MUNICIPALITY OF KINCARDINE, INTEGRITY COMMISSIONER, H.G. ELSTON

Citation: Complainant v. Cuyler
Date: January 22, 2020

REPORT ON THE MATTER OF A COMPLAINT
AGAINST COUNCILLOR CUYLER

Notice: Municipal Integrity Commissioners provide investigation reports to their respective municipal council and, in most cases, make recommendations for imposition of penalty or other remedial action to the municipal council. Therefore, reference should be made to the minutes of the municipal council meeting where the Commissioner’s report was presented to obtain information about council’s consideration of each report. When possible, a link to the relevant municipal council minutes is provided.

[Link to Council Decision]
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>TABLE OF CONTENTS</td>
<td>2</td>
</tr>
<tr>
<td>INTRODUCTION</td>
<td>3</td>
</tr>
<tr>
<td>THE COMPLAINT</td>
<td>3</td>
</tr>
<tr>
<td>THE KINCARDINE CODE OF CONDUCT FOR MEMBERS OF COUNCIL</td>
<td>3</td>
</tr>
<tr>
<td>CONTEXT – “ALLIES FOR ALLY CATZ”</td>
<td>6</td>
</tr>
<tr>
<td>THE FACTS</td>
<td>7</td>
</tr>
<tr>
<td>MUNICIPAL ORGANIZATION AND ADMINISTRATION</td>
<td>10</td>
</tr>
<tr>
<td>DISCUSSION AND FINDINGS</td>
<td>12</td>
</tr>
</tbody>
</table>
INTRODUCTION

1. Councillor Cuyler is a first-term Councillor and a former employee of 22 years in the Kincardine Public Works Department. He is the Chair of the Building and Property Standards Committee. Councillor Cuyler is a man of much and varied workplace experience, working at everything from running heavy construction equipment to hauling cattle. He is proud of his accomplishments and draws on what he has learned over the course of his career to, as he says, impart his wisdom to staff. He grew up in Kincardine and sought election to Council as a way to give back to his community.

2. Dallas James Hewitt is the By-law Compliance Officer and Building Inspector of the Municipality of Kincardine. He has been employed at Kincardine since April 23, 2018. He is a graduate of the Police Foundations program at Mohawk College, and of the Law and Justice Program at Laurentian University, in Sudbury. He is enrolled in the “Municipal Law Enforcement Officers Association”, the Ontario Association of Property Standards Officers and the Ontario Building Officials Association. Mr. Hewitt was born and raised in Kincardine.

3. This inquiry and report concern an unfortunate incident between Councillor Cuyler and Compliance Officer Hewitt, in Kincardine’s municipal offices. The report reviews the incident in the context of the separation of duties between Members of Council and municipal staff, and the requirement that that relationship be enjoyed without abuse and free of attempts to influence.

THE COMPLAINT

4. On September 10, 2019, a member of the Building and Planning Department made a written complaint to me, alleging that, on that day, Councillor Cuyler approached Dallas Hewitt and confronted him about an on-going investigation Mr. Hewitt was conducting. According to the Complainant, Councillor Cuyler become aggressive, and was yelling and swearing at Mr. Hewitt.

5. The Complainant alleges that Councillor Cuyler has contravened sections 4(b), (f) & (h), 6.0, 7.0 (b), (d)(i) & (ii), and 8.0 (b) & (c) of the Kincardine Code of Conduct.

THE KINCARDINE CODE OF CONDUCT FOR MEMBERS OF COUNCIL

6. For ease of reference, I will include the language of the sections at issue:

4.0 General Integrity

b) Members are responsible for complying with all applicable legislation, by-laws and policies that pertain to their positions as an elected official.
f) Members will be open and honest, focus on issues rather than personalities, and avoid aggressive, offensive or abusive conduct.

h) Members shall avoid the improper use of the influence of their office and shall avoid conflicts of interest, both apparent and real.

6.0 Discrimination and Harassment

All members have a duty to treat members of the public, one another, and staff with respect and without abuse, bullying or intimidation, and to ensure that the work environment is free from discrimination and harassment. The Ontario Human Rights Code applies and, where applicable, the Municipality’s Workplace Harassment Policy.

7.0 Conduct Respecting Staff

b) Members shall acknowledge and respect the fact that staff carry out directions of Council as a whole and administer the policies of the Municipality, and are required to do so without any undue influence from any individual member or group of members.

d) Members of Council have no individual capacity to direct staff to perform specific functions. Inquiries of staff from members of Council should be directed to the Chief Administrative Officer or the appropriate Senior Manager.

e) The Municipal Act, 2001 sets out the roles of members of Council and the municipal administration, including specific roles for statutory officers such as the Chief Administrative Officer, Clerk, Treasurer and the Integrity Commissioner.

f) Members of Council are expected to:

i. Represent the public and to consider the well-being and interests of the Municipality;

ii. Develop and evaluate policies and programs of the Municipality;

iii. Determine which services the Municipality provides;

iv. Ensure the administrative policies, practices and procedures and controllership policies, practices and procedures are in place to implement the decisions of Council;
v. Ensure the accountability and transparency of the operations of the Municipality, including the activities of the senior management of the Municipality;

vi. Maintain the financial integrity of the Municipality; and,

vii. Carry out the duties of Council under the Municipal Act, 2001 or any other Act.

g) Municipal staff is expected to:

i. Implement Council's decisions and establish administrative practices and procedures to carry out Council’s decisions;

ii. Undertake research and provide advice to Council on the policies and programs of the Municipality; and

iii. Carry out other duties required under the Municipal Act, 2001 or any Act and other duties assigned by the Municipality.

h) Members shall be respectful of the role of staff to provide advice based on political neutrality, professional judgement and objectivity.

i) Members should not:

i. Maliciously or falsely injure the professional or ethical reputation, or the prospects or practice of staff;

ii. Compel staff to engage in partisan political activities or be subjected to threats or discrimination for refusing to engage in such activities; or

iii. Use, or attempt to use, their authority or influence for the purpose of intimidating, threatening, coercing, commanding or influencing any staff member with the intent of interfering in staff's duties.

8.0 Improper Use of Influence

b) Members should not use the status of their position to influence the decision of another individual to the private advantage of oneself, one's parents, children, or spouse, staff members, friends, or business or other associates.

c) In the same manner and as outlined in the Provincial Offences Act, members shall not attempt to influence or interfere, either directly or indirectly, financially, politically
or otherwise with employees, officers or other persons performing duties under the Provincial Offences Act.

CONTEXT – “ALLIES FOR ALLY CATZ”

7. “Allies for Ally Catz” is a Kincardine shelter for cats, located on Stewart Drive. It is the municipality’s position that the use was not a permitted use under the zoning by-law. There was a complaint about odour and garbage, apparently arising from the cats. It appears that the municipality and the owner had several meetings over the course of more than a year, resulting in a reduction in the number of cats from 35 to 15.

8. In a letter dated September 25, 2019, Mr. Hewitt wrote to the operator of Allies for Ally Catz, requiring compliance with the zoning by-law, on or before March 2020, failing which the municipality would take steps to enforce the zoning by-law.

9. As it turns out, Councillor Cuyler was familiar with the Ally Catz operation and the complaint. He had attended at least one meeting at the cat shelter with senior staff and another Member of Council. After stepping back for two or three months, with no resolution at hand, he told a senior staff member that he would “look after it”. According to Councillor Cuyler, he was not told no, “so I assumed that they were going to let me handle it”.

10. The Councillor commenced a parallel process to solve the Allies for Ally Catz problem, including making a series of requests of the owner. Those requests were outlined in a document given to me by Councillor Cuyler, dated July 17, 2019:

- I would like you to refrain from taking in cats outside of our region
- I want you to say no to people who want you to accept a cat or kittens until we can get some in homes
- I would like to see the numbers reduced to at least half
- I would like to see a more intense public image presentation to help move the cats to forever homes as soon as possible

11. Councillor Cuyler closes off his requests of the owner, in the following way: “I have stuck my neck out as far as I dare, so if you don’t want to agree to these requests, please tell me now”.
THE FACTS


13. I was advised that Mr. Hewitt is responsible for managing complaints and compliance matters with respect to most Kincardine by-laws, including those dealing with parking, zoning, animal control, property standards, ATVs, and signs. He is the only by-law enforcement officer for the municipality.

14. There was no overlap between Councillor Cuyler’s employment with Kincardine and Mr. Hewitt’s, and Mr. Hewitt has only known Councillor Cuyler as a Member of Council. There has, however, been regular contact between them, as Councillor Cuyler approaches Mr. Hewitt with questions about his cases, on a weekly basis. Mr. Hewitt has often had to refuse to answer the Councillor’s questions, or provide him with the information he is requesting, because the information was confidential.

15. On September 9, 2019, Mr. Hewitt emailed the owner of the cat shelter, following up on their meeting in the spring, requesting another meeting. That meeting was scheduled for September 17, 2019.

16. On September 10, 2019, Councillor Cuyler arrived in the Planning and Building Department. At the time, there was a senior management meeting taking place and there were no senior staff in the department. Councillor Cuyler confronted Dallas Hewitt, asking him what he was doing on the Allies for Ally Catz matter. Councillor Cuyler told Dallas Hewitt that he, Cuyler, was dealing with the file. Mr. Hewitt countered that he had been directed to continue trying to resolve the matter.

17. Councillor Cuyler then argued that the zoning by-law does not prohibit a cat shelter, as the definition of a “kennel” would not include a cat shelter. Dallas Hewitt explained that the definition of a “kennel” is quite broad and would include any animal, to which Councillor Cuyler proclaimed bull***. Mr. Hewitt felt that Councillor Cuyler was very frustrated and found him to be intimidating. Mr. Hewitt felt cornered and became more fearful as Councillor Cuyler became more aggressive. He felt threatened and unsafe and tried to leave. The Councillor’s agitated state was apparent to everyone in the office, to the point that another staffer loudly announced her shock at what was happening, which seemed to bring Councillor Cuyler to his senses and he left.
18. The day after the incident, Councillor Cuyler went to the municipal offices to apologize to Mr. Hewitt. Two senior staff persons greeted Councillor Cuyler at the entrance and dissuaded him from speaking directly with Mr. Hewitt. Councillor Cuyler sent an apology by email, later that day, which I have set out, below:

Hi Dallas,

I was at the MAC today to apologize to you for the way I spoke to you yesterday. It was very unprofessional and uncalled for. If [name redacted] had filled you in on the details of the meeting you missed things would have been different.

I’m not using that as an excuse as there is no excuse for the way I handled the situation. As I said I was there to apologize to everyone but [name redacted] wouldn’t allow me to.

Please accept my sincere apology and convey my feelings to the people in your department.

 Regards,

Dave Cuyler

19. The impact on Dallas Hewitt was significant. He told me that he was left flustered by the encounter and that he couldn’t do anything for the next two or three days. Mr. Hewitt finds himself repeatedly running through a variety of different scenarios as to what might have happened and looks for the Councillor’s vehicle, everywhere.

20. On September 13th, at 9:45 a.m. Mr. Hewitt pulled into the municipal parking lot. He noticed that Councillor Cuyler was parked, but then saw him turn towards him and pull up behind him. Councillor Cuyler asked whether Mr. Hewitt received his email apology and said he was sorry. The Councillor promised that it wouldn’t happen again. As of October 3rd, Mr. Hewitt has not had further contact with Councillor Cuyler.

21. Mr. Hewitt expressed to me his concern about the impact on some of the administrative staff. Even though, as the by-law enforcement officer, he is used to dealing with people who are upset and can be threatening, he found the incident extremely upsetting. He worries about the impact of such an abusive outburst on his colleagues, for whom it is not a common or expected risk of the job.

22. Mr. Hewitt is also concerned that Councillor Cuyler’s actions may interfere with or undermine any future prosecution of Allies for Alley Catz.
23. I also met with three other employees, who were present and witness to the September 10, 2019, incident. There was a suspicion that Councillor Cuyler was aware that there was a senior manager’s meeting that morning and that is why he chose to visit that day. One witness told me that her instinct was that they needed someone there who could say something to him. Calls were placed to their Director and to Human Resources.

24. These witnesses describe Councillor Cuyler as being abrupt, with a stern tone in his voice. He is known as having a temper and was harassing Dallas Hewitt. His behaviour is described as intimidating and bullying.

25. One staff member explained to me that Councillors have been told not to enter the staff work areas and that contact should be through the Chief Administrative Officer, or a senior manager. Councillor Cuyler does not follow this rule and when he arrives in their workspace the supervisor is often alerted to his presence. I was told that Councillor Cuyler has been told on a number of occasions to stop interfering with staff, but to no avail.

26. The incident has had a profound impact on staff in the Building Department. Without overstating the concern, there is a shared trauma and a group fear of what might have happened, or what could happen the next time. Some no longer feel safe, leading to the re-arranging of furniture to eliminate hidden workspaces where people feel trapped, as well as changes to daily routines.

27. There is a worry about what the Councillor’s reaction will be to my report – and how it may affect his interactions with them.

28. In an email to me, dated October 9, 2019, Councillor Cuyler provided his understanding of the events leading up to his visit to the building department and his explanation of why he was upset with Dallas Hewitt. I will include some excerpts from that email:

   … Before the date of his visit, Donna became ill and cancelled and offered another date a week later to which she received the letter dated Sept 25/19. I consider that a threat as I have said before they do not have a by-law to back up their complaint. It is my opinion that they are trying to scare her for whatever reason they have. I just think xxxxxxxxxx does not like being proven wrong. …

   I do not know who actually provided the complaint about my actions on Sept. 10/19 but I do think that the situation is being completely blown out of proportion by someone other than Mr. Hewitt.
I am not naïve enough to think that there is not a collaboration between members of administration about things they want to do. … It all has to do with what I think is for the best not whether someone is working to the letter of the law. I do not mean purposely break the law, I mean “use some common sense. Sit down with the parties involved and come to a compromise. It believe it is less costly in the long run.

I have had conversations with employees in authoritative positions within our municipality and they have told me that due to my number of years, the type of work I have done, for more than fifty years I might add, that I am more knowledgeable than they. I take that as a compliment.

What I do not understand is that after making a statement like that, why do they not come to me about issues that I have been involved in where I am able to give an opinion that might help make a better decision. …

It is my opinion that we as a municipality have become a training school which is not a good thing when you do not have the practical knowledge as well as the book knowledge to pass on to people that are just beginning to learn to operate equipment or know what to do in situations that could injure or even heaven forbid, kill them or another person or animal. There have been people hired and sent out by themselves in snowplows with little or no training whatsoever. … I am a firm believer that you listen to the people that have done the job longer and it will serve you well in the end.

I have been operating all types of equipment, from road building to mining, since my mid teens and I believe I have a good understanding of what is safe as well as good work ethics.

Sometimes I slip and raise my voice a bit too loud and I am guilty of being not to complimentary (sic) but as I said, when that happens I am not beyond apologizing.

MUNICIPAL ORGANIZATION AND ADMINISTRATION

29. The starting point for an inquiry concerning a complaint by a member of staff against a member of council, is a review of Part VI, Municipal Organization and Administration, of the Municipal Act, 2001, S.O. 2001, c. 25, as amended (the “Act”). Section 224 is included in the Code of Conduct.
30. Section 224 of the Act describes the role of council:

224. It is the role of council,

(a) to represent the public and to consider the well-being and interests of the municipality;

(b) to develop and evaluate the policies and programs of the municipality;

(c) to determine which services the municipality provides;

(d) to ensure that administrative policies, practices and procedures and controllership policies, practices and procedures are in place to implement the decisions of council;

(d.1) to ensure the accountability and transparency of the operations of the municipality, including the activities of the senior management of the municipality;

(e) to maintain the financial integrity of the municipality; and

(f) to carry out the duties of council under this or any other Act.

31. I first note that the Act contains no description of the role of an individual Member of Council. I do not believe this to be an oversight, but, in fact, an important implication of the Legislature – Members of Council have no statutory role as individuals, only when they are acting in concert with their fellow Councillors.

32. Second, and I will paraphrase here, Council’s job is to represent and consider the interests of the municipality and to develop and evaluate the policies and programs of the municipality. Regarding its relationship with the administration of the municipality, it is to: 1) ensure that the administration has the necessary tools to implement Council’s decisions on these policies and programs; and 2) to ensure the accountability and transparency of the activities of the senior management of the municipality.

33. While the Act assigns no role to an individual Member of Council, it does mandate a certain standard of behaviour by requiring a municipality to establish codes of conduct (generally, members are to behave with integrity, respect for others and without conflict of interest) for Members of Council and to appoint an Integrity Commissioner to apply the code.

34. Section 227 of the Act describes the role of staff.

227. It is the role of the officers and employees of the municipality,
(a) to implement council's decisions and establish administrative practices and procedures to carry out council's decisions;

(b) to undertake research and provide advice to council on the policies and programs of the municipality; and

(c) to carry out other duties required under this or any Act and other duties assigned by the municipality.

DISCUSSION AND FINDINGS

35. It is abundantly clear to me that Councillor Cuyler has overstepped his role as a Member of Council and, quite intentionally, assumed the hands-on management of the cat shelter matter. Moreover, he has done so in an aggressive and disrespectful manner towards Mr. Hewitt, which has had a serious impact on the sense of safety felt by members of the Building and Planning Department. He has contravened the intent and purpose of several individual sections of the Code.

36. The purpose of the Code is stated, as follows:

The Council of the Municipality of Kincardine is committed to achieving the highest standards of conduct in its actions which is essential to maintaining and ensuring public trust and confidence in the Municipality's decision-making and operations. The Municipality of Kincardine Council members shall act in an accountable and responsible manner, with integrity and fairness in the decision-making process.

37. The public's trust and confidence in the municipality's decision-making and operations is contingent on, among other things, the conduct of individual Members towards the municipality's staff. If instances of interference in the day-to-day work of staff, let alone the intimidation, bullying or harassment of staff, are not identified and curtailed, how are the public to trust and have confidence in Council decisions that flow from the recommendations of those same staff members.

38. Section 4 enumerates matters of “General Integrity”; Members must comply with all laws, by-laws and policies (including the Council Staff Relations Policy), avoid aggressive, offensive or abusive conduct, and avoid the improper use of the influence of their office.

39. It was clear to me that, in his visit to Dallas Hewitt, Councillor Cuyler was unfittingly aggressive, offensive and abusive, all as part of an attempt to influence how Mr. Hewitt conducted his investigation of Allies for Ally Catz.
40. Section 6 of the Code provides the prohibition against discrimination and harassment: All members have a duty to treat members of staff with respect and without abuse, bullying or intimidation. It was simply wrong for Councillor Cuyler, as a Member of Council, a former employee of Kincardine, and a man self-reporting of much experience and wisdom, to have challenged a young, relative new employee, such as Mr. Hewitt. Wrong in many ways, including that it was an attempt to bully Compliance Officer Hewitt into changing his approach on this enforcement matter.

41. The important principles governing conduct respecting staff are laid out in section 7 of the Code. In particular, 7 b) and d):

7 b) Members shall acknowledge and respect the fact that staff carry out directions of Council as a whole and administer the policies of the Municipality, and are required to do so without any undue influence from any individual member or group of members.

7 d) Members of Council have no individual capacity to direct staff to perform specific functions. Inquiries of staff from members of Council should be directed to the Chief Administrative Officer or the appropriate Senior Manager.

42. The failure of Councillor Cuyler to acknowledge that staff carry out “directions of Council as a whole” and are “required to do so without undue influence from any individual member”, is very apparent. Mr. Hewitt was acting, as he saw fit, in accord with his duties concerning by-law enforcement, as assigned by Council, and under the direction of his Director. Councillor Cuyler had no right to direct, or attempt to interfere or influence, Kincardine’s by-law enforcement officer.

43. Under section 7 i) of the Code, Members should not:

i. Maliciously or falsely injure the professional or ethical reputation, or the prospects or practice of staff;

ii. Compel staff to engage in partisan political activities or be subjected to threats or discrimination for refusing to engage in such activities; or

iii. Use, or attempt to use, their authority or influence for the purpose of intimidating, threatening, coercing, commanding or influencing any staff member with the intent of interfering in staff’s duties.

44. While I believe Councillor Cuyler’s actions could be construed to be an attempt to injure Mr. Hewitt’s professional reputation and his practice when it comes to by-law enforcement, I have no doubt that he is in breach of section 7 i) iii) – attempting to use his authority or influence for
the purpose of threatening, coercing, commanding or influencing Mr. Hewitt with the intent of interfering in his duties.

45. Finally, I find that Councillor Cuyler has used the status of his position to attempt to influence Mr. Hewitt’s decision to the private advantage of Allies for Alley Catz and, in so doing, has also attempted to influence or interfere with Mr. Hewitt’s duties under the *Provincial Offences Act*, a clear breach of section 8.0 of the Code – Improper Use of Influence.

46. While I accept that Councillor Cuyler is an experienced and capable person in many things to do with the matters of public works and by-law enforcement, he must recognize that, as a Member of Council, he has left those responsibilities behind. It is no longer his role to advise on by-law interpretation or enforcement matters, full stop. To be clear, Councillor Cuyler should restrict his actions to participation in the formation of policy decisions, as a Member of Council, and not interfere with the work of staff, as they strive to implement those decisions.

47. I do note his apology and take that as a sincere expression of contrition and an encouraging sign that Councillor Cuyler has, himself, recognized that his actions towards Mr. Hewitt were inappropriate.

48. For the reasons set out above, I find that, on September 10, 2019, Councillor Cuyler breached sections 4(b), (f), (h), 6, 7(b), (d), (i) (i) and (iii), and 8 (c) of the Code in his confrontation with and challenge to Compliance Officer Dallas Hewitt.

49. It is, accordingly, my recommendation to Council that Councillor Cuyler be reprimanded by Council and prohibited from entering staff workspaces and from having any direct dealings with Kincardine staff, except through the Chief Administrative Officer, or her delegate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd day of January 2020

H.G. Elston