

Decision of the Hearing Panel of the Standards Commission for Scotland following the Hearing held at Angus House, Orchardbank, Forfar, DD8 1AN on 20 February 2019.

Panel Members: Mr Paul Walker, Chair of the Hearing Panel
Mr Mike McCormick
Professor Kevin Dunion

The Hearing arose in respect of a Report by Mr Bill Thomson, the Commissioner for Ethical Standards in Public Life in Scotland (the ESC), further to complaint reference LA/An/2134 (the complaint) concerning an alleged contravention of the Councillors' Code of Conduct (the Code) by Councillor Brian Boyd (the Respondent).

COMPLAINT

A complaint was received by the ESC about the alleged conduct of the Respondent. Following an investigation, the ESC referred the complaint to the Standards Commission for Scotland on 10 December 2018, in accordance with section 14(2) of the Ethical Standards in Public Life etc. (Scotland) Act 2000, as amended.

The substance of the referral was that the Respondent had failed to comply with the provisions of the Councillors' Code of Conduct and, in particular, that he had contravened its paragraphs 3.1 and 3.2.

The relevant provisions are:

3.1 The rules of good conduct in this section must be observed in all situations where you act as a councillor or are perceived as acting as a councillor, including representing the Council on official business and when using social media.

Relationship with other councillors and members of the public

3.2 You must respect your colleagues and members of the public and treat them with courtesy at all times when acting as a councillor.

Evidence Presented at the Hearing

Joint Statement of Facts

The Hearing Panel noted that a Joint Statement of Facts had been agreed between the parties and that, in particular, the following matters were not in dispute:

- That on 13 April 2018, the Respondent signed a petition that called for the removal of the complainer as a chaplain of a high school in the Council area.
- The petition referred to the complainer as "a homophobic Reverend", and included allegations that he "had, on multiple occasions, expressed hatred for the LGBTQ+ community".

- The petition included an allegation that the complainer “had kicked his transgender daughter out, she was thirteen”, this being a contention the complainer’s daughter then wholly refuted in an online posting on 15 April 2018.
- The Respondent signed the petition on the website 'change.org', and encouraged others so to do. A link to it had been posted automatically on the Respondent’s Facebook page, where he was identified, in his profile, as a councillor.

Neither party called any witnesses.

Submissions made by the ESC

The ESC advised that after the Respondent signed the petition on change.org, a link to it had been posted on his Facebook page. The Respondent had posted an entry on Facebook stating “No wonder his church is empty. Please sign the petition.” The ESC noted that the Respondent’s Facebook page contained biographical information, which included that he was a councillor of Angus Council. The ESC contended, therefore, that the Respondent was recognisable in that capacity on Facebook.

The ESC advised that it was accepted that the Respondent had signed the Petition on change.org and had not identified himself as a councillor when doing so. The ESC advised, however, that the link to the petition had then been posted automatically on his Facebook page. The ESC indicated that a privacy policy on change.org provided information about how users could connect to other social media platforms but gave an option for users to opt out of doing so, if they did want information from change.org to be shared on other sites. The ESC contended that the Respondent either proactively chose to share the petition on Facebook or he had agreed settings on change.org that allowed information on it to appear on his Facebook page, where he was identifiable as a councillor. The ESC argued, therefore, that the Respondent could be perceived as acting as a councillor, under paragraph 3.1, when using social media and when endorsing and encouraging others to sign the petition.

The ESC noted the Respondent’s position was that his Facebook page was only accessible to those he had accepted as ‘friends’. The ESC advised, however, that the complainer had provided a screenshot of it and the Investigating Officer had also been able to access it during the investigation, despite not being ‘friends’ with the Respondent on Facebook. As such, the ESC contended that it could not be concluded that the page was private.

The ESC advised that there had been press coverage of the petition and, after the complainer had been quoted in an article in the Courier newspaper on 16 April 2018, indicating that he was very disappointed to see the petition appearing on social media, the Respondent had provided a quote to the paper about the matter the following day. This had included a comment on the Council’s conduct. The ESC argued that, in allowing himself to be quoted, and in mentioning the Council, the Respondent was identifying it as a matter of public interest to him as a councillor.

The ESC advised that the false statement in the petition about the complainer’s daughter had been removed from the petition after she had posted the online entry confirming it was untrue on 15 April 2018.

The ESC noted that the enhanced protection of freedom of expression afforded under Article 10 of the European Convention on Human Rights (ECHR) to politicians when commenting on matters of public interest, and in making certain value judgements, did not cover gratuitous personal comments that had no basis in fact and were entirely without foundation. The ESC argued that the accusation regarding the complainer's daughter on the petition was an offensive personal allegation about the complainer and his private and family life and, as such, did not attract the enhanced protection afforded by Article 10.

The ESC further argued that in signing and encouraging others to sign the petition, the Respondent had effectively endorsed the comment. The ESC contended that the Respondent had, therefore, failed to treat the complainer with respect, as required by paragraphs 3.1 and 3.2 of the Code.

Submissions made by the Respondent

The Respondent advised that he had never intended to be disrespectful to the complainer, or the complainer's family, and that his only motivation had been to support the school's pupils with what he considered to be their legitimate concerns. The Respondent advised that he considered it was his duty, as a councillor, to help his constituents in trying to ensure their voices were heard.

The Respondent indicated that he had been sent a link to the petition when he was on holiday, which he had then opened using his personal mobile telephone, while on a train. The Respondent advised that he had not scrolled through its content and had simply added an entry encouraging others to sign it, referring also to the complainer's church being empty.

The Respondent advised that he had not posted the link to the petition on his Facebook page and that the posting had been automatically generated by change.org. The Respondent argued that he had understood that his privacy settings were such that his Facebook page was accessible only to individuals he had accepted as 'friends', and not to the general public. The Respondent advised that while the petition had been sent to two MSPs, as decision-makers, it had not been sent to him in that capacity.

The Respondent noted that while he had encouraged others to sign the petition on change.org, his posting on the petition had only referred to the complainer's church being empty, and had not made any reference to his daughter.

The Respondent advised that he had not seen the comment within the content on the petition about the complainer's daughter. The Respondent contended that had he done so, he would have either contacted the petitioner, who was of school age, to advise her to remove it, or would have removed his own support for the petition. The Respondent asked the Panel to note that he had not made any comment about the complainer's daughter in the press.

In response to questions from the Hearing Panel, the Respondent indicated that he accepted he had made an error of judgement in not reading the petition in full before signing it. The Respondent further accepted that he had not replied to an email the complainer had sent him at the time, expressing concerns, but indicated he had not considered there was any need to respond as by the time he returned from his holiday, the petition having been amended and the statement about the complainer's daughter removed.

DECISION

The Hearing Panel considered the submissions given orally at the Hearing, and in writing, and found as follows:

1. The Councillor's Code of Conduct applied to the Respondent.
2. The Respondent had breached paragraphs 3.1 and 3.2 of the Councillors' Code of Conduct.

Reasons for Decision

The Panel accepted the Respondent had not referred to himself as a councillor when signing or commenting upon the petition. The Panel noted, however, that the Respondent admitted that the question of whether the complainer should remain as the school chaplain had been brought to his attention, in his capacity as a councillor, and that, after the signing of the petition, he provided comments to the press on it in that capacity.

The Panel determined that while the Respondent received and signed the petition in his personal capacity, he was not acting as a councillor at that stage. The Panel found, however, that a link had then been posted to the Respondent's Facebook page, as a result of the settings he must have selected, which allowed chang.org to do so. The Panel noted that the Respondent could have taken steps to prevent this, but had not done so.

The Panel was satisfied that the Respondent's Facebook page had been proven to be accessible to those other than his Facebook friends, given the Investigating Officer had been able to review it during the investigation. The Panel was further satisfied that the Respondent was identifiable as a councillor on his Facebook page, and the fact that he had subsequently commented on the petition in that capacity, meant that he was acting, or could be perceived as being acting, as a councillor when posting about the petition and encouraging others to sign it. The Panel determined, therefore, that the Code of Conduct applied to the Respondent at the time of the events in question.

The Panel accepted that the Respondent had not made directly any comment about the complainer's daughter, and further, accepted his position that, at the time he signed the petition, he had not read it in full and had not seen the content about the complainer's daughter. The Panel noted that when the complainer made the Respondent aware of the content, he had not made any effort to respond, to distance himself from the petition, or to address the factual inaccuracy it contained; albeit the petition was subsequently amended, following the complainer's daughter refuting the false allegation that she had been kicked out of the family home.

The Panel found that by signing and encouraging others to sign a petition that contained an untrue accusation that was critical of the complainer's private family life, the Respondent was, in essence, endorsing the comment or, at the very least, could be perceived as doing so. The Panel considered that, as a prominent local politician, the Respondent should have known the matter to be of concern or interest to some of his constituents and the Panel was of the view that he should have taken steps to review the petition and ensure he agreed with the comments it contained before signing, endorsing and proactively circulating it.

The Panel considered that the comment amounted to a personal attack on the complainer. In consequence the Panel was satisfied that the Respondent failed to observe the rules of good conduct by behaving in a respectful manner towards the complainer.

The Panel found that the Respondent's behaviour amounted, on the face of it, to a contravention of paragraphs 3.1 and 3.2 of the Councillors' Code of Conduct. The Panel then proceeded to consider whether such a finding would breach of the Respondent's right to freedom of expression under Article 10 of the ECHR and, if so, whether the restriction involved by the finding was justified by Article 10(2), which allows restrictions that are necessary in a democratic society, and in particular, in this case, for the protection of the reputation or rights of others.

The Panel did not accept that the false accusation about the complainer's daughter in the petition was a comment on a political matter and, as such, the Respondent did not benefit from the enhanced protection of freedom of expression afforded to politicians under Article 10. The Panel concluded that the comment was false and gratuitous, and that the Respondent's implicit endorsement of it amounted to a personal attack on the complainer. As such, the Panel determined that the imposition of a restriction in the circumstances was relevant, sufficient and proportionate. The Panel concluded, therefore, that it was satisfied that a finding of breach, and subsequent application of a sanction, would not contravene Article 10.

The Hearing Panel concluded that the Respondent had contravened paragraphs 3.1 and 3.2 of the Councillors' Code of Conduct.

Evidence in Mitigation

The Respondent advised that, in his nine years as a councillor, he had never before been the subject of a complaint. The Respondent submitted a number of supportive statements and character references from constituents, which testified he was a diligent, conscientious and committed councillor who had worked hard to serve the interests of his constituents.

The Respondent advised that he took his responsibilities as a councillor very seriously and, in particular, was deeply committed to supporting young people in his constituency, particularly given the immense pressures they were under and the difficulties they could face with issues concerning gender and sexuality.

The Respondent indicated he accepted the statement in question on the petition contained "the wrong choice of language", and that he should have responded to the complainer when he contacted him directly with his concerns. The Respondent reiterated that, at the time, he had not considered there was any need to respond to the Complainer or, later, upon his return from holiday, as the petition had by then been amended.

SANCTION

The decision of the Hearing Panel was to censure the Respondent, Councillor Boyd.

The sanction was made under the terms of the Ethical Standards in Public Life etc. (Scotland) Act 2000 section 19(1)(a).

Reasons for Sanction

In reaching its decision, the Hearing Panel:

- Accepted the Respondent had not made the comment in question himself, or subsequently relied on the misinformation it contained in any way. The Panel agreed that the sanction would have been much more severe had he done so.
- Noted the Respondent's position was that he had not read the content before signing the petition and encouraging others to do so.
- Further noted that the Respondent had co-operated fully with the investigative and Hearing processes and, further, noted the character references submitted on his behalf.

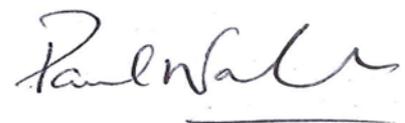
However, the Panel:

- Considered the requirement for councillors to behave in a respectful manner was an important part of the Code, as it prevented a Council and role of a councillor from being brought into disrepute and ensured public confidence in both were not adversely affected. In this case, the Respondent had failed to conduct himself in a respectful manner and had behaved in a grossly irresponsible way by endorsing a petition he knew to have been created by a school pupil, and one that contained false, personal comments, without reviewing it first.
- Was concerned that the Respondent had failed singularly to provide an apology to the complainer. The Panel was further concerned that the Respondent had failed also to demonstrate any insight into the impact his endorsing the content of the petition may have upon the complainer, the complainer's daughter and, potentially, the wider community.
- Noted the Respondent's commitment to supporting and protecting young people but considered this was at odds with him having endorsed and disseminated a petition containing a false comment about the complainer's daughter.
- Emphasised it was a councillor's personal responsibility to be aware of the provisions in the Code as well as to ensure that he or she complied with them.

RIGHT OF APPEAL

The Respondent has a right of appeal in respect of this decision, as outlined in Section 22 of the Ethical Standards in Public Life etc. (Scotland) Act 2000, as amended.

Date: 22 February 2019



Mr Paul Walker, Chair of the Hearing Panel