

COUNCILLOR CONDUCT PANEL

In the matter of an Application by the West Wimmera Shire Council
concerning Councillor Tom Houlihan of West Wimmera Shire Council

HEARING PURSUANT TO DIVISION 1B OF PART 4 OF LOCAL GOVERNMENT ACT (1989)

Applicant: West Wimmera Shire Council
Appointed representative: Councillor Trevor Domaschenz
Respondent: Councillor Tom Houlihan
Date of Hearing: 25 November 2019
Date of Decision: 19 December 2019
Panel Members: Mrs Jo-Anne Mazzeo (Chairperson)
Ms Jan Boynton

DETERMINATION

Pursuant to s 81J(1)(b) of the *Local Government Act 1989* (the Act) the Panel makes a finding of serious misconduct against Cr Tom Houlihan.

Pursuant to s 81J(2A)(b)(iv) of the Act the Panel suspends Cr Houlihan (effective from the date of this decision) for a period of two (2) months.

Pursuant to s 81J(1)(a) of the Act the Panel makes a finding of misconduct against Cr Houlihan.

Pursuant to s 81J(2)(c) of the Act the Panel directs Cr Houlihan to take leave of absence for a period of two (2) months (effective from the date of this decision) to be served concurrently with his period of suspension.

Jo-Anne Mazzeo
Chairperson

Jan Boynton
Panel Member

STATEMENT OF REASONS FOR DECISION

The Application

1. The Application dated 3 July 2019 and revised on 27 October 2019 was made by the West Wimmera Shire Council as a result of a resolution passed on 20 June 2019 seeking a finding of misconduct and/or serious misconduct against Cr Tom Houlihan relating to multiple allegations which are summarised below.
2. Councillor Trevor Domaschenz was appointed as the applicant's representative.
3. The Application alleged that Cr Houlihan had repeatedly behaved in an aggressive, intimidating and disrespectful manner towards fellow Councillors and members of Council staff (including the Chief Executive Officer and the Governance Officer) creating a risk to their health and safety, and that these actions constituted bullying of these Councillors and members of Council staff.
4. The Application also alleged that Cr Houlihan had by various actions and activities (set out below in these reasons) repeatedly contravened one or more of the following Councillor conduct principles:
 - the following primary principles of Councillor conduct under s 76B of the Act:
 - (a) act with integrity; and
 - (c) not improperly seek to confer an advantage or disadvantage on any person.
 - the following principles of Councillor conduct under s 76BA of the Act:
 - (a) avoid conflicts between public duties as councillor and personal interests and obligations;
 - (b) act honestly and avoid statements that are likely to mislead or deceive;
 - (c) treat all persons with respect and have due regard to opinions, beliefs, rights and responsibilities of others;
 - (e) endeavour to ensure that public resources are used prudently and solely in the public interest; and
 - (g) support and promote these principles by leadership and example and act in a way that secures and preserves public confidence in the office of Councillor.

Evidence provided at hearing

5. Written evidence was submitted by both the applicant and the respondent prior to the hearing, including witness statements made by witnesses who gave evidence at hearing.
6. Oral evidence was given at the hearing by both the applicant's appointed representative and the respondent.
7. Oral evidence was also provided by the following individuals:
 - Mr David Leahy, Chief Executive Officer, West Wimmera Shire Council
 - Ms Elizabeth Matuschka, Governance Officer, West Wimmera Shire Council
 - Councillor Richard Hicks
 - Councillor Jodie Pretlove
 - Ms Margo Petersen.

The jurisdiction of the Panel in relation to this Application

8. Section 81B(1) of the Act provides that a Panel may hear an Application that alleges misconduct or serious misconduct by a Councillor.
9. Pursuant to s 81J of the Act a Panel may determine whether or not a Councillor has engaged in misconduct or serious misconduct.
10. "Misconduct" is defined in s 3 of the Act as:
 - (a) failure by a Councillor to comply with the Council's internal resolution procedure; or
 - (b) failure by a Councillor to comply with a written direction given by the Council under s 81AB; or
 - (c) repeated contravention of any of the Councillor Conduct Principles.
11. "Serious misconduct" is defined in s 3 of the Act as:
 - (a) the failure of a Councillor to attend a Councillor Conduct Panel hearing formed to make a finding in respect of that Councillor; or
 - (b) the failure of a Councillor to give a Councillor Conduct Panel any information the Councillor Conduct Panel has requested the Councillor to give; or
 - (c) the failure of a Councillor to comply with a direction of a Councillor Conduct Panel; or

- (d) continued or repeated misconduct by a Councillor after a finding of misconduct has already been made in respect of the Councillor by a Councillor Conduct Panel; or
- (e) bullying of another Councillor or member of Council staff by a Councillor; or
- (f) conduct by a Councillor in respect of a member of Council staff in contravention of s 76E; or
- (g) the release of confidential information by a Councillor in contravention of s 77.

12. "Bullying" is defined in s 3 of the Act:

"Bullying by a Councillor means the Councillor repeatedly behaves unreasonably towards another Councillor or member of Council staff and that behaviour creates a risk to the health and safety of that other Councillor or member of Council staff".

Evidence of the Applicant

- 13. By way of background, the applicant's representative outlined how the respondent in his capacity as President of the Committee of Management of the Harrow and District Recreational Reserve (CoM) sought and secured significant government funding to provide a modern upgrade to the facilities at the Harrow Recreation Reserve.
- 14. Correspondence dated 5 June 2018 from the Program Manager of the Land and Built Environment Team at the Department of Environment, Land, Water and Planning (DELWP) advised the Harrow and District Recreation Reserve Committee that in order to secure the funding, a detailed application must be provided to Sport and Recreation Victoria (SRV) by August 2018, and that it must be submitted by the West Wimmera Shire Council, and that it could not be submitted by the CoM or by DELWP.
- 15. In a confidential part of the Council meeting held on 15 August 2018 Council, by resolution, approved the submission of the SRV Female Friendly Facilities Program Application for the Harrow Recreation Reserve Development. The resolution noted the amount to be contributed by each of the parties involved in funding the project and required a contractual agreement protecting the Council against any cost overruns.
- 16. The expected outcome of the funded project included female friendly facilities to support netball and tennis participation and programming and upgraded unisex football facilities.

17. The respondent had envisaged a one building construction/project, however it became apparent during the planning phase of the project that the total cost of the one building construction in its original form significantly exceeded the grants allocated to the project.
18. Councillors discussed the need for a modified build (consisting of a two-building construction with the current facilities remaining) with the CoM and local constituents. General support was received for the two-building construction, with the exception of the respondent.
19. The applicant submitted that the respondent had been the subject of two formal Councillor Code of Conduct complaints (lodged in June 2018 and December 2018 respectively) relating to ongoing inappropriate behaviour, consistent with that which led to the application for establishment of this Councillor Conduct Panel.
20. The complaint made in June 2018 was withdrawn and then subsequently reinstated shortly before Council lodged the application before this current Panel.
21. The complaint made in December 2018 stemmed from the respondent's conduct regarding management of the Government grant allocated for the upgrade of facilities at the Harrow Recreation Reserve [outlined above in paragraphs 13 to 18].
22. The complaint resulted in mediation between the respondent and Mr David Leahy, the Chief Executive Officer of the West Wimmera Shire Council (which was held in Edenhope on 29 January 2019). As part of the agreement reached at mediation, the respondent was required to make a public statement that included the words:

"There was never any intention to allege, or give the impression, that there was any corruption or wrongdoing by the CEO, other Councillors or other Officers of the Council or state departments."
23. The applicant submitted that despite making a public statement including the words extracted directly above on 4 February 2019, the respondent had continued to make derogatory, intimidating and threatening statements about West Wimmera Shire Council and staff to local media (including the ABC and the Wimmera Mail Times) and whilst doing so, clearly identifying himself as a councillor. An example given by the applicant was from the ABC Wimmera Facebook Page on 5 May 2019 (8:30am) stating that the respondent "...intends to lodge a formal complaint with the Local Government Inspectorate...as he isn't happy with decisions made by council ..."

24. The applicant also submitted that the respondent both had access to and relied on confidential information to benefit him in his other role as President of the CoM, with that information being obtained during the in-camera section of Council meetings.
25. The applicant further submitted that the respondent had notified WorkSafe Victoria on 13 May 2019 that the construction site at the Harrow Recreation Reserve was unsafe, that the location of electrical services at the site was in question and that the West Wimmera Shire Council was unable to manage the construction site, therefore placing workers in danger. The applicant submitted that the construction site was not within the jurisdiction of the West Wimmera Shire Council, and Council had no legal responsibility for the modality or timing of works. The applicant told the Panel the notification to WorkSafe was vindictive and vexatious, causing unnecessary angst and embarrassment to the contractor and sub-contractors, had sullied the relationship between Council and the Contractors and had made Council look foolish.
26. The applicant also told the Panel of an interview the respondent was involved in on or about 6 May 2019 with the ABC breakfast radio show. It is alleged that during this interview the respondent again reiterated his dissatisfaction with decisions made by Council, further damaging public confidence in both Council and in his own role as a Councillor.
27. The applicant also submitted that the respondent's ongoing refusal to sign an amended Councillor Code of Conduct (which was amended on the recommendation of the Local Government Inspectorate) demonstrates his lack of integrity, respect and does not preserve confidence in his role as councillor.
28. The applicant told the Panel of occasions where the respondent had "stormed out of meetings", "knocked over his nameplate" and refused to comply with Council processes - all demonstrating a lack of respect for Council process, other Councillors and Council officers.
29. The applicant also submitted that by virtue of his role as President of the CoM of the Harrow and District Recreation Reserve and the way he managed the exchange of information (or lack thereof), the respondent was seeking to confer an advantage to that group by failing to appropriately manage the two roles that he had (that of a Councillor and that of President of the CoM).

30. Furthermore, the applicant stated that whilst the respondent writes to other organisations/government bodies/regulatory bodies in his capacity as a private citizen, he then stands up during Council meetings declaring this, thus further blurring the lines between his role as a Councillor and that of a private citizen. The applicant gave an example of a recent Council meeting where the respondent told the public gallery that he had made complaints about Council to the Victorian Ombudsman, IBAC and the Premier of Victoria.
31. In relation to the allegation of bullying, the applicant submitted that whilst the respondent's behaviour could constitute that of a bullying nature, he repeatedly behaved in a way that creates a risk to the health and safety of Council officers, namely Mr Leahy and Ms Matuschka. Examples given in support of this were the way in which the respondent repeatedly accused Mr Leahy of theft and misappropriation of funds, the way in which he addressed Mr Leahy at their meeting on 7 December 2018 at the Horsham Police station and the way in which the respondent dealt with Ms Matuschka in her role as Governance Officer.
32. In his evidence before the Panel, Mr Leahy told the Panel that he felt attacked by the respondent, he was publicly accused of theft and constantly harassed by the respondent to the point that it has placed both himself and his family under significant stress. Just one week prior to the Panel hearing, the respondent had yet again publicly called Mr Leahy "a disgrace". Mr Leahy felt threatened by the respondent to the extent that he was no longer willing to meet with the respondent without a witness present.
33. In relation to the altercation between Mr Leahy and the respondent at the Horsham Police station in December 2018, Mr Leahy told the Panel that the respondent was insistent on meeting with Mr Leahy on that day, despite Mr Leahy already having a full calendar of meetings scheduled. The respondent demanded to meet at the Police station and Mr Leahy agreed after first suggesting that the meeting be held at the office in which, he, Mr Leahy was holding a prior meeting. The respondent was there with Ms Petersen, who witnessed the altercation. Mr Leahy told the Panel that the respondent was aggressive, accusing him of theft along with a long list of other accusations. Mr Leahy terminated the meeting and left the Police station when it became apparent to him that things were going to escalate.
34. Regarding the respondent's management of his role on Council and that of President of the CoM, Mr Leahy acknowledged that on occasions the respondent had declared a conflict of interest, but on other occasions had not.

35. Ms Matuschka provided evidence to the Panel reflecting on her observation of Mr Leahy when he returned to the Edenhope Council offices, directly after the meeting that took place at the Horsham Police Station. She recalled Mr Leahy was distressed and visibly shaken to a point that she had never seen him before.
36. Ms Matuschka also told the Panel of her own dealings with the respondent, claiming that she too felt bullied and was fearful of what he might do. Ms Matuschka made reference to the respondent's "excessive" alcohol consumption, his claims regarding use of his guns, and his "disturbing behaviour". Ms Matuschka said "...in even the simplest of exchanges..." the respondent was aggressive and attacking, and that she feels unsafe and fearful in his presence.
37. Ms Matuschka told the Panel of the respondent's repeated failure to comply with Council processes (such as completion of the Ordinary Interest Return for Councillors, participation in management of the Council diary and pool car bookings) and how she believed this to be disrespectful, unprofessional and unbecoming of the role of a Councillor.
38. Councillor Hicks gave evidence consistent with that of Mr Leahy and Ms Matuschka, confirming that he himself had witnessed firsthand the bullying by the respondent towards both Mr Leahy and Ms Matuschka.
39. Councillor Pretlove gave limited evidence to the Panel, acknowledging she had personal connections with the respondent by way of a family relationship but also acknowledged as a Councillor she was also one of the applicants.
40. Councillor Pretlove spoke of her observation of the breakdown in the relationship between the respondent and Council officers during her time as Mayor, and told the Panel of an alternative arrangement she had put in place for the respondent in order for him to comply with Council processes and to avoid direct dealings with Ms Matuschka. This alternative arrangement had been in place for some months and to Ms Pretlove's knowledge, the respondent was still yet to comply with the procedural requirements.
41. Councillor Pretlove was questioned regarding the altercation between the respondent and Mr Leahy at the Horsham Police Station. Councillor Pretlove confirmed Mr Leahy had contacted her after the event and was shaken, distressed and very upset by the exchange.

Evidence of the Respondent

42. The respondent largely gave evidence around his allegation of "misappropriation of funds and theft" by Mr Leahy and three other Councillors and responded to the substance of the allegations when put to him by the Panel.
43. The respondent told the Panel that he believed his relationship with Mr Leahy and his fellow Councillors changed once he obtained the grant for the enhancement of the Harrow Recreation Reserve. He agreed that there had been a breakdown in the relationship and said he had been "tricked" into making an agreement at the mediation in January 2019. The respondent acknowledged that he breached the agreement numerous times, including on ABC radio on 5 May 2019 and during the course of the Councillor Conduct Panel hearing.
44. The respondent addressed the claims made regarding the new Councillor Code of Conduct and conceded that he had not yet signed it and had no intention of doing so. When questioned as to why this was the case, the respondent said "for no particular reason."
45. Regarding the allegations of bullying and in particular the events that transpired at the Horsham Police station, the respondent submitted that he had never been accused of being aggressive before securing the grant. The respondent then denied being aggressive, instead saying he simply "... asked him the tough questions."
46. Regarding compliance with Council process and particularly diary management, the respondent said "... diary management - reporting is a recommendation, not a law", but agreed to participate in the diary management process now that Ms Matuschka no longer has carriage of this task.
47. The respondent denied knocking over his nameplate at a meeting, saying that he put it on its side before walking out. When asked about whether he walked out of meetings, the respondent conceded he has walked out of meetings in the past and recalled one where he left because of "unfair allocation of ratepayer funds".
48. During his oral evidence, the respondent also confirmed that he had contacted WorkSafe regarding the contractors works at the Harrow Recreation Reserve, and stood by his decision to do so, saying it was in the interest of public safety.

49. When asked about his roles as Councillor and President of the CoM and the apparent tensions in those roles, the respondent submitted that he consistently declared a conflict of interest when dealing with Harrow Committee matters, and that he didn't disclose to Council matters/issues regarding the committee as those matters should come from the Committee, not him as President. Furthermore, the respondent said he had never thought of stepping down from his role of President of the CoM and did not see that he had attempted to confer an advantage on the Harrow and District Recreation Reserve CoM.
50. The respondent confirmed that he had contacted the Premier, the Victorian Ombudsman and IBAC in relation to various matters, but believed he was justified in doing so as he did it in his private capacity as a citizen of the West Wimmera Shire.
51. When asked as to whether he is respectful in his dealings with other Councillors and Council staff, the respondent said he is respectful and treats others as they treat him. He believed he had been respectful towards the Panel during the hearings and avoided dealing with Ms Matuschka to avoid getting into more trouble.
52. The respondent denied all allegations that formed part of the application, instead stating that his behaviour was justified, that he used the media as a way of securing confidence in the office of Councillor and of Council as a whole, and that he himself had been the target of bullying and inappropriate conduct by others.
53. Ms Margo Petersen gave evidence in support of the respondent, particularly in the context of the incident at the Horsham Police station as Ms Petersen was there with the respondent. Ms Petersen said the meeting started off cordially, but when Mr Leahy refused to answer questions asked by the respondent, the respondent got closer to him, got louder and was eyeing him off. Ms Petersen said she did not believe the respondent was a bully but acknowledged that the behaviour at the police station came close.
54. Ms Petersen told the Panel that the respondent does get passionate about things and can get loud, but that he is well liked and well respected and may not necessarily see that his behaviour can be viewed by others as aggressive.

Findings of the Panel

55. Pursuant to s 81J(1)(b) of the Act the Panel makes a finding of serious misconduct against Cr Houlihan.
56. Pursuant to s 81J(1)(a) of the Act the Panel makes a finding of misconduct against Cr Houlihan.

Penalty

57. In relation to the finding of serious misconduct, pursuant to s 81J(2A)(b)(iv) of the Act, the Panel suspends Cr Houlihan (effective from the date of this decision) for a period of two (2) months.
58. In relation to the finding of misconduct, pursuant to s 81J(2)(c) of the Act, the Panel directs Cr Houlihan to take leave of absence for a period of two (2) months (effective from the date of this decision) to be served concurrently with his period of suspension.

Reasons for the Panel's Decision

59. There is substantial evidence before the Panel supporting the grounds of the application regarding alleged breaches of ss76B(a), 76BA(a), 76BA(c) and 76BA(g) of the Act. During his evidence the respondent was assertive to the point of aggressive, he was dismissive towards the Panel members and became fixated on matters not relevant to the application.
60. Despite numerous attempts to redirect the respondent to the matters at hand, the respondent was unable to explain, justify or curtail the very behaviour that led to the application being made. Instead the respondent used the hearing as another forum to allege conspiracy, misappropriation of funds and theft on the part of the West Wimmera Shire Council and senior Council officers.
61. The Panel is persuaded by the evidence of all witnesses called, who each (including the respondent's own witness) acknowledged inappropriate behaviour to varying degrees. The respondent's own witness, whilst acknowledging that she did not agree with the application or the grounds upon which it was made, told the Panel that the respondent was very angry at his meeting with the Chief Executive Officer at the Horsham Police Station. She went on to say that whilst she herself did not see the respondent as a bully, his behaviour towards Mr Leahy during their exchange at the Horsham Police station came close to bullying.

62. The Panel is also persuaded by its direct observation of the respondent's own behaviour at hearing, where he had several outbursts that required the matter to be stood down in order for the respondent to regain his composure and participate in the hearing again.
63. The respondent has clearly blurred the lines between his roles as a private citizen, as a member of the CoM, and as a councillor of the West Wimmera Shire Council. This has led to a conflict of duties, exacerbated by the respondent not maintaining clear distinction between his positions, especially when making public statements. He has continued to advocate at Council meetings for the Harrow and District Recreation Reserve, which has placed his role on Council in a precarious position.
64. The respondent continued to justify his actions, confirmed in evidence that he had made the statements as alleged (regarding theft and misappropriation of funds) and continued to make the same allegations during his submissions to the Panel.
65. The respondent demonstrated a lack of awareness of his actions, a lack of insight into his behaviour and the impact it has on those around him, and an unwillingness to work with his fellow councillors on matters with which he is not politically or socially aligned.
66. The Panel finds that the respondent repeatedly behaved in an aggressive, intimidating and disrespectful manner towards fellow Councillors and members of Council staff (including the Chief Executive Officer and the Governance Manager) creating a risk to their health and safety, and that these actions constitute bullying of these Councillors and members of Council staff.
67. The Panel is also satisfied that the respondent's conduct demonstrated a breach of ss76B(a), 76BA(a), 76BA(c) and 76BA(g) of the Act.