



Local Government Standards Panel

Complaint Number	SP 2019-069
Legislation	<i>Local Government Act 1995</i>
Complainant	Mr Ian McCabe
Respondent	Councillor Michael Southwell
Local Government	Shire of Capel
Regulation	Regulations 7(1)(b), 10(3)(b) of the <i>Local Government (Rules of Conduct) Regulations 2007</i>
Panel Members	Mr Gordon MacMile (Presiding Member) Ms Elanor Rowe (Deputy Member) Ms Deborah Hopper (Deputy Member)
Heard	8 March 2021 Determined on the documents
Outcome	1 x Breach of Regulation 7(1)(b) 1 x Breach of Regulation 10(3)(b)

FINDING AND REASONS FOR FINDING

Delivered 5 August 2021

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. The Local Government Standards Panel ("the Panel") found that Shire President Councillor Michael Southwell ("Cr Southwell"), a councillor for the Shire of Capel ("the Shire") committed two breaches under the *Local Government Act 1995* (WA) ("the Act") and regulations 7(1)(b) and 10(3)(b) of the *Local Government (Rules of Conduct) Regulations 2007* ("the Regulations"). It was found that Cr Southwell breached Regulation 7(1)(b) and Regulation 10(3)(b) in relation to the same conduct when he made a comment about the Shire's Chief Executive Officer at the Council Meeting that was held on 24 April 2019.

Jurisdiction and procedural fairness

2. The Act makes provision for the circumstances in which a council member commits a minor breach.¹
3. On 30 July 2019 the Department of Local Government, Sport and Cultural Industries ("the Department") received a Complaint of Minor Breach Form dated 30 July 2019 ("Complaint"). The Complaint was signed by Mr Ian McCabe ("the Complainant") and contained one allegation of a breach of Regulation 7(1)(b) and one allegation of a breach of Regulation 10(3)(b) by Cr Southwell in relation to the same conduct when he made a comment about the Complainant (who was the Chief Executive Officer of the Shire at the time), at the Council Meeting that was held on 24 April 2019.
4. On 2 August 2019, the Department advised Cr Southwell of the Complaint and invited him to respond. The Department sent Cr Southwell copies of the original Complaint and all the supporting documents provided by the Complainant.
5. Under the Act the Panel is required to consider a complaint of a minor breach and make a finding as to whether the alleged breach occurred.² On 8 March 2021, the Panel convened to consider the Complaint.
6. The Panel:
 - (a) accepted the Department's advice, based on information from the Western Australian Electoral Commission, that Cr Southwell was a councillor at the time of the alleged breaches, having been elected on 21 October 2017, and was still a Councillor when the Panel met on 8 March 2021;
 - (b) was satisfied the Complaint had been made within six months after the alleged breaches are said to have occurred.
 - (c) was satisfied the Complaint had been dealt with in accordance with the administrative requirements in the Act for dealing with complaints of minor breaches³; and
 - (d) was satisfied that the Department had provided procedural fairness to Cr Southwell.

¹ Section 5.105 of the Act.

² Section 5.110(2)(a) of the Act.

³ Sections 5.107, 5.108, 5.109 of the Act.



7. If a councillor has previously committed two or more minor breaches, the Panel may send the complaint to the Chief Executive Officer of the department assisting the relevant Minister at the time instead of considering the Complaint itself.⁴ Cr Southwell had previously been found to have committed eleven breaches. The Complaint was referred to the Departmental Chief Executive Officer for investigation and consideration as recurrent breaches and was referred back to the Panel for determination on 24 February 2021.
8. Based on the information referred to in paragraphs 2 to 7 above, the Panel found it had jurisdiction to determine whether Cr Southwell had breached Regulations 7(1)(b) and 10(3)(b) in connection with the Complaint.

Panel's role

9. The Panel is not an investigative body. It determines complaints of minor breaches solely upon the evidence presented to it.
10. Any finding, that a councillor has committed a minor breach, must be based on evidence from which it may be concluded that it is more likely than not that the breach occurred than that it did not occur (the required standard of proof).⁵
11. In order to find the allegation, proposition or conduct has been established, and where direct proof is not available, the Panel must be satisfied from the evidence that it is more probable than not that it has occurred. The Panel cannot make a finding that the alleged fact, proposition or conduct occurred if the evidence merely supports two or more conflicting but equally possible inferences.⁶
12. For a finding that a councillor has breached a particular regulation, the Panel must be satisfied that every element of the particular regulation has been established to the required standard of proof.

Regulation 7(1)(b)

13. Regulation 7(1)(b) provides:

"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 –*

.....

- (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."*

⁴ Sections 5.110(2)(b), 5.111(1) of the Act.

⁵ Section 5.106 of the Act.

⁶ *Bradshaw v McEwens Pty Ltd* (1951) 217 ALR 1, paragraph 5.

14. The Panel decided that the alleged conduct is not conduct that contravenes section 5.93 of the Act or section 83 of *The Criminal Code*.

Elements of Regulation 7(1)(b)

15. In order to find a breach of Regulation 7, the Panel must be satisfied to the required standard of proof that:

- (a) the person, the subject of the Complaint, engaged in the alleged conduct (first element);
- (b) the person, the subject of the Complaint, was a council member both at the time of the conduct and the time when the Panel makes its determination (second element);
- (c) by engaging in the conduct, the person, the subject of the complaint, made use of his or her office as a council member (in the sense that he or she acted in their capacity as a councillor, rather than in some other capacity) (third element);
- (d) when viewed objectively, such use was an improper use of the person's office as a council member in that it:
 - (i) involved a breach of the standards of conduct that would be expected of a person in the position of a councillor, by reasonable persons with knowledge of the duties, power and authority of the councillor and the circumstances of the case; and
 - (ii) was so wrongful and inappropriate in the circumstances that it calls for the imposition of a penalty;(fourth element);
- (e) the person engaged in the conduct in the belief that detriment would be suffered by the local government or any other person (fifth element).

Fourth element - meaning of "to make improper use of....office"

16. The Macquarie dictionary definition of "*improper*" is "*not in accordance with propriety of behaviour, manners, etc; unsuitable or inappropriate for the purpose or occasion; abnormal or irregular.*"⁷ The Shorter Oxford dictionary definition is "*irregular, wrong; unsuitable, inappropriate; unbecoming, unseemly.*"⁸
17. Whether there is impropriety is to be assessed objectively: would a reasonable person with knowledge of the duties, powers and authority of a councillor, and all the circumstances of the particular case, form the view that the councillor had breached the standards of conduct expected of a councillor?⁹ "*For behaviour to be improper it must be such that a right-thinking person would regard the conduct as*

⁷ Macquarie Dictionary, Revised Third Edition.

⁸ Shorter Oxford English Dictionary, Sixth Edition.

⁹ *Ryan and Local Government Standards Panel* [2009] WASAT 154, paragraph 27, referring to *R v Byrnes* (1995) 183 CLR 501.

*so wrongful and inappropriate in the circumstances that it calls for the imposition of a penalty.*¹⁰

18. Under the Act Panel members must have regard to the general interests of local government in Western Australia.¹¹ It is in the interests of local government that councillors are, and are seen to be, professional and respectful in their dealings with fellow councillors, local government employees and members of the public.
19. Regulation 3 sets out general principles to guide councillors' behaviour, although contravention of any of these does not amount to a minor breach.¹² Regulation 3 provides, among other things, that councillors should act with reasonable care, diligence and integrity and treat others with respect and fairness.
20. The meaning of "*improper*" must be considered in the context of relevant legislation, such as the Act and the Regulations, and other rules and standards that apply to a councillor's role and conduct, such as the local government's Code of Conduct, and the circumstances and context of the case.¹³ All these provisions form part of the backdrop to the Regulations and give context to a complaint but the alleged conduct must also be judged in the particular circumstances.
21. Conduct can be improper even though the councillor's judgment is that it isn't improper. A councillor's use of his or her office can be improper even though the councillor is intending to benefit the local government, the council or the ratepayers and residents.¹⁴

Fifth element - meaning of "*to cause detriment to the local government or any other person*"

Detriment

22. "*Detriment*" means loss, damage or injury.¹⁵ It includes financial and non-financial loss and adverse treatment, such as humiliation, denigration, intimidation, harassment, discrimination and disadvantage. A person can suffer detriment through others thinking less favourably of them.¹⁶
23. For regulation 7(1)(b) to be satisfied it is not necessary to show that the local government or the person concerned actually suffered detriment.¹⁷ However it is not enough to show that the local government or the person concerned suffered detriment, or could have suffered detriment. The Panel must find that it is more likely than not that the councillor believed that his or her actions would cause detriment and intended to cause detriment.¹⁸

¹⁰ *Hipkins and Local Government Standards Panel* [2014] WASAT 48, paragraph 9, referring to *Robbins v Harness Racing Board* [1984] VR 641.

¹¹ Section 5.122(3) of the Act, Schedule 5.1 of the Act, clause 8(6).

¹² Regulation 3.

¹³ *Hipkins and Local Government Standards Panel* [2014] WASAT 48, paragraph 10.

¹⁴ *Yates and Local Government Standards Panel* [2012] WASAT 59, paragraph 64, referring to *Treby* 2010.

¹⁵ Macquarie Dictionary Revised Third Edition, 2001.

¹⁶ *Ryan and Local Government Standards Panel* [2009] WASAT 154, paragraphs 31, 32.

¹⁷ *Treby* 2010, paragraph 96, referring to *Chew v The Queen* 1992 CLR 626 (*Chew* 2010).

¹⁸ *Re and Local Government Standards Panel* [2014] WASAT 111, paragraph 51, referring to *Australian Securities and Investments Commission v Australian Property Custodian Holdings Ltd* [2013] FCA 1342.

24. “To cause detriment” has been interpreted as meaning “in order to” or “for the purpose of” causing detriment, or “with the will to” cause detriment.¹⁹ There can be a finding of intent if, after considering all the evidence, the only reasonable inference is that the councillor intended to cause detriment.

Regulation 10(3)(b)

25. Regulation 10(3)(b) provides:

“10. Relations with local government employees

.....

(3) *If a person, in his or her capacity as a council member, is attending a council meeting, committee meeting or other organised event and members of the public are present, the person must not, either orally, in writing or by any other means –*

.....

(b) use offensive or objectionable expressions in reference to a local government employee.

Elements of Regulation 10(3)(b)

26. The essential issues or elements which need to be satisfied in order for a contravention of Regulation 10(3)(b) to have occurred are that it is more likely than it is not that:

- a. the conduct occurred at a council or committee meeting or other organised event;
- b. members of the public were present when the conduct occurred and in a position to witness that conduct;
- c. the council member was in attendance at the meeting or event in their capacity as a council member (that is, not as a private citizen or invited guest); and
- d. the council member referred to an employee using an expression (a word or phrase that has a distinct and unmistakeable meaning) that is offensive or objectionable.

27. It is not the intent of Regulation 10(3) to deter or prevent the giving of appropriately phrased negative feedback.

Substance of the Complaint

28. At the Council Meeting held on 24 April 2019 (“Council Meeting”), there were nine members of the public present, as well as all Councillors and several members of Shire staff. At the meeting, Cr Southwell moved an alternate motion (“First Motion”)

¹⁹ Chew 2010.

to accept the Minutes of the Ordinary Council meeting held on 27 March 2019, without the inclusion of the “*response to previous public questions taken on notice*” section that had been prepared by the Complainant. The First Motion was lost 2/7.

29. Cr Southwell also tabled two other motions (“Second and Third Motions”) relating to public question time at Council meetings. The Complainant had provided a written comment in relation to both motions including advice in relation to the relevant Standing Orders Local Law. The Second and Third Motions were also both lost.
30. Prior to discussion of a fourth motion (“Fourth Motion”) that had been moved by Cr Southwell at the Council Meeting, he made the following comment (“Comment”), that was directed at the Complainant, in a derogatory and dismissive tone:

“well, thanks for that, tenth councillor, Mr Ian McCabe.”

There was an audible “*surprised*” response from the gallery. According to the Complainant, the Presiding Member (and others) were so shocked by the Comment, that Cr Southwell was not asked to withdraw it.

31. The Complainant was subsequently made aware that the Comment had been repeated by a member of the gallery to other community members. In addition, members of Council and Shire staff had repeated the Comment to the Complainant directly.
32. Cr Southwell repeated the phrase “*tenth councillor*” with reference to the Complainant at the Council meeting held in June 2019. At that time, he was asked to withdraw the remark by the Deputy President; and after deliberation, he did so.
33. At the Council Meeting, Cr Southwell used sarcastic language deliberately to personally ridicule the Complainant. The Complainant takes the role of Council and local government very seriously; he also, highly values his own integrity, honesty and professionalism. Cr Southwell had caused him great offence and had compromised his professional credibility.
34. By implying there had been undue influence and participation in the Council process by the CEO, Cr Southwell had also “*wantonly*” damaged and undermined the position of Chief Executive Officer, as well as local government in general and the Council. Cr Southwell had also potentially deterred future prospective employees from wanting to join the Shire through his conduct.

Cr Southwell’ Response

35. Cr Southwell did not accept the information detailed in the Complaint nor that he had committed the alleged misconduct. He submitted that the Complaint was vexatious and should be dismissed because it was trivial and without substance.
36. Firstly, he submitted that he did not move an alternate motion at the Council Meeting, but instead, he moved an amendment.
37. Secondly, the Complainant had failed to provide the full context when making the Complaint. During the Council Meeting, when the First Motion was being considered, the Complainant had interrupted the debate and made several

interjections. The Complainant "*rebutted points*" made by Cr Southwell and re-stated points that he had made in the written background for the item. This included the following comment by the Complainant:

"It is my advice that the local law does not need amendment at this time."

This "*advice*" to councillors on how they should vote regarding the First Motion was evidence that the Complainant had a "*propensity to over-step his role of simply providing legal, operational and technical support to Council*" and to "*venture into the territory of seeking to influence the outcome of Council deliberations*".

38. Cr Southwell was not sure what was meant by the allegation that he had used a "*dismissive and derogatory tone*" when he made the Comment but denied using it anyway. He also denied using the words quoted by the Complainant when he allegedly made the Comment. Instead, if he had said something like: "*it's a bit like having a tenth councillor*", it was only meant as an aside to "*gently*" make the point that the Complainant seemed to be over-stepping the boundary between providing information and expressing his opinion.
39. There was no audible reaction to the Comment, and Cr Southwell doubted that anyone in the gallery would have heard it. The Complainant could not claim that he knew the reason why Cr Southwell was not asked to withdraw the Comment. It was his belief that he was not asked, because whatever he might have said was barely audible and not offensive in the circumstances.
40. It was not an "*improper*" use of a councillor's position to make such "*off-the-cuff*" statements during the "*cut and thrust of debate*" at Council meetings. Nor did it cause a detriment to anyone to be referred to as a "*councillor*". It was simply Cr Southwell's way of seeking to remind the Complainant that he was not supposed to take part in, or impose himself on, Council debates and decision-making.
41. When he had used a similar phrase (to make a similar reminder) at another Council meeting, he had been asked to withdraw the remark and did so. That is where the matter should have ended.

Panel's Consideration

First Allegation – alleged breach of Regulation 7(1)(b)

First, second and third elements satisfied

42. The Panel finds that Cr Southwell engaged in conduct which is the subject of the First Allegation and that he was a councillor and was acting as a councillor at all relevant times.
43. The first, second and third elements of Regulation 7(1)(b) are established.

Whether Cr Southwell acted improperly (fourth element)

44. Based on the evidence before it, the Panel is satisfied that the fourth element has been established in relation to the First Allegation and finds that Cr Southwell did act improperly. The Panel makes this finding because it is satisfied to the required standard of proof that a reasonable person would consider that Cr Southwell did



not meet the standards of conduct expected of a councillor when he made the Comment at the Council Meeting:

- a. The allegation is that during the Council Meeting, Cr Southwell made the following improper Comment that was directed at the Complainant (the CEO of the Shire at the time):

“well, thanks for that, tenth councillor, Mr Ian McCabe.”

However, Cr Southwell submitted that the statement he had actually made was:

“it’s a bit like having a tenth councillor.”

The Panel finds that regardless of whether it was the Complainant’s, or Cr Southwell’s, version of the statement, that was correct, the manifest meaning was the same. That was, that at the Council Meeting, the Complainant was acting outside his authority as CEO and partly taking on the role of an elected member.

- b. By making the Comment, Cr Southwell raised doubts about the Complainant’s professionalism and questioned his adherence to the rules regarding the separation of powers, which is a key governance concept in local government. The Panel finds that it was highly improper for Cr Southwell to do so, and in the manner that he did, publicly in front of others.
- c. Furthermore, while there is no specific relationship identified between Councillors and the Chief Executive Officer in legislation, the parties are likely to be in contact during the course of performing their respective roles. By choosing to communicate so poorly, Cr Southwell had undoubtedly damaged that relationship and any inherent trust and goodwill between the parties.
- d. Finally, one of the fundamental roles of the Council is the employment of the local government’s CEO. The CEO’s performance should be discussed, in a fair, impartial and objective manner. It is essential that any areas requiring attention or improvement are identified following a structured process and discussed with the CEO properly. Cr Southwell clearly believed that the Complainant had a tendency to “*over-step the boundary*” as he described it and impose his opinions on others during debates. However, when the issue arose at the Council Meeting, Cr Southwell could have made his point (that the Complainant should refrain from interjecting) politely. Then, if he was still unhappy with the Complainant’s performance after the meeting, he should have referred the issue on to the President, who could then determine the most appropriate means of investigation.
- e. It was entirely wrongful for Cr Southwell to deal with what was a serious issue in the manner he did. The Comment was both rude and offensive and was made openly in front of members of the public, as well as the Complainant’s colleagues and peers. Moreover, the Complainant was not given a fair right of reply and was not in a position to defend himself.

45. Based on all the evidence before it, the Panel finds it more likely than not that Cr Southwell did act improperly when he made the Comment at the Council Meeting.

Whether Cr Southwell intended to cause detriment to the local government or any other person

46. The Panel is satisfied that the fifth element has been established and that Cr Southwell intended to cause detriment to the Complainant when he made the Comment at the Council Meeting:

- a. Cr Southwell submitted that when he made the Comment, it had been barely audible. Conversely, the Complainant stated that the Comment had been overheard by several other people and had been repeated back to him following the Council Meeting. Based on the evidence before it, the Panel finds that it is more likely than not that the Comment was audible to others (including the Complainant who clearly heard it) and that Cr Southwell intended to make a point (which he acknowledged) regarding the Complainant's conduct, and did so.
- b. Cr Southwell made the controversial Comment during an open Council Meeting at which several other people (including members of the public, all elected members and Shire staff) were present. It was a foreseeable consequence that the Comment he made would cause the Complainant some embarrassment and undermine his position as CEO of the Shire. The Complainant was attending the Council Meeting in his professional capacity, and it was his professionalism and ability to respect the separation of powers (between Council and the Administration) and follow the rules regarding meeting procedure and debate, that were being questioned.
- c. Finally, the Panel has also taken into consideration the fact that Cr Southwell appeared to have a propensity to make similar comments regarding the Complainant, at council meetings. This suggested that it was not simply an "*off-the-cuff*" Comment, but that Cr Southwell intended to make a serious point. He chose to do so in an insulting and sarcastic manner in front of others, rather than follow the proper process that would have allowed the Complainant to prepare a response and defend himself.

Findings

47. Accordingly, for the above reasons, the Panel finds that Cr Southwell did breach Regulation 7(1)(b).

Second Allegation – alleged breach of Regulation 10(3)(b)

48. The Panel finds that Cr Southwell engaged in the conduct which is the subject of the Second Allegation, that he was a councillor and was acting as a councillor at all relevant times. Furthermore, the conduct occurred at a council meeting and members of the public were present and, in a position to witness that conduct.

Whether the council member referred to an employee using an expression that is offensive or objectionable.

49. It was alleged that when Cr Southwell made the Comment, he used an "*offensive*" or "*objectionable*" expression in reference to the Complainant (in his capacity as CEO of the Shire). The word "*offensive*" means "*causing someone to feel resentful*,

upset or annoyed”; “objectionable” means “arousing distaste or opposition; unpleasant or offensive.”

50. The Panel has considered all the evidence before it and it is satisfied that Cr Southwell used an offensive and objectionable expression in relation to the Complainant, who was an employee of the Shire, at the Council Meeting.

- a. Proceedings at a Council meeting should be fostered in a fair, orderly and courteous fashion. Moreover, councillors should be able to question (and in some cases, to criticise) the actions of others. However, it should be done in a manner that is free from objectionable or offensive expressions.
- b. As already stated, the Panel finds that it is clear what Cr Southwell intended and meant to convey when he made the Comment; which is, that the Complainant was not performing in his position as CEO properly at the Council Meeting and that he was partly taking on the role of an elected member. Cr Southwell mocked the Complainant when making that point and openly insulted him. Clearly, the Complainant was offended by the Comment and by the fact that doubt about his professionalism had been raised in such a manner.
- c. Cr Southwell submitted that he was justified in making the Comment, based on the Complainant’s pattern of behaviour in expressing his opinions at council meetings when it was not appropriate to do so. However, the Complainant strongly disputed that there was any truth to the statement made by Cr Southwell, or the criticism levelled against him. Certainly, given the manner and context in which the Comment was made, the Panel finds that it was reasonable for the Complainant to feel that it was unacceptable for Cr Southwell to choose to make his point in the way that he did. When Cr Southwell made a similar comment at a later council meeting, he was asked to withdraw it, and he did so then.
- d. The Panel also had paid regard to the fact that the word “*councillor*” is not in itself an offensive term. However, Cr Southwell used it sarcastically to imply that the Complainant was acting unprofessionally. The accusation was insulting to the Complainant and the Panel finds that the Comment was both offensive and objectionable in the circumstances.

Findings

51. Accordingly, for the above reasons, the Panel finds that Cr Southwell did breach Regulation 10(3)(b).



Signing

A handwritten signature in blue ink, appearing to read 'G MacMile'.

Gordon MacMile (Presiding Member)

A handwritten signature in blue ink, appearing to read 'Deborah Hopper'.

Deborah Hopper (Deputy Member)

A handwritten signature in black ink, appearing to read 'Elanor Rowe'.

Elanor Rowe (Deputy Member)



Local Government Standards Panel

Complaint Number	SP 2019-069
Legislation	<i>Local Government Act 1995 (WA)</i>
Complainant	Ian McCabe
Respondent	Former Councillor Michael Southwell
Local Government	Shire of Capel
Regulation	Regulations 7(1)(b) and 10(3)(b) of the <i>Local Government (Rules of Conduct) Regulations 2007 (WA)</i>
Panel Members for Penalty Consideration	Mr Tim Fraser (Presiding Member) Councillor Peter Rogers (Member) Ms Elanor Rowe (Deputy Member)
Heard	8 March 2021 Determined on the documents
Penalty Considered	11 November 2021
Outcome	No Sanction

DECISION AND REASONS FOR DECISION

Delivered 15 December 2021

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



Introduction

1. At its meeting on 8 March 2021, the Panel found that Councillor Michael Southwell ("Cr Southwell"), a councillor for the Shire of Capel ("the Shire"), committed two minor breaches under the Local Government Act 1995 (WA) ("the Act") and Regulation 7(1)(b) and Regulation 10(3)(b) of the *Local Government (Rules of Conduct) Regulations 2007* (WA) ("the Regulations") when he made a comment about the Shire's Chief Executive Officer at the Council Meeting that was held on 24 April 2019 ("Minor Breaches").
2. On 5 August 2021, the Panel published its Finding and Reasons for Finding ("Findings") stating that Cr Southwell had breached Regulations 7(1)(b) and 10(3)(b). The Panel reviewed all the evidence presented to it and made the following observations:

"44.

b. *By making the Comment, Cr Southwell raised doubts about the Complainant's professionalism and questioned his adherence to the rules regarding the separation of powers, which is a key governance concept in local government. The Panel finds that it was highly improper for Cr Southwell to do so, and in the manner that he did, publicly in front of others.*

c. *.....By choosing to communicate so poorly, Cr Southwell had undoubtedly damaged that relationship and any inherent trust and goodwill between the parties.*

.....

e. *It was entirely wrongful for Cr Southwell to deal with what was a serious issue in the manner he did. The Comment was both rude and offensive and was made openly in front of members of the public, as well as the Complainant's colleagues and peers. Moreover, the Complainant was not given a fair right of reply and was not in a position to defend himself.*

46.

b. *Cr Southwell made the controversial Comment during an open Council Meeting at which several other people (including members of the public, all elected members and Shire staff) were present. It was a foreseeable consequence that the Comment he made would cause the Complainant some embarrassment and undermine his position as CEO of the Shire...."*

Jurisdiction and Law

3. Cr Southwell was a councillor at the time of the alleged breaches and was still a councillor when the Panel met on 8 March 2021 to consider whether the alleged breaches in the Complaint occurred.
4. However, at the time the Panel convened, on 11 November 2021, to consider how it should deal with the Minor Breaches, Cr Southwell was no longer an elected member of the Shire.

5. Under the Act, if a Panel finds that a council member has committed a breach, it is required to determine how the breach should be dealt with¹. Therefore, the Panel proceeded to consider how it should deal with the Minor Breaches at the meeting on 11 November 2021.

Possible Sanctions

6. Section 5.110(6) of the Act provides that the Panel is to deal with a minor breach 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).*

5. Section 5.110(6) is about penalty. The Panel does not have the power to review any finding of a breach. Under section 5.110(6)(a), the Panel may order that no sanction be imposed; not to reverse the finding of a breach, but to however indicate that in all the circumstances the relevant councillor should not be penalised further.
6. Sub-section 5.110(6)(b)(iv) (in respect of a monetary sanction) was introduced in 2019 to allow the Panel to require a councillor to personally bear the cost of dealing with a complaint, which in other circumstances, would be paid by the local government concerned. This ensures the cost of a breach is borne by the councillor individually, and not simply passed onto the local government and therefore, ultimately, rate payers.

Cr Southwell's Submissions

7. 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).²

¹ *Local Government Act 1995 (WA)*, s 5.110(6).

² *Local Government Act 1995 (WA)*, s 5.110(5).



8. By an email dated 10 August 2021, Cr Southwell was:
- i. notified of the Panel's Finding of the Minor Breaches;
 - ii. provided with a copy of the Panel's Findings; and
 - iii. offered an opportunity to make submissions as to how the Minor Breaches should be dealt with under section 5.110(6) of the Act.
9. The Department received a response from Cr Southwell on 31 August 2021 in which he submitted:
- a. the Complaint was vexatious;
 - b. the comment he had made about the Complainant at the Council Meeting was simply a casual remark;
 - c. it was the Complainant who had acted grossly improperly; and
 - d. the Panel was biased, and its Finding was baseless.

Panel's Consideration

10. The purpose of the imposition of a sanction under the Act is generally for the protection of the public and the maintenance of standards of council members. Furthermore, it reflects the disapproval of a contravention of the Regulations, dissuades councillors from other local governments from engaging in similar conduct and facilitates the maintenance of appropriate standards of behaviour by councillors. Guidance on the factors which the Panel may consider in determining the appropriate penalty to impose, 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 Act knowingly or carelessly;
 - e. the councillor's disciplinary history;
 - f. the likelihood or not of the councillor committing further breaches of the Act;
 - g. the councillor's personal circumstances at the time of the conduct, and at the time of imposing the sanction;
 - h. the 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.



11. In this case, the Panel found that Cr Southwell breached Regulation 7(1)(b) and Regulation 10(3)(b) when he made a comment about the Shire's Chief Executive Officer at the Council Meeting that was held on 24 April 2019.
12. The subject of the Minor Breach Finding, was viewed by the Panel and considered a serious matter. Despite that, throughout the proceedings, Cr Southwell did not show any insight or remorse as to the effect his conduct may have had on the Complainant. Furthermore, when Cr Southwell was given the opportunity to respond to how the Panel should deal with the Minor Breaches, he used it to criticise the Panel and its Finding. Finally, the Panel notes that Cr Southwell had previously been found to have committed several other minor breaches.
13. On that basis, the Panel considered it reasonable that a penalty may have been warranted.
14. However, as stated above, at the time when the Panel convened to decide how the breaches were to be dealt with, Cr Southwell had ceased to be an elected member. Therefore, in the circumstances, the Panel finds that the imposition of a penalty would be futile.

Panel's Decision

15. Having regard to the Findings, the matters set out herein, and the general interests of local government in Western Australia, the Panel's decision on how the Minor Breach is to be dealt with under s5.110(6)(a) of the Act, is that no sanction is to be imposed against Cr Southwell.

Tim Fraser (Presiding Member)

Peter Rogers (Member)

Elanor Rowe (Deputy 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."