



Charter Compliance Commission For the Town of Provincetown

Consideration and Decision 2021-1

The Charter Compliance Commission met on Tuesday, February 9, 2021, at 1:00 pm, via Conference Call, in accordance with Governor Baker's Executive Order of March 12, 2020, "Order Suspending Certain Provisions of the Open Meeting Law" to consider a Request for Interpretation of the Charter. All participation in the Meeting was by remote access.

On the call were Charter Compliance Commission members Robert Klytta, Chair, and Julia Perry, Secretary. Also on the call were Charles Sumner, Acting Town Manager; David Gardner, Assistant Town Manager; Lise King, Select Board Member; Emmett Catanese, Town Clerk and Moderator; and Mark Del Franco, Complainant. Also on the call was Laura Rood, a member of the Public.

The Minutes of the Meeting where this Consideration and Decision was discussed are a separate document.

The authority of the Commission in this matter is stated at Chapter 1, Section 4.b. of the Town of Provincetown Charter voted 2018:

The Commission shall provide its written interpretation of the Charter on the written request of any resident or official of the Town. The Commission's interpretation is advisory only and for educational purposes and shall not be the basis for any legal action. A copy of the request and the proposed response shall be provided to the Board of Selectmen and the Town Manager for review prior to being issued.

Charter References

In reviewing the Complaint filed by Mr. Del Franco on January 26, 2021, the Charter Compliance Commission referred to the following sections of the Charter, as well as to the Charter as a whole –

Chapter 3, Section 2.a.

Section 2. General Powers and Responsibilities

a. The Board of Selectmen shall exercise the powers and duties prescribed by the Massachusetts General Laws, this Charter, and the Provincetown General Bylaws. The Board of Selectmen may delegate powers and duties to the Town Manager or to another Town Board.

Chapter 3, Section 5.a.

Section 5. Investigatory Powers

a. The Board of Selectmen may investigate the alleged misconduct of the Town Manager, any Town Board, or any member of a Town Board.

Chapter 3, Section 5.d.

d. The individual who is the subject of an investigation shall be informed in writing of the investigation and shall have the right to a Public Hearing.

Chapter 3, Section 5.f.

f. A report of the investigation shall be posted on the Town's website by the Town Clerk after review by Town Counsel for any matters protected by the State's privacy laws, which shall be deleted prior to posting. A summary of the investigation shall be printed in the next Town Report.

Chapter 3, Section 6.c.

c. Except as otherwise specified in this Chapter, the Select Board shall be subject to the same rules as apply to all other Town Boards, including that members have no authority in their individual capacities except as delegated by majority vote of the Board.

Chapter 5, Section 5.b.

b. ... no action of a Town Board shall be valid and binding unless ratified by an affirmative vote of the majority of the Members present

CONSIDERATION

The January 26, 2021, Complaint of Mark Del Franco contains multiple allegations, which are addressed below in the order they are presented in the Complaint. The questions and answers that follow were developed by the Charter Compliance Commission as part of its analysis.

Opening Statement of the Complaint – “On November 29, 2020, Select Lise King filed a false harassment complaint with Acting Town Manager Charles Sumner against Finance Committee member Mark Del Franco which appears to violate the Town Personnel Rules and the Town Charter in several instances.”

Is the November 29, 2020, memo from Lise King to Charles Sumner the filing of a false harassment complaint?

The November 29, 2020, Memorandum from Select Member King to Acting Town Manager Charles Sumner does not appear to be intended as the filing of a Complaint, but rather a request for guidance. “I would like to know how one would file an official grievance for harassment against Mr. Mark Del Franco ...”

Are the Town Personnel Rules applicable in this situation?

No, the Town Personnel Rules only apply to paid employees – so they do not apply to Mr. Del Franco. Per 1-2-1, the Town Personnel Rules only apply to “A person employed by the Town of Provincetown for regular payment for his or her work.”

In addition, the protections of the Town Personnel Rules are for “employees” and the Code says at 1-3-1 that they do not apply to an elected official, so they do not provide a remedy for Select Member King under Chapter 5, Article 6.

Allegation #1 - “1. Finance Committee members are designated “Special Municipal Employees” in accordance with Mass. G.L. 268A. Select King filed her complaint under the Town’s Personnel Rules by claiming a equivalency between “Special Municipal Employee” and “town employee.”

“This equivalency appears to be incorrect under Mass. G.L. 268A, which clearly defines “special municipal employee” as a designation for the Conflict of Interest law and no other reason—it does not define a special municipal employee in any other way as an “employee” of the town or a member of town staff.

“Municipalities do not appear to have the authority to change or modify that state law definition.”

Is Mr. Del Franco a “special municipal employee” under Massachusetts Law?

No, in accordance with Massachusetts General Laws 268A, the “Special Municipal Employee” designation only applies in Towns and Cities with a population over ten thousand. In addition, a “Special Municipal Employee” must be specifically designated by the Select Board. On the other hand, Select Member King is a “Special Municipal Employee” per the law because she is a Member of a Select Board.

MGL Part IV, Title I, Chapter 268A Conduct of Public Officials and Employees, Section 1. Definitions:

(n) "Special municipal employee", a municipal employee who is not a mayor, a member of the board of aldermen, a member of the city council, or a selectman in a town with a population in excess of ten thousand persons and whose position has been expressly classified by the city council, or board of aldermen if there is no city council, or board of selectmen, as that of a special employee under the terms and provisions of this chapter; provided, however, that a selectman in a town with a population of ten thousand or fewer persons shall be a special municipal employee without being expressly so classified.

Is Mr. Del Franco a “Special Employee”?

Yes, but, per Massachusetts law, only for purposes of the Conflict of Interest laws.

Does the Town Code of Conduct referred to in Select Member King’s Memorandum of November 29, 2020, apply to Mr. Del Franco?

The Commission has not been able to identify a Town Code of Conduct. Select Board Secretary Elizabeth Paine responded to a request from Chair Robert Klytta that there is no Code of Conduct currently existing. As noted above, the Town Personnel Rules do not apply to either Mr. Del Franco or to Select Member King.

Allegation #2 - "2. Acting Town Manager commenced an investigation into Select King's complaint. As noted repeatedly by the Select Board and the Charter, neither the Select Board nor the Town Manager has disciplinary authority over the Finance Committee under the Charter. The Appointing Authority for the Finance Committee is the Moderator, who did not request an investigation."

"Select King herself has stated in public meetings that the Select Board has no authority over the Finance Committee. Select King's attempt to discipline a Finance Committee member is a knowingly incorrect and abuse of a personnel process initiated intentionally for her own purposes."

"Regardless as to the legitimacy of the investigation, the Acting Town Manager and the Select Board, and specifically Select King who participated in the investigation, proceeded as though they had proper authority and authorization. Within that context, several other Charter violations occurred."

May the Select Board investigate the behavior of a Board Member?

Yes, per the Charter at Chapter 3, Section 5.a.:

Section 5. Investigatory Powers

a. The Board of Selectmen may investigate the alleged misconduct of the Town Manager, any Town Board, or any member of a Town Board.

The definition of Town Board in the Charter includes Committees and Commission.

May the Select Board delegate its authority to investigate to the Town Manager?

Yes, the Select Board may delegate the duty to investigate to the Town Manager per the Charter at Chapter 3, Section 2.a.:

Section 2. General Powers and Responsibilities

a. The Board of Selectmen shall exercise the powers and duties prescribed by the Massachusetts General Laws, this Charter, and the Provincetown General Bylaws. The Board of Selectmen may delegate powers and duties to the Town Manager or to another Town Board.

Did the Select Board delegate this responsibility to the Town Manager in this instance?

No, there is no evidence of a delegation by the Select Board to the Town Manager in this instance.

Did Select Member King "attempt to discipline" Mr. Del Franco?

Yes, Select Member King's Memorandum dated November 29, 2020, states that she is inquiring about "official sanction". "This is the first time his behavior has occurred in the "workplace," and therefore the first time I have inquired about official sanction"

May the Select Board discipline a member of a Board?

No, there is nothing in the Charter authorizing the discipline of any Board Member by anyone. The Charter only provides the Appointing Authority the authority to remove an appointed Board Member for “good cause” as defined in the Charter and following the procedure in the Charter.

Allegation #3 – “3. Per the Town Charter, Chapter 3, Section 5(a):

(a) The Select Board may investigate the alleged misconduct of the Town Manager, any Town Board, or any member of a Town Board. The Select Board may direct the Town Manager to investigate the affairs of the Town, the conduct of any Town Department or Town Employee, and any claim against the Town.

“As such, only the Select Board, meeting in quorum in public, can direct the Town Manager to perform an investigation. No such meeting, vote, or direction from the Select Board occurred. The Acting Town Manager, therefore, performed his investigation without official authorization from the Select Board but solely at the behest of Select King in her individual capacity.”

May Select Member King, acting on her own, request or direct an investigation by the Town Manager?

No, only the Select Board acting as a whole may request or direct an investigation by the Town Manager. As stated in the Charter at Chapter 5, Section 5: “*b. ... no action of a Town Board shall be valid and binding unless ratified by an affirmative vote of the majority of the Members present ...*.” However, Select Member King’s request does not specifically request an investigation. Therefore, the Memorandum taken on its own is not a violation of the Charter. However, it triggered action by the Acting Town Manager that resulted in an investigation, in violation of the procedures in the Charter. In this instance,

The Charter Compliance Commission recommends that in this instance the Acting Town Manager should have referred the request back to the full Board for consideration and action.

Allegation #4 – “4. Given the distinction between the Finance Committee, which is appointed by the Moderator, and all other committees, which are appointed by the Select Board and/or the Town Manager, it raises the questions of whether the Charter can empower the Select Board to act against Finance Committee through sanctions, reprimands, or removal.”

“The Charter itself establishes a separate process for removal of Finance Committee members and reserves that authority to the Moderator. Further, it has been clearly demonstrated and discussed that the Select Board and its appointed board members

and the Finance Committee have distinct codes of conduct. It follows, therefore, that the Select Board likely does not have clear—if any—authority under the Charter or the Charter under state law that allows it to apply punitive measures against Finance Committee members up to, but not including, removal.”

“Either the Charter is unclear on this matter in its compliance with state law through its definition of “Town Boards” by including the Finance Committee in that general definition or it is incorrect in its application of empowering the Select Board to interfere with the governance and management of the Finance Committee by the elected Town Moderator.”

Does the Select Board have authority to investigate the conduct of a member of the Finance Committee?

Yes, as noted above, per the Charter at Chapter 3, Section 5, gives the Select Board the authority to investigate the alleged misconduct of any member of a Town Board.

Does the Select Board have authority to sanction or reprimand a member of the Finance Committee?

No, as noted above, there is no authority in the Charter to sanction or reprimand the member of any Committee.

Does the Select Board have authority to remove a member of the Finance Committee?

No, the authority to remove a member of the Finance Committee rests solely with the Moderator as the Appointing Authority, acting under the procedure in the Charter.

Allegation #5 – “5. Per the Town Charter, Chapter 3, Section 5(d):

d. The individual who is the subject of an investigation shall be informed in writing of the investigation and shall have the right to a Public Hearing.

The Acting Town Manager never informed Mark Del Franco of the complaint nor his investigation. Since Finance Committee member Mark Del Franco was not informed, he was also not given his right to a Public Hearing. The Acting Town Manager and/or the Select Board, therefore, were in violation of the above.

Did the Town Manager violate the Charter by not notifying Mr. Del Franco of the investigation?

Yes, the Acting Town Manager failed to notify Mr. Del Franco of the investigation as required by the Town Charter, Chapter 3, Section 5.d.:

d. The individual who is the subject of an investigation shall be informed in writing of the investigation and shall have the right to a Public Hearing.

The Charter Compliance Commission recognizes that the reply to this response might be that this was not a formal investigation, but that is precisely the problem. Matters of this nature should only be addressed through a formal investigation following the

procedures in the Charter. The Acting Town Manager was attempting to address the allegation by Select Member King of the misconduct of a member of a Town Board, which is specifically required by the Charter to be the subject of a formal investigation.

Allegation #6 – “6. Per the Town Charter, Chapter 3, Section 5(f):

f. A report of the investigation shall be posted on the Town’s website by the Town Clerk after review by Town Counsel for any matters protected by the State’s privacy laws, which shall be deleted prior to posting. A summary of the investigation shall be printed in the next Town Report.

“No report of the investigation was posted to the Town’s website at the direction of the Select Board and/or Acting Town Manager in violation of the above. In fact, no report of the conclusion of the investigation exist.”

Did the Town Manager violate the Charter by not posting a report of the Investigation?

Yes, per the Town Charter, Chapter 3, Section 5.f., a report of the investigation should have been posted.

Allegation #6 continued – “To date, neither Select King, Select Venden, nor the Select Board have retracted their false accusation against Mark Del Franco, nor have they made any attempt after more than two months to correct the public record. As evidence by their silence in response to continuing public comments during Select Board meetings, they continue to allow the lie to propagate through the community, inherently damaging Mark Del Franco’s character and reputation.”

Response: The Charter Compliance Commission does not have the authority to address an allegation of libel by Select Board members, since the matter is not addressed in the Charter.

Allegation #7 – “7. Per the Town Charter, Chapter 3, Section 6(c):

c. Except as otherwise specified in this Chapter, the Select Board shall be subject to the same rules as apply to all other Town Boards, including that members have no authority in their individual capacities except as delegated by majority vote of the Board.

“As evidenced by the attached, Select King directed her complaint to the Acting Town Manager in her individual capacity as a Select Board member without the authorization of the Select Board. The investigation that followed by town staff and herself occurred as a direct result of her complaint.”

“In addition, also without authorization of the Select Board, Select King participated in the investigation personally, gave specific direction to the Acting Town Manager on how to proceed, and unilaterally declared the matter concluded, all actions in her individual capacity. All these actions are in violation of the above since she had no authority to act without the authorization of the Select Board.”

Response: The issue of Select Member King’s authority to act on her own has already been addressed above.

As to Ms. King’s participation in the investigation, the investigation did not follow the procedure specified in the Charter at Chapter 3, Section 5.

Allegation #8 – “8. During the Select Board meeting of December 14, 2020, Select King, in response to the escalation of the controversy she and Select Venden caused by the false accusation against Mark Del Franco stated it was internal matter but it got out in public due to a FOIA request from the press.”

Response: Although it is not specifically addressed in the Charter (which does identify emails as “writing” in the Definitions), it is the understanding of the Charter Compliance Commission that, in accordance with Massachusetts law, all memoranda issued by Select Board or its Members, the Town Manager, or Town Staff, acting in their official capacity, are official documents subject to review by the public under the Freedom of Information Act. There are exceptions – such as communication of personnel actions under the Town Personnel Rules – but they do not apply in this instance, as noted above. We recommend that the Select Board discuss this issue with the Town Counsel if there continues to be confusion on the matter.

Allegation #8 continued – “By characterizing her intentional character smear as an “internal matter,” King presumptively continues to make the claim that Finance Committee members are subject to the Personnel Rules under which she made her false accusation. If that is true, then the Town is in violation of the FOIA law by releasing such information since personnel matters are exempt from the law. If the Charter Compliance Committee decides Finance Committee members are not subject to the Personnel Rules, then Select King is guilty of knowingly lying to the public that her complaint was ever an “internal matter.”

Response: The Charter Compliance Commission does not have the authority to address the truth or falsity of statements by Select Board members, since the matter is not addressed in the Charter.

“Further, Mark Del Franco submitted an FOIA request asking for copies of any and all FOIA requests on this matter, which are public records, to be produced. The Town’s official response is that no such FOIA requests exist at all. Select King’s assertion

otherwise is another direct lie to the public as a sitting Select Board member and should be addressed by the Select Board, if not the Charter Compliance Committee.”

Response: The Charter Compliance Commission does not have the authority to address the truth or falsity of statements by Select Board members, since the matter is not addressed in the Charter.

Closing Comments by the Charter Compliance Commission

The Charter Compliance Commission is not unsympathetic to concerns by Select Board Members about inappropriate language that may be directed at them. But the correct procedure for addressing such concerns is action by the Select Board acting as a whole. As stated in the Charter at Chapter 3, Section 2, “*b. The Board of Selectmen is the primary policy-making, planning, and goal-setting agency of the Town.*” The Select Board has the authority to issue a policy on inappropriate language during Select Board meetings. In addition, in both her Memoranda dated November 29, 2020, and December 2, 2020, Select Member King references communications on Facebook. We are aware that the Select Board in another Town (Easton) has taken steps to issue a social media policy for appointed and elected Board members. Provincetown’s Select Board has the authority to do the same.

On another point, the Charter Compliance Commission would like to encourage all parties to consider the tone of their communications. As noted above, all written communications among the Select Board and the Town Manager are official documents that are available to the public through the Freedom of Information Act, in accordance with Massachusetts law. In considering this all parties should attempt to communicate in a manner that is professional and respectful.

DECISION

It is our Decision, based on the above, that the November 29, 2020, Memorandum from Select Member Lise King to the Acting Town Manager Charles Sumner, although not asking for an investigation, initiated an investigation that did not follow the procedures in the Charter. Any investigation should only have been initiated if requested by the Select Board as a whole and should have followed the procedures in the Charter.

Per the Charter, a Decision of the Charter Compliance Commission is advisory only and for educational purposes and shall not be the basis for any legal action.

Moved and approved by the Charter Compliance Commission by a vote of 2-0-0.