

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

DOCKET NO. 2005-0684

MARK R. ACCIARD

v.

PHILIP V. CONSENTINO AS CHIEF OF POLICE FOR THE TOWN OF ATKINSON
and
PHILIP V. CONSENTINO AS SELECTMEN FOR THE TOWN OF ATKINSON
AND NOT INDIVIDUALLY

BRIEF OF THE DEFENDANT/APPELLANT

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Constitutional mandate of “separation of powers” (NH Const. Pt. 1 Art. 37) deny the Superior Court authority (NH Const Pt 2 Art 72-a) to “prohibit(s) any participation or deliberation on any police or elderly affairs matters so long as ...” a duly elected selectman, and duly appointed part time chief of police of a municipality incorporated and enabled by the legislature (Pt 2 Art 5 and RSA 31: et ux ...). “is a selectman”; and further orders after a finding of contempt that “to avoid future sanctions he must leave the room when police or elderly affairs issues are being discussed by the Board of Selectmen. It also means he cannot discuss these issues on an informal basis with other selectmen outside of the Selectmen’s meetings”? (Quoted from Superior Court Order)
2. Does the judicial branch have the legal authority to “gag” a duly elected selectman of a municipality incorporated and enabled by the legislative branch “who must manage the prudential affairs of the town and perform duties prescribed by law” (RSA 41:8), who also serves as a part time police chief having “authority to direct and control all employees of his department in their normal course of duty” and is “responsible for the efficient and economical use of all department equipment (RSA 105:2-a), being compatible offices (RSA 669:7), denying him the ability to discuss or even be in the same room with the Board of Selectmen when police or elderly affairs matter are being discussed, and further prohibiting discussions on these issues with the selectmen on an informal basis outside of selectmen meetings?
3. Is a decision of the Atkinson Code of Ethics Committee (RSA 31:39-a) “irrelevant” when after their hearing process they “blessed Mr. Consentino’s conduct” but failed to satisfy the Court’s own, unwritten, conflict of interest code?
4. If a Court Order states “Philip Consentino, in his capacity as selectman while holding the position of chief of police of the Town of Atkinson, shall recuse himself from the Atkinson Board of Selectmen and *shall not participate as a selectmen* in discussions

of and shall not deliberate or vote on any Police Department or Elderly Affairs matter” (emphasis added), is a decision of the Court finding him in contempt of that Order and “reminding” him of the “specific provisions of the Order, which the Court expects he will now follow to the letter” legal and reasonable when the specific provision that the Court refers to, “that he must leave the room when police or Elderly Affairs issues are being discussed by the Board of Selectmen”, are not contained in the Order?

5. “The separation of powers requirement of the Constitution (NH Const. Pt I, Art 37) is violated by an encroachment by one branch of government upon a constitutional function of another.” If “however desirable comprehensive legislation in the area of conflict of interest may be, the enactment of such legislation is the prerogative and responsibility of the legislature and not of the executive” Opinion of the Justices 116 NH 406 (1976). Can this “prerogative” and “responsibility” of the legislature be assumed by the judiciary without an encroachment by one branch of government upon a constitutional function of another?

CONSTITUTIONAL PROVISIONS

New Hampshire Constitution - Part 1, Article 37. Separation of Powers.

In the government of this state, the three essential powers thereof, to wit, the legislative, executive, and judicial, ought to be kept as separate from, and independent of, each other, as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity.

June 2, 1784

STATEMENT OF THE CASE/STATEMENT OF FACTS

On July 16, 2004 the Appellee, Mark R. Acciard ("Acciard"), filed a "Petition seeking injunctive relief" against Philip V. Consentino ("Consentino"), a duly elected Selectman, part time Police Chief and Elderly Affairs Director for the Town of Atkinson, New Hampshire.

That the litigation of this matter resulted in an "Order" dated May 10, 2005, which in substantive part, states as follows:

"Philip Consentino, in his capacity as selectman, while holding the position of Chief of Police of the Town of Atkinson, shall recuse himself from the Atkinson Board of Selectmen and shall not participate as a selectman in discussions of and shall not deliberate or vote on any Police Department or Elderly Affairs Department matters. The said Philip Consentino shall only be allowed to discuss, deliberate and vote on any Town employee matters when such matters will not benefit himself, his wife or his son in any way".

That on July 27, 2005 Acciard filed a "Petition for Contempt" alleging that the Court's Order of May 10, 2005 had been violated by Consentino, stating:

"The above mentioned order has been repeatedly violated by Mr. Consentino both in selectmen's meetings, and in meeting and telephone discussion with the other two selectmen, Mr. Childs and Mr. Sapia, outside of public selectmens meetings.

"Mr. Consentino has also petitioned the Board of Selectmen, as Police Chief for Police matters while sitting in the selectmen's chair, clearly violating the spirit as well as/if not the actual letter of the order."

That a hearing was held on the Motion for Contempt on August 31, 2005. At that hearing Acciard states:

"MR. ACCIARD: Your Honor, on May 10 of this year the Court issued an Order which demanded that the respondent, Mr. Consentino, recuse himself from discussing – that the respondent, Mr. Consentino, recuse himself from discussing, deliberating or voting upon Police Department or Elderly Affairs Department matters. Further, he may only discuss, deliberate or vote

upon Town employee matters which do not affect himself or his family in any way.

Since that time, Mr. Consentino has repeatedly and willfully violated that Order. Black's Legal Dictionary defines recuse as to remove oneself from a board, committee or panel if there's a conflict of interest or potential for a conflict of interest.

Mr. Consentino does not remove himself from the Board for these events but instead turns his selectman's nameplate around and stays, sitting there in the selectman's chair while the discussion continues. He may or may not participate in the discussion, but abstains from voting..." (Transcript of hearing, page 7, line 22)

That the point of this quotation is an acknowledgment by Acciard that Consentino did not vote on any prohibited subject matter and, in fact, abstained when decisions by the remaining members of the Board of Selectmen were made concerning Police Department or Elderly Affairs issues. The key is that the Court's Order required Consentino to not participate AS A SELECTMAN in discussions of and shall not deliberate or vote on any Police Department or Elderly Affairs Department matters. That Acciard acknowledges that Consentino did not vote on any issues concerning prohibited matters and it was Consentino's testimony that his involvement in discussions was in his capacity as the Police Chief and Elderly Affairs Director and that he did not "deliberate or vote on any Police Department or Elderly Affairs Department matters" as a selectman. Consentino felt that when he, "turned his selectman's name plate around and stays" it was clear he was not speaking in his capacity as a selectman, but only in his capacity as the Police Chief and Elderly affairs Director.

That the Court's Order dated September 6, 2005 points to Acciard's allegations concerning his claim of contempt,

"Specifically, the plaintiff claims that at various public meetings of the Board of Selectmen and also during non-public sessions, Philip Consentino continued to participate in discussions in matters involving the Police Department and elderly affairs, of which he is the Director. While the plaintiff

concedes that the defendant may not have voted on those matters, he argues that Mr. Consentino was always present as the issues were being discussed and on occasion participated in those discussions.”

Further,

“the defendant testified that it was his belief that he could participate in matters as a selectman involving the Police Department or Elderly Affairs so long as he did not vote on any issue under consideration...The Order clearly prohibits any participation or deliberation on any police or elderly affairs matters so long as Mr. Consentino is a selectman...The fact that the Atkinson Code of Ethics Committee has apparently blessed Mr. Consentino’s conduct is irrelevant when the issue is the violation of a Court Order...Because the Court finds that Philip Consentino has willfully ignored its past Order, it GRANTS the plaintiff’s Motion for Contempt. However, no sanctions shall be imposed at this time. In order to avoid future sanctions, the defendant is reminded of the specific provisions of the Court’s May 10, 2005 Order, which the Court expects he will now follow to the letter. That means he must leave the room when police or Elderly Affairs issues are being discussed by the Board of Selectmen. It also means he cannot discuss these issues on an informal basis with other selectmen outside of the selectmen’s meetings.” (Emphasis added)

The Court’s Order of May 10, 2005 did not prohibit Consentino from participating when police or Elderly Affairs issues were being discussed by the remaining Board of Selectmen so long as his contribution was made not “in his capacity as selectman” and so long as he did not participate “as a selectman” in discussions of and did not deliberate or vote on any Police Department or Elderly Affairs Department matters. The May 10, 2005 order does not “clearly prohibit any participation or deliberation on any police or Elderly Affairs matter so long as Mr. Consentino is a selectman” ... does not require him to “leave the room when police or Elderly Affairs issues are being discussed by the Board of Selectmen nor does it prohibit him from discussing these issues on an informal basis with other selectmen outside of the selectmen’s meeting.” Had those restrictions been placed on Consentino by the May 10, 2005 Order an appeal would have been filed, from that order, based on the issues raised in this appeal.

SUMMARY OF ARGUMENT

This appeal questions the authority of the Superior Court to prohibit a duly appointed part time Police Chief and Elderly Affairs director, who has also been duly elected as a member of the municipal Board of Selectmen, from any participation or deliberation on any police or Elderly Affairs matters so long as he is a selectman. And further, after being found in contempt, “in order to avoid future sanctions” be required to “leave the room when police or Elderly Affairs issues are being discussed” by the board of selectmen, which also means he cannot discuss these issues on an informal basis with other selectmen outside of the selectmen’s meeting.

It is agreed by Acciard and Consentino that Consentino did not participate in any votes concerning Police Department or Elderly Affairs matters after May 10, 2005. The only issue is whether the affirmative step of turning the selectman’s name sign around indicating that he was not participating in his capacity as a selectman in any discussion but was offering information and providing input in his capacity as the Police Chief and Elderly Affairs director, equated to an act of contempt. He did not “deliberate” as a selectman but, of course, participated in those discussions in his Police Chief and Elderly Affairs director capacity. Based on these facts, the record does not support the Court’s conclusion that Consentino was in contempt of its May 10, 2005 order, which did not prohibit or limit Consentino’s contribution in his capacity as the Police Chief or Elderly Affairs director, so long as he did not deliberate or vote “in his capacity as a selectman.” The Court’s Order of September 6, 2005 goes far beyond the scope of its May 10, 2005 Order and finds Consentino in contempt based on the “letter” of the May 10, 2005 order, concerning restrictions, which cannot be found within the May 10, 2005 Order.

A duly elected selectman of a municipality in New Hampshire, pursuant to RSA 41:8 is required to “manage the prudential affairs of the town and performs duties prescribed by law”. A part time Police Chief has “authority to direct and control all employees of his department in their normal course of duties” and is “responsible for the efficient and economical use of all department equipment” pursuant to RSA 105:2-a.

The position of part time Police Chief and Selectman are compatible pursuant to RSA 669:7.

That the Court’s enhanced Order of September 6, 2005 requiring the Police Chief and Elderly Affairs director to not be in the same room with the selectmen while police or Elderly Affairs matters are being discussed and further prohibiting him from discussing these issues on an informal basis with other selectmen outside of the selectmen’s meeting makes it impossible for Consentino to fulfill his statutory duties as Police Chief and Elderly Affairs Director.

The New Hampshire Constitution succinctly states the concept of “separation of powers” in part 1 article 37:

“In the government of this state, the three essential powers thereof, to wit, the legislative, executive, and judicial, ought to be kept as separate from, and independent of, each other, as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the Constitution in one indissoluble bond of union and amity.”

This court has ruled:

“Courts do not enact or create laws; (they) declare what the law is and what it requires. ...To hold otherwise violates ... the separation of powers among the three coordinate powers of ... government.

“Separation of the three co-equal branches of government is essential to protect against a seizure of control by one branch that would threaten the ability of our citizens to remain a free and sovereign people. ... Thus, the separation of powers doctrine prohibits each branch from encroaching upon the powers and

functions of the other branches.” Petition of Senator Clifton Below et al 151 NH 135 (2004).

“The separation of powers requirement of the Constitution is violated by an encroachment by one branch of government upon a constitutional function of another...However desirable comprehensive legislation in the area of conflict of interest may be, the enactment of such legislation is the prerogative and responsibility of the legislature and not of the executive.” Opinion of the Justices, 116 NH 406 (1976). Nor is it the function of the judicial branch.

“The political question doctrine is essentially a function of the separation of powers, existing to restrain courts from inappropriate interference in the business of the other branches of Government, and deriving in large part from prudential concerns about the respect we owe the political departments...In the New Hampshire Constitution, the principle of separation of powers is espoused in Pat I, Article 37. ... The justiciability doctrine prevents judicial violation of the separation of powers by limiting judicial review of certain matters that lie within the province of the other two branches of government.” Baines v. New Hampshire Senate President, 152 NH 124 (2005).

This case presents the question whether or not the judicial branch without legislative authority can, on its own, limit Consentino from performing his statutory duties as a Police Chief and Elderly Affairs Director by prohibiting him from even being in the same room with the Board of Selectmen when issues concerning those two areas are being discussed and further prohibiting him from discussing those issues on an informal basis with the selectmen outside of the selectmen’s meetings,

Clearly, there was no misunderstanding concerning limitations placed on Consentino by the Court Order of May 10, 2005. He did not vote on any issues as a selectman concerning the Police Department or Elderly Affairs matters. Further, he believed that by turning his selectman’s name plate around, that this physical act made it clear that any contribution he was making concerning Police Department or Elderly Affairs Department matters were being made

not in his capacity as a Selectman but in the capacity as Police Chief and Elderly Affairs Director only, and did not violate the Court's Order.

When the judicial branch assumes powers not given it by the legislature and interferes with the statutory function placed on a Police Chief and Elderly Affairs Director by the legislature, the separation of powers provision of the New Hampshire Constitution is violated and those restrictions enforced by the threat of further sanctions are beyond the Court's authority and unconstitutional.

ARGUMENT

That Consentino has been found in contempt of a Superior Court Order requiring him, in his capacity as Selectman, while holding the position of chief of police of the Town of Atkinson to "recuse himself from the Atkinson Board of Selectmen and shall not participate as a selectman in discussions of and shall not deliberate or vote on any police department or elderly affairs department matters." (Emphasis added)

That the Appellant did not vote on any issues concerning those departments after May 10, 2005 and indicated that any contributions he made to the remaining members of the Board of Selectmen concerning the Police Department or Elderly Affairs Department matters were limited to his capacity as the Police Chief and Elderly Affairs Director. He did not deliberate concerning those issues as a Selectman and factually there is no dispute that he did not vote concerning those issues as a Selectman. That the Court's "enhanced" Order of September 6, 2005, to avoid future sanctions, requires the Appellant to leave the room when police or Elderly Affairs issues are being discussed by the Board of Selectmen and further prohibits him from discussing these issues on an informal basis with other selectmen outside of the selectmen's

meetings. Those additional restrictions are not within the “letter” of the Court’s Order of May 10, 2005 and cannot be the basis for a “finding of contempt” in its subsequent Order of September 6, 2005.

Further, if those restrictions had been contained in the May 10, 2005 Order, an appeal would have been taken from that decision at that time, as those restrictions violate the separate of powers provision of the New Hampshire Constitution. The judicial branch cannot legislate its own “conflict of interest” requirements without legislative authority and cannot find an illegality where no statutory or case law authority exists to support its finding. The restrictions placed on Consentino by the Court in its September 6, 2005 order amounts to an unauthorized judicial encroachment on the lawful operation of the Atkinson Police Department and Elderly Affairs Department. Courts are restrained from inappropriate interference with powers and functions of the other branches, addressing a nonjusticiable, political question, “where there is a textually demonstrable constitutional commitment of the issue to coordinate political department, and a lack of judicially discoverable and manageable standards for resolving it” by statute or case law. Hughes v. Speaker of N.H. House of Representatives Slip Opinion (2005-169) June 2, 2005.

CONCLUSION

That the Superior Court's Order of September 6, 2005 finding Consentino in contempt of its Order of May 10, 2005 is a conclusion that cannot reasonably be drawn from the "letter" of that Order.

The enhanced conditions not included in the May 10, 2005 order, but purporting to be the "letter" of the May 10, 2005 order, specifically that "he must leave the room when police and elderly affairs are being discussed by the Board of Selectmen, ...and ... cannot discuss these issues on an informal basis with other selectmen outside of the selectmen's meeting" are without statutory or case law authority.

The positions held by Consentino are statutorily compatible, and each carry a responsibility which must be reconciled, in a political context.

The judicial branch cannot "enact or create laws" and cannot encroach "upon the powers and functions of other branches." A nonjusticiable political question, prevents judicial violation of the province of the other two branches of government. To attempt to do so violates our constitutional observance of a 'separation of power' between the branches.

That Philip V. Consentino, as Selectman, Police Chief and Elderly Affairs Director, has contributed a lifetime of service to the Town of Atkinson, tarnished by the Court's finding him in contempt, for doing his statutory duty, and in his mind satisfying the Court's original mandate. The Court's finding of September 6, 2005 is not supported by a fair reading of its May 10, 2005 Order, and cannot survive a "separation of power" constitutional analysis.

Philip V. Consentino asks that the court's order of September 6, 2005 be reversed and that the Court's finding of "contempt" be expunged.

REQUEST FOR ORAL ARGUMENT

Plaintiff requests fifteen (15) minutes for oral arguments and Sumner F. Kalman, Esq. will argue on Plaintiff's behalf.

January 9, 2006

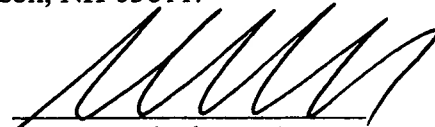
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CERTIFICATE OF SERVICE

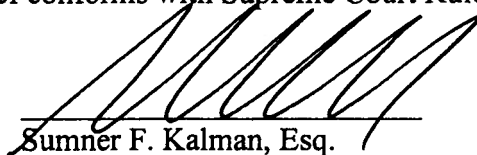
I hereby certify that the foregoing was mailed first class mail, postage prepaid to Mark R. Acciard, 6 Christine Drive, Atkinson, NH 03811.



Sumner F. Kalman, Esq.

CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief conforms with Supreme Court Rule 26(2), (3) and (4).



Sumner F. Kalman, Esq.

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