

Selectmen Reject Opinion On Harbormaster Eligibility

by William F. Galvin

HARWICH— The board of selectmen went against the opinion of town counsel Monday night on the question of whether a member of the waterways committee can be appointed to the harbormaster's position. At issue is a provision in the Harwich Home Rule Charter prohibiting members of an appointed town agency from being eligible to accept a paid position inside that agency for the year.

Selectman Angelo LaMantia, the board's liaison to the waterways committee, requested a review of an opinion issued by attorney Brian Riley of Kopelman & Paige, LLC, the town's legal adviser. On Monday night, attorney John Giorgio presented a second opinion on the matter, cautioning

selectmen a contrary position could be challenged.

With less than three weeks left before Harbormaster Thomas Leach serves his final day in that capacity, a search committee has been appointed to assist Town Administrator James Merriam to cull through applications for the position. The charter provides the town administrator with the authority to appoint a new harbormaster and the board of selectmen, by a super-majority vote, has the power to negate the appointment.

While the names of the candidates for the position have yet to be made public, it is clear from the legal opinions issued that a

Continued on Page 14

Selectmen

Continued from Page 1

member of the waterways commission has applied for the harbormaster's position. The question at hand is whether a member of that committee can serve in that capacity given language in the charter and provisions in the state Conflict of Interest Law.

Charter language in 7-5-2 states: "During the term for which a member is appointed and for one year following expiration of that term, no member of any appointed town agencies shall be eligible to accept a paid position in that agency." The Conflict of Interest Law specifies a 30-day prohibition in hiring of a committee member.

"It's kind of inherently a conflict of interest and absolutely something the board didn't want to happen," former selectman Sandra (Daniels) Hall, who was chair of the charter commission that crafted the town constitution, said on Tuesday. "It's a revolving door thing and you want to prevent a revolving door," Hall said of remembering the words of the late Dr. David Booth, who served as the town's charter consultant in 1986 and 1987, before the document was approved in a ballot question by a two-to-one margin.

"I don't know why you need to get an opinion from town counsel, it's painfully clear," Hall said. "I don't see any room for interpretation in that language at all."

On Monday night, Giorgio said he concurred with Riley's opinion that a member of the waterways committee would have to wait one year before being eligible to be appointed harbormaster. Legal counsel cited provisions in 7-14-3 of the charter stating the harbormaster shall administer

the policies adopted by selectmen and is subject to the day-to-day supervision of the town administrator "within the scope of the general policy and directives established by the waterways committee."

That language is virtually identical to provisions in the charter relating to the board of health and its director, the conservation commission and its administrator, the board of assessors and the deputy assessor, the council on aging and its director, the golf committee and its director and the cemetery commission and its administrator, Giorgio pointed out.

Giorgio said there are two questions in need of answering: The first is whether the waterways committee is an appointed town agency. It is clear based on the definitions of town agency and committee contained in the charter, that the waterways committee is a committee of the town, but without statutory authority, he said.

"Furthermore, it is my opinion that the waterways committee is also a town agency because it is 'a committee of town government consisting of two or more persons, whether appointed or elected,'" Giorgio stated in his opinion.

The second question is whether the harbormaster is a paid position within the waterways committee. Legal counsel said in his opinion the one-year prohibition "is meant to prohibit a member of a town agency from being appointed to a paid town position where the job duties of the position fall under the scope of the general policy and direction of his or her former agency. In the case of the harbormaster and waterways committee, it seems clear that because the harbormaster... performs duties which are subject to the general policy and direction of the waterways committee, the one-year prohibition against

appointment of a member of the waterways committee would apply to the position of harbormaster," Giorgio's opinion stated.

He took it one step further, stating the prohibition applies to each of those members cited under Chapter Seven of the charter. "To conclude otherwise would, in essence, render the one-year prohibition in Section 7-2-5 a nullity from a practical standpoint," Giorgio said.

Yet another provision of the charter, 7-2-2, states: "All agencies of the town shall ... nominate prospective employees of their choice, who shall then be considered for appointment by the town administrator, as provided in clause 4-4-2."

The attorney also said he realizes there is room for debate as to the wisdom of the prohibition, which is much more restrictive than the Conflict of Interest Law. He said the question of whether the policy makes good sense should be addressed through the charter amendment process.

Giorgio said a contrary decision would "eviscerate" the one-year provision in the charter. While he added he is not the charter police, he cautioned the board a contrary opinion could be challenged because the language is pretty clear.

But selectmen held a contrary position. Selectman Peter Hughes said the town administrator is the harbormaster's supervisor and while the waterways committee gives him guidance, they do not instruct him on a daily basis. Giorgio said he would have preferred the charter language be a little more precise, especially with what is meant by "in that agency."

LaMantia, who was also named to the harbormaster search committee, said the waterways committee recommends to the board of selectmen, which sets policy.

Arguably the only position that comes under those agencies is the clerk or board secretary, Selectman Ed McManus said. Merriam questioned why the charter authors would go to this length for board secretaries.

"It's hard to find people to serve on boards and committees, it's harder if they have expertise," McManus said. "We shoot ourselves in the foot, if they can't be considered for employment."

"All of these positions are the same.

Whatever you decide, be consistent," Giorgio warned.

LaMantia said there was a situation in the past when a committee member took over as an administrator. In 2005, Robbin Kelley served on the cemetery commission and when administrator Nancy Roy left that position, Kelley said she did the administrator's work as a commissioner at no expense to the town. After several months she was appointed administrator.

In the past year, Conservation Commission Vice Chair Amy Morris, who is employed in the health department, was one of 27 candidates who applied for the conservation administrator's position upon the retirement of John Chatham, but was told by town officials she was ineligible because of the charter provision prohibiting a member of that agency from taking the paid position.

LaMantia argued the situation is different with the waterways committee because that committee is not formed under state statute and they take no statutory actions, but serve as advisory. Giorgio pointed out only certain agencies are mentioned in the charter, including the waterways committee, but there is nothing that says they are different because they are advisory.

But LaMantia said he believes the charter covers the situation and would allow a waterways committee member to be appointed, absent the one-year hiatus.

"If that's what you feel, fine," Giorgio responded. "You set policy in town, but be consistent in the interpretation."

"The charter does not preclude a commission or committee member from being appointed," LaMantia said. The board supported that position.

Hall said Tuesday no one contacted her to get a reading on what the charter commission's intentions were when putting the provision in place. She said anyone aggrieved by a charter decision can appeal to the state Attorney General's Office or any 10 registered voters can bring an action in Barnstable Superior Court.

"In my opinion it's completely clear in the charter and if it goes through some action should be taken," Hall said.

Tom Leach

From: Sandy Robinson [srobinson@town.harwich.ma.us]
Sent: Monday, June 11, 2012 11:17 AM
To: 'Tom Leach'
Subject: FW: Harbormaster Appointment

Here is the opinion from KP

From: James Merriam [mailto:jmerriam@town.harwich.ma.us]
Sent: Thursday, May 31, 2012 3:59 PM
To: Sandy Robinson
Subject: FW: Harbormaster Appointment

From: John Giorgio [mailto:JGiorgio@k-plaw.com]
Sent: Tuesday, May 29, 2012 2:23 PM
To: James Merriam
Subject: Harbormaster Appointment

Dear Jim;

At the request of Selectman LaMantia, I have conducted a review of Attorney Brian Riley's opinion regarding the eligibility of a current member of the Waterways Committee to be appointed to the position of Harbormaster, which is a paid full-time position appointed by the Town Administrator. Attorney Riley had concluded that pursuant to Section 7-2-5 of the Town Charter, a member of the Waterways Committee would have to wait one year before being eligible to be appointed as the Harbormaster. I concur in that opinion for the following reasons.

Section 7-14-3 of the Town Charter provides: "The harbormaster shall administer the policies adopted by the board of selectmen and shall be subject to the day-to-day supervision of the town administrator within the scope of the general policy and directives established by the waterways committee." The language of Section 7-14-3 is virtually identical to sections 7-14-4 (Board of Health /Health Director), 7-14-6 (Board of Assessors/Deputy Assessor), 7-14-7 (Conservation Commission/Conservation Administrator), 7-14-8 (Council on Aging/Director), 7-14-10 (Recreation and Youth Director/Director), 7-14-13 (Golf Committee/Director), and 17-14-15 (Cemetery Commission/Cemetery Administrator).

Section 7-2-5 of the Charter states: "During the term for which a member is appointed and for 1 year following expiration of that term, no member of any appointed town agencies shall be eligible to accept a paid position in that agency."

Based on these Charter provisions, there are two questions that need to be answered:

First, is the Waterways Committee an Appointed Town Agency within the meaning of the Charter? In my opinion, it is clear that based on the definitions of "Town Agency" and "Committee" contained in Section 10-3-1 of the Charter, the Waterways Committee is a committee of the Town because it "performs a specified function on behalf of the Town (see its charge under section 7-14-2 of the Charter) but without statutory authority." Furthermore, it is my opinion that the Waterways Committee is also a Town Agency because it is "a committee of town government consisting of 2 or more persons, whether appointed or elected."

The second question that must be answered is whether the Harbormaster is a paid position within the Waterways Committee. In my opinion the one year prohibition in Section 7-2-5 of the Charter for a member of a Town Agency to be appointed to a paid position "in that agency" is meant to prohibit a member from being appointed to a paid Town position where the job duties of the position fall under the scope of the general policy and direction of his or her former agency. In the case of the Harbormaster and the Waterways Committee, it seems clear that because the Harbormaster under section 7-14-3 of the Charter performs duties which are subject to the general policy and direction of the Waterways Committee, the one year prohibition against appointment of a member of the Waterways Committee would apply to the position of Harbormaster.

Furthermore, based on the nearly identical language in Chapter 7 of the Charter relating to other Town agencies as noted above, it is my opinion that a similar prohibition would apply to members of each of those agencies as well. To conclude otherwise would, in essence, render the one year prohibition in Section 7-2-5 a nullity from a practical standpoint.

I realize that there is plenty of room for debate as to wisdom of the prohibition in Section 7-2-5, which we have indicated is much more restrictive than the Conflict of Interest Law (c. 268A), the question whether the prohibition makes good sense for the Town is a policy issue which could and should be addressed through the Charter amendment process.

Please let me know if you have any further questions.

John.

John W. Giorgio, Esq.
Kopelman and Paige, P.C.
101 Arch Street
12th Floor
Boston, MA 02110
jgiorgio@k-plaw.com
Phone: (617) 556-0007
Fax: (617) 654-1735
Mobile Phone: (617) 785-0725