

FINAL VOTE OF THE CHARTER ENFORCEMENT COMMISSION FOR THE
TOWN OF PROVINCETOWN ON THE PETITION FILED BY DIETER GROLL DATED
APRIL 2, 2014, WITH SUPPLEMENTARY MEMORANDUM DATED APRIL 4, 2014

Finding: It is the Finding of the Charter Enforcement Commission that the Petition submitted by Provincetown voter Dieter Groll fails to state an adequate basis on which to determine that either Acting Town Manager David Gardner or the Board of Selectmen violated the Charter by not disallowing the candidacy of the Finance Director for the Town of Provincetown for a vacancy on the Charter Enforcement Commission.

Authority: The authority of the Charter Enforcement Commission with regard to a Petition filed by a voter is established in Section 2 of Chapter 5 of the Charter, as follows:

- Section 5-2-3 states that the Commission shall take action only after receiving a written Petition filed by a voter or voters alleging a violation of the Charter by reason of an act or failure to act of the Town Manager, the Acting Town Manager, the Moderator, the Board of Selectmen, the School Committee, or the Finance Committee, or members of those Committees.
- Section 5-2-4 states that the Petition shall state the specific section of the Charter which is the subject of the violation, the Officer or Board who is responsible for the violation, and the act or failure to act resulting in the violation.
- Section 5-2-5 states that the Petition shall be filed by delivery to the Town Clerk, who shall note the date of its receipt on the Petition and mail a copy to each member of the Charter Enforcement Commission within one week of its receipt.
- Section 5-2-6 states that within three weeks of the receipt of a Petition by the Town Clerk, the Commission shall vote whether to dismiss the Petition without further action, and if the Commission so votes, the Chairman shall notify the Town Clerk.
- Section 5-2-7 states that if the Commission does not vote to dismiss the Petition, the Chairman shall set a time and date for the Hearing, and shall mail notice of the Hearing to the Town Clerk who shall post and publish the notice, and [send a copy] to the Petitioner and to the Officer or Board named in the Petition. The Hearing date shall be not less than

three weeks nor more than eight weeks from the date of the receipt of the Petition by the Town Clerk.

- Section 5-2-8 states that at the Hearing the Commission shall allow any person to address the Commission as to the merits of the Petition.
- Section 5-2-9 states that within three weeks of the Hearing, the Commission shall vote whether there has been a violation of this Charter as alleged in the Petition, and shall mail a notice of its vote to the Town Clerk, who shall post a copy of the vote for a period of four weeks, and [send a copy] to the Petitioner and the officer or board named in the Petition.

History: The Charter Enforcement Commission received a Petition from Provincetown voter Dieter Groll by Memorandum dated April 2, 2014, with a Supplementary Memorandum dated April 4, 2014. The April 2, 2014, Memorandum stated the matter as follows: “I wish to file a complaint against the Acting Town Manager and/or the Board of Selectmen before the Charter Enforcement Commission. This complaint is for failing to uphold and defend the Charter by taking such actions as necessary to disallow the candidacy of Finance Director Dan Hoort for a seat on the Charter Enforcement Commission in the upcoming elections, to be held on May 6, 2014.”

The Petition further alleges that the Charter renders the Finance Director “ineligible to serve as both the Finance Director and as Charter Enforcement Commissioner, for that would be in violation of Sections 3-4-2 and 3-4-3 of the Charter.” The Petition then quotes Sections 3-4-2, 3-4-3, 3-4-6, and 3-4-8 of the Charter, which state as follows:

- Section 3-4-2. A paid Town employee shall not be a member of a Town Board which is [in] any way related to his employment.
- Section 3-4-3. A paid Town employee with supervisory duties shall not be a member of a Town Board which is in any way related to his employment during his or her term of office or for at least one year after leaving office.
- Section 3-4-6. A member of a Town Board shall not be paid for any work done for the Town, or be allowed to bid on any Town contract for a job, which is in any

way related to the Board on which he or she serves or on which he or she has served within the past year.

- Section 3-4-8. Town employees and members of Town boards shall be governed by the ethical standards set forth in Chapter 268A of the Massachusetts General Laws, the Provincetown General By-Laws, and the Charter.

The Petition was filed with the Town Clerk and forwarded to the Commission members for review. The Commission met on April 8, 2014, and, after reviewing the Petition, the Commission voted to decline to dismiss the Petition on the grounds that there was a sufficient issue for consideration. In accordance with the Charter, the Commission then set a date for a Public Hearing and posted legal notice. The Commission also provided a letter dated April 15, 2014, to the Acting Town Manager explaining why it voted to decline to dismiss the Petition, and identifying the issues that it believed were under consideration. The Hearing took place on April 30, 2014. At the Hearing, the Acting Town Manager was represented by Counsel, Michelle Randazzo of the firm Kopelman and Paige, PC, which is under contract to serve as Counsel to the Town of Provincetown. Mr. Groll spoke on his own behalf. Mr. Thomas Donegan spoke on behalf of the Board of Selectmen. Members of the public were also given the opportunity to speak as provided for in the Charter.

Basis for the Finding:

Since the responsibility to appoint Town employees and to manage Town functions is placed by the Charter solely on the Town Manager by Sections 7-2-1 and 7-2-4, the Commission recognizes no responsibility in the Board of Selectmen to act to disallow the candidacy of the Finance Director. Therefore, the focus of its Finding in this matter is solely on the Acting Town Manager.

The Finance Director for the Town of Provincetown reports directly to the Town Manager – or, following the resignation of the Town Manager, to the Acting Town Manager - and, in accordance with his Position Description:

- Works under the policy direction of the Town Manager;
- Supervises approximately four full time employees, and has indirect supervisory responsibility for an additional four full-time employees and one part-time employee;
- Has frequent contact concerning accounting and budgetary matters with all town departments, committees, boards;
- Reviews and recommends total revenue and expense budgets of the Town in conjunction with the Town Manager, the Board of Selectmen and the Finance Committee; and
- Answers questions from other departments, the Board of Selectmen, the Finance Committee and the general public regarding Town finances and/or accounting procedures; among other responsibilities.

Membership on Town Boards is restricted under Section 4 of Chapter 3 of the Charter. Section 3-4-2 states, “A paid town employee shall not be a member of a town board which is [in] any way related to his employment.” Section 3-4-3 states, “A paid Town employee with supervisory duties shall not be a member of a Town Board which is in any way related to his employment during his or her term of office or for at least one year after leaving office.” In accordance with his Position Description, the Commission Finds that the Finance Director is a “paid Town employee with supervisory duties”. Section 3-4-6 states, “A member of a Town Board shall not be paid for any work done for the Town, or be allowed to bid on any Town contract for a job, which is in any way related to the Board on which he or she serves or on which he or she has served within the past year.”

Given the scope and responsibilities of the Finance Director’s position, and given the broad impact of financial issues on all actions of the Town, the Charter Enforcement Commission finds that the responsibility of the Commission under 5-2-3 to review a “Petition filed by a voter or voters alleging a violation of the Charter by reason of an act or failure to act of the Town Manager, the Acting Town Manager, the Moderator, the Board of Selectmen, the School Committee, or the Finance Committee, or members of those Committees” is clearly related to the scope of the Finance Director’s responsibility as a paid Town employee, and vice versa. This relationship is illustrated by the fact that if the Finance Director were to become a member of the Charter Enforcement Commission while serving as Finance Director, he would be required to

recuse himself for a potential conflict of interest in matters that involved any aspect of financial issues relating to all of the parties named in Section 5-2-3. Therefore, his ability to serve as a member of the Charter Enforcement Commission would be severely compromised, and would be in violation of Sections 3-4-2, 3-4-3 and 3-4-6.

The Commission wishes to express that this Finding does not in any way reflect on the capabilities of the Finance Director. To the best of our knowledge he has served the Town capably and effectively. And the Commission has no reason to believe that he would not be an equally effective member of the Commission. The Commission is merely here applying the clearest possible interpretation of the Charter, which suggests a concern with an individual at his level serving simultaneously both positions. At the Public Hearing, it was pointed out that a previous Treasurer had served ably on the Charter Enforcement Commission. But a Treasurer has a more limited scope and impact of duties than the Finance Director.

Counsel has argued that the restriction in 3-4-2 is so broad as to prohibit any Town employee from seeking membership on any Board. The Commission does not share this interpretation. First, there are few Boards with the responsibility – even if rarely invoked – that the Charter Enforcement Commission has to review allegations of fault by senior management. Second, most employees have clear areas of responsibility that do not extend across the full scope of Town government, and thus could find Boards to serve on that did not relate to their employment. The Finance Director is a clear exception.

The Commission does not agree that his candidacy represents a potential violation of Section 3-4-8, which states, “Town employees and members of Town boards shall be governed by the ethical standards set forth in Chapter 268A of the Massachusetts General Laws, the Provincetown General By-Laws, and the Charter.” There are no ethical standards set forth in the Charter or the By-Laws. This section principally endorses State ethics standards. Under a recent regulation of the Massachusetts State Ethics Commission 930.602(3), a previous restriction in the Ethics Laws on municipal employees serving on related committees was lifted as to unpaid committee positions. Membership on the Charter Enforcement Commission is unpaid in order to ensure the independence and objectivity of its members as they address allegations of a violation

of the Charter by the senior members of Town Government.

The Acting Town Manager's Counsel has argued, and the Commission initially agreed, that the Town was faced with something of a conundrum in this matter. As noted above, Section 3-4-2 of the Charter states that a paid Town employee shall not be a member of a Town board which is in any way related to his or her employment; and Section 3-4-3 imposes further restrictions on a paid Town employee with supervisory duties. However, Section 2-4-3 of the Charter states that any registered voter of the Town shall be eligible for election to any office, with a restriction only on holding more than one elected office. This provision was argued by Counsel as overriding any other restriction in the Charter, thereby requiring that the Finance Director's candidacy be allowed. However, after further review, the Commission wishes to note that there are several restrictions on elective office in the Charter, which are fully and consistently applied despite the wording in Section 2-4-3. These include:

- Section 3-4-4: An elected member of a Town board shall not serve on that Town board for more than three consecutive terms.
- Section 4-1-3: A member of the Board of Selectmen shall not hold any other appointed or elected, paid or non-paid, position in Town government, including any temporary, or ad-hoc committee created at Town Meeting, or otherwise.
- Section 6-7-3: A member of the Finance Committee shall not be a member of any other Town board.
- Section 7-1-5: The Town Manager shall not hold any other public office ...

It is not clear to the Commission why these restrictions can be fully applied despite the language in Section 2-4-3, while the restrictions in Sections 3-4-2, 3-4-3 and 3-4-6 cannot. The Commission is also reluctant to render any section or sections of the Charter inapplicable by interpretation, when there is an alternate interpretation that allows both sections to be applied. In this instance, the Commission finds that Section 2-4-3 is the general rule; one that is modified by the more specific rules appearing in Sections 3-4-2, 3-4-3, 3-4-4, 3-4-6, 4-1-3, 6-7-3 and 7-1-5.

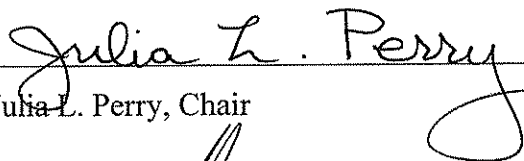
All of the above is meaningless as to the success of the Petition, however, unless it can be shown that any such violation of the Charter creates a responsibility under the Charter for the Acting

Town Manager to take action. As noted above, Section 5-2-3 states that the Commission shall take action only after receiving a written Petition filed by a voter or voters alleging a violation of the Charter by reason of an act or failure to act of the Town Manager, the Acting Town Manager, etc. The allegation in the Petition submitted by Mr. Groll is not of a violation of the Charter by reason of an act or failure to act of the Acting Town Manager, but a violation of the Charter by reason of an act by the Finance Director. The Petitioner needed to cite the section of the Charter that required the Acting Town Manager to act when he became aware of this potential violation. The Commission has searched in vain and found none. Section 7-2-1 states that the Town Manager shall be responsible for the administration of all Town functions. Section 7-2-4 states that the Town Manager shall hire all Town employees. Section 7-2-15 states that the Town Manager shall have such other powers and duties as may be conferred or assigned by vote of the Board of Selectmen, vote of the Town Meeting, the Provincetown General By-Laws, or this Charter. But none of these – and nothing anywhere else in the Charter - state that the Town Manager shall take action to prevent an employee of the Town from seeking elective office contrary to the provisions in the Charter.

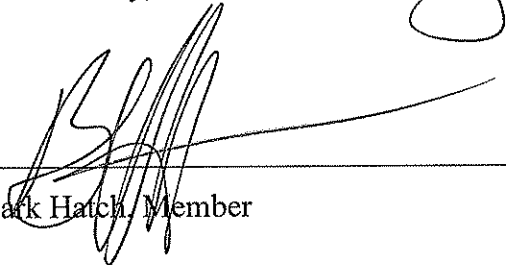
The problem of enforcement of the Charter in this matter is made more difficult by the wording of 3-4-2, 3-4-3 and 3-4-6. Not only is the term “in any way related” common and vague simultaneously, but, particularly with regard to the Charter Enforcement Commission, the details of the relationship between the particulars of any employee’s scope of responsibilities and the responsibilities of the Commission is only theoretical until an actual petition is brought. Although the Commission is concerned about the personnel implications of having a senior Town employee reviewing potential allegations against the Board of Selectmen, against the Town Manager - his direct supervisor - and in this case against those entities with which he is required by his position description to act “in conjunction with” or in “frequent contact” with, all of these concerns are only with potential future actions. Perhaps for the three years of the Finance Director’s term, there will be no petitions brought. Perhaps, the specific issues raised will be so acutely clearly related to his duties that the Finance Director will voluntarily recuse himself from serving on those matters. There is nothing in the Charter we can point to that makes the Acting Town Manager responsible to stop the Finance Director from running for a vacancy on the Charter Enforcement Commission.

Given the absence of a clear requirement in the Charter for the Town Manager to take action, the Town Manager's authority must be interpreted under a concept known as discretionary function. In those instances where the Charter is not clear, the interpretation must defer to the authority of the Town Manager to exercise his professional discretion in the application of the Charter. The details of the daily responsibilities of a high-level administrative authority such as the Town Manager position cannot be fully known to an outside reviewing authority, and it must, therefore, defer to his decision when the Charter does not clearly state otherwise.

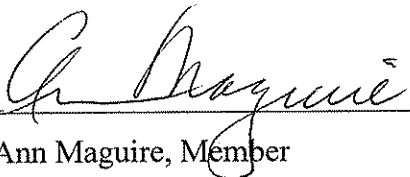
So voted this 5th of May, 2014.



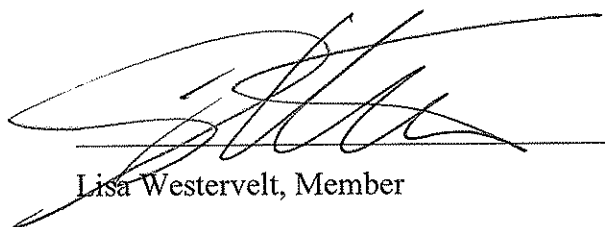
Julia L. Perry, Chair



Mark Hatch, Member



Ann Maguire, Member



Lisa Westervelt, Member