is taken by the city or town, it continues to be subject to the plenary power of the General Assembly. Advisory Opinion to House of Representatives, 628 A.2d 537, 538 (R.I. 1993). [emphasis added].

It is commonplace for cities and towns to incorporate the power to remove elected town officials from office in their Home Rule charters, when they adopt them through the process delineated in R.I. Const. Article 13 sections 6, 7 and 8.

In Providence, for example, the City Charter provides a number of grounds for which elected officials may be removed from office, and for how long. Thus, in Gelch v. Bd. of Elections, 482 A.2d 1204 (R.I. 1984), the Court's seminal opinion proscribing the plaintiff from returning to office after resigning (in the face of Dr. Gelch's recall petition, initiated under the City's Charter), turned on application of the City's Charter, not state law:

We need not decide whether state law (in particular G.L.1956 (1981 Reenactment) § 13-6-2) prohibits Cianci from holding public office. The issue before the court is whether the charter requires the mayor's removal from office for the full four-year term thereby prohibiting him from acting as a qualified candidate in the special election to fill the remainder of the unexpired term. Our interpretation of the charter-that upon the incumbent's conviction of a felony the office must be declared vacant for the full term-is dispositive of this matter. State law concerning respondent's right to be a candidate in a general election for a full new term is not at issue, and therefore we need not address it. *Id.* at 1211. [emphasis added].

More recently, in 2007 the voters of Smithfield successfully invoked the recall provision in Smithfield's Town Charter to remove the president of the Town Council from office. See Providence Journal, Nov. 9, 2007 ("Tocco recall vote set for Tuesday"). But the Home Rule provision of Article XIII applies only to "cities and towns" and only they can avail themselves of the inherent powers deriving from Article 13 only by following the rigorous process delineated therein for adopting a Home Rule Charter. All other statutory bodies politic of the General Assembly are without any inherent power.

The Chariho Regional School District does not and cannot have a Home Rule Charter because it is not a city or town.¹⁰ Instead, like any other creation of the General Assembly that cannot avail itself of an article of the Constitutional, it is “a creature of statute and, as such, it possesses only those powers, duties, responsibilities and jurisdiction conferred upon it by the General Assembly.” *Bristol County Water Co. v. Public Utilities Commission*, *supra* at 449. Its only powers are those specifically delineated in its enabling legislation. That legislation does not provide the school committee with the power to remove its own members, for any reason, even for “cause”.¹¹

All power to “disqualify” or remove school committee members is reserved to the General Assembly. If the General Assembly had seen fit to create a process to “disqualify” or remove members of school committees (other than for felonious misconduct as provided in RI Constitution Article 3 section 2 or G.L. 13-6-2.1) surely it would have included such powers in titles 45, 36 or 16 (or anywhere else) of the General Laws or in Chariho’s legislative charter. Since it did not, the Chariho School Committee is without authority to “disqualify” the plaintiff.

¹⁰ Section 2 of Article 13 provides in pertinent part that “Every city and town shall have the power at any time to adopt a charter, amend its charter, enact and amend local laws relating to its property, affairs and government not inconsistent with this constitution and laws enacted by the general assembly in conformity with the powers reserved to the general assembly.”

¹¹ Chariho suggests this Court will create a mischievous result, if it doesn’t allow the school committee to “disqualify” plaintiff that will allow felons and criminals to be or remain on school committees. This is simply incorrect. The General Laws **already provide** that persons convicted of felonies “forfeit” the office they were elected to. G. L. 13-6-2.1. In addition, RI Constitution Article 3 §2, provides essentially the same, except that it also proscribes a felon from returning to elective office for three years after the completion of his or her sentence.

B. Chariho's Position on Inherent Authority To Self-Regulate Is Wrong.

In an attempt to avoid the consequence stemming from the obvious lack of express authority to remove Mr. Felkner from office, the School Committee suggests that *all* legislative bodies have an *inherent* authority to conduct their own affairs *and regulate their membership*. Chariho fails to acknowledge a critical distinction as to which legislative bodies enjoy such power, and which do not. Only *sovereign* legislative bodies enjoy an inherent right of self-regulation. Sovereign legislative bodies are those which are created by a Constitution, embodying within them sovereign legislative power (i.e. the United States House and Senate, the Rhode Island House and Senate, Rhode Island Cities and Towns via Article XIII of the Rhode Island Constitution). The Chariho School Committee argues that legislatively created entities such as zoning boards, utility commissions and of course, school committees, should be elevated to the status of a City or Town, or even be regarded as equal to our State and National Legislatures. Only our Constitution could exalt the Chariho School Committee to such a level, which it has not done. Chariho relies upon a Kentucky Law Journal article and *dicta* from a Superior Court case to make its case that the School Committee is somehow vested with the inherent authority to remove an elected member of the Committee.

The Kentucky Law Journal article relied upon by Chariho¹² pertains *only* to sovereign legislatures—such as State General Assemblies, the United States Congress, the Crown of England, and so forth—and not to the agencies created by them, i.e. the “creatures of statute” that “possess only the powers, rights, duties, or responsibilities

¹² Paul E. Salamanca & James E. Keller, *The Legislative Privilege to Judge the Qualifications, Elections, and Returns of Members*, 95 Ky. L.J. 241, 262-63 (2005)

conferred upon them by the Legislature.”¹³ Further, while supporting the notion that legislative self-regulation dates to antiquity, the article states the application of legislative self-regulation in the Colonies and States of this nation was not left as some vague “inherent power”, but was rather expressly provided for *in writing* due to the founding father’s desire to keep power in the hands of the people and limit government power.

This point is best demonstrated on page 273 of the Article, wherein the authors note:

Unlike their English predecessors, Americans of the founding era did not recognize sovereignty and government as fungible concepts. That is, they saw the people, and not any department or level of government, as the true sovereign, and they saw the government itself as a mere agent. Because of this, Americans of this era were almost universally inclined to reduce their constitutional preferences to writing, much as any principal is inclined to reduce a relationship with an agent to writing. This inclination, together

¹³ Copied herein is the introduction to the Kentucky Law Journal article relied upon by Chariho. Its authors examine only the historical underpinnings of sovereign State Legislatures to self-regulate their memberships. A power the authors acknowledge is expressly stated in at least 48 of our nation’s state constitutions.

In *Stephenson v. Woodward*, the Supreme Court of Kentucky functionally affirmed a quo warranto against a sitting member of the senate. Although a respectable argument can be made that the person in question was in fact not qualified to serve, the senate itself had deliberated on the issue and had reached its own respectable conclusion that she was qualified. More importantly, the Constitution of Kentucky, like the Constitution of the United States and that of virtually every other state, authorizes each house of the legislature to be the “judge of” its members’ “qualifications, elections and returns.” According to the Court, the senate’s authority did not apply because a lower court had found the person unqualified in a separate action litigated before the senate convened. What the Court never really explained was how this earlier ruling could supersede the senate’s authority without contradicting the language of the constitution. This extraordinary reasoning, which defies longstanding tradition and precedent, is inconsistent with legislative independence, which the Court itself has recognized as a critical facet of separation of powers. The decision is also a blow to textualism, which the Court has frequently identified as an important ground for interpreting the constitution. Because of these apparent defects, and because the opinion will quite likely produce uncertainty in the areas of elections and separation of powers, the Court should consider limiting or overruling it as precedent at the first opportunity. Introduction, [footnotes omitted]

with a profound solicitousness for the legislature that typified the colonial and revolutionary period, produced wide spread *textual recognition* of the privilege to determine members' eligibility. [emphasis added] [footnotes omitted].

Far from supporting Chariho's notion of historic, unwritten and inherent authority of self-disqualification, the authors claim the founding fathers were inclined to specifically state such powers so as to *not grant* departments of government "inherent" power. To the extent this Article is relevant to the discussion at hand, it only serves to support Mr. Felkner.

Finally, in support of its position that the school committee can "disqualify" its own members, Chariho relies on *dicta* in Judge Silverstein's decision in *Foster-Glocester Regional School District v. Sette*, P.C. No 07-6060. In the *Foster-Glocester* case, the Gloucester Town Council purported to "remove" the chair of the Regional Building Committee, whom they had appointed pursuant to the enabling act passed by the General Assembly, P.L. 04 chapter 499 and the School District's original 1958 charter, P.L. 1958 chapter 109.¹⁴ There was no dispute that the Town Council of Gloucester had the power to "appoint" the Building Committee members. "The dispositive legal issue that this Court must determine is whether the appointment power in the Act confers authority upon the Foster and Gloucester Town Councils to remove their appointed members." Judge Silverstein ruled – correctly – that it did not, and reinstated the member of the Building Committee whom the Gloucester Town Council had removed. In *dicta*, Judge Silverstein noted:

In so declaring, this Court does not conclude that members of the RBC may never be removed. Although not an issue presently before this Court,

¹⁴ Petitioner notes that the *Foster-Glocester* case is currently pending before this Court, in any event.

for the purposes of discussion this Court notes that the RBC may have an inherent power to self regulate. *Decision p. 7*

The Superior Court then noted some authority in support of the notion that the RBC

“may” have such inherent power:

- The US Constitution Art. I sec. 5 (House and Senate may each remove members by a two thirds vote)
- RI Constitution. Article 6, sec. 7 (Both State Senate and House may each remove members by a two thirds vote)
- 56 Am. Jur. Municipal Corporations § 131 (A Municipal Council has an inherent power to expel its members)
- Gloucester Home Rule Charter, Art. IV, §§ C4-3, C4-7, C6-3 (Gloucester Town Council may remove its own members for cause and declare vacancies, and the Gloucester School Committee may declare vacancies among its membership).
- Roberts Rules of Order (10th ed.), p. 640 I. 12-13 (A member of an organization may be expelled by a two thirds vote of its membership)

Regarding the U.S. and R.I. constitutional provisions, they are inapposite in that they are constitutions and are explicit to the House and Senate. Regarding the Gloucester Town Charter, the plaintiff has already addressed the distinction between city and town charters under the Home Rule portion of Rhode Island’s constitution and the Chariho legislative charter.

As for the reference to 56 Am. Jur. Municipal Corporations § 131 (A Municipal Council has an inherent power to expel its members), that treatise actually states:

It has been held that a municipality authorized to make its own charter may provide for the election or appointment of municipal officers and the manner of their nomination and election, and for the removal of municipal officers by recall. [emphasis added]

..*

It has been held that a contest over the election of a municipal officer is a matter of statewide concern in respect of which the jurisdiction

conferred upon the courts by a statewide law cannot be affected by any action taken by a home-rule city under its charter. Constitutional permission to municipal corporations to frame their own charters does not include the right to provide a tribunal and clothe it with power to hear and decide contests of election to municipal offices.

This is no different from the Supreme Court’s holdings that only when a city or town adopts a Home Rule charter does it acquire any inherent authority of self regulation over its members and “[u]ntil such affirmative action is taken by the city or town, it continues to be subject to the plenary power of the General Assembly.” *Opinion to House of Representatives, supra* at 538. If anything, Chariho’s assumption of an adjudicatory role in this matter—deciding that Mr. Felkner’s duties as a town council member disqualified him from serving on the school committee under its application the common law doctrine of incompatibility—are among the types of conduct which the treatise notes are forbidden.

Finally, Roberts Rules of Order is simply not authority for Chariho to remove its members; it is a set of procedural rules. The issue here is substantive: can Chariho “disqualify” its members. All of the authority cited by Judge Silverstein (with the notable exception of Robert’s Rules of Order) deal with the inherent powers of sovereign legislative bodies. Even in a light most favorable to Chariho, Judge Silverstein’s *dicta* does nothing more than cast doubt on Chariho’s claim that it can disqualify its elected members.

The School Committee is not vested with sovereign power, it does not make law, it is not a member of the Judiciary; rather it fulfills the powers delegated to it by the General Assembly under Article 12 of the RI Constitution. The Chariho School Committee lacks both the judicial authority to evaluate the common law, and the power

to adjudicate and expel one of its members. The Court should rule that Mr. Felkner must be recognized as a member of the school committee.

IV. The Decision of The Electors of Hopkinton Should Prevail

Another significant problem with the school committee's ouster of the petitioner is that they are attempting to reverse the choice so obviously made by the electors of Hopkinton that petitioner represent them on both the town council and school committee. Far from being an incident of "incompatibility," petitioner's election to both positions is simply a *choice* or perhaps a *preference* of the electors of Hopkinton: to have the same person representing them on the town council and school committee. Unlike other situations where the Court has upheld removal of elected officials who hold two public positions, (*see e.g. Cranston Teachers Alliance Local No. 1704 AFT v. Miele*, 495 A.2d 233, 237 (R.I.,1985), here we know with certainty that petitioner's duties and loyalties are perfectly aligned. He was elected successively to each office by the same constituency, and his duties and loyalties are to them. In almost every other case where Courts have seen fit to remove public officials due to a conflict of interest or duty, it has based the officer's inability to fulfill conflicting demands on his loyalties. As the Court observed in *Miele*:

Proper performance of defendant's duties as a school-committee member and also as a rehabilitation specialist in the City of Cranston Redevelopment Office is almost certain to create conflicting demands on his loyalties.

The people of Hopkinton made their choice and the Court should require the Chariho School Committee to respect it.

Conclusion

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

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by his attorneys,

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CERTIFICATION

I hereby certify that a copy to the above Petition was sent via first class mail, to Attorney Jon Anderson, Solicitor for the Chariho Regional School Committee, Edwards, Angell, Palmer & Dodge, 2800 Financial Plaza, Providence, RI 02903, and the Honorable Patrick C. Lynch, Attorney General, 150 South Main Street, Providence, RI 02903 on this 17 day of February 2009.