

**PETITION, March 11, 2010**

petition of Martin R. Rosenthal, *et al.*

[Martin R. Rosenthal, TMM-9 (62 Columbia St., 617.738.6621, [martyros@world.std.com](mailto:martyros@world.std.com))]

ARTICLE \_\_\_\_\_, *By-Law Adding to Selectmen's Authority the Titles of Police and Fire Commissioners:*

To see if the Town will amend the By-Laws of the Town of Brookline by amending our current By-Law for "BOARD OF SELECTMEN, §3.1.2, General Authority, The Selectmen shall exercise general supervision over all matters affecting the general and financial interest and welfare of the town"

by adding immediately afterwards the following new provision:

§ 3.1.2.A, Police and Fire Commissioners:

In accordance with and to implement the Selectmen's responsibilities under applicable Laws, the Selectmen shall be designated both "Police Commissioners" and "Fire Commissioners," and shall be responsible, *inter alia*, to make suitable regulations and policies for the Police and Fire Departments.

, or act on anything relative thereto.

**EXPLANATION**

For important symbolic and psychological reasons, this article makes "official" the selectmen's two titles that have been a universally-used, longstanding Brookline tradition and practice for many decades. It merely codifies and ratifies -- without changing or expanding -- the respective responsibilities of both the selectmen and the two chiefs.

*Q1. Does this change the authorities or powers of the selectmen or the two Chiefs?: No.*

Just as our nation's Founding Fathers explicitly emphasized "*civilian control*" over the military,<sup>1</sup> since at least 1921 (and maybe much longer), Brookline has consciously emphasized "*civilian control*" over the Police Department -- and, although it raises less complicated choices between competing values, also the Fire Department.

Thus, this article explicitly cites and follows pre-existing law and Brookline traditions, in particular as to Police, *G.L.c. 41, §97*, adopted by the 1921 Town Meeting, the so-called "Weak Chief Law" (as opposed to §97A, "Strong Chief"), which reads (*emphasis added*):

*c.41, §97: In towns which accept this section ... there shall be a police department established under the direction of the Selectmen, who shall appoint a chief of police and such other police officers as they deem necessary, and fix their compensation ... and the Selectmen may remove such chief or other officers for cause ... . The Selectmen may make suitable regulations governing the police de-*

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<sup>1</sup> See, e.g., "George Washington's Tear-Jerker," *N.Y. Times*. op-ed, 2/14/10, by John Miller, senior fellow, Discovery Institute: "CIVILIAN control of the military is a cherished principle in American government. ... [T]he new country adopted a Constitution that implicitly recognized civilian control. "

*partment and the officers* thereof. The chief of police shall be in immediate control of all town property used by the department, and of the police officers, who shall obey his orders.<sup>2</sup>

Nobody disputes that selectmen have long “been” *Police/Fire Commissioners*, at least *de facto* by tradition (see D. Turner, etc., *infra*).<sup>3</sup> And, selectmen civilian control under §97 was discussed at length in 1987’s *Selectmen’s Report on Police & Community Relations*, e.g.:

We have, and wish to have, a Chief who is “strong” in many ways, e.g., energy, professionalism, managerial and administrative initiative; but by law it is the Board of Selectmen who should make significant policy decisions. It is important that the Selectmen not meddle in the daily administrative and managerial activities of the Department. For “policy” issues, it is important not only that the Selectmen invite, receive, and accord some deference to the advice of the Chief, but also that the community have an opportunity to provide input.

*Q2. Why “Commissioners”? Titles matter, especially for “civilian control” in a paramilitary organization.*

In the Constitution, the Founding Fathers did *not* merely put verbiage like, “*the President shall appoint the top general and may make suitable regulations governing the armed forces.*” Instead, they *both* gave Congress the power to “raise and support armies and navies,” and gave the President a title, “*COMMANDER-IN-CHIEF.*”

Not just within the Police and Fire Departments, but even more importantly, both to the selectmen themselves and to Brookline’s citizens, *titles* convey important messages, especially for a necessarily “*paramilitary*”<sup>4</sup>-type organization like a Police or Fire Department, where everyone has a title and rank. The title would be, indeed has already been, a daily reminder that our public safety officers derive their authority -- and values and priorities (e.g. complex trade-offs between liberty and safety) -- from the community, i.e. through its elected officials.

Finally, the title can only serve to help the Selectmen assert themselves in their crucial role as “civilian reviewers,” a central reason why in both 1987 and 2009 an independent “civilian review board” was rejected. As to both civilian appeals and overall policy responsibility, the title could only help. In any event, the need to affirm “*civilian control*” of police issues seems neither radical nor unclear.<sup>5</sup>

<sup>2</sup> See also, *Chief of Police of Westford v. Westford*, 365 Mass. 526, 530-31 (1974) (“... the primary control of the police department is in the chief of police under §97A and in the Selectmen under § 97. ... [T]he Legislature [] has given towns the alternatives of a 'strong' chief, a 'weak' chief, or no chief at all. G.L. c. 41, § 96.”)

<sup>3</sup> Until the 1990’s, selectmen got official, leather-bound badges as Police Fire Commissioners -- see Q4 *infra*.

<sup>4</sup> As to “*paramilitary*,” the 1987 Report in “§VI, *Disciplinary Process & Selectmen’s Review* began: “Because all police departments are *paramilitary* in tone and structure ...”; see also *Police Dept. of Boston v. Tolland*, 2006 WL 2772632, 3, 67 Mass. App. Ct. 1107 (Unpublished opinion, 2006) (“the head of a paramilitary organization ... is dependent on adherence to the commands of superior officers”)

<sup>5</sup> The Selectmen’s recently approved *Rules & Regulations, Policies & Procedures for the Police Department* hints that both the Selectmen and Police officials are slightly unclear about the Selectmen’s roles as Police leaders. This extremely worthwhile, well-done effort is not explicit about either the Selectmen’s roles as Police Commissioners  
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*Q3. Why a by-law? To make it official by filling a current (written) gap.*

As to the need to "codify," former and longtime Town Counsel David Turner said -- to widespread surprise -- in a Feb. 2 1997 memorandum to the selectmen (*emphasis added*):

*Sometime before the memory of man remembereth the Selectmen in Brookline acquired the additional title of Police Commissioners.<sup>6</sup> There is no known statutory authorization for the title. There is no other known authorization for its use. Custom and past practice appear to be the only basis for its continued use. ... [T]he Board is the proper authority for review and approval of any modifications of or revisions to the Police Manual. References in the Manual to "Police Commissioners" should either be replaced by the reference to "Selectmen" or "appointing authority" or, in the introduction, the Board of Selectmen should be designated for further reference as "Police Commissioners."<sup>7</sup>*

*Q4. Would this by-law dictate, or even suggest, that the selectmen should have badges? No.*

The proposal does *not* suggest anything about badges, now discontinued; but it is beyond the scope of a by-law to delve into that policy issue, or the myriad issues that could hypothetically be tacked onto this, but are left for the selectmen and Chief to continue deciding (as always).

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or even their role under §97; the Selectmen are hardly mentioned in its 518 pages, except with regard to the discipline process. See e.g., p. 29, "General Orders - are permanent written orders issued by the Chief of Police outlining policy matters which affect the entire Department. A General Order is the most authoritative written order the Chief issues, and may be used to amend, supersede or cancel any previous order." While technically accurate, should it also mention the Selectmen? Maybe, maybe not; but it at least deserved some consideration.

<sup>6</sup> Former Chief Simard and current Chief O'Leary have often referred to them as such. See, e.g., the former's *General Order #85-5*, creating the Internal Affairs process, beginning: "The Selectmen, in their capacity as the Police Commissioners... have established the position of Internal Affairs/Staff Inspection Officer ... ." Chief O'Leary too has often used it; see, e.g., "Selectmen enjoy power of the badge," 5/27/04 Brookline TAB:

... Brookline Selectmen apparently believe in the power of the badge. ... a handsome gold one that bears the inscription "Police Commissioner," ... a title reserved for ... the Selectmen. In most communities, the chief of police answers to the police commissioner; in Brookline's case, that's all five Selectmen. According to Chief Daniel O'Leary, the commissioner's badges are to not to be used "to get [Selectmen] out of problems." ... As for the commissioner's badges, O'Leary confirmed that he does not collect them after Selectmen leave office.

The Police Commissioner title is commonplace in towns; see "5/6/03, "Former Pembroke selectman arrested for Impersonating a PO," *MassCops - Massachusetts Law Enforcement Network*, ("... In Massachusetts, Selectmen serve as police commissioners by virtue of their office. ...").

<sup>7</sup> Brookline government has numerous "Commissioners." Cf., 1963 Acts, Ch. 12, establishing a *Department of Public Works* In Brookline: "... [T]here shall be established in ... Brookline a Department Of Public Works, ... which shall be under the supervision and control of a Commissioner of Public Works, hereinafter called the Commissioner ... [whom] the selectmen shall appoint and may remove ..."; we also have a Building Commissioner, by-law 3.8.1, and several "Commissions" whose "members" are often called "Commissioners."