

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE
DOCKET #01-250-PH

Dorothy Lafortune)
)
 Plaintiff)
)
 v.) **THIRD AMENDED COMPLAINT**
)
 CITY OF BIDDEFORD, et al)
)
 Defendants)
)

INTRODUCTION

In Count I the Plaintiff seeks declaratory and injunctive relief against past and future actions of Mayor Dion of the City of Biddeford taken in violation of her rights under the First Amendment to the United States Constitution. Count II is an 80B Appeal of a decision of the Biddeford City Council seeking to reinstate the decision of the CTVC Committee (ACTVC@). Counts III and IV challenge the right of the City Council to determine Plaintiff=s guilt and impose punishment upon her without any judicial process and in violation of procedural due process.

PARTIES

1. The Plaintiff Dorothy Lafortune is a resident of the City of Biddeford in York County, Maine.
2. The Defendant City of Biddeford is a political subdivision of the State of Maine located in York County.
3. The Defendant Donna Dion is the elected Mayor of the City of Biddeford. The

Defendant Dion is a defendant in her official capacity as Mayor of the City.

JURISDICTION AND VENUE

4. Jurisdiction is pursuant to 42 USC ' 1983, 14 M.R.S.A. ' 5951 et seq.; 14 M.R.S.A. ' 6051, and 4 M.R.S.A. ' 105 as to the Declaratory Judgment and Injunctive Relief sought in Count I. Jurisdiction as to Count II is pursuant to Rule 80B, 14 M.R.S.A. ' 5951 et seq., and 4 M.R.S.A. ' 105.
5. Venue is in York County pursuant to 14 M.R.S.A. ' 505.

Count I
(Violation of Plaintiffs= Constitutional Rights)

6. The Plaintiff repleads and incorporate by reference & 1-5 above.
7. The City of Biddeford has entered into a cable franchise agreement which establishes a public access channel (hereinafter AChannel 2.@)
8. The Plaintiff is the producer and host of *The Maine Forum*, a weekly show on Channel 2 that features call-ins when broadcast live. The Plaintiff signed a Biddeford Community Television Channel 2 AAccess User=s Agreement.@
9. The July 4, 2001 program of *The Maine Forum* was entitled AWhat Price Justice.@ The program was an hour in length. The program featured Philip Castora, a licensed investigator and member of the Biddeford City Council who gave a report containing his opinions and conclusions with respect to various public documents relative to his investigation of the acts and failure to act of many state officials and local public officials in both Saco and Biddeford, including Biddeford Mayor Dion, former Biddeford Mayor (and present City Councilor) James Grattelo, and Biddeford City Attorney Harry Center.

The program also criticized the actions of Saco-Biddeford Savings Bank and Coastal Bank, and their officials in the foreclosure of properties located in Saco and Biddeford.

10. Programs of *The Maine Forum*, and programs produced by others are usually rebroadcast on a first-come several times per day after original broadcast, depending upon capacity. *What Price Justice* was re-broadcast on July 5, 2001. *What Price Justice* was dropped from its rebroadcast cycle after Mayor Dion received a telephone complaint from the auctioneer employed by one of the banks in foreclosure.
11. In addition to prohibiting further rebroadcast of *What Price Justice*, Mayor Dion also ordered the public access director not to permit the Plaintiff to broadcast new programs of *The Maine Forum* until Mayor Dion had a chance to review the program.
12. Mayor Dion required all future programs to be broadcast on *The Maine Forum* be submitted to her for review (to prevent the possible airing of additional defamatory statements) in advance. As a result of this pre-submission requirement, several broadcasts were taped rather than broadcast live. These taped programs did not permit call-ins. Mayor Dion reviewed and pre-cleared *The Maine Forum* programs on July 11, 2001, July 18, and July 25, 2001 prior to their being broadcast. On advice of Counsel the Plaintiff notified Mayor Dion's office that she would no longer acquiesce in Mayor Dion's pre-screening procedure, and the Plaintiff has again broadcast her show live since August 1, 2001.
13. At the time that she took these actions, Mayor Dion relied as the basis for her actions upon the requirement of the City of Biddeford User Agreement (signed by the Plaintiff) that program material will not contain material which constitutes libel or slander. The

Agreement states that violation of the Agreement is grounds for forfeiture of the right to use Channel 2 equipment, facilities, or channel time.

14. The City of Biddeford cable television ordinance provides a procedure for resolving disputes as to Channel 2 programming. Disputes are to be resolved informally by the public access director. If the dispute is not resolved by the public access director, the complainant can appeal to the Cable Television Committee (ACTVC@.) The cable television ordinance provides for a further appeal to the City Council from the CTVC.
15. The Plaintiff complained to the CTVC about the actions taken by Mayor Dion (or the Public Access Director at the direction of Mayor Dion.) The Plaintiff filed a written appeal to the CTVC on 8/6/01, which the CTVC scheduled for a public hearing on 8/20/01. The CTVC held a hearing on the Plaintiff's complaint on 8/20/01. Mayor Dion and Mr. Zafirson (Coastal Savings Bank's foreclosure auctioneer mentioned on the program in question) appeared at the hearing. Each argued that the *What Price Justice* program was in violation of the Producer Agreement signed by the Plaintiff.
16. Mayor Dion testified at the August 20, 2001 Cable Television Committee meeting that she had investigated the Castora allegations previously, that she had concluded that there was no truth to them, and she took action to prohibit rebroadcast to protect private persons from libel. Mayor Dion did not identify which statements in *What Price Justice* were untrue, nor did she offer any proof as to the truth or falsity of any statement.
17. Mayor Dion asserted at the August 20, 2001 Cable Television Committee meeting that she had a duty as Mayor to protect private persons from possible libel.
18. The hearing ran over four (4) hours. No one stated at the hearing which statements of Mr.

Castora were defamatory and Mr. Zafirson contended that the Plaintiff had violated the User Agreement by not obtaining a written release from him before using his name. The Committee did not listen to the tape nor review any transcript of it. The members of CTVC did not determine whether defamation had occurred, and disclaimed any ability to determine a judicial question of that type. The Committee decided unanimously, but without any recorded vote, that there was no merit to the claim that the producer of a public access program was required to obtain a written release from every person mentioned by name in the program.

19. The complaint was resolved in the Plaintiff=s favor. The CTVC found that Mayor Dion=s actions had been unauthorized by the ordinance, and that the tape should be replayed 3 additional times to make up for the times it had been withheld from replay during the week following the original July 4, 2001 broadcast.
20. No appeal from the CTVC decision of August 20, 2001 was filed by Mr. Zafirson. However, on or about August 31, 2001, Mayor Dion placed Order #2001.80 entitled Authorization / Upholding Mayor=s Directive / Maine Forum Program on the City Council Agenda for September 4, 2001. Order #2001.80 stated that Mayor Dion=s directive not to broadcast the videotape of the Maine Forum program as originally aired on July 4, 2001 at 7:00 P.M. be upheld. An explanatory note attached to Order #2001.80 stated that This item was reviewed and voted unanimously by the Cable Committee on August 20, 2001 to be rebroadcast three (3) additional times. This decision is being appealed to the City Council. Plaintiff was not given any notice that Order #2001.80 would be considered by the City Council.

21. On Tuesday, Sept. 4, 2001 the Council took up Order #2001.80. Mayor Dion sat on the dias with the City Council in speaking in favor of Order #2001.80 without identifying any specific statement as being libellous or slanderous. There was no time limit imposed on Mayor Dion=s speech. The only written materials given to the Council were the minutes of the CTVC, without the attached statement submitted to the CTVC by Counsel for the Plaintiff referenced in the minutes. Neither the tape nor any transcript of the tape of *What Price Justice* was presented or reviewed.
22. Plaintiff learned of the pendency of Order #2001-80 and attended the meeting. The Plaintiff was permitted to speak for only five (5) minutes pursuant to the Council rules governing Apublic comment.@ The City Council gave the Plaintiff=s attorney to speak for 5 minutes as a member of the public, and granted one five (5) minute extension under a suspension of the Council rules.
23. The City Attorney represented Mayor Dion at the meeting. However, the City Attorney answered both procedural and substantive questions from members of the Council as if he were representing the Council, and stated that Mayor Dion had originally acted upon his advice in prohibiting rebroadcast of *What Price Justice*. The City Attorney also argued that there was case law supporting Mayor Dion=s actions, and asserted that even if the Castora statements were true, they were an invasion of privacy.
24. No member of the City Council stated on the record that he or she had ever listened to *What Price Justice* few if any members of the City Council heard the program in its entirety. No transcript of *What Price Justice* was made available to the Council in connection with the Order.

25. In her argument on appeal to the City Council Mayor Dion said that she had taken action because the tape had portrayed private persons in a false light for the first time. She did not state who these persons were, nor did she indicate which specific statements she believed to have portrayed private persons in a false light.
26. After lengthy questions to the City Attorney and the Plaintiff's attorney, but with little discussion, the Council voted 6-3 to pass Order #2001.80. The City Council made no oral findings of fact, nor did it adopt any written findings or conclusions thereafter with respect to Order #2001.80.
27. The City Council treated Mayor Dion as the only party to the proceeding. The City Council limited the participation of the Plaintiff and her attorney to brief statements as members of the public.
28. The City Council allowed members who were biased to participate (including former Mayor Grattelo, who had previously applauded the action of Mayor Dion that was before the Council.
29. The City Attorney acted both as the advisor to Mayor Dion and to the City Council hearing her proposed Order.
30. The bias of members of the City Council and of the legal advisor to the City Council deprived the Plaintiff of the due process of law guaranteed by the 14th Amendment to the United States Constitution.
31. At the Council meeting and on other occasions prior thereto, Mayor Dion said that she would again prohibit rebroadcast of programs of *The Maine Forum* if she felt that private parties were being libeled, slandered, or had their privacy invaded.

32. At a press conference called by the Mayor on October 5, 2001, Mayor Dion stated that she had not taken action against the Plaintiff because *The Maine Forum* program of July 4, 2001 contained libelous or slanderous statements, or invaded privacy, but because the Plaintiff had failed to obtain releases from persons mentioned on the program.
- 32A. The Access User=s Agreement is not authorized by the Biddeford Cable Television Ordinance.
- 32B. Any requirement of the Access User=s Agreement that the producer of a public access channel first obtaining releases from persons mentioned in a program is a violation of 47 USC ' 544(f).
- 32C Any requirement of the Access User=s Agreement that the producer of a public access channel first obtaining releases from persons mentioned in a program is a prior restraint on speech in violation of the First and Fourteenth Amendments to the United States Constitution.
33. The actions of Mayor Dion denied the Plaintiff rights protected by the First and Fourteenth Amendments to the United States Constitution and 42 USC ' 1983.
34. The action of the City Council violated 42 USC ' 1983.

WHEREFORE, with respect to Count I, Plaintiffs request that this Honorable Court enter preliminary and permanent injunctions restraining the City of Biddeford and its Mayor from imposing any prior restraint on the content of Channel 2; and from imposing any forfeiture of any right under the Access User=s Agreement, except after a judicial adjudication of violation.

Count II
(RULE 80B APPEAL)

35. Plaintiff hereby repleads and incorporates by reference & 1-34 above.
36. The Council=s passage of Order #2001.80 is final municipal action which is reviewable under Rule 80B of the Maine Rules of Civil Procedure.
37. The Plaintiff was a party to the proceeding below and participated at the Apublic comment@ session of the City Council to the extent permitted.
38. The Council Order sponsored by Mayor Dion constituted a collateral attack, rather than an appeal of the CTVC decision.
39. The proceeding before the City Council denied the Plaintiff due process by adjudicating Plaintiff=s rights without treating her as a party (limiting the participation of the Plaintiff and her attorney to brief statements as members of the public); by failing to provide an impartial hearing and allowing members who were biased (including former Mayor Grattelo who had previously applauded the actions of Mayor Dion which the Council was voting to support) to participate and vote; by allowing the City Attorney to act both as the advisor to Mayor Dion and to the City Council; by hearing the Order as if it were an appeal; and by failing to make any findings of fact.
40. There was no substantial evidence in the record to support the decision of the City Council which did not contain any findings of fact or conclusions of law.
41. The decision of the City Council was the result of error of law.

WHEREFORE with respect to Count II, the Plaintiff requests that this honorable Court reverse the Order of the City Council and remand this matter to the City Council with

instructions to implement the CTVC=s decision that the program *What Price Justice* be rebroadcast at least three (3) more times (BILL OF ATTAINDER)

COUNT III

42. The Plaintiff hereby pleads and incorporates by reference &&1-41 above.
43. The Plaintiff replayed portions of *What Price Justice* in *The Maine Forum* program of September 26, 2001, as part of a rebuttal to an attack upon the Plaintiff by Former Mayor Grattelo at the Biddeford City Council meeting of September 18, 2001.
44. The Biddeford City Council had Order #2001.94 on its Agenda for its October 2, 2001 meeting. That Order was entitled AForfeiture of Use of Cable Access Facilities.@
45. Order #2001.94 declared that: the City Council voted on September 4, 2001 to uphold the Mayor's directive not to rebroadcast the video tape of the Maine Forum program that originally aired on July, 4, 2001; that Plaintiff rebroadcast portions of that program in direct violation of the City Council's Order #2001.80; that the Plaintiff violated the Producer's Agreement for use of the City's public access station and studio. Order #2001.94 concluded by ORDERING that: (1) Plaintiff has forfeited her privilege to use Biddeford's public access station and studio by violation of the Mayor's directive regarding the rebroadcast of any portion of the July 4, 2001 Maine Forum video; and directs the Public Access Director to ban the Plaintiff from access to the Public Access Channels or studio, and that there be no rebroadcast of Maine Forum videos for a minimum period of one year. No notice was given to Plaintiff of Order #2001.94.
46. Plaintiff again learned of proposed Council action adjudicating her rights and attended the meeting, where she was again advised that she would be permitted to speak only as a member of the public and limited to five (5) minutes.

47. The Plaintiff=s attorney was told by City Attorney Harry Center on October 2, 2001 that if the Council passed Order 2001.94, it would be effective immediately, and that the Plaintiff would be unable to broadcast the regular program of Maine Forum scheduled for the next day, October 3, 2001.
48. The Plaintiff=s attorney advised City Attorney Center on October 2, 2001 that Order #2001.94 would be a legislative act which inflicts punishment without a judicial trial, and that Order #2001.94 was therefore a bill of pains and penalties, and prohibited as a bill of attainder under Article 1, Section 10 of the United States Constitution.
49. On October 16, 2001 the City Council of the City of Biddeford again had on its Agenda Order #2001-94.
50. Defendant Dion presided over the City Council throughout consideration of Order #2001-94. Mayor Dion stated that Ms. Lafortune and her attorney would be extended Athe privilege@ of speaking on Order #2001-94 as members of the public, without regard to the usual 5 minute limitation on such public comment, but would not enjoy the rights due process required of quasi-judicial bodies, since they were merely deciding whether Dorothy Lafortune had violated their Order #2001-80 and imposing punishment.
51. In response to a request to be able to cross-examine witnesses and present rebuttal evidence, Mayor Dion stated that this was not a judicial proceeding, and that Athe would be no witnesses or evidence@ as the Council would only be comparing the two orders.
52. The Plaintiff was denied the right to voir dire members of the City Council as to whether they had watched either of the two *Maine Forum* programs in question.

53. The Plaintiff objected to the participation of Councilor Grattelo, Council President Lessard, and Defendant Dion, each of whom had a fixed intention to punish Dorothy Lafortune.
54. The Plaintiff also asked if any other decision-makers had a fixed intention to punish Dorothy Lafortune, but was prevented from questioning any of them as to bias.
55. The Plaintiff also objected to the participation of City Attorney Center who had been an advocate for the Mayor and Councilor Grattelo=s positions with regard to Dorothy Lafortune.
56. None of the persons whose participation was objected to by Plaintiff=s Counsel on the basis of bias was disqualified from participation or voting and Plaintiff=s Counsel was denied any opportunity to question any member of the Council as to bias.
57. Other than Councilor Grattelo, no member of Councilor had seen either *Maine Forum* program.
58. The Plaintiff called the Council=s attention to the inconsistency between Orders #2001-80 which prohibited the replaying of Athe videotape of the Maine Forum program as *originally aired on July 4, 2001 at 7:00 P.M.*, and the proposed Order #2001-94, which declared that Dorothy Lafortune A had replayed *portions* of that program in direct violation of Order #2001-80.
59. In fact, Order #2001-80 was directed to the public access director rather than the Plaintiff, as it purported to overrule the CTVC decision that the public access director replay the July 4, 2001 tape three more times.
60. Council President Lessard commenced the Council deliberations by stating that Dorothy

Lafortune had signed an Access User Agreement, and had agreed that she would forfeit her rights by violating it; that Dorothy Lafortune was fully aware that the Council had voted 6-3 to uphold the Mayor=s directive.

61. Council President Lessard stated that the Plaintiff had played Aportions, the entirety, - whatever - it doesn=t really matter.@ He later stated that the Council=s intent Astands for itself@; that Awe had voted 6-3 to support the Mayor@, and Awe need to follow through on it.@
62. Councilor Grattelo argued, repeatedly and forcefully, that the Council must act because the CTVC would not enforce the rules, and that the City Council must support the Mayor. Councilor Grattelo, even if there was Aless than a 100% violation.@
63. Councilor Rhames observed that the City Council was not an unbiased decision-maker, and was clearly passing a bill of attainder. Council President Lessard then asked City Attorney Center whether the City Council had the authority to pass Order #2001-94 to which City Attorney Center replied that it was his position that the City Council was the ultimate authority on cable television matters.
64. Although Mayor Dion had earlier said that no testimony or evidence other than Order #2001-80 would be presented, the Mayor interrupted the Council deliberations near the end to make a statement consisting of a lengthy recounting of all of the history, and the reasons for the City=s actions from July through the Council meeting from her perspective. The statement included assertions that she had been following the legal advice of City Attorney Center throughout; that the issue was just one of Dorothy Lafortune not following the rule requiring obtaining of written releases from persons

mentioned on the July program (and was not censorship); that she appreciated the support given to her by the City Council at the September meeting when it passed Order #2001-80; and that she again needed the Council's support.

65. Councilor Grattelo moved the previous question to shut off further debate. The vote was 4-4 as Councilor Noble had then left the room. Two of those voting in the affirmative were persons whom the Plaintiff had asked to have recused. The motion passed when Mayor Dion broke the tie. The main motion for final passage of Order #2001-94 then passed on an identical 4-4 vote with Defendant Dion again breaking the tie.
66. Order #2001.94 constituted a bill of pains and penalties and was prohibited by Article 1 ' 10, Clause 1 of the Constitution of the United States, as a bill of attainder.
67. When the City Council passed Order #2001.94 at its October 16, 2001 meeting, the Plaintiff was immediately barred from producing the weekly *Maine Forum*.
68. The next usual time slot for the weekly *Maine Forum* was on October 17, 2001.
69. The plaintiff suffered humiliation and other damages by having to go through the City's bill of attainder proceeding.

COUNT IV DUE PROCESS

70. The Plaintiff hereby repleads and incorporates by reference &&1-69 above.
71. The Plaintiff had a liberty interest in the proceeding conducted on October 16, 2001.
72. The City Council process upon Order #2001.94 was fundamentally unfair as did not accord the Plaintiff basic rights to present evidence, cross-examine witnesses, or confront her accusers.
73. The City Council process for consideration of Order #2001.94 was fundamentally unfair

as members of the City Council deliberating thereon were not impartial; because the Mayor and Councillors Gratello and Lessard acted as both judges and prosecutors in the proceeding; and because the City Council was advised by a City Attorney who was an advocate for passage of the Order.

WHEREFORE with respect to Counts III and IV, the Plaintiff requests that this Honorable Court declare that Order #2001.94 is an unconstitutional bill of attainder and that its passage denied the Plaintiff due process of law. The Plaintiff asks that the Court grant preliminary and permanent injunctive relief against the enforcing of Orders #2001.80 and 94, and further asks for costs and attorney=s fees as provided by law and pursuant to 42 USC ' 1988 with respect to each Count of the Court upon which she prevails and for such other relief as is just.

Dated: November 24, 2001

David A. Lourie, Maine Bar #1041
Law office of David Lourie
189 Spurwink Avenue
Cape Elizabeth, ME 04107