

PRIVILEGED AND CONFIDENTIAL

June 27, 2023

Our File No.: 309545

Board Chair Evans and Members of the Board of Trustees
Ottawa-Carleton District School Board
133 Greenbank Road
Ottawa, ON
K2H 6L3

Dear Board Members:

Re: Opinion re Code of Conduct Complaint Report Findings in the Matter of Code of Conduct Complaint by Trustee Dickson against Trustee Kaplan-Myrth

We have been requested to provide a legal opinion to the Ottawa-Carleton District School Board (the “**Board**”) with respect to the Formal Review Report – Findings dated May 29, 2023 and prepared by Michael L. Maynard of ADR Chambers Inc. relating to the complaint filed by Zone 8 Trustee Donna Dickson against Zone 9 Trustee Nili Kaplan-Myrth (the “**Findings Report**”). In particular, we have been asked to provide an opinion on whether or not the determinations in the Findings Report disclose a contravention of the Board Member Code of Conduct, Policy P.073.GOV (the “**Code of Conduct**”) and, if so, to recommend a proportional range of sanctions.

Qualifications and Expertise

Aird & Berlis LLP has been appointed as Integrity Commissioner for some 75 public sector entities, primarily municipalities, throughout all of Ontario. In this role, we act as an impartial, expert and independent officer to carry out the statutory functions set out in the *Municipal Act, 2001* including the application and enforcement of municipal codes of conduct in relation to members of councils and local boards.

We currently serve as the Interim Integrity Commissioner of the Toronto Catholic District School Board where we have dealt with a number of complaints and have provide advice to members as to their obligations under the Trustee Code of Conduct and other related policies. We were the first Integrity Commissioner appointed for the York Region District School Board and we have also acted as Integrity Commissioner for other school boards with respect to investigation and enforcement matters. We have also assisted a number of school boards with respect to their ethical policies and codes of conduct and are generally familiar with the *Education Act*.

We have conducted numerous investigations as Integrity Commissioner and as a workplace investigator and submit that we are knowledgeable and well-versed in the obligations of procedural fairness required when discharging investigations into code of conduct complaints and in reviewing, assessing and providing recommendations on penalties and sanctions in the context ethical, ethics and accountability matters.

Materials Reviewed

In preparing this opinion, we have reviewed the following materials:

- the Complaint (as defined below);
- the Findings Report;
- the Code of Conduct;
- the text messages exchanged between Trustee Dickson and Trustee Kaplan-Myrth; and
- the letter dated February 19, 2023 written by Trustee Kaplan-Myrth to Trustee Dickson and circulated to all members of the Board.

Code of Conduct – Specific Directives

The following sections of the Code of Conduct are relevant to this opinion as they relate to Steps of Formal Review and Sanctions:

4.26 The Final Report of the investigators shall outline the findings of facts, but not contain a recommendation or opinion as to whether the Code of Conduct has been breached. This will be determined by the Board of Trustees as a whole.

...

4.36 If the Board determines that there has been no breach of the Code of Conduct or that a contravention occurred, although the trustee took all reasonable measures to prevent it, or that a contravention occurred that was trivial, or committed through inadvertence, or an error of judgment made in good faith, no sanction shall be imposed.

4.37 If the Board determines that a Board member has breached the Code of Conduct, the Board may impose one or more of the following sanctions:

- a) censure of the Board member;
- b) barring the Board member from attending all or part of a meeting of the Board or a meeting of a committee of the Board; or
- c) barring the Board member from sitting on one or more committees of the Board, for the period of time specified by the Board, not to exceed six months.

4.38 The Board shall not impose a sanction that is more onerous than the above but may impose one that is less onerous such as a warning. The Board has no power to declare the trustee's seat vacant.

Issue

We have been asked to provide a legal opinion as to whether the Findings Report discloses a contravention of the Code of Conduct and, if so, to recommend a reasonable and proportional range of sanctions.

For the reasons that follow, it is our opinion that the conduct in question constitutes a breach of Sections 3.17 and 3.18 of the Code of Conduct. However, it is also our opinion that the contravention does not merit a sanction in view of Section 4.36 of the Code of Conduct, which provides, in part, that no sanction shall be imposed in relation to an error of judgment made in good faith.

Analysis

(a) Investigation

ADR Chambers Inc. (the “**Investigator**”) was requested by the Board to conduct a formal review of a complaint made under the Code of Conduct in or around February 13, 2023 (the “**Complaint**”). The Complaint was made by Trustee Dickson (the “**Complainant**”) regarding the conduct of Trustee Kaplan-Myrth (the “**Respondent**”) with respect to various communications made by Trustee Kaplan-Myrth in and around late November 2022 regarding her proposed motion before the Board to implement a temporary masking mandate. The Complaint alleged that the Respondent’s conduct contravened Sections 3.17 and 3.18 of the Code of Conduct in the following way:

- a) by insinuating that a vote against the Respondent’s proposed mask mandate was a vote in support of “white supremacists”; and
- b) by making comments about other Board members who were voting against the mask mandate.

We understand that a confidential memorandum was presented to the Board on February 23, 2023 which advised that Sections 3.15, 3.17 and 3.19 of the Code of Conduct were alleged to have been breached by the Respondent’s conduct and that efforts were underway to retain the services of the Investigator.

The relevant sections of the Code of Conduct are set out below:

- 3.15 Board members shall not engage in conduct that would discredit or compromise the integrity of the Board during the meetings of the Board or at any other time.
...
- 3.17 When expressing individual views, Board members shall respect the differing points of view of other Board members, staff, students and the public.
- 3.18 Board members shall, at all times, act with decorum and shall be respectful of other Board members, staff, students and the public.

- 3.19 All Board members shall endeavour to work with other Board members and staff of the Board in a spirit of respect, openness, courtesy and cooperation.

In undertaking its investigation and preparing the Findings Report, the Investigator was retained by virtue of Sections 4.22 and 4.23 of the Code of Conduct. In accordance with Section 4.26 of the Code of Conduct, the Investigator's Findings Report is limited to findings of fact. Accordingly, the Findings Report does not offer any conclusions or recommendations on its findings.

By the express wording of Section 4.26, whether there has been a breach of the Code of Conduct "will be determined by the Board of Trustees as a whole."

(b) Report Findings

The Findings Report provides a detailed overview of the parties and the background in which the comments which gave rise to the Complaint were made. We will not reproduce this, but note that the relevant sections are contained at page 7 of the Findings Report.

Likewise, the Findings Report provides a detailed overview of the evidentiary record reviewed by the Investigator. The evidence consisted primarily of text messages exchanged between the Complainant and Respondent, and is set out at pages 8-13 of the Findings Report.

Finally, the Findings Report provides a detailed summary of the Investigator's interviews with the Complainant, the Respondent and two witnesses, and sets out the legal arguments presented by the Respondent's legal counsel. Notably, the Investigator concluded:

"I found both Parties credible. Both were forthright in expressing their views and presented reasonable explanations for their actions and interpretations.

The Complainant appears genuinely upset by the words communicated by the Respondent...The Respondent acknowledged her words, and referred to her February 19th letter in which she made certain admissions, provided explanations, and apologized and expressed regret for her actions. It appears that she was not fully aware of the extent of the offence her words caused until she was presented with the written Complaint on February 17th."

The Findings Report concludes by setting out the following factual findings:

1. The Respondent sent a series of text messages to the Complainant soliciting her support for a temporary mask mandate at the Board;
2. The Complainant indicated some support for the policy as of November 12, 2022, but later changed her mind;
3. The Respondent then engaged in attempts to persuade the Complainant to return to her previous supportive position;
4. While doing so, the Respondent made several comments about the political and moral convictions of several of their colleagues; and,

5. The Respondent eventually asked the Complainant to “abstain” rather than “vote with White supremacists,” to which the Complainant took offence, for reasons elaborated herein.

With respect to Item Number 4 above, and comments made by the Respondent to the Complainant concerning other Trustees, the Findings Report provides as follows:

“The specific words the Respondent used are established by the evidence, and the parties have clear differences in how they interpret their intent and affect. I note that the Respondent has since attempted to clarify her intent and apologized for making these comments.”

With respect to Item Number 5 set out above, and the Respondent’s comment to “abstain” rather than “vote with White supremacists,” the Findings Report notes as follows:

“These words that the Respondent used are not debatable - they are a matter of evidence. However, I find it unlikely that this interpretation [i.e. the Complainant’s interpretation of the comment to be a racist remark] reflects the Respondent’s intent, and she more likely made the remark to suggest that certain White supremacists would (in her view) welcome the result of a defeated mask mandate resolution. This notion was clearly communicated poorly, and the Respondent has since attempted to clarify her intent and expressed regret for making this remark and for the harm it caused the Complainant.”

Finally, in closing, the Findings Report also notes that the Complainant demanded a public apology to herself and the other Trustees named in the text messages to resolve the Complaint. While not a factual finding, the Investigator writes:

“As an independent third party, I found the remorseful words in the Respondent’s letter, published to all Trustees, to be sincere. My own opinion is it was an earnest attempt by the Respondent to explain where she thought she went wrong, coupled with words of apology and conciliatory messages respecting ongoing and future relationships...”

(c) Contravention of the Code of Conduct

For the reasons set out above, it is our opinion that the Respondent’s comments concerning other Board members and comments to the Complainant contravened Sections 3.17 and 3.18 of the Code of Conduct which requires that Board members “...shall respect the differing points of view of other Board members” and shall be “respectful of other Board members.” The comments contained in the text messages sent by the Respondent, while attempting to be persuasive advocacy, were written in such a way that, on their face, do not appear to be respectful of her fellow Board members.

We do not find that the Respondent’s conduct rose to a level that would discredit or compromise the integrity of the Board as set out in Section 3.15 of the Code of Conduct. Likewise, we do not find that the comments breached Section 3.19 of the Code of Conduct, when they are viewed and considered in their entire context.

(d) Recommendations

Section 4.37 of the Code of Conduct sets out the sanctions the Board may impose on a member where the Board determines that a breach of the Code of Conduct has occurred. They consist of the following: (a) censure of the Board member; (b) barring the Board member from attending all or part of a meeting of the Board or of a committee of the Board; or (c) barring the Board member from sitting on one or more committees of the Board, for a period of time not to exceed more than six (6) months. Section 4.37 expressly provides that the Board may impose “one or more” of the aforementioned sanctions.

Section 4.38 of the Code of Conduct provides that the Board shall not impose a sanction that is more onerous than the three specifically sanctions listed in Section 4.37, but that the Board may impose a lesser sanction, such as a warning.

Having carefully reviewed the Findings Report and the Respondent’s letter to the Complainant dated February 19, 2023, it is our opinion that the conduct in question constitutes a breach of the Code of Conduct. However, it is also our opinion that the contravention does not merit a sanction in view of Section 4.36 of the Code of Conduct, which provides, in part, that no sanction shall be imposed in relation to an error of judgment made in good faith.

The reasons for our determination are as follows:

1. The Respondent made sincere efforts to apologize and explain her actions after the Complainant’s concerns were fully brought to her attention as of February 17, 2023 by virtue of her detailed and lengthy letter to the Complainant of February 19, 2023. In her correspondence, the Respondent sincerely apologized for her conduct and explained her intent in making the comments. We note the following:
 - a. The Respondent’s apology and expressions of regret were not coerced and she acknowledged she could have handled the situation differently.
 - b. The Respondent’s letter dated February 19, 2023 provided a detailed explanation for her conduct in championing the mask mandate motion, given her training and qualification as a doctor and the impact of COVID-19 she had witnessed on vulnerable members of the population.
 - c. The Investigator found that the Respondent’s remark concerning “White supremacists” was more likely made to suggest that certain persons would welcome the result of a defeated mask mandate resolution. While noting that the Respondent’s comments were poorly communicated, the Respondent has since attempted to clarify her intent and has expressed regret for making this remark and for the harm it caused the Complainant.
2. The Complaint sought a public apology from the Respondent, despite the fact that the comments at issue in the Complaint were never publicly made or distributed, given the private nature of the text messages between the two Trustees. As the Investigator writes in the Findings Report:

“It is plainly unfortunate that this matter came to this point. It seems there could have been ample opportunity to attempt an earlier informal resolution, but circumstances of miscommunication and misunderstanding conspired against that.”

In light of these factors, it is our opinion that the conduct in question, while in contravention of the Code of Conduct, does not merit the imposition of a sanction. The Respondent’s comments were not made in bad faith, and were issued in an error of judgment. The Respondent’s letter of February 19, 2023 clearly sets out her regret for her actions and attempts to foster conciliatory relations with the Complainant as well as with her fellow Board members.

Should the Board be of the view that a sanction is merited, we would recommend a penalty at the lower end of the spectrum to be imposed as a preventive measure, such as a warning or caution to the Respondent to pause and exercise some restraint before advocating for a position or arguing a point when sending a text or electronic communication where emphasis, tone and context may not be transmitted as intended.

Conclusions

For the reasons set out above, it is our opinion that the Respondent’s text communications contravened Sections 3.17 and 3.18 of the Code of Conduct. However, the Respondent made sincere efforts to apologize and explain her actions after the Complainant’s concerns were fully brought to her attention as of February 17, 2023. As the Respondent’s correspondence of February 19, 2023 sets out, her communications were made in a good faith attempt to persuade a fellow Board member to consider supporting her mask mandate motion, given her experience as a doctor and her observations of the impact on COVID-19 on vulnerable segments of the population. We also note that the Respondent’s communications were also sent early in her term, shortly after being elected to office.

In light of these factors, it is our opinion that the conduct in question does not merit sanction by virtue of the express language of Section 4.36 which specifically provides that no sanction shall be imposed where a Board member committed an error of judgment made in good faith.

We would be pleased to answer any questions arising from the foregoing opinion.

Yours truly,

AIRD & BERLIS LLP



Meghan A. Cowan

MAC/JM

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