

Local Government Act 1993
HUON VALLEY COUNCIL CODE OF CONDUCT DETERMINATION REPORT *
RELATING TO THE CONDUCT OF COUNCILLORS
Local Government Act 1993
(Reference C 20181)

Complaint made by Mr Geoffrey Swan against Cr Mike Wilson

Date of Determination: 8 June 2020

Code of Conduct Panel:

Lynn Mason (Chairperson), Sam Thompson (legal member), Katherine Schaefer (community member with experience in local government)

Summary of the Complaint

The complaint made by Mr Swan was referred to the Executive Officer of the Code of Conduct Panel (the Panel) on 7 February 2020.

The Chairperson of the Panel undertook an initial assessment of the complaint and on 27 February 2020 advised that part of the complaint should be referred to a Panel for investigation. The complaint detailed two occasions on which it was alleged that Cr Wilson had breached the Huon Valley Council Code of Conduct relating to the Conduct of Councillors (the Code) - 15 August 2019 and 9 January 2020.

Pursuant to section 28ZB(1)(a) of the *Local Government Act 1993* (the Act), the Chairperson dismissed that part of the complaint relating to events which took place on 9 January 2020. The Chair decided that, pursuant to section 28ZA(1)(f) of the Act, the balance of the complaint (relating to alleged breaches on 15 August 2019) was to be investigated by the Panel.

The Code in force at the time of the alleged breaches on 15 August 2019 was approved by Council in March 2019. The sections of the Code which Mr Swan alleged Cr Wilson breached are:

PART 2 – CONFLICT OF INTERESTS THAT ARE NOT PECUNIARY

2. *A Councillor must act openly and honestly in the public interest.*

PART 3 – USE OF OFFICE

1. *The actions of a Councillor must not bring the Council or the office of Councillor into disrepute.*

PART 8 – Representation

7. *The personal conduct of a Councillor must not reflect, or have the potential to reflect, adversely on the reputation of the Council.*

The Complaint

The complaint alleged that Cr Wilson, while appearing as a witness at a Code of Conduct hearing on 15 August 2019, stated under oath that mints of some kind were always handed out at Huon Valley Council ordinary meetings. The complainant stated that he considered this to be a lie, as he had been attending these council meetings for approximately five years and he had never seen mints handed out. The complainant said that he had not attended the ordinary council meeting held on 6 February 2019.

* Section 28ZK (7) of the *Local Government Act 1993* requires that any person who receives a determination report must keep the determination report confidential until the report is included within an item on the agenda for a meeting of the relevant council. Failure to do so may result in a fine of up to 50 penalty units.

Procedure

Cr Wilson was asked to provide a response to the Panel by 12 March 2020. The Panel received Cr Wilson's response on 16 March 2020, although Cr Wilson stated that it had been sent on 1 March 2020, the date on the response. The Panel accepted the response.

The Panel met on 11 March 2020 to consider the complaint. The Panel agreed that while the matter of handing out sweets before a council meeting is, on the surface, a trivial matter, the essence of the complaint was whether or not Cr Wilson had told a lie under oath about this; and that he had repeated the alleged lie when questioned at that hearing by the complainant.

The Panel did not have access to an audio recording of the Code of Conduct panel hearing on 15 August 2019. After considering Cr Wilson's response, the Panel wrote on 18 March 2020 to the Chairperson of the Hearing on 15 August 2019 to request her recollection of the statements made at that hearing. The Panel also wrote to the General Manager of the Huon Valley Council, to ask:

- *Whether it is customary for a member of staff to distribute sweets to councillors prior to council meetings, once councillors are in the meeting chamber?*
- *If so, does this occur at all Council meetings?*
- *To the best of your knowledge, how long has this practice been in place?*

On 27 April 2020 the Panel wrote to Mr Swan to inform him that, in accordance with Sections 28ZG (2) (a) and (b) of the Act, the Panel was of a mind not to conduct a hearing into this complaint, and to request his submission on whether he considered that he would be disadvantaged if a hearing were not held. Similarly, the Panel wrote on 27 April 2020 to Cr Wilson, and as well as requesting his submission on a hearing, asked Cr Wilson what penalty he considered would be appropriate if the Panel decided to uphold any part of, or all of, the complaint.

On 29 April 2020 the Panel received an email from Mr Swan in which he asked if he could provide another Statutory Declaration regarding mints being handed around at council meetings. The Panel refused this request on the grounds that three Statutory Declarations were provided with Mr Swan's complaint, that Mr Swan had had ample opportunity to provide evidence of his allegations, that Cr Wilson had already responded to the earlier statutory declarations, and that no further material was necessary to enable the Panel to reach a determination.

On 1 May 2020 the Panel received Mr Swan's submission on a hearing, in which he agreed that no hearing should be necessary as the matter should be 'cut and dried, with no possible misinterpretation of the facts'.

On 4 May 2020 the Panel received a letter from Cr Wilson reiterating his statement that mints are available at council meetings and are 'passed around'. Cr Wilson made no submission on sanction or hearing.

On 7 May 2020 the Panel met and decided that the determination could be reached by means of written submissions and examination of documentary evidence, and that neither party would be disadvantaged if a hearing was not held. Pursuant to section 28ZG (3) of the Act, the Panel proceeded to hear and determine the complaint.

Material considered by the Panel

- The Huon Valley Code of Conduct relating to the conduct of Councillors, March 2019;
- Audio recording of the Huon Valley Ordinary Council meeting, 6 February 2019;
- Huon Valley Council Code of Conduct Determination Report, 2 September 2019;

- The Complaint by Mr Swan, 7 February 2020, including Statutory Declarations from Dr Elizabeth Smith, Mrs Jennifer Hadaway, and Mr Robert Hawkins;
- Letter from Cr Wilson to the Chairperson, Code of Conduct Panel, 1 March 2020;
- Letter from the General Manager, Huon Valley Council, to the Chairperson, Code of Conduct Panel, 6 April 2020;
- Statutory Declaration from Mrs Jillian Taylor, Chairperson, Code of Conduct Panel, 8 April 2020;
- Submission on hearing from Mr Swan, 1 May 2020;
- Letter from Cr Wilson, 4 May 2020.

Determination

Pursuant to section 28ZI(1)(b), the Code of Conduct Panel dismisses the complaint against Cr Wilson.

Reasons for the Determination

The Panel noted that the matter of whether or not mints are distributed at Huon Valley Council meetings is in itself trivial; but based its investigation on deciding whether or not sufficient evidence was provided to show that Cr Wilson had lied about this practice under oath. The Panel considered that if Cr Wilson did lie under oath as alleged by the complainant, Cr Wilson might have breached Parts 2(2), 3(1) and 8(7) of the Code. The anterior question was whether Cr Wilson did in fact lie about mints always being handed out.

The complaint heard by a different panel on 15 August 2019, dealt with an occurrence at the Council meeting on 6 February 2019. Dr Elizabeth Smith confirmed in her Statutory Declaration, which was evidence in that hearing, that mints were handed out by a Council staff member to the Councillors and members of the public at that meeting, as this meeting occurred immediately following severe bushfires had affected the municipality. This was the meeting which Mr Swan did not attend. The distribution of mints on that occasion is not disputed by the complainant nor by Cr Wilson.

The Huon Valley Council Code of Conduct Determination Report, 2 September 2019, stated that Cr Wilson made his statements at the hearing on 15 August 2019 under oath. The Chairperson at that hearing wrote in her Statutory Declaration that Cr Wilson had said that mints were regularly handed out before the council meetings started. That the statement was made under oath is therefore not disputed.

The matter for this Panel to determine was whether mints were regularly handed out to Councillors and to people sitting in the public gallery, or whether mints on other occasions were confined to sharing only between Councillors; and whether Cr Wilson's statement on 15 August 2019 could reasonably be interpreted as referring only to the latter practice.

The complaint is based on the assumption that when Cr Wilson made his statement about mints at the hearing on 15 August 2019, he meant that mints were always handed to both Councillors and members of the public gallery before Council meetings started. Cr Wilson contended that while he said that mints were always handed out, he meant that they were shared between Councillors; in his words, *they are regularly offered around the table at meetings*.

The General Manager of the Council stated that:

It is not a Council practice where Council staff regularly hand out mints to the Councillors or members of the public prior to a Council meeting. Rather it has been the practice of, mainly, Councillors to share mints while they are sitting at the Council table while waiting for the meeting to commence.

...

My observations are that mints are shared between individual Councillors and not necessarily every single Councillor.

The Panel determines that it cannot be satisfied that Cr Wilson meant, by his statement about mints, that such sweets were always made available to members of the public before Council meetings. The Panel considers that the language attributed to Cr Wilson in the complaint, and affirmed by Cr Wilson in his responses to the complaint, can reasonably be interpreted as acknowledging that mints are always shared between some or all Councillors before Council meetings, and that therefore, Cr Wilson did not lie under oath.

The Panel is not satisfied that Cr Wilson lied. It follows that the Panel is not satisfied that Cr Wilson breached the Code in the ways alleged by the complainant. Pursuant to section 28Z(1)(b), the complaint is dismissed.

Pursuant to Section 28Z(3), the Panel determines that the complainant may not make a further complaint in relation to the allegation that Cr Wilson lied under oath at the Code of Conduct Panel hearing on 15 August 2019 regarding the distribution of mints, sweets or lollies.

Timing of Determination

In accordance with section 28ZD (1) (a), the Panel is required to investigate and determine a complaint within 90 days of the Chairperson's decision to investigate the complaint. The 90 day period for this complaint expired on 27 May 2020. Investigation of this complaint occurred over Easter, and this caused a relatively brief delay in reaching the Determination. Further delay was caused by the fact that several investigations into alleged breaches of the Code of Conduct within Huon Valley Council were occurring simultaneously, and the resultant need to give the parties adequate time to respond to the Panel.

Right to Review

Under s28ZJ of the Act, a person aggrieved by the determination of the Panel is entitled to apply to the Magistrates Court (Administrative Appeals Division) for a review of the determination on the ground that the Panel has failed to comply with the rules of natural justice.



Lynn Mason
(Chairperson)



Sam Thompson
(Legal member)



Katherine Schaefer
(Community member with
experience in local government)