

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE**

_____)	
JEFFREY CLAY,)	
)	
Plaintiff,)	
)	
v.)	Civil Case. No. 15-cv-279
)	
TOWN OF ALTON and RYAN L.)	
HEATH, in his individual capacity,)	
)	
Defendants)	
_____)	

COMPLAINT

Plaintiff Jeffrey Clay, by and through his attorneys, hereby alleges as follows:

INTRODUCTION

1. This is an action brought under 42 U.S.C. § 1983 for damages against the Town of Alton—which encompasses the Alton police department and its Board of Selectmen—and Alton Police Chief Ryan L. Heath in his individual capacity (collectively, “Defendants”) on behalf of Plaintiff Jeffrey Clay, a 19-year Air Force veteran. Mr. Clay was arrested on February 3, 2015 during an Alton Board of Selectmen meeting simply for engaging in political, non-disruptive speech on matters of public concern. This arrest violated Mr. Clay’s clearly established rights under the First and Fourth Amendments to the United States Constitution.

2. During this February 3, 2015 Board meeting, Mr. Clay was given the opportunity to speak on any issue for 5 minutes as part of the Board’s policy to allow the public to “provide the Board with an opportunity to receive directly from citizens concerns, desires, or hopes they may have for the community.” During his remarks, Mr. Clay asked all Board members to resign for their “poor actions as selectmen,” “poor decisions,” and “continued violations of the citizens’

rights here in Alton.” He did not raise his voice or use any profanities. His speech was not disruptive. Approximately 40 seconds into Mr. Clay’s remarks, one Board member interrupted Mr. Clay, called the remarks “character assassination,” and requested a “point of order.” The Board Chairman recognized the request and ultimately proposed a “point of order” to “clos[e] down public input” because of the “libelous” and “defamatory statements made by Mr. Clay.” The 5-member Board then, with no dissenters, immediately approved the “point of order” closing down public input. All of this occurred within the first 2 minutes of Mr. Clay’s allotted time. Because Mr. Clay was speaking peacefully on matters of public concern within his 5 minutes of allotted time, he continued speaking. As a result, he was arrested 4 minutes into his remarks.

3. On February 23, 2015, the Town of Alton, on behalf of the State of New Hampshire, filed two charges against Mr. Clay alleging disorderly conduct. Though one charge was later nolle prossed, the Town insisted on prosecuting Mr. Clay for disorderly conduct for “[k]nowingly refus[ing] to comply with a lawful order given by [Alton Police] Chief [Ryan] Heath ... to move from a public place, to wit the Alton Town Hall” under RSA 644:2, II(e).

4. The egregious nature of the Defendants’ actions is further confirmed by the June 5, 2015 order issued by Judge James M. Carroll of the Laconia Circuit Court dismissing the disorderly conduct charge. Judge Carroll’s decision was unequivocal, ruling that Defendants Town of Alton and Chief Heath, in suppressing Mr. Clay’s speech, engaged in “pure censorship” in violation of the First Amendment.

5. Unfortunately, this was all preventable. After the Town filed charges on February 23, 2015, the American Civil Liberties Union of New Hampshire (“ACLU”), on Mr. Clay’s behalf, made clear to the Town in a March 10, 2015 letter that the charges should be immediately

dismissed because Mr. Clay's speech was protected under the First Amendment. The Town ignored this request and maliciously continued to prosecute Mr. Clay, compelling him to spend further time and money preparing a defense with the assistance of defense counsel he had to pay for. Giving the Town one more chance to withdraw the criminal complaint, Mr. Clay's counsel filed a motion to dismiss on April 20, 2015. Rather than dismissing the charge in light of this motion, the Town pressed on, compelling Mr. Clay and his counsel to attend a motion to dismiss hearing on May 8, 2015 and to obtain relief from Judge Carroll through his June 5, 2015 order.

6. The actions of the Defendants in this case were outrageous and, as confirmed by Judge Carroll's order, in clear violation of the United States Constitution.

THE PARTIES

7. Plaintiff Jeffrey Clay was at all times relevant to this Complaint a resident of the Town of Alton in Belknap County, New Hampshire.

8. Defendant Town of Alton is a municipal entity within the District of New Hampshire created under the laws of the State of New Hampshire. It maintains a Board of Selectmen—a municipal legislative body tasked with enacting the official policies of the Town. The Town of Alton is also authorized by law to maintain a police department, which acts as the Town's agent in the area of law enforcement and for which the Town is ultimately responsible. At all times relevant to this lawsuit, Defendant Town of Alton was and is a "person" as that term is used by 42 U.S.C. § 1983.

9. Defendant Ryan L. Heath is, or was at all times relevant to this lawsuit, acting under color of law as the Chief of Police employed by the Town of Alton police department. On information and belief, he resides in New Hampshire, which is within the District of New Hampshire. Defendant Heath is being sued in his individual capacity. At all times relevant to

this lawsuit, Defendant Heath was and is a “person” as that term is used by 42 U.S.C. § 1983.

JURISDICTION AND VENUE

10. Jurisdiction is proper under 28 U.S.C. § 1331 (federal question jurisdiction) and 28 U.S.C. § 1343 (civil rights jurisdiction).

11. The Court has personal jurisdiction over the Defendants.

12. Venue is proper under 28 U.S.C. § 1391(b)(2), as the events giving rise to Plaintiff’s claims occurred in the Town of Alton which is within the District of New Hampshire.

FACTS

I. The February 3, 2015 Board Meeting

13. The facts of this case are made clear in the video located at <http://youtu.be/RYnSJZTFghY>, which is incorporated herein by reference.

14. On February 3, 2015, the Board of Selectmen opened up its meeting for “Public Input I” following the Town Administrator’s Report and Update. Under a January 14, 2015 Board policy, these public input sessions are designed “to provide the Board with an opportunity to receive directly from citizens any concerns, desires, or hopes they may have for the community.” The public input session is not limited to specified topics. *See Exhibit A.*¹

15. Mr. Clay was the first to speak. He was given 5 minutes per the January 14 policy. He brought a timer to the speaker’s table so he would be permitted to speak for the full 5 minutes. During Mr. Clay’s speech, he asked all Board members to resign for their “poor actions as selectmen,” “poor decisions,” and “continued violations of the citizens’ rights here in Alton.”

¹ On March 16, 2015, the Town of Alton modified its policy for public participation at Board meetings. The new operative policy, among other things: (i) limits public input “only for items on the agenda”; (ii) adds prohibitions for speech that the Board unilaterally views as “argumentative,” “disruptive,” or “disorderly”; and (iii) prevents speakers from bringing new issues to the Board’s attention through the public input session without “first contact[ing] the Selectmen’s Office in writing” summarizing “the topic or subject matter that the person wants to discuss” and requesting an appointment to address the Board, where permission “shall be within the sole discretion of the majority of the Board.”

His remarks referenced, in part, his belief that the Board has violated New Hampshire's Right-to-Know law by holding "workshop" sessions at odd hours of the day and making decisions during them that were not transparent. He did not raise his voice or use any profanities.

16. Approximately 40 seconds into the remarks, Selectman David Hussey interrupted Mr. Clay, called the remarks "character assassination," and requested a "point of order." Mr. Hussey then left the room for less than 5 seconds. When Mr. Hussey returned—and while Mr. Clay was still speaking—Chairman R. Loring Carr recognized Mr. Hussey's request and ultimately proposed a "point of order" to "clos[e] down public input" because of the "libelous" and "defamatory statements made by Mr. Clay." Mr. Clay then stopped his timer. The 5-member Board then, with no dissenters, immediately approved the "point of order" closing down public input. Selectmen Hussey then left the room again. All of this occurred within the first 2 minutes of Mr. Clay's allotted time.

17. After the Board vote, Mr. Clay restarted his timer and continued to peacefully express his political views, stating the following:

Integrity is the quality of being honest and having strong moral principles—moral uprightness. It is generally a personal choice to uphold oneself consistently to moral and ethical standards. Integrity also demands knowledge and compliance with both the letter [and] spirit of the written and unwritten rules. To this end, this Board is morally corrupt. It is bankrupt. It is without integrity We the citizens pay the price in legal fees for your representation. Two little words: [I] Resign Stand up and resign now.

Alton deserves better. Audacity is defined as boldness and daring, especially with confident, arrogant disregard for laws and rules and policies. Continued violations cannot be tolerated by the public. Stand up, take responsibility for your willful violations of the rights of the community. Resign. Do it now. Two little words. Stand up and resign.

18. While Mr. Clay peacefully engaged in the speech above, the Board continued to attempt to silence him before his 5 minutes had expired on the purported ground that public input had been closed. Defendant Chief Heath then approached Mr. Clay and asked him to stop

speaking several times. Because Mr. Clay was not being disruptive and was merely exercising his political views peacefully within his 5 minutes of allotted time, he declined and kept conveying the remarks above. Defendant Chief Heath then informed Mr. Clay that he was under arrest. Mr. Clay immediately cooperated with the arrest, and Chief Heath removed Mr. Clay from the room by holding Mr. Clay's arm behind his back using an "arm bar" hold. Mr. Clay was arrested after speaking for less than 4 minutes.

19. After Mr. Clay's arrest, the Board then immediately reopened public input without a formal vote and permitted another individual to speak. This individual stated before his formal remarks that he "was happy with the Select people and you don't have to stand up and resign on my account. I like what you're doing." The Board took no action against this individual.

II. The Town's Malicious Prosecution, and Judge Carroll's Decision Calling Defendants' Actions "Pure Censorship" In Violation of the First Amendment.

20. On February 23, 2015, the Town of Alton (on behalf of the State of New Hampshire) filed criminal complaints against Mr. Clay alleging (i) disorderly conduct for "[k]nowingly refus[ing] to comply with a lawful order given by [Alton Police] Chief [Ryan] Heath ... to move from a public place, to wit the Alton Town Hall" under RSA 644:2, II(e) and (ii) disorderly conduct for "purposely caus[ing] a breach of the peace by disrupting an Alton Board of Selectmen meeting ... by continuing to speak after being informed repetitively by the board that public input was closed" under RSA 644:2, III(c). See *Exhibit B*. Each was charged as a class B misdemeanor, punishable by a fine of up to \$1,200.

21. On March 10, 2015, the ACLU of New Hampshire ("ACLU"), on Mr. Clay's behalf, sent the Town of Alton a letter explaining that the Defendants, in suppressing Mr. Clay's peaceful political speech and arresting him, engaged in impermissible viewpoint discrimination

in violation of the First Amendment. See Exhibit D. Thus, as the ACLU stated, Mr. Clay's arrest was unlawful, and all charges should be dismissed. However, the Town insisted on continuing to prosecute Mr. Clay for one count of disorderly conduct for failing to comply with Defendant Chief Heath's order to stop speaking. See RSA 644:2, II(e); see also Exhibit F (case docket).

22. Accordingly, the ACLU and co-counsel (that Mr. Clay had to pay for) filed a motion to dismiss the charge on April 20, 2015. See Exhibit E. Rather than dismissing the charge in light of this motion, Defendants Town of Alton and Chief Heath continued the prosecution and compelled Mr. Clay and his counsel to attend a motion to dismiss hearing on May 8, 2015. A transcript of this hearing is attached as Exhibit G.

23. On June 9, 2015, the Laconia Circuit Court (Carroll, J.) dismissed the charge. The Court ruled that the Defendants, in suppressing Mr. Clay's speech, engaged in "pure censorship" in violation of the First Amendment. See Exhibit C. The Court held as follows:

- a. "The reference [by the Chief in his report that Mr. Clay was engaging in a 'rant'] speaks to the State's next action in silencing [Mr. Clay]. The silencing is nothing less than censorship of [Mr. Clay's] criticisms given at a time and place designated by the Board itself for public input." *Id.* at p. 4.
- b. "The State's actions of arresting [Mr. Clay], whether taken independently of, or in conjunction with the Board's action, were content-based censorship as [Mr. Clay] was acting within the very rules promulgated by the Board as well [as] within his Constitutional rights under the US and NH Constitutions." *Id.*
- c. "[Mr. Clay] complied with the Board's own protocol, established by the Board for public input." *Id.*
- d. The State pointed to no offense having been committed by [Mr. Clay], nor to any offense by [Mr. Clay] which was to be imminently committed by [Mr. Clay]." *Id.*
- e. "[T]he action taken against [Mr. Clay], who was complying with the very

protocols of the Board and not committing any of the prohibited indicators as defined in the protocols, was pure censorship. Again, the silencing of [Mr. Clay] by [these] actions must be judged in comparison with the immediate presence of the very next speaker expressing confidence in the Board's actions." *Id.* at p. 5.

- f. "In the present case, the limitations on [Mr. Clay] as affected by his arrest were [a] content driven response by the State whether reviewed independently or in conjunction with the Board's actions. The arrest of [Mr. Clay] is found by the Court to be a violation of [Mr. Clay's] 1st Amendment right of Free Speech as attributable to this State of New Hampshire through the Due Process Clause of the 14th Amendment, as well as [Mr. Clay's] Rights under the New Hampshire Constitution, Part I, Article 22 [stating that] 'Free speech and liberty of the press are essential to the security of freedom in a state: They ought, therefore, to be inviolably preserved.'" *Id.* at p. 5-6.
- g. "The order by the State was not lawful." *Id.* at p. 6.

III. As Confirmed By The Laconia Circuit Court, The Defendants' Actions Were Clearly Unlawful

24. As Judge Carroll held, Mr. Clay's comments during the February 3 Board meeting that led to his silencing and arrest were clearly protected under the First Amendment to the United States Constitution. These remarks, though undoubtedly critical, (i) were made consistent with the Town's policy of allowing the public to "provide the Board with an opportunity to receive directly from citizens any concerns, desires, or hopes they may have for the community," (ii) were political in nature and of public concern, (iii) were made within the 5-minute time frame allotted to speakers, and (iv) were not remotely disruptive to the proceedings. To reiterate, while the Town placed a valid 5-minute time limit on speakers' statements during the public comment portion of the meeting, Mr. Clay *never* violated this time restriction during the meeting. He was ejected before he had used his allotted time. Mr. Clay's speech was never disruptive. Speech is not "disruptive" simply because it is critical of public officials. In short, Mr. Clay acted lawfully in criticizing members of the Alton Board of Selectmen at a Board

meeting open to the public.

25. Given Mr. Clay's compliance with all rules and the Board's apparent belief that Mr. Clay was engaging in "character assassination," it is clear that the Town's actions were motivated by a desire to suppress Mr. Clay's viewpoint. This is further confirmed by the fact that the Board immediately reopened public input after Mr. Clay was removed. Viewpoint discrimination—especially when such discrimination concerns political speech—is abhorrent not only to the Constitution, but also to this nation's deep history of allowing alternative and dissenting perspectives to be conveyed freely and without fear of prosecution. Put another way, under clear Supreme Court precedent, the government is forbidden "from exercising viewpoint discrimination, even when the limited public forum is one of its own creation." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). The law is also clearly established that a prohibition on criticism of public officials is a form of viewpoint discrimination. Moreover, there was no compelling governmental interest in suppressing Mr. Clay's speech, nor was shutting him down a narrowly tailored means of effectuating any compelling governmental interest that the Town may have had.

26. In a free society, governmental officials are required to tolerate harsh criticism and even a demeaning attitude towards them—including viewpoints that can feel like "character assassination." See *Boos v. Barry*, 485 U.S. 312, 322, (1988) ("As a general matter, we have indicated that in public debate, our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment."). Thus, speech directed to and about the government is singled out for First Amendment protection because speech—including about how well or badly officials carry out their duties—lies at the very heart of the First Amendment. Indeed, the actions of Defendants

Town of Alton and Chief Heath in arresting and prosecuting Mr. Clay not only foreclosed him from addressing the Board on February 3, 2015, but created an atmosphere of hostility and fear that may discourage others from exercising their right to criticize the Board.

27. In short, the Board shut Mr. Clay down and silenced him before his 5 minutes were up in violation of the First Amendment, and Defendant Chief Heath separately violated Mr. Clay's First and Fourth Amendment rights by then physically seizing him and arresting him.

28. Because Mr. Clay's actions were lawful and constitutionally protected, there was no probable cause (let alone a warrant) to arrest Mr. Clay under New Hampshire's disorderly conduct statute or any other statute, especially because Mr. Clay was engaging in speech protected under the First Amendment.

29. The Town knew or should have known that Mr. Clay's non-disruptive comments on a matter of public concern made within the content-neutral 5-minute time limit provided by the Board were protected by the First Amendment.

30. Any reasonable police officer would have known that Mr. Clay's non-disruptive comments on a matter of public concern made within the content-neutral 5-minute time limit provided by the Board were protected by the First Amendment.

31. Any reasonable police officer would have known that the arrest and removal of a speaker from a public meeting when that speaker is non-disruptively speaking on a matter of public concern within the content-neutral 5-minute time limit provided by the Board is an unreasonable seizure in violation of the Fourth Amendment.

32. Defendant Chief Heath's actions were taken with reckless disregard for Mr. Clay's constitutional rights.

33. Mr. Clay was harmed as a result of this incident. In addition to losing his First

Amendment rights and being deprived of his liberty, Mr. Clay suffered the following: (i) the humiliation, reputational harm, embarrassment, and mental anguish of being arrested and placed in an arm bar hold in a public meeting that was recorded and is available on the Internet; (ii) being forced to wait outside in the freezing cold and during a snow storm without a coat before a police cruiser arrived; (iii) being handcuffed, booked, photographed, and searched by the Alton Police Department; (iv) being detained for several hours at the Alton Police Department; (v) being informed by the booking officer from the Alton Police Department that he was not to go to the Board of Selectmen meeting after he was released despite the fact that he had a constitutional right to attend this public meeting; (vi) being publicly treated as (and effectively labelled) a “criminal” by the Town of Alton simply for engaging in protected expressive activity; and (vii) being subjected to a frivolous prosecution for which Mr. Clay was required to spend time and energy. In addition to these damages, the Town’s actions required Mr. Clay to pay a law firm to provide a criminal defense. And, troublingly, Mr. Clay reasonably fears that he will be arrested again in the future simply for engaging in speech critical of the Board—a result which chills his speech and, on information and belief, was the desired effect of his arrest and prosecution.

34. The conduct of Defendant Chief Heath as alleged in this Complaint was willful, malicious, oppressive and/or reckless, and therefore Plaintiff is entitled to punitive damages.

35. Defendant Chief Heath will be indemnified subject to the provisions of RSA 31:106 relating to civil rights suits against municipal employees.

CLAIMS FOR RELIEF

Count I

Violation of the First and Fourteenth Amendments

(Against Defendants Town of Alton and Ryan L. Heath in His Individual Capacity)

36. Plaintiff realleges and incorporates by reference the allegations contained in the

preceding paragraphs.

37. The First Amendment to the United States Constitution prohibits abridgement of freedom of speech. The First Amendment is incorporated against the states by the Fourteenth Amendment.

38. The First Amendment protects the right of individuals to engage in expressive activity in forums created by the government that are open to the public.

39. Under 42 U.S.C. § 1983, municipal defendants are “persons” liable for unconstitutional (i) official actions by its municipal legislative body, and (ii) official actions by municipal agencies—including police departments—done pursuant to authority delegated by municipal legislative bodies.

40. Under 42 U.S.C. § 1983, every person acting under color of state law who deprives another person of his or her constitutional rights is also liable at law and in equity.

41. Defendant Town of Alton, through the direct action of its municipal legislative body—the Board of Selectmen—silenced Plaintiff before his 5 minutes to speak had elapsed, which ultimately caused him to be removed from the February 3, 2015 Alton Board of Selectmen meeting.

42. Defendant Town of Alton, through the direct action of its municipal legislative body—the Board of Selectmen—deprived Plaintiff of his clearly established right to freedom of speech under the First Amendment to the United States Constitution.

43. Defendant Ryan L. Heath, acting under color of law, attempted to silence Plaintiff and ultimately arrested and removed him from the February 3, 2015 Alton Board of Selectmen meeting.

44. In so doing, Defendant Heath, acting under color of law, deprived Plaintiff of his

clearly established right to freedom of speech under the First Amendment to the United States Constitution.

45. As a direct and proximate result of this violation of Plaintiff's First Amendment rights by Defendants Town of Alton and Chief Heath, Mr. Clay suffered actual and irreparable harm, including interference with his First Amendment rights, the chilling of his freedom of speech, the deprivation of his liberty, fear, humiliation, and embarrassment.

Count II
Violation of the Fourth and Fourteenth Amendments
(Against Defendant Ryan L. Heath in His Individual Capacity)

46. Plaintiff realleges and incorporates by reference the allegations contained in the preceding paragraphs.

47. The Fourth Amendment to the United States Constitution prohibits unreasonable seizures. The Fourth Amendment is incorporated against the states by the Fourteenth Amendment.

48. Under 42 U.S.C. § 1983, every person acting under color of state law who deprives another person of his or her constitutional rights is liable at law and in equity.

49. The right of citizens to be free from arrest without a warrant or probable cause under the Fourth Amendment to the United States Constitution is clearly established law. *See Dunaway v. New York*, 442 U.S. 200, 213-14 (1979).

50. Defendant Ryan L. Heath, acting under color of law, attempted to silence Plaintiff and ultimately arrested and removed him from the February 3, 2015 Alton Board of Selectmen meeting.

51. In so doing, Defendant Heath, acting under color of law, deprived Plaintiff of his clearly established right to freedom from unreasonable seizures under the Fourth Amendment.

52. As a direct and proximate result of this violation of Mr. Clay's Fourth Amendment rights by Defendant Chief Heath, Mr. Clay suffered actual and irreparable harm, including interference with his First Amendment rights, the chilling of his freedom of speech, the deprivation of his liberty, fear, humiliation, and embarrassment.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff Jeffrey Clay respectfully requests that this Court:

- a) Award Plaintiff compensatory damages for the violation of his constitutional rights against all Defendants;
- b) Award Plaintiff punitive damages for the violation of his constitutional rights against Defendant Ryan L. Heath;
- c) Award Plaintiff costs and reasonable attorneys' fees pursuant to 42 U.S.C. § 1988; and
- d) Grant or award other such relief as this Court deems just and proper.

JURY DEMAND

Plaintiff Jeffrey Clay requests a trial by jury.

Respectfully submitted,

JEFFREY CLAY,

By and through his attorneys with the American Civil
Liberties Union of New Hampshire Foundation,

/s/ Gilles R. Bissonnette

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