



Local Government Standards Panel

Complaint Number	SP 2018-102
Legislation	<i>Local Government Act 1995</i>
Complainant	Councillor Michael Southwell
Respondent	Councillor Murray Scott
Local Government	Shire of Capel
Regulation	Regulation 7 of the <i>Local Government (Rules of Conduct)</i> <i>Regulations 2007</i>
Panel Members	Mrs Sheryl Siekierka (Presiding Member) Mrs Emma Power (Member) Councillor Paul Kelly (Member)
Heard	5 March 2019 Determined on the documents
Finding	One breach of Regulation 7(1)(b)

FINDING AND REASONS FOR FINDING

Delivered 23 March 2019

DEFAMATION CAUTION

The general law of defamation, as modified by the *Defamation Act 2005*, applies to the further release or publication of all or part of this document or its contents. Accordingly, appropriate caution should be exercised when considering the further dissemination and the method of retention of this document and its contents.



Summary of the Panel's decision

1. On 5 March 2019, the Panel found that Councillor Murray Scott a councillor of the Shire of Capel (**"the Shire"**) did commit a minor breach pursuant to:
 - a. the Local Government Act 1995 (WA) (**"the Act"**);
 - b. regulation 7 of the Local Government (Rules of Conduct) Regulations 2007 (**"the Regulations"**);when he sent an email referring to Cr Southwell in a negative manner as set out in paragraph 15 below.

The Panel's Role

2. Under section 5.110(2) of the Act the Panel is required to consider a minor breach complaint and make a finding as to whether the alleged minor breach occurred.
3. The Act provides for the circumstances in which a council member commits a minor breach.¹
4. The Panel may make a finding that a councillor has committed a minor breach of the Act and Regulations based on evidence from which it may be concluded that it is more likely that the alleged breach occurred than it did not occur.²
5. In order to find a breach, it must be established that each element of the relevant Regulation is more likely than not to have been breached or met.
6. In considering whether a minor breach is established the Panel must consider:
 - a. all evidence provided and, where there are conflicting circumstances, inferences or evidence, must come to a reasonable conclusion that any circumstance, inference or evidence relied upon is more likely than not to have occurred or be accurate³; and
 - b. the seriousness of any allegation made, as well as the gravity of the consequences flowing from a particular finding⁴.
7. The Panel does not possess investigative or supervisory powers.⁵ The Panel makes decisions about complaints regarding minor breaches solely upon the evidence presented to it and, where appropriate, materials published by the relevant local authority's website.
8. It is the responsibility of both complainants and respondents to provide the Panel with all information they wish the Panel to consider when making its determination.
9. The Panel also must have regard to the general interests of local government in Western Australia⁶.
10. The Panel is obliged to give notice of the reasons for any finding it makes under section 5.110(2) of the Act.

¹ Section 5.105 of the Act

² Section 5.106 of the Act

³ Bradshaw v McEwans Pty Ltd (1951) 217 ALR 1

⁴ Briginshaw v Briginshaw (1938) 60 CLR 336

⁵ Re and Local Government Standards Panel [2015] WASC 51 (at paragraph 24)

⁶ Section 8(6) of Schedule 5.1 of the Act



Jurisdiction and Procedural Fairness

11. On 25 October 2018 the Panel received an email from Mr Ian McCabe, acting as complaints officer of the Shire (**“the Complaints Officer”**). The same enclosed a Complaint of Minor Breach Form (with an explanatory letter and attachments) dated 22 October 2018.
12. In his letter of complaint Cr Southwell alleges that Cr Scott has breached regulation 7 of the Regulations by writing an email containing derogatory remarks regarding Cr Southwell as set out in paragraph 15 (**“the Complaint”**).
13. The Panel convened on 5 March 2018 to consider the Complaint.
14. The Panel:
 - a. accepted the advice of the Department that, based on information published on the Western Australian Electoral Commission’s website, Cr Scott was:
 - i. last elected to the Council of the Shire in October 2017 for a term expiring in October 2021;
 - ii. a Councillor at the time of the alleged breach; and
 - iii. a Councillor when the Panel met on 5 March 2018;
 - b. was satisfied the Complaint was made within two years after the alleged breach occurred⁷;
 - c. was satisfied that the Shire’s Complaints Officer had dealt with the Complaint in accordance with the administrative requirements in the Act for dealing with complaints of a minor breach⁸;
 - d. was satisfied the Department had provided procedural fairness to Cr Scott; and
 - e. found it had jurisdiction to consider the Complaint.

The Specifics of the Complaint

15. the Complaint relates to an email chain sent to various parties as follows:
 - a. on 24 August 2018, Cr Southwell sent to Cr Scott an email regarding a stakeholders advisory group (**“the Initial Email”**). The Chief Executive Officer Ian McCabe (**“the CEO”**) was cc’ed into the email.
 - b. subsequently on 24 August 2018 Cr Scott forwarded the Initial Email to Cr B Hearne and Cr J Scott with the following message:

“Why doesn’t this p get on with the job he was elected to do. it doesn’t look like it is moving south from what they said I did declare an impartiality interest at the very beginning of the meeting so what the f is his problem. don’t give the b any air time.” (sic)

(the **“Scott Email”**);
 - c. on 27 August 2018 Cr J Scott replied to Cr Scott, also reforwarding the Initial Email and the Scott Email. The particulars of the response are not reproduced here;

⁷ Section 5.107(4) and 5.109(2) of the Act

⁸ Section 5.107 and 5.109 of the Act



- d. on 2 September 2018 Cr Scott responded to Cr Southwell and cc'ed in the CEO to such response. The response included as part of the email chain the Initial Email, the Scott Email and the response from Cr J Scott of 27 August.
16. In particular, the Complaint alleges that:
- a. The single letter abbreviations are obviously specific swear words intended to be critical, insulting and demeaning;
 - b. the Scott Email urges two fellow councillors to think less of him and to shun or ignore him and this causes him a detriment;
 - c. the behaviour of writing insulting remarks about a fellow councillor to other councillors is improper;
 - d. Cr Scott's motive is to cast him in a poor light and encourage others to shun, ignore and ostracise him;
 - e. the relevant negative comments were also shared with the CEO and Cr Southwell directly;
 - f. in addition, the remarks made by Cr J Scott (in the email of the 27 August 2018) are negative and suggest that he is a person of little worth or should be ignored. By also sharing this email the Respondent has further caused him detriment.
17. In the Complaint, the Complainant also provided a copy of the relevant email chain.

Respondent's Response

18. By a letter dated 6 November 2018 and received on 9 November 2018, Cr Scott provided a response to the Complaint.
19. Cr Scott makes the following particular comments and arguments in respect to the allegations of Minor Breach:
- a. the Complaint does not detail the relevant history in relation to this matter. This is relevant as it provides insight into the consistent practices adopted by Cr Southwell to try to discredit Cr Scott and which have the potential to bring the Council into disrepute;
 - b. there is no evidence that the CEO read the comments in the Scott Email and formed an opinion about Cr Southwell as alleged;
 - c. he sent the Scott Email out of complete frustration at the continued innuendo from Cr Southwell that he acts in a dishonest manner. The purpose was to take a breath and ascertain if he should respond at all to Cr Southwell;
 - d. he mistakenly pressed the respond all button rather than create a new email;
 - e. he was not securing a personal advantage or disadvantaging others, only emailing two colleagues who he believes share his concerns that Cr Southwell's continuing suspicion and criticism of himself and Council action is cause for concern and a distraction from the Council's focus and core business;
 - f. the fact that Cr Southwell has publicly admitted he has been found to have breached the Regulations supports that concern;
 - g. it was not his intention to cause detriment to the Local Government or any other person;
 - h. he expressed a personal opinion that was not in a public forum by way of simple computer error;



- i. Cr Southwell has made assumptions about the email, being that it was read by 3 other people who would in turn ignore him, ostracize him and encourage others to shun him and cause him further detriment; and
 - j. there is no evidence to suggest he acted improperly and he will leave it to the Panel to interpret his actions.
20. Cr Scott provided a detailed explanation of the background of the matter along with various extracts of minutes and motions and Facebook posts which support Cr Scott's explanation of the background and the relationship between the parties.
21. These were read and considered by the Panel but are not specifically set out in this decision.

Regulation 7

22. Regulation 7 prohibits councillors engaging in conduct to either gain an advantage for themselves (or another party) or cause detriment to another party and specifically provides as follows:

“7. Securing personal advantage or disadvantaging others

(1) A person who is a council member must not make improper use of the person's office as a council member —

(a) to gain directly or indirectly an advantage for the person or any other person; or

(b) to cause detriment to the local government or any other person.

(2) Subregulation (1) does not apply to conduct that contravenes section 5.93 of the Act or The Criminal Code section 83.

23. It is not alleged that Cr Scott or any other person received any advantage so the Panel has only considered regulation 7(1)(b) in this Complaint.

Shire of Capel – Code of Conduct

24. The Complainant did not provide a copy of the Shire's Code of Conduct but the same is available on the Shire's website.

25. The relevant Code provides a series of guidelines for elected members, the most relevant being as follows:

“• Avoid causing any reasonable person unwarranted offence or embarrassment.

• Refrain from publicly criticising either a Councillor, Committee Member or employee in a way that casts aspersions on their competence or credibility.

• Councillors, Committee members and employees will ensure that in their dealings with each other, they:

□ work together as part of the Shire's corporate team;

□ maintain an environment of mutual respect and cooperation; and

□ are respectful, frank and honest in their communications.”

Panel's Consideration



Regulation 7

26. To make a finding of a minor breach of regulation 7(1)(b) of the Regulations the Panel must be satisfied that it is more likely than not that:
- a. Cr Scott was an elected member at the time of the alleged breach and the time of the determination;
 - b. Cr Scott made use of his office as Council member of the Shire;
 - c. when viewed objectively, such use was an improper use of Cr Scott's office in that it:
 - i. involved a breach of the standards of conduct that would be expected of a person in the position of councillor by reasonable persons; and
 - ii. was so wrongful and inappropriate in the circumstances that it calls for the imposition of a penalty; and
 - d. Cr Scott engaged in the conduct in the belief that detriment would be suffered by another person.

Cr Scott was an Elected Member at the relevant times

27. Cr Scott was an elected member at the time of the alleged breach and at the date the Panel considered the Complaint.

Cr Scott made use of his office as Council Member of the Shire

28. Although the email was sent using Cr Scott's personal email address:
- a. the Initial Email was sent in respect to a matter directly relating to the Shire and Cr Scott's conduct in respect to a Shire matter; and
 - b. the Scott Email was sent to other councillors of the Shire in respect to an elected member.
29. The fact that Cr Scott was making a comment based on his personal opinion does not prevent the same from being reasonably considered to be made in his capacity as an elected member.
30. Given the above, the Panel finds, to the required standard, that a reasonable person would conclude that Cr Scott made the comments in his role as elected member and therefore made use of his office as a council member.
31. This element is met.

Cr Scott's use was improper

32. Deciding if conduct is an improper use of office requires something more than simply a demonstration of poor judgment or lack of wisdom⁹. It requires an abuse of power or the use of the councillor's position in a manner that such councillor knew (or ought to have known) was not authorised.
33. Impropriety does not depend on a councillor's consciousness of impropriety. It is to be judged objectively and does not involve an element of intent¹⁰.
34. Any decision as to what is "improper" cannot be made in isolation but must be considered in the relevant context including the specifics of the relevant event as well as councillor's formal role and responsibilities.

⁹ Complaint of Minor Breach No. SP 3 of 2013

¹⁰ *Chew v R* [1992] HCA 18



35. The provisions of the Shire's Code of Conduct set out in paragraph 25 indicate that it is accepted that councillors will be courteous and refrain from causing unwarranted offence or embarrassment.
36. It is clear on the information supplied that the parties were each frustrated by the actions of the other. Despite such frustrations it cannot be seen to be an appropriate use of office to denigrate another councillor.
37. The Panel has considered the fact the Scott Email was distributed by mistake and only to a few persons.
38. The Panel finds it is more likely than not that although the Scott Email was a personal opinion and based upon personal frustrations, as soon as the Scott Email was shared with other persons it was improper in that that it was:
 - a. more likely than not in breach of the Shire's Code of Conduct;
 - b. of such a nature that a reasonable individual would consider the same to be inappropriate and not in keeping with the conduct that would be expected of a councillor; and
 - c. deserving of a penalty.
39. This element is met.

Cr Scott intended detriment to be suffered by another person

40. "Detriment" means loss, damage or injury. It is construed widely and includes financial and non-financial loss and adverse treatment, such as humiliation, denigration, intimidation, harassment, discrimination and disadvantage.
41. It is not necessary to find whether any detriment was actually suffered¹¹, but an intent to cause such detriment must be established.
42. Cr Scott states that:
 - a. there is no evidence that the CEO read the comments in the Scott Email to form an opinion about Cr Southwell as alleged; and
 - b. Cr Southwell has made assumptions about the email and that it was read by 3 other people who would in turn ignore him, ostracize him, encourage others to shun him and cause him further detriment.
43. The Panel is not required to find that a detriment was actually suffered, only that, it is more likely than not that a detriment was intended to be suffered.
44. In this case a reasonable person would think, upon reading the Scott Email, that Cr Scott wished for Cr Southwell:
 - a. to be seen in a negative light, by the use of various derogatory swear words and the implication that Cr Southwell was not doing the job he was elected to do; and
 - b. to be ignored by fellow councillors by the use of the phrase "*don't give the b any air time*".
45. The Panel does not consider that the mere fact that Cr Scott forwarded the email of the 27 August 2018 that was written by Cr J Scott as part of the email chain to constitute an intention to cause further detriment as alleged by Cr Southwell. This re-forwarding was clearly in error.

¹¹ *Yates and Local Government Standards Panel* [2012] WASAT 59 at [72]



46. As such, the Panel finds that it is more likely than not that the comments in the Scott Email by Cr Scott were intended to denigrate, and thereby cause damage and detriment to, Cr Southwell.

47. This element is met.

Conclusion

Given the above, the elements required to find a breach of regulation 7(1)(b) of the Regulations have been met.

Panel's Finding

48. Cr Scott did commit a breach of Regulation 7(1)(b) of the Regulations and therefore did commit a minor breach.

Sheryl Siekierka (Presiding Member)

Emma Power (Member)

Paul Kelly (Member)



Local Government Standards Panel

Complaint Number	SP 2018-102
Legislation	<i>Local Government Act 1995 (WA)</i>
Complainant	Councillor Michael Southwell
Respondent	Councillor Murray Scott
Local Government	Shire of Capel
Regulation	Regulation 7(1)(b) of the <i>Local Government (Rules of Conduct) Regulations 2007 (WA)</i>
Panel Members for Penalty Consideration	Mr Michael Connolly (Presiding Member) Cr Paul Kelly (Member) Mrs Emma Power (Member)
Heard	5 March 2019 Determined on the documents
Penalty Considered	7 May 2019
Outcome	Public Apology

PENALTY DECISION AND REASONS FOR DECISION

Delivered 17 May 2019

DEFAMATION CAUTION

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Introduction

1. At its meeting on 5 March 2019, the Panel found that Councillor Murray Scott, a Councillor for the Shire of Capel (“**the Shire**”), committed one minor breach of Regulation 7(1)(b) of the *Local Government (Rules of Conduct) Regulations 2007* (WA) (“**the Regulations**”) when he made negative comments in relation to Councillor Michael Southwell in an email dated 27 August 2018 (“**the Minor Breach**”).

Jurisdiction

2. The Panel convened on 7 May 2019 to consider how it should deal with the Minor Breach.
3. The Panel accepted the advice of the Department of Local Government, Sport and Cultural Industries (“**the Department**”) that on this date there was no available information to indicate that Cr Scott had ceased to be, or was disqualified from being, a councillor.

Possible Sanctions

4. Section 5.110(6) of the *Local Government Act 1995* (WA) (“**the Act**”) provides that the Panel is to deal with a minor breach by:
 - (a) *dismissing the complaint;*
 - (b) *ordering that —*
 - (i) *the person against whom the complaint was made be publicly censured as specified in the order;*
 - (ii) *the person against whom the complaint was made apologise publicly as specified in the order; or*
 - (iii) *the person against whom the complaint was made undertake training as specified in the order;*
 - or*
 - (c) *ordering 2 or more of the sanctions described in paragraph (b).*

Councillor Scott’s Submissions

5. If the Panel finds that a councillor has committed a minor breach, it must give the councillor an opportunity to make submissions to the Panel about how it should deal with the breach under section 5.110(6).¹
6. By a letter dated 29 March 2019, Cr Scott was:
 - a. notified of the Panel’s finding of the Minor Breaches;
 - b. provided with a copy of the Panel’s Finding and Reasons for Finding; and
 - c. offered an opportunity to make submissions as to how the Minor Breach should be dealt with under section 5.110(6) of the *Act*.
7. By email dated 22 November 2018, the Department received a response from Cr Scott with the following comments and arguments:

¹ *Local Government Act 1995* (WA), s 5.110(5).



- a. after having read the Panel's findings he contacted and checked with the two Councillors involved and they confirmed that the email in no way changed their opinion of Cr Southwell;
- b. Cr Southwell has chosen to selectively publish on Facebook excerpts from the Panel's decision which resulted in several negative comments regarding Cr Scott;
- c. if Cr Southwell was as concerned as he says he is, why would he choose to publicise the matter on Facebook on 30 March 2019;
- d. if the Standards Panel had the resources to deal with the other breaches lodged against Cr Southwell in a timely manner, Cr Southwell's behaviour many have been curtailed months earlier negating the frustration and disruption that continues to occur at the Shire of Capel that Cr Scott is determined to rectify;
- e. he made an error of judgement and in the interim he has sought guidance and one on one training on the better use of his email;
- f. Cr Southwell has continually denigrated Cr Scott his family;
- g. Cr Southwell did not bother to contact Cr Scott with regard to his concerns;
- h. Cr Southwell continually espouses the virtues of freedom of speech. However with free speech comes responsibility and respect and in many instances over the past the past 12 months the Standards Panel would be aware that Cr Southwell has yet to come to grips with that responsibility;
- i. he notes the Panel's comments in paragraphs 36 and 37 of the decision relating to the distribution mistake and frustration between the parties. Cr Scott's frustration is with Cr Southwell and the damage he is doing to the Shire of Capel and the very fabric of Local Government generally; and
- j. he would appreciate if the Panel could give consideration to not imposing a sanction against him in view of the fact only two other persons were involved and he has already sought guidance and one on one training on the better use of his email account.

Panel's Consideration

8. Section 5.110(6) is about penalty. The Panel does not have the power to review any finding of a breach. The Panel may dismiss a complaint under section 5.110(6)(a), not to reverse the Panel's finding of a breach but to indicate that in all the circumstances the councillor should not be penalised and the breach should not be recorded against the councillor's name.
9. The Panel notes that Cr Scott accepts that he has breached the Regulations by his conduct but asserts that his actions were justified due to the circumstances of Cr Southwell's continual poor behaviour and Cr Scott's frustration with this situation as well as the fact only two other Councillors were involved.
10. Despite any contributing factors, the Panel has found Cr Scott has breached the Regulations. Although the wider dissemination of the email was in error, the relevant comments in the email were still made to third parties with an intent to denigrate Cr Southwell.
11. The standards of behaviour expected of councillors are of a generally higher standard than a member of the public due to their public position. An elected




member is not free to choose when the obligations and expected standards of conduct attached to such an office will apply to them.


12. In this case, the conduct of Cr Scott is not excused by the poor conduct of Cr Southwell.
13. The Panel does, however, recognise that it was inappropriate for Cr Southwell to publish excerpts of the Panel's findings on Facebook prior to the provision of a penalty decision. The Panel does not consider the wider distribution of the conduct to a public audience to be proper or in the general interests of the local government.
14. In these circumstances, the Panel considers that the appropriate penalty is that Cr Scott make a public apology.
15. Making a public apology is a significant sanction, being a personal admission by the individual of wrongdoing. It is a suitable and appropriate penalty when a councillor's conduct:
 - a. adversely affects particular individuals²; or
 - b. does not meet the standards other councillors seek to uphold.

Panel's decision

16. The Panel orders pursuant to section 5.110(6)(b)(ii) and section 5.110(c) of the Act that, in relation to the minor breaches of regulation 4(1) and regulation 7(1)(b) of the Regulations, Cr Scott make a public apology in terms of the attached Order.



Mick Connolly (Presiding Member)



Paul Kelly (Member)



Emma Power (Member)

² *Treby and Local Government Standards Panel* [2010] WASAT 81 [127] (Pritchard J).



ORDER

Delivered 17 May 2019

DEFAMATION CAUTION

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THE LOCAL GOVERNMENT STANDARDS PANEL ORDERS THAT:

1. Councillor Murray Scott, a Councillor for the Shore of Capel publicly apologise to Councillor Michael Southwell, as specified in paragraph 2 below.
2. On the ordinary council meeting first occurring after the expiration of 28 days from the date of service of this Order on him, Councillor Scott shall:
 - a. attend the relevant ordinary council meeting;
 - b. ask the presiding person for his or her permission to address the meeting to make a public apology to the public;
 - c. make the apology immediately after Public Question Time or during the Announcements part of the meeting, or at any other time when the meeting is open to the public, as the presiding person thinks fit; and
 - d. address the Council and public as follows, without saying any introductory words before the address, and without making any comments or statement after the address:

"I advise this meeting that:

- i. A complaint was made to the Local Government Standards Panel, in which it was alleged that I contravened *the Local Government (Rules of Conduct) Regulations 2007 (WA)* on 24 August when I wrote a negative email regarding Cr Southwell to other Councillors of the Shire of Capel.
- ii. The Panel found that I breached the Shire of Capel's Code of Conduct and regulation 7(1)(b) of the said Regulations by making comments that were likely to cause Cr Southwell embarrassment.
- iii. I accept that I should not have made the negative comments regarding Councillor Southwell.
- iv. I now apologise to Councillor Southwell."



3. If Cr Scott fails or is unable to comply with the requirements of paragraph 2 above he shall cause the following notice of public apology to be published in no less than 10 point print, as a one-column or two-column display advertisement in the first 10 pages of the South Western Times newspaper and the Bunbury Mail newspaper:

PUBLIC APOLOGY BY COUNCILLOR MURRAY SCOTT

A formal complaint was made to the Local Government Standards Panel, in which it was alleged that I contravened the *Local Government (Rules of Conduct) Regulations 2007 (WA)* on 24 August when I wrote a negative email regarding Cr Southwell to other Councillors of the Shire of Capel.

The Panel found that I breached the Shire of Capel's Code of Conduct and regulation 7(1)(b) of the Regulations by making comments that were likely to cause Cr Southwell embarrassment.

I accept that I should not have made the negative comments regarding Councillor Southwell.

I now apologise to Councillor Southwell.

Mick Connolly (Presiding Member)

Paul Kelly (Member)

Emma Power (Member)



NOTICE TO THE PARTIES TO THE COMPLAINT

RIGHT TO HAVE PANEL DECISION REVIEWED BY THE STATE ADMINISTRATIVE TRIBUNAL

The Local Government Standards Panel (the Panel) advises:

- (1) Under section 5.125 of the *Local Government Act 1995* the person making a **complaint** and the person complained about each have the right to apply to the **State Administrative Tribunal (the SAT)** for a review of the Panel's decision in this matter. In this context, the term "decision" means a decision to dismiss the complaint or to make an order.
- (2) By rule 9(a) of the *State Administrative Tribunal Rules 2004*, subject to those rules **an application to the SAT under its review jurisdiction must be made within 28 days** of the day on which the Panel (as the decision-maker) gives a notice [see the Note below] under the *State Administrative Tribunal Act 2004 (SAT Act)*, section 20(1).
- (3) **The Panel's Breach Findings and these Findings and Reasons for Finding – Sanctions**, constitute the Panel's notice (i.e. the decision-maker's notice) given under the *SAT Act*, section 20(1).

Note:

- (1) This document may be given to a person in any of the ways provided for by sections 75 and 76 of the *Interpretation Act 1984*. [see s. 9.50 of the *Local Government Act 1995*]
- (2) Subsections 75(1) and (2) of the *Interpretation Act 1984* read:
 - "(1) Where a written law authorises or requires a document to be served by post, whether the word "serve" or any of the words "give", "deliver", or "send" or any other similar word or expression is used, **service shall be deemed** to be effected by properly addressing and posting (by pre-paid post) the document as a letter to the last known address of the person to be served, and, **unless the contrary is proved, to have been effected at the time when the letter would have been delivered in the ordinary course of post.** [Bold emphases added]
 - (2) Where a written law authorises or requires a document to be served by registered post, whether the word "serve" or any of the words "give", "deliver", or "send" or any other similar word or expression is used, then, if the document is eligible and acceptable for transmission as certified mail, the service of the document may be effected either by registered post or by certified mail."
- (3) Section 76 of the *Interpretation Act 1984* reads:

"Where a written law authorises or requires a document to be served, whether the word "serve" or any of the words "give", "deliver", or "send" or any other similar word or expression is used, without directing it to be served in a particular manner, service of that document may be effected on the person to be served —

 - (a) by delivering the document to him personally; or
 - (b) by post in accordance with section 75(1); or
 - (c) by leaving it for him at his usual or last known place of abode, or if he is a principal of a business, at his usual or last known place of business; or
 - (d) in the case of a corporation or of an association of persons (whether incorporated or not), by delivering or leaving the document or posting it as a letter, addressed in each case to the corporation or association, at its principal place of business or principal office in the State."

JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

ACT : LOCAL GOVERNMENT ACT 1995 (WA)

CITATION : SCOTT and LOCAL GOVERNMENT STANDARDS
PANEL [2019] WASAT 95

MEMBER : MS P LE MIERE, MEMBER

HEARD : DETERMINED ON THE DOCUMENTS

DELIVERED : 22 OCTOBER 2019

FILE NO/S : CC 911 of 2019

BETWEEN : MURRAY SCOTT
Applicant

AND

LOCAL GOVERNMENT STANDARDS PANEL
First Respondent

SHIRE OF CAPEL
Second Respondent

Catchwords:

Local Government - Rules of conduct - Sanction for minor breach - Turns on own facts

Legislation:

Local Government (Rules of Conduct) Regulations 2007 (WA), reg 7(1)(b)
Local Government Act 1995 (WA), s 5.102A, s 5.110(6), s 5.125
State Administrative Tribunal Act 2004 (WA), s 27(1) s 27(2), s 29(1), s 29(3)

Result:

Application allowed

Category: B

Representation:

Counsel:

Applicant : In Person
First Respondent : Mr J Misso
Second Respondent : N/A

Solicitors:

Applicant : N/A
First Respondent : State Solicitor's Office
Second Respondent : N/A

Case(s) referred to in decision(s):

Chief Executive Officer, Department of Local Government and Communities
and Scaffidi [2017] WASAT 67 (S)

Chief Executive Officer, Department of Local Government and Communities
and Scaffidi [No 2] [2018] WASAT 66

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

1 On 22 October 2018 Michael Southwell (Cr Southwell) of the Capel Shire Council (Shire) lodged a formal complaint with the Local Government Standards Panel (Panel) against Murray Scott (Cr Scott) a councillor of the Shire (applicant). The complaint alleged a minor breach of the *Local Government (Rules of Conduct) Regulations 2007* (WA) (Regulations).

2 On 5 March 2019 the Panel found that the applicant had committed one minor breach of reg 7(1)(b) of the Regulations when he made a negative comment about councillor Cr Southwell in an email dated 27 August 2018 (Minor Breach).

3 On 17 May 2019 the Panel handed down its penalty decision in respect of the Minor Breach by the applicant. The penalty was that Cr Scott was required to make a public apology at a meeting of the Council of the Shire (Council) as set out below:

ORDER

Delivered 17 May 2019

DEFAMATION CAUTION The general law of defamation, as modified by the *Defamation Act 2005* (WA), applies to the further release or publication of all or part of this document or its contents. Accordingly, appropriate caution should be exercised when considering the further dissemination and the method of retention of this document and its contents

THE LOCAL GOVERNMENT STANDARDS PANEL ORDERS THAT:

1. Councillor Murray Scott, a Councillor for the Shore of Capel publicly apologise to Councillor Michael Southwell, as specified in paragraph 2 below.
2. On the ordinary council meeting first occurring after the expiration of 28 days from the date of service of this Order on him, Councillor Scott shall:
 - a. attend the relevant ordinary council meeting; -
 - b. ask the presiding person for his or her permission to address the meeting to make a public apology to the public;
 - c. make the apology immediately after Public Question Time or during the Announcements part of the meeting, or at any other time when the meeting is open to the public, as the presiding person thinks fit; and
 - d. address the Council and public as follows, without saying any introductory words before the address, and without making any comments or statement after the address:

I advise this meeting that:

- i. A complaint was made to the Local Government Standards Panel, in which it was alleged that I contravened *the Local Government (Rules of Conduct) Regulations 2007 (WA)* on 24 August when I wrote a negative email regarding Cr Southwell to other Councillors of the Shire of Capel.
- ii. The Panel found that I breached the Shire of Capel's Code of Conduct and regulation 7(1)(b) of the said Regulations by making comments that were likely to cause CR Southwell embarrassment.
- iii. I accept that I should not have made the negative comments regarding Councillor Southwell.
- iv. I now apologise to Councillor Southwell.'

4 On 20 June 2019 the applicant lodged an application for review of the penalty decision with the Tribunal. The review of the Panel's decision is within the Tribunal's review jurisdiction (see s 5.125 of the *Local Government Act 1995 (WA)* (LG Act)).

5 On 8 July 2019 the Tribunal stayed the Panel's decision until further order.

6 The Tribunal made orders adding the Shire as a party to the proceedings and granted leave to the Attorney General for Western Australia to intervene.

7 The Tribunal determined it appropriate to add the Shire as a party given the penalty decision of the Panel (if affirmed) by the Tribunal would require the involvement of the Shire in the implementation of the order.

8 Neither the Panel nor the Shire played an active role in the review as is appropriate given the nature of review proceedings. The Panel's role was confined to providing a statement of the reasons for the decision under review and other documents and material in the Shire's possession or under the Shire's control that are relevant to the Tribunal's review of the decision.

9 The Tribunal was assisted by written submissions in relation to penalty filed by the intervener.

10 With the agreement of the parties the Tribunal ordered that it would determine the matter entirely on the documents.

The issue arising on review

11 The review proceeding is a hearing de novo (s 27(1) of the *State Administrative Tribunal Act 2004* (WA) (SAT Act)) with the purpose of the review being to produce the correct and preferable decision (s 27(2) of the SAT Act). In dealing with this matter the Tribunal has the same functions and discretions exercisable by the original decision-maker (s 29(1) of the SAT Act). The Tribunal may either affirm the decision being reviewed; or vary the decision being reviewed; or set aside the decision being reviewed and substitute its own decision or refer the matter back to the original decision-maker for reconsideration (s 29(3) of the SAT Act).

12 The Tribunal therefore undertakes the same considerations as the respondent with the benefit of any new and/or additional information and the critical issue remains as it was when the complaint was originally considered by the respondent.

13 The issue arising on review is what sanction(s) should be imposed on the applicant for the Minor Breach.

Sanctions for minor breaches generally

14 The LG Act allows for the imposition of various penalties for minor breaches. The hierarchy of penalties range from the least serious being an order that a person undertake training as specified in the order, to the most serious, being an order the person be publicly censured.¹

15 At the period when the penalty decision was imposed s 5.110.6 of the LG act stated:

The breach is to be dealt with by -

- (a) dismiss the complaint; or
- (b) ordering that -
 - (i) the person against whom the complaint was made be publicly censured as specified in the order; or
 - (ii) the person against whom the complaint was made apologise publicly as specified in the order; or

¹ *Local Government Act 1995* (W.A.), s.5.102A, minor breach has the meaning given in s.5.105(1) and *Chief Executive Officer, Department of Local Government and Communities and Scaffidi* [2017] WASAT 67 (S) (*Scaffidi*) at [22].

(iii) the person against whom the complaint was made undertake training as specified in the order; or

or

(c) ordering 2 or more of the sanctions described in paragraph (b).

16 Subsection 5.110(6) of the LG act was amended in July 2019. The subsection currently provides:

The breach is to be dealt with by -

(a) ordering that no sanction be imposed; or

(b) ordering that -

(i) the person against whom the complaint was made be publicly censured as specified in the order; or

(ii) the person against whom the complaint was made apologise publicly as specified in the order; or

(iii) the person against whom the complaint was made undertake training as specified in the order;

or

(iv) the person against whom the complaint was made pay to the local government specified in the order an amount equal to the amount of remuneration and allowances payable by the local government in relation to the complaint under Schedule 5.1 clause 9;

or

(c) ordering 2 or more of the sanctions described in paragraph (b).

Principles to be applied when imposing a penalty for minor breaches

17 The Tribunal accepts the intervener's submission that the purpose of the imposition of a penalty under the LG Act is generally for the

protection of the public and the maintenance of standards of conduct of council members.²

18 Further, guidance as to the factors which the Tribunal may consider when determining the appropriate penalty to impose can be found in *Scaffidi* at [75] and *Chief Executive Officer, Department of Local Government and Communities and Scaffidi [No 2]* [2018] WASAT 66 at [76]. They include but are not limited to:

- (a) the nature and seriousness of the breaches;
- (b) the councillor's motivation for the contravention;
- (c) whether or not the councillor has shown any insight and remorse into his/her conduct;
- (d) whether the councillor has breached the LG Act knowingly or carelessly;
- (e) the councillor's disciplinary history;
- (f) likelihood or not of the councillor committing further breaches of the LG Act;
- (g) personal circumstances at the time of conduct, and of imposing the sanction;
- (h) need to protect the public through general deterrence and maintain public confidence in local government; and
- (i) any other matters which may be regarded as aggravating conduct or mitigating its seriousness.

The appropriate sanction

19 The applicant submitted that the offending email was sent as a result of frustration with Cr Southwell's conduct towards him. The applicant accepts that his conduct was inappropriate. He says his conduct was an error of judgment.

20 The applicant says and it is not disputed that he has been a councillor since 1993, he was recognised by the Western Australian Local Government Association in 2019 for eminent service to the local

² Ibid at [14]-[19].

government sector and there has been no complaints in respect of his conduct as a councillor until this incident.

21 The applicant also submits that the email correspondence did not enter the public domain and there was no public comment regarding it.

22 The applicant says that an appropriate sanction is for an order for further training.

23 The intervener maintains that the sanction imposed by the Panel of a public apology is the correct sanction. It argues that the applicant's breach is, whilst not on the upper range of seriousness it cannot be considered insignificant.

24 Further that the applicant's conduct cannot be excused because the applicant acted out of frustration. That as a councillor with 25 years' experience he is expected to conduct himself in all his communications relating to local government matters at a higher standard than an ordinary member of the public.

25 The intervener submits a sanction should be imposed to reflect the community's disapproval of the contravention of reg 7(1)(b) of the Regulations to dissuade other councillors from engaging in similar conduct and thereby seeking to maintain appropriate standards of behaviour of councillors who send any communication relating to other councillors or council business.

26 The intervener says that a sanction requiring training is not appropriate in this situation. The applicant is not an inexperienced councillor and further training as to the use of emails on the use of acceptable language in emails is unlikely to be useful.

Consideration

27 In this instance the breach on the scale of minor breaches is towards the lower end.

28 The email the subject of the finding of the Minor Breach was not publicly distributed, it was purposely sent to two councillors and the Chief Executive Officer of the Shire. The applicant mistakenly also forwarded the email to Cr Southwell.

29 The Tribunal has purposefully not set out the wording of the offending email, as to do so would further publish the offending words. It considers it does not need to do so as it is accepted by all parties that

the negative comment in relation to Cr Southwell in the email by the applicant to Cr Southwell was intended to denigrate, and thereby cause damage and detriment to Cr Southwell and thereby breached reg 7(1)(b) of the Regulations.

30 In considering the submissions by the applicant and intervener as to what is an appropriate sanction the Tribunal has determined that whilst the Minor Breach is towards the minor end of the scale the Panel found the negative comment was intended to denigrate and cause damage and detriment to Cr Southwell and therefore an apology is required to be made to Cr Southwell.

31 The Tribunal accepts that the negative comments were made as a result of frustration by the applicant and the applicant has shown insight and remorse.

32 There is no suggestion by the intervener that the applicant deliberately contravened the LG Act.

33 The Tribunal considers it unlikely the applicant will commit further breaches given his insight and remorse.

34 The purpose of disciplinary proceedings includes as submitted by the Intervener to not only reflect the communities' disapproval of such conduct (if they are aware of it) but to also maintain appropriate standards of behaviour of councillors who send communications relating to other councillors or council business.

35 The Tribunal finds the correct and preferable decision is to vary the decision of the Panel to include an apology to Cr Southwell but not to make the apology public.

36 The Tribunal does not consider that a public apology is necessary as the email was not addressed to or sent to the public at large.

37 The Tribunal does consider it appropriate that other members of the Shire be aware of the apology to dissuade other councillors from engaging in similar conduct and to reinforce to councillors what appropriate standards of behaviour are expected of councillors who send any communication relating to other councillors or council business.

Orders

1. The decision of the Local Government Standards Panel dated 17 May 2019 in SP 2018-102 is varied.
2. Pursuant to s 5.110(6)(b)(ii) and s 5.110(c) of the *Local Government Act 1995* (WA) that, in relation to the minor breaches of reg 4(1) and reg 7(1)(b) of the *Local Government (Rules of Conduct) Regulations 2007* (WA) Councillor Murray Scott make an apology to Councillor Michael Southwell at a closed Council meeting in the terms set out below.
3. On the ordinary council meeting first occurring after the expiration of 28 days from the date of service of this order on him Councillor Scott:
 - (a) attend the relevant ordinary council meeting;
 - (b) ask the presiding person to close the meeting to the public at an appropriate time and to allow him to address the councillors:
 - (c) immediately upon the meeting being closed to the public address the Council and without saying any introductory words and without making any comments or statements after the address apologise as follows:

I advise this meeting that:

- (i) A complaint was made to the Local Government Standards Panel, in which it was alleged that I contravened the *Local Government (Rules of Conduct) Regulations 2007* (WA) on 24 August 2019 when I wrote a negative email regarding Councillor Southwell to other Councillors of the Shire of Capel.
- (ii) The panel found that I breached the Shire of Capel's Code of Conduct and regulation 7(1) of the said Regulations by making comments that were likely to

cause Councillor Southwell
embarrassment.

- (iii) I accept that I should have not made negative comments regarding Councillor Southwell.
- (iv) I now apologise to Councillor Southwell.

I certify that the preceding paragraph(s) comprise the reasons for decision of the State Administrative Tribunal.

MS P LE MIERE, MEMBER

22 OCTOBER 2019