

**TOWN OF TIVERTON
MUNICIPAL COURT**

**JUSTIN KATZ
Complainant**

Vs.

**JEROME LARKIN, SALLY BLACK,
DIANE FARNWORTH, and
ELAINE PAVAO, in their individual
capacities; and TIVERTON SCHOOL
COMMITTEE
Respondents**

MOTION TO DISMISS

I. INTRODUCTION

The instant matter continues last spring's dispute regarding the Town budget for FY2017-18. That budget -- the one proposed by the Budget Committee -- has long since been adopted. Nevertheless, one member of the Budget Committee, Justin Katz, brings a Charter complaint in order to punish citizens and Town officials who had the temerity to press their own views on appropriate funding for Town services. This attempt is grossly contrary to the letter and spirit of the Charter, and must fail.

Pursuant to the Charter's Article III, budgets are determined by the electors at a Financial Town Referendum (FTR). In other words, when it comes to financial matters, Tiverton's Home Rule Charter maintains the New England tradition of direct democracy: annual budgets are determined by the electors themselves in a direct vote. The main difference between the traditional "town meeting" and the Financial Town Referendum established by the Charter is that the vote is not done in a public meeting, but in a secret ballot election. Additionally, under the Financial Town Referendum, voters also have input in what proposals appear on the ballot, both

directly and indirectly. There is an elected Budget Committee that develops a budget proposal for placement on the ballot. Charter, Sec. 301(c)(1). The elected Town Council may then submit its own proposal. Charter 301(c)(2). The elected School Committee may also submit its own proposal for the School Department budget. Charter 301(c)(2). In addition, pursuant to the Charter's Section 301(d), individual electors have the right to have an Elector Budget Proposal placed on the ballot for the annual Financial Town Referendum alongside the proposal assembled by the Town Budget Committee, as well as any proposal assembled by the School Committee, and the Town Council.

This Financial Town Referendum, along with the Elector Budget Proposal process, was initiated with the Charter amendments of 2011. Ironically, Complainant Katz was one of the Town's most ardent supporters of the Financial Town Referendum and its Elector Budget Proposal provisions.¹ Not only did he welcome the opportunity for direct voter participation, but also saw the electoral process as relief from the "mocking grumbles and sneering looks" and other bullying that he allegedly encountered when speaking at the Financial Town Meeting.²

Now that he has become a member of the Budget Committee, and School Committee members differ with his Committee's opinions on what funding the School Department should receive, Complainant Katz's enthusiasm for direct participation and protection from bullying appears to have distinctly cooled. For FY 2017-18, his Budget Committee proposed a budget that would only appropriate one dollar more than the School Department had received the previous year. The School Committee then attempted to exercise its right to place its proposal on the ballot pursuant to Section 301(c)(2). The School Committee's proposal called for an appropriation in the amount of \$31,141,756. However, the Committee was frustrated in these

¹ See, e.g., <http://tivertonfr.org/wp-content/uploads/2011/10/A-Simple-Clarification-To-Tiverton-Financial-Town-Referendum-Misconception.pdf>

² http://www.anchorrising.com/barnacles/cat_tiverton.html

efforts by the Town Solicitor, Anthony DeSisto, who took the position that the School Committee was not permitted to submit a proposal in that amount.

School Committee members Jerome Larkin and Sally Black then determined that they would exercise their rights as electors to include an Elector Budget Proposal on the ballot. Town Council members Joan Chabot and Randy Lebeau joined in this petition. Significantly, the Charter specifically granted Larkin, Black, Chabot, and Lebeau the right to submit Elector Budget Proposal notwithstanding their statuses as members of the School Committee and Town Council. Charter, Section 301(d)(1).

The Elector Budget Proposal circulated by Dr. Larkin, Mrs. Black, Ms. Chabot, and Mr. Lebeau increased funding for the School Department over that which the Budget Committee recommended. Larkin, Black, Chabot, and Lebeau obtained nearly twice the number of signatures that the Charter required for inclusion on the ballot for the May 20, 2017 election, and timely filed their petition with Town Clerk Nancy Mello.

On April 22, 2017, however, Complainant Katz filed what he styled as an "Elector Petition Complaint" to prevent this proposal from being placed on the ballot. In his view, the Elector Budget proposal was deficient. Although there is no provision in the Charter for one elector to challenge the inclusion of another elector's budget proposal on the ballot, the Complaint was referred to the Board of Canvassers. On April 27, 2017, the Tiverton Board of Canvassers, relying upon an opinion by the Town Solicitor, voted to reject the Plaintiffs' petition.

Dr. Larkin, Mrs. Black, and the Tiverton School Committee filed an action in the Newport County Superior Court to have the petition placed on the ballot. Dr. Larkin and Ms. Black sought to vindicate the right of electors to have elector petitions put on the ballot. The

Tiverton School Committee also brought the action in order to have a more advantageous budget included on the ballot, and also to ensure that the budget adoption would not be subject to later challenge. This attempt was unsuccessful. The FTR thus proceeded with only the Budget Commission budget on the ballot. That budget of course passed.

However, Complainant Katz apparently is still not satisfied with this victory. He now brings a complaint pursuant to Section 1211 of the Tiverton Town Charter seeking to penalize members of the School Committee and the School Committee as a whole for having attempted to put forth an Elector Petition in the first place. In his view, the petition was ". . . a mere pretense around limits that the Charter places on them in their official capacity." (Complaint, p. 2.) For some unexplained reason, Complainant Katz did not name Town Council members LeBeau and Chabot. He instead saves his prosecutorial zeal for individual members of the School Committee, and the School Committee as a whole. In any event, as we shall demonstrate, this effort at silencing dissenting fiscal views is frivolous, and therefore must be dismissed.

II. LEGAL ARGUMENT

A. THE COMPLAINT FAILS TO STATE A VIOLATION OF THE CHARTER.

Complainant Katz alleges that the School Committee and its individual members violated the Charter by originating an Elector Budget Proposal to circumvent the limits placed on the School Committee's ability to submit its own budget. As he knows through past experience, he must satisfy a demanding standard to prove a Charter violation. It is not enough to state a technical violation of the Charter. Instead, the drafters of Section 1211(a)(2) required that the official"... has *knowingly* taken any action or failed to take any action, in his or her

official capacity, in violation of any of the terms or provisions of this Charter, or of any ordinance, rule, or regulation adopted under the authority thereof." (Emphasis added.) In order to establish a violation of the Charter, one must thus satisfy a scienter element, that is, one must prove that the official was aware that his or her actions violated the Charter. *See, e.g., Still v. Commissioner of Employment and Training*, 672 N.E.2d 105, 112,423 Mass. 805 (1996).

Because the official must be aware that his or her actions violated the Charter, it logically follows that ambiguities in the Charter must be resolved in favor of the accused official. This point was clarified in connection with the 2013 Charter complaint brought against Town Clerk Nancy L. Mello by Katz. Katz had charged the Town Clerk with a violation of her Charter responsibilities when investigating a Charter complaint brought by Mrs. Donna Cook. Mrs. Cook had alleged a violation of Section 1218 of the Charter, prohibiting the use of Town property, goods, money, grants, or labor to influence the outcome of an election, ballot question, or referendum. Mrs. Cook alleged that Section 1218 had been violated when buttons for the organization Tiverton First had been circulated or displayed on an elementary school secretary's desk. Clerk Mello had received the Cook complaint, went to the school, and spoke to the secretary and other school officials. Based upon her investigation, she found no Charter violation, and dismissed the Cook complaint.

Katz – even then something of a perennial Section 1211 complainant -- alleged that Ms. Mello's actions in investigating and dismissing the complaint was a violation of the Charter complaint procedure. The Town Council found that no violation had been committed. The Town Council noted that scienter was a necessary element of a Charter violation. (Minutes, March 11, 2013, p. 7.) Moreover, even though the Charter contained no specifics on the Clerk's right or duty to investigation, the Town Council found no

knowing violation of the Charter. As the President concluded: "As her job as she perceives, investigated, found it did not raise [sic] to that level, informed the School Department, boils down to interpretation. Does not rise to the level of a Charter violation." (Minutes, March 11, 2013, p. 7.)

Requiring a scienter element is not simply a matter of Charter text, or past precedent. The scienter element is also matter of sound public policy. Resolving Charter ambiguities against the Town official would mean that Town officials could be personally subject to fines and removal from office each and every single time there is a dispute about the interpretation of the Charter. It is well-established that government officials cannot govern effectively under such a threat. Therefore, even when important individual Constitution rights at stake, liability is not imposed upon the individual public official unless his or her behavior was a violation of established law. *Schuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 1689, 340 L.Ed.2d 90 (1974) (providing rationale for doctrine of qualified immunity).

In this case, there is more than enough room to interpret the Charter to have permitted Dr. Larkin and Mrs. Black to circulate an Elector Budget Proposal, and for the School Committee to have supported that action. Mr. Katz' allegation of an "end run" around the Charter rests upon a flawed view of the Charter in the first instance. When it first attempted to submit its own budget proposal for inclusion on the ballot for the Financial Town Referendum for FY2017-18, the School Committee had sought less than it had originally requested from the Budget Committee – but more than the Budget Committee was putting on the ballot. The Town Solicitor took the position that the School Committee

could only submit a budget proposal that requested the same amount that it had requested from the Budget Committee. The Charter does not unequivocally support that proposition that the School Committee could only propose the same amount that it had originally requested from the Budget Committee:

(b) Access to Ballot

- 3.) At the request of either the Town Council or School Committee or both, an Optional Budget Proposal shall appear on the ballot in accordance with Section 301(b) .1) At the discretion of the School Committee, said Optional Budget Proposal shall include the Budget Committee recommended school budget or the school budget request.

This provision makes it less than clear as to what is meant by ". . . the school budget request." As written, it could mean ". . . the budget that the School Committee originally put forward to the Budget Committee," or it could mean ". . . whatever the School Committee feels that it needs at this point in time." The Town Solicitor chose to resolve the ambiguity in favor of the former interpretation rather than the latter, but that does not mean that the ambiguity does not exist. Because of this ambiguity, Katz's thesis that the School Committee knowingly violated its budget proposal limits accordingly suffers.

Even more significantly, Katz also ignores the procedure for voter proposals is set out in Section 301(d) of the Charter:

- 1.) Elector Budget Proposals:* Electors of the town may petition that an alternate budget proposal be included in the Financial Town Referendum. No later than 35 days before the Financial Town Referendum the Town Clerk shall make petition forms available which include fields for the name of the elector who is the petition originator and the ballot entry amounts of Section 301(b)l.A through E. The Town Clerk shall record the dollar amounts sought by the petition originator on the petition form, shall prepare a typed version of this petition form to be verified by the petition originator, and record a petition originator's statement, if any, as to the purpose of the petition. The petition originator shall provide and the Town Clerk shall record either (1) the specific docket line item(s) to be increased, decreased, or created, or (2) a statement to

remand the docket to the Budget Committee for final determination of docket line item(s) in accordance with said petition originator's budget proposal. Any person obtaining signatures must be a legal resident of voting age. Petitions must be returned to the Town Clerk no later than 28 days prior to the Financial Town Referendum. Any language added to a petition, or any alteration of the language thereof subsequent to the verification by the petition originator of the Town Clerk's typed version, shall be of no force or effect. There shall be no limit to the number of separate petitions which an elector may sign. ***Nothing in this charter shall prevent an elected official or any appointed member of a Board, Committee or Commission from being a petition originator or signatory. Nothing in this Charter shall prevent an elector, a majority of an elected body or Board, Committee or Commission from circulating a petition. An elector may originate no more than one Budget Proposal petition.***

(Emphasis added.)

Under this language, it is manifest that Dr. Larkin and Mrs. Black had every right to originate and circulate whatever Elector Budget Proposal they liked, regardless of their status as School Committee members. To declare otherwise is to ignore the express provisions of Section 301(d)(l). That language expressly preserved Dr. Larkin and Mrs. Black's rights as citizens to originate a petition. To file a Charter complaint against Dr. Larkin and Mrs. Black for originating a petition should be considered nothing less than a direct attack on their rights under the Charter, and also of their rights to free speech.

Moreover, Section 301(d)(l) left more than enough room to allow an interpretation to permit the School Committee as a whole to support Dr. Larkin and Mrs. Black in that effort. The express language of Section 301(d)(l) also permits". . . a majority of an elected body or Board, Committee, or Commission" to circulate a petition. In other words, Section 301(d)(l) permitted the School Committee to do more than merely support Dr. Larkin and Mrs. Black in their petition; it could affirmatively go out and circulate that petition. Katz conveniently ignores this provision.

In sum, the Katz complaint should have been dismissed on its face. The Charter left

more than enough room to support an interpretation to permit the School Committee and its individual members to act as it had. The Charter had been specifically drafted to preserve the School Committee members' rights as individual citizens to submit an Elector Budget Proposal. The Charter also could be reasonably interpreted to allow *all* committees the right to support a petition. For that reason, Katz cannot satisfy the scienter requirement necessary to find a Charter provision.³ His claim of abuse of Charter procedures is baseless.

Indeed, if anyone is abusing Charter procedures, it is Justin Katz. This Charter specifically granted Dr. Larkin, and Mrs. Black the right to originate an Elector Budget Proposal notwithstanding their status as School Committee members. This Charter specifically granted the Tiverton School Committee the same right to circulate an Elector Budget Proposal notwithstanding its status as a Town Committee. Nevertheless, Katz ignored this language, and filed this Complaint. In other words, Katz has clearly signaled that he feels he can disregard the rights of others to have input into the budget process when he does not like that input. He feels that others should be prosecuted for putting forth proposals that he does not like.

Katz' behavior represents an abuse of the Charter Complaint process. Katz apparently cannot be even content with the fact that the Elector Budget Proposal did not make it to the ballot. Instead, he feels a need to punish those who even attempt to put forth the proposal in the first instance. In light of his previous championing of the Elector Budget Proposal process, is rank hypocrisy. His filing this frivolous complaint is precisely the type of bullying and intimidation that he complained of when he supported the present Financial Town Referendum in the first place. The end result can only be chilling public participation in the budgetary

³ A requirement that Katz fully understands, but clearly dislikes. *See, e.g.*, <http://oceanstatecurrent.com/opinion/the-providence-mayors-schedule-and-knowing-and-willful-violations/>

process. For that reason, this Court should dismiss this Complaint as lacking merit.⁴

B. THE MUNICIPAL COURT LACKS JURISDICTION OVER THIS MATTER.

In addition, this Complaint must be dismissed due to the fact that various Town officials have persistently failed to follow the procedures for bringing a Charter Complaint to the Municipal Court level. The Town Charter specifically requires the Town Council to hear Charter complaints before they proceed to the Municipal Court:

(a) Complaints by Citizens

- 1.) If the Town Clerk determines that the charges are "sufficiently set forth", he or she shall schedule a public hearing before the Town Council acting in its capacity as the Charter Monitoring and Complaint Review Board, such hearing to be held no later than thirty (30) days from the date on which the charges were filed. If the Town Clerk fails to find that the charges are "sufficiently set forth", he or she shall so notify the complainant in writing, providing the reason(s) for dismissal.
- 2.) In the event a "sufficiently set forth" complaint is against a majority of the Town Council members, the Town Clerk, within ten (10) days from the date on which the charges were filed, shall file the complaint in the Municipal Court.

(b) Action by the Town

- 1.) At the public hearing, the Review Board shall receive testimony from the complainant and from the official, board, or commission, or the members of the official body, against whom or which the charges were made, and from such witnesses as either party may bring forward. In the event the complaint is against a member of the Town Council, such member shall not take part in review of the complaint.
- 2.) If, following the hearing, the Review Board, by a two-thirds vote of those present - but in no event fewer than four (4) affirmative votes - concludes that the charges have been supported by the testimony, and the evidence presented, it shall direct the Town Administrator to cause a complaint to be filed within ten (10) days of the hearing against the alleged violator(s)

⁴ As have *all* of Mr. Katz' previous and numerous Charter complaints.

in the Municipal Court.

- 3.) The Municipal Court shall have jurisdiction to determine violations of this Charter, Town ordinances and rules or regulations adopted under the authority hereof and to enter appropriate orders, decrees or judgments with respect to such violations.

The actions before the Town Clerk and the proceedings before Town Council, then, are roughly akin to a preliminary hearing on whether probable cause exists to require a Town official or body to appear before the Municipal Court. This step has been willfully bypassed. As a result, the Respondents have not been given their due process, this Court lacks jurisdiction, and the Complaint must be dismissed.

1. The Town Clerk Failed to Properly Review This Baseless Complaint.

Pursuant to Section 1211, the Town Clerk had the duty to review the Katz Complaint to determine whether or not it was sufficiently set forth. As set forth above, it was manifest on the face of the Complaint that Katz had failed to put forth a valid claim of Charter violation under Section 1211. For that reason, the Town Clerk should have permitted the Complaint to proceed no further. Instead, the Town Clerk appears to have simply forwarded the Complaint to the Town Council and/or its Solicitor. (Town Council Minutes, October 10, 2017.⁵)

The Town Clerk's passivity is a departure from her role under Section 1211, but also past precedent. When the same Town Clerk was presented with the Cook Charter Complaint described above, the Town Clerk actively investigated that Complaint, determined that it had no merit, and dismissed it.

The Town Clerk's reticence with respect to Katz' instant complaint may be due to

⁵ Available at <http://sos.ri.gov/documents/publicinfo/omdocs/minutes/4672/2017/56206.pdf?r=>.

the fact that her dismissal of the Cook Complaint resulted in her facing a Charter Complaint herself -- brought by none other than Katz himself. However, the Town Clerk's unwillingness to face another baseless Charter Complaint by Katz does not excuse her from her duties.⁶ More importantly, that unwillingness should not deprive the Respondents of due process, nor should it force them to appear before the Municipal Court to face charges that are baseless.

Accordingly, this Court should dismiss this Complaint due to the failure of the Town Clerk to fulfill her duty to review the Complaint. Instead, this Court should order the Town Clerk to perform this review process, notwithstanding Katz' previous behavior towards her.

2. The Town Council Failed to Conduct the Public Hearing Required by Section 1211.

Section 1211 on its face requires that the Town Council hold a public hearing on the Charter complaint before it proceeds to the Municipal Court. The Town Council, apparently acting on the advice of the Town Solicitor, has declined to follow this mandatory step. (Minutes, Town Council, October 10, 2017.) On this basis alone, this Court lacks jurisdiction over the Charter complaint, and must dismiss it.

The Town Solicitor has attempted to elide over this requirement by arguing the Town Council was forced to recuse as a whole. This position is baseless. It may be that Council members Chabot and Lebeau must recuse because they participated in circulating the petition. Katz also alleged that Council Member John G. Edwards, V, ". . . should recuse on the grounds that this complainant has filed a matter against him currently pending before the state Ethics Commission." This fact, standing alone, should not have

⁶ The Town Clerk was in any event exonerated. (Minutes, March 11, 2013, p. 7.)

been sufficient to disqualify Edwards. In any event, even if we agreed that Edwards must recuse, there were still four members of the seven-member Council, and therefore, a quorum that could act.

No conflict of interest was ever identified with respect to the remainder of the Council. Instead, at the October 10, 2017 Town Council meeting, the Council's legal counsel raised the issue of disqualification *sua sponte*. Legal counsel informed the Council as a whole that they must recuse because they had previously discussed the Elector Budget Petition. At no point were any specifics of the previous discussions raised. Instead, the Town Council merely acceded to its legal counsel's position.

This position was legally wrong. The mere fact that the Town Council members may have discussed the matter falls far short of requiring disqualification. A mere statement of opinion about law or policy does not require disqualification on the basis of bias or prejudice. *Hortonville Joint Sch. Dist. v. Hortonville Educ. Ass'n*, 426 U.S. 482, 493, 96 S.Ct. 2308, 49 L.Ed.2d 1 (1976), *citing United States v. Morgan*, 313 U.S. 409,421, 61 S.Ct. 999, 1004, 85 L.Ed. 1429 (1941). *See also Rombough v. Federal Aviation Admin.*, 594 F.2d 893, 900 (2nd Cir. 1979), *citing F.T.C. v. Cement Institute*, 333 U.S. 683, 702, 68 S.Ct 793, 92 L.Ed. 1010 (1948). Mere exposure to the facts of a case gained in the performance of an official's statutory duties similarly does not work to disqualify that official. *Hortonville*, at 493, *citing Withrow v. Larkin*, 421 U.S. 35, 47, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712 (1975); *FTC v. Cement Institute*, 333 U.S. 683, 700-03, 68 S.Ct. 793, 803-04, 92 L.Ed. 1010 (1948). Additionally, mere recitation of pending charges during an investigatory stage does not work to disqualify a member of a hearing body. *McClure v. Ind. Sch. Dist. No. 16*, 228 F.3d 1205 (10th Cir. 2000), *citing Staton v.*

Mayes, 552 F.2d 908, 914 (10th Cir. 1977). A decision-maker only crosses the line and show bias when he or she makes public remarks directly referencing the facts of a particular case and entrenching himself in a position with respect to that case. *Cinderella Career and Finishing Schools, Inc. v. F.T.C.*, 425 F.2d 583, 589 (D.C. Cir. 1970).

Our Supreme Court recently had the opportunity to examine this very question with respect to the question of whether or not a school committee member had demonstrated disqualifying bias. The case before the school committee involved a school principal's appeal of his non-renewal. The school committee had previously non-renewed the principal. One member remarked at that time that he had voted the way he had on the principal's renewal ". . . because of what he saw as a significant amount of evidence suggesting that the individual is not prepared or equipped for the job of the principal."

The principal, when appealing his non-renewal before the school committee, moved for that member's recusal based upon that remark. The member refused, and the non-renewal was upheld. On appeal before the Supreme Court, the principal raised the refusal to recuse. The Court refused to find that the member should have been made to recuse, observing:

Put somewhat differently, "[u]nless there is evidence that preformed opinions of board members are fixed and unchangeable, or that in the deliberations after hearing all the evidence, the result was dictated by such a preformed opinion, the [employee] cannot successfully maintain that he was deprived of a fair and impartial hearing." *Kizer v. Dorchester County Vocational Education Board of Trustees*, 287 S.C. 545, 340 S.E.2d 144, 148 (1986); accord *Hubbard v. Board of Education*, 19 Kan.App.2d 853, 882 P.2d 483, 487-88 (1994); *Palmer v. Van Buren R-1 Board of Education*, 872 S.W.2d 590, 593 (Mo.Ct.App.1994) ("The critical inquiry is whether a review of the record indicates that the board of education's prior knowledge * * * resulted in an irrevocable commitment on its part to terminate [the teacher], regardless of what the evidence at the hearing, pro or con, might reveal***.") (quoting *Cochran v. Board of Education of Mexico*

School District No. 59, 815 S.W.2d 55, 63 (Mo.Ct.App.1991)).

Alba v. Cranston Sch. Comm., 90 A.3d 174, 183 (R.I. 2014). In other words, even a strong, damning statement at the early stages of the proceedings was not enough to disqualify the member later.

The October 10, 2017 meeting tape,⁷ nor the Town Solicitor's later Memorandum of November 15, 2017, give us absolutely no specifics as to the nature of the Town Council's discussion of the Elector Budget Proposal or the budget process. It may be that the statements were completely neutral. For that reason, we cannot determine whether or not the Town Council as a whole was disqualified. It was therefore gross error for the Town Council to shirk its duties with respect to this Complaint, and deny the Respondents the process due them.

In fact, the lack of basis for recusal is so manifest that one must question whether or not the true motive for that recusal was to allow the Town Council to escape Katz's inquisitorial zeal. The Town Council's fear of a Charter complaint or other legal action, however, should not work to deprive the Respondents of due process. If anything, the Town Council should be stepping in to prevent further abuse of the Charter complaint by Katz.

Accordingly, this matter should, at minimum, be remanded for a closer examination of whether or not the Town Council members do in fact have some disqualifying bias.

⁷ Available at <https://www.youtube.com/watch?v=qpwKikkop4c>

III. CONCLUSION

For the above-referenced reasons, the Charter Complaint should be dismissed.

Respondents,
By their attorneys,

/s/ Stephen M. Robinson
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/s/ Vicki J. Bejma
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