STATE OF RHODE ISLAND SUPREME COURT

WILLIAM FELKNER	:	
	:	
v.	:	No.
	:	
CHARIHO REGIONAL SCHOOL COMMITTEE	:	

PETITIONER'S MEMORANDUM IN SUPPORT OF PETITION FOR QUO WARRANTO

Petitioner asks this Court to consider if the Chariho Regional School Committee, as a legislatively created entity, has the requisite authority to interpret the content of another body politic's Charter (Hopkinton Town Charter), adjudicate the common law (Doctrine of Incompatibility) and in turn self-regulate and oust an elected member of the Committee, or; does the power to evaluate the qualifications of an elected official lie solely with the Attorney General via a petition for Quo Warranto by the Chariho School Committee?

I Who Must Bring An Action For Quo Warranto In The First Instance, The Party Seeking Ouster *or* The Party Seeking To Vindicate His Office After Ouster?

There is no dispute that nothing in the Chariho Charter provides for the Chariho School Committee to evaluate the qualifications of its elected members or to perform adjudicatory functions to interpret the law. Regardless, Chariho suggests that such power is inherent in *any* "legislative" body, even one that is the creation of statute.[1] This Court has a long history of denying the existence of any authority in legislatively created entities beyond that specifically vested in the entity by the General Assembly. See e.g. *Zeilstra v. Barrington Zoning Bd. of Review*, 417 A.2d 303 (R.I. 1980) ("Zoning boards are creatures of statute; hence they possess

[1] It is an open question as to whether a School Committee can properly be considered a Legislative rather than Administrative body.

only the powers, rights, duties, or responsibilities conferred upon them by the Legislature."), *Bristol County Water Co. v. Public Utilities Commission*, 363 A.2d 444 (R.I. 1976) ("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.") *Peloquin v. ITT Hammel-Dahl*, 292 A.2d 237, 240 (R.I. 1972) ("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.").

Petitioner asserts that without the power to self-regulate its membership or exercise adjudicative functions, the Chariho School Committee is like any other third party challenging an incumbent's right to hold office and must therefore petition the State Attorney General for relief.[2] It would be improper to require Mr. Felkner to bring an action for Quo Warranto if the Chariho School Committee exceeded its authority and thus all of its actions are null and void as a matter of law. A declaration as to the authority of the School Committee to carry out its own

[2] The Chariho School Committee has asserted that Mr. Felkner's actions in the Superior Court seeking Declaratory Judgment as to the authority of the Chariho School Committee to interpret the law and oust a sitting member is actually a petition in Quo Warranto shrouded as another form of relief and thus must be brought by Mr. Felkner in this Court. (Relying on the language of *McKenna v. Williams*, 874 A.2d 217, 229-30 (R.I. 2005) (This Court has consistently rejected claims that sounded in quo warranto but were otherwise disguised.). However, Petitioner asserts that it was the School Committee that acted improperly by ousting Mr. Felkner from office without the necessary intervention of the Attorney General. ("This Court concluded that the purpose of the petition was to oust the respondents from office, and as such, the proceedings must be instituted in the name of the state. There are no exceptions to this rule, because it "would be detrimental to the public welfare and highly inexpedient that title to a public office should be put in question whenever any private citizen sees fit to make the assault." The remedy sought is enforcement of a public right and must be brought in the name of the public prosecutor." *Id*. at 228 (internal citations omitted). Mr. Felkner questions if an improper act by the School Committee should necessarily force him to bring an action in this Supreme Court. This question is at the heart of the concurrent appeal of the Superior Court's dismissal of Mr. Felkner's count for Declaratory Relief for lack of subject matter jurisdiction.

Quo Warranto hearing is precisely the type of matter suited for a claim for Declaratory Relief in the Superior Court.

II Is there Any Legal Prohibition to Mr. Felkner Serving on both the Chariho Regional School Committee and the Hopkinton Town Council?

No Statutory Prohibition

It is be undisputed that neither the General Assembly nor the Chariho Charter prohibit dual office holding.[3] The only suggestion of a statutory prohibition to Mr. Felkner holding the offices at issue is found in Section 1240 of the Hopkinton Town Charter. Section 1240 states in pertinent part:

> "No elected member of the Town government shall hold more than one (1) elective or position in the *Town Government* at the same time."(emphasis added).[4]

For this prohibition on dual office holding to apply, this Court must conclude that the Chariho Regional School Committee is in fact part of Hopkinton's town government. This is impossible for both practical and Constitutional reasons.

The Hopkinton Town Charter exists under the umbrella of Article XIII, the Home Rule Charter, of our Constitution. The Home Rule Charter encompasses all of the power and

[3] While the General Assembly has chosen to specifically prohibit school teachers from serving on a school committee by statute (R.I.G.L. 17-1-5.1(b)) it has not recognized any other conflict worthy of express prohibition.

[4] Section 1240 Multiple Office Holding.

No elected member of the Town government shall hold more than one (1) elective or position in the Town Government at the same time. No elected member of the Town government shall, at the same time, hold any position by virtue of an appointment by the Town Council or the Town Manager. Appointed members of the Town Government may hold more than one (1) appointed position if the Town Council fails to find and appoint any other Town elector to the vacant position. Membership 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. Hopkinton Town Charter.

authority available to the Town of Hopkinton.[5] Noticeably absent from the Home Rule Charter (and thus Hopkinton's) 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 Article XII of the Rhode Island Constitution, and could not have been delegated to the Towns under Article XIII. Since the Chariho Regional School Committee is not an entity created under Article XIII, 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 make Chariho part of the Hopkinton Town Government, it could have done so. It did not.[6]

No Common Law Prohibition

Without a statutory prohibition, Chariho's final attack on Mr. Felkner lies in the common law Doctrine of Incompatibility. This Court in, *Advisory Opinion to the Governor of the State of*

[5] Together with what the General Assembly delegates by statute.

[6] 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 Section 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. P.L. 1986, chapter 286 and P.L. 1958, chapter 55 (emphasis added).

Rhode Island, 394 A.2d 1355 (R.I. 1978) laid out the history and policy behind this long-standing doctrine. *Id.* at 1356-57. Without engaging in a detailed history of the doctrine, all sides will agree that when public offices are found to be incompatible as a matter of law, then the same individual cannot hold both offices simultaneously. However, it should also be noted that the very existence of the incompatibility doctrine implicitly proves that there is *no* blanket prohibition to dual office holding. Rather, dual office holding is only prohibited when the offices themselves are found to be incompatible.

Standard Required For Finding Of 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.
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> * * *
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> 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, *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, the Court has offered 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. It must be noted that mere interaction between two public offices will not rise to the level of "inherent inconsistency and repugnancy." The Illinois Appellate Court dealt with a case in which the Mayor of the Village of Bolingbrook (Village) was also appointed to the Board of Directors of the Illinois Toll Highway Authority (Authority). The issue of incompatibility of office arose when the Village sought to annex a portion of land owned by the Authority. The court noted the respective powers and responsibilities of both the office of Mayor and of the Authority, which both authorized land acquisition, and authority to enter into contracts. The Court also found that the Mayor was faced with a conflict of interest when the annexation issue arose. *State of Illinois v. Claar*, 687 N.E.2d 557, 561 (Ill. App. 1997). However, the Court stated:

> Although it is conceivable, as was the case here, that there may be instances of interaction between the two entities, such matters would be rare, and ordinarily, one would be expected to have very little interaction with the other. Consequently, the duties imposed upon the holder of each office do not inherently conflict, and defendant's simultaneous service does not, in and of itself, prevent him from fully and faithfully performing the duties of both offices. *Id*.

This Court need only consider the extent, degree and nature of any interaction between the Chariho School Committee and the Hopkinton Town council when evaluating if such interaction rises to the level of "inherently inconsistent and repugnant." As will be shown, what little interaction there is between the Chariho School Committee and Hopkinton Town Council stems

from requirements imposed by the State Legislature in which there is no room for either the School Committee or the Town Council to exercise discretion.

Far from being "inherently inconsistent and repugnant", the Chariho School Committee and the Hopkinton Town Council have almost nothing to do with each other due to the wholly separate functions of each body. Via the enactment of the Chariho Charter, the State Legislature mandated that all school functions shall be administered, governed and budgeted for by the Chariho School Committee. Chariho Charter, Section 2 and Section 10(3). This express delegation of power from the State to the Chariho School Committee expressly precludes any involvement by the Hopkinton Town Council in any school functions.

III. The Court Should Address All Issues Raised By This Petition and Petitioner's Appeal in One Proceeding

It is in the best interests of our state this Court address the issues raised herein and in petitioner's appeal of the Washington County Superior Court's dismissal for lack of subject matter jurisdiction, in one proceeding. There are broad policy issues inevitably presented by these matters that should be addressed together, in tandem.

The core issue in this case, of "incompatibility" between service on a town council and a school committee when a person is elected successively by the same constituency, presents broad policy issues about local government and education.

The regional school committee's finding of "incompatibility" between the two posts posits that educating the children of our state inevitably engenders repugnancy with other aspects of local government. This Court may well conclude that given such broad policy issues, such questions are best resolved by the legislative branch, not the judicial. On the other hand, it may decide that such decisions are best made by the Attorney General, not local school committees,

who may, in his discretion, bring a petition in the nature of quo warranto to this Court. In any event, petitioner requests this Court consolidate this petition and petitioner's appeal from the Washington County Superior Court dismissal (on grounds of lack of jurisdiction over the subject matter) of his request for injunctive relief.

Respectfully submitted
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by his attorneys,

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CERTIFICATION

I hereby certify that a copy to the above Memorandum 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 to The Honorable Patrick Lynch, Attorney General for the State of Rhode Island, 150 South Main Street, Providence, RI 02903, on this 21st day of January 2009.