



MEMORANDUM

TO: Benjamin Hartwell
Chairman, Gorham Town Council

FROM: Mark A. Bower, Esq.

RE: Interpretation of Town Charter Sec. 201

DATE: November 11, 2019

You have requested an opinion regarding the interpretation of Section 201 of the Town Charter, which governs the qualifications of Councilors. Specifically, you are seeking guidance as to whether the employment position of education technician (also called “ed tech”) is an “office of emolument or profit under the Town Charter or Ordinances” as stated in Section 201. For the reasons discussed below, my opinion is that an ed tech is not one of the “offices” referred to in Section 201.

Section 201 of the Charter sets forth three basic qualifications that any individual elected to the Town Council must meet in order to serve. During his/her term, a Councilor: (1) must be a qualified elector (voter) of the Town; (2) must reside in the Gorham; and (3) must not hold any “office of emolument or profit under the Town Charter or Ordinances.” The first two qualifications are self-explanatory and non-controversial, but the third requires further analysis.

The first question is what the term “office” refers to. The Charter itself does not define the term; therefore, principles of statutory interpretation direct us to look to the “plain meaning” of the term. In so doing, it will be useful to look to common dictionary definitions of the term “office”:

- Merriam-Webster Dictionary: “a special duty, charge, or position conferred by an exercise of governmental authority and for a public purpose; a position of authority to exercise a public function and to receive whatever emoluments may belong to it.”
- Black’s Law Dictionary: “Although an office is an employment, it does not follow that every employment is an office. A person may be employed under a contract, express or implied, to do an act, or to perform a service, without becoming an officer.”

Moreover, the term “public office” is defined as follows:

- Merriam-Webster Dictionary: “an office created by a constitution or legislative act, having a definite tenure, and involving the power to carry out some governmental function.”
- Black’s Law Dictionary: “The right, authority, and duty created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of government for the benefit of the public.”

The next step is to determine what the phrase “emolument or profit” means. Although the term “profit” is well understood, we look to the dictionary definitions of “emoluments” to determine the plain meaning of that term:

- Merriam-Webster Dictionary: “the returns arising from office or employment usually in the form of compensation or perquisites.”
- Black’s Law Dictionary: “The profit arising from office of employment; that which is received as a compensation for services, or which is annexed to the possession of office as salary, fees, and perquisites. Any perquisite, advantage, profit, or gain arising from the possession of an office.”

Based on these definitions, my conclusion is that the term “emolument or profit” means anything of value received by an official as a result of holding that office. This conclusion is supported by recent court decisions in litigation involving President Trump and the “Emoluments Clause” of the Constitution. *See Blumenthal v. Trump*, 373 F. Supp. 3d 191 (D.D.C. 2019) (interpreting “emolument” broadly to include any profit, gain, advantage or benefit).

For the last step of the analysis, I interpret the phrase “under the Town Charter or Ordinances” to mean an office that is created by a provision of the Charter or the Code of Ordinances. For example, the Charter creates the offices of Town Manager (Sec. 301), Town Clerk (Sec. 214), Town Assessor (Sec. 601), and also makes reference to the Fire Chief, Police Chief, Tax Collector, and Treasurer (Sec. 204.1). The Code of Ordinances create various other offices, including the animal control officer and the code enforcement officer. Furthermore, an “office” is a position for which the official must take the oath of office as set forth under Sec. 1007 of the Charter.

This conclusion is consistent with 30-A M.R.S. § 2604(2), which defines the term “official” as “any elected or appointed member of a municipal or county government or of a quasi-municipal corporation.” (Of course, an “official” is one who serves in an “office.”) This is further consistent with a decision of the Maine Superior Court, which considered a case involving a Town of Harpswell transfer station employee who was elected to the Board of Selectmen. In that case, *Inhabitants of Harpswell v. Wallace*, 2008 Me. Super. LEXIS 93 (May 16, 2008), the town’s position was that the worker was

barred by the doctrine of “incompatibility of offices” from serving both as a town employee and on the board of selectmen. That doctrine provides that, if one person cannot discharge the duties of both offices “in every instance,” then the two offices are deemed “incompatible,” and one of the offices must be vacated by that person. The court declined to extend the application of that doctrine to municipal employment situations—in other words, finding that a transfer station position was not an “office.”

Although the Department of Education is created and governed by the Charter (Art. IV), given the definitions of “office” and “public office” as discussed above, it does not logically follow that every school employee holds an “office of emolument or profit under the Town Charter or Ordinances.” This conclusion is supported by another statutory provision, 30-A M.R.S. § 2605, which prohibits conflicts of interest in the municipal context. The language in that section expressly states that it “does not prohibit a member of a city or town council or a member of a quasi-municipal corporation who is a teacher from making or renewing a teacher employment contract with the municipality or quasi-municipal corporation for which the member serves.”

Finally, I would note that there has been some litigation in Maine surrounding this area of law. In *Cullaghan v. City of South Portland*, 2013 ME 78, the Maine Supreme Judicial Court struck down a provision of the city’s personnel policy that prohibited town employees from campaigning for (or serving in) an elective office or otherwise engaging in political activity, on the grounds that the policy violates the First Amendment. More recently, in *Casey v. Town of Yarmouth* (currently pending), two school employees are challenging a provision of the town charter that states: “No councilor shall hold any other paid office or position of employment with the Town or Department of Education (School Department) during the term for which the Councilor was elected to the Council.” In that case, the employees are asserting that the charter provision infringes on their First Amendment rights to campaign for office and communicate with voters and constituents. It is interesting to note that, until November 2018, Yarmouth’s charter provision on councilor qualifications was identical to Gorham’s, but it was changed by citizen initiative to cover all town employees—not just public officials. This would suggest that, in Yarmouth, it was determined that the original provision did not cover town or school employees—otherwise, there would have been no need to amend the charter.

In conclusion, it is my opinion that the term “office of emolument or profit under the Town Charter or Ordinances” should not be interpreted so broadly as to cover any position of employment within the Town of Gorham or Gorham School Department. Rather, it operates to bar service on the Council by any individual who holds an office (of emolument or profit) created by the Charter or Ordinances to carry out a governmental function, which is consistent with the doctrine of incompatibility of offices.