

October 18, 2018

Nathan Poore, Town Manager
Town of Falmouth
271 Falmouth Road
Falmouth, ME 04105

RE: Revised Opinion on Proposed Charter Revision

Dear Nathan:

I am writing to follow up on my written opinion letter to Karen Farber, chair of the Falmouth Charter Review Commission, dated September 18, 2018. In that letter, I certified that it was my opinion that the proposed Charter revision, which contains several proposed amendments to discrete provisions of the Charter as outlined in the Commission's Final Report, did not contain any provision prohibited by the United States Constitution, the Constitution of Maine or the general laws.

Since my September 18th letter, I have discovered an issue with one of the recommended changes to the Charter. The Commission's effort to make reciprocal a number of parallel provisions in the Charter pertaining to the Town Council and the School Board may have led to an unintended consequence that may be contrary to law in one specific instance. The companion provisions at issue involve sections of the Charter dealing with the qualifications of Town Councilors (Section 202) and School Board members (Section 402).

Specifically, the proposed amendment to Section 202 governing the qualifications of Town Councilors clarifies that, in addition to a Town employee, neither a School Department employee nor a Falmouth Memorial Library employee may serve as a Town Councilor. The proposed amendment to Section 402 governing the qualifications of School Board members was intended to provide a similar, reciprocal restriction on the qualifications of School Board members as was proposed by the amendment in Section 202; thus, it states that, in addition to a School Department employee, neither a Town employee nor a Falmouth Memorial Library employee may serve as a School Board member.

In 2013, the Maine Law Court found a provision of the City of South Portland's personnel policy prohibiting City employees from seeking or accepting nomination or election to the South Portland School Board to be an unconstitutional violation of the First Amendment rights of two City employees, one, a part-time circulation librarian, and the other a part-time employee in the City's parks and recreation department. *Callaghan v. City of South Portland*, 2013 ME 78, 76 A.3d 348. While acknowledging that the City likely could lawfully prohibit some City

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employees from running for and serving on the School Board,¹ the Court noted that under the specific factual circumstances presented, the City could not demonstrate that “its interest, as an employer, in providing efficient public services outweigh(ed) the employee’s interest, as a citizen, in commenting on a matter of public concern.” *Id.* At ¶34. In applying this balancing test in the employees’ favor, the Court considered that the School Board had no supervisory authority over the part-time employees within the City’s Library Department and Parks & Recreation Department. *Id.* At ¶31.

In light of the *South Portland* case, which I regrettably overlooked when issuing my original September 18th opinion letter to Ms. Farber, I recommend that the proposed change to Section 402 of the Charter prohibiting town and library employees from serving on the Falmouth School Board be removed from the Charter in the event that the slate of Charter revisions is approved by the voters on November 6th. Under 30-A MRS § 2104, the municipal officers have the authority to determine that a specific amendment to the charter should be considered and, by order, can propose that the proposed amendment be placed on a ballot at the next regular municipal election to be held at least 30 days after the order is passed, which in this case will occur in June of 2019. The Town Council thus has the authority, following a hearing, to remove the potential constitutional infirmity contained in Section 402 as amended, prior to the entire Charter revision taking effect on July 1, 2019.

I appreciate the opportunity to revise and clarify my opinion on this matter, and would recommend that this letter be added to the Charter Review Commission’s final report. Please let me know if you have any questions regarding the contents of this letter.

Sincerely,



Amy K. Tcho

AKT/mk

Cc: Karen Farber, chair, Falmouth Charter Review Commission

¹ The Court in *Callaghan* noted that the plaintiff employees had conceded that the City could lawfully prohibit some City employees from running for and serving on the School Board, such as the City Manager and perhaps other supervisors and City employees with direct input into the City’s budgetary process. *Id.* at ¶36. The problem with the City’s personnel policy, however, was the blanket prohibition on *all* City employees from running for and serving on the School Board, without an examination of the negative impact on or interference with efficient municipal government operations caused by the particular employee’s candidacy for and election to the School Board.