

TOWN OF TRUMBULL
ETHICS COMMISSION

In re: THOMAS KELLY : CASE NO.: 1-2014
: :
: May 12, 2014

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MEMORANDUM OF DECISION

I. BACKGROUND

On January 14, 2014, James Henderson, an employee of the Town of Trumbull, commenced this action by filing a complaint with the Trumbull Ethics Commission (the "Commission") against Thomas Kelly. At all times relevant to the allegations in the Complaint, Mr. Kelly was a member of Trumbull's Board of Education ("BOE"). In the Complaint, Mr. Henderson alleges that, on October 28, 2013, during a publicly-televised meeting of the BOE, Mr. Kelly made certain remarks concerning Mr. Henderson that were in violation of the Trumbull Code of Ethics.

On January 23, 2014, the Commission found probable cause to believe that Mr. Thomas Kelly's remarks were in violation of Section III (B) (3), Standards of Service, of the Ethics Code.

In accordance with the Town Charter and Code of Ethics, the Commission has now fully investigated the matter. The Commission has determined that it has received sufficient and competent evidence to render a just and final decision on the merits of the complaint.

The pertinent code section, Section III (B) (3), reads, in part:

Officials and employees will conduct themselves with propriety, discharge their duties impartially and fairly, and make continuing efforts toward attaining and maintaining the highest standards of performance.

In this context, "propriety" essentially means conduct that conforms to the standards of respect, decorum and professionalism that we expect of our town officials.

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II. PROCEDURAL HISTORY

During a hearing before this Commission in April 2014, all parties were present. At that time, Mr. Henderson withdrew his complaint. Counsel for Mr. Henderson stated that Mr. Henderson would instead seek relief in Court that could not be obtained before the Commission.

Mr. Kelly did not object to Mr. Henderson's withdrawal. However, having already found probable cause, the Commission decided to proceed without Mr. Henderson as authorized by the Code of Ethics. Article V, paragraph D of the Ethics Code provides, in part, that "[t]he Commission may proceed in the absence of any person charged with a complaint, the charging party or any witnesses but shall make every effort to receive sufficient competent evidence in order to render a just and final decision."

The Commission held a hearing at 7:00 p.m. on May 7, 2014. Mr. Henderson failed to appear even though he was subject to a valid subpoena served by Mr. Kelly.

Earlier that day, anticipating that Mr. Henderson would not attend the hearing, counsel for Mr. Kelly appeared in Superior Court seeking injunctive relief to prevent the Commission from moving forward with the investigation. Counsel argued that the complaint should be dismissed because Mr. Henderson's failure to appear would deprive Mr. Kelly of the right to confront his accuser as provided for in Section 17(D)(iii) of the Town Charter.

The Superior Court denied Mr. Kelly's application stating that the interests of all concerned were best served by an adjudication of the complaint on the merits. Further, the Court found that Mr. Kelly had adequate remedies at law if Mr. Henderson failed to appear at the ethics hearing.

At the start of the ethics hearing on May 7, and in the absence of Mr. Henderson, counsel for Mr. Kelly moved for dismissal citing his client's inability to confront his accuser. The Commission denied the motion in accordance with Article V, Section D of the Trumbull Code of Ethics, and the decision of the judge of the Superior Court. Further, the Commission noted that it was unclear what steps, if any, had been taken by Mr. Kelly to enforce the subpoena to command Mr. Henderson's appearance.¹

Accordingly, on the evening of May 7, 2014, the Commission heard evidence and testimony regarding the alleged violation, and adjourned to executive session for deliberations, as required.

At the conclusion of the executive session, the Commission announced that the investigation would reconvene on May 9th at 4:00 p.m. solely for the purpose of the examination of Mr. Henderson.

At the hearing on May 9th, Mr. Henderson again failed to appear, and again, there was no indication that Mr. Kelly took any steps to enforce his subpoena. Accordingly, the Commission received further comment and evidence from Mr. Kelly's counsel and then adjourned to executive session for deliberations.

III. UNDISPUTED FACTS

There is no dispute that during the publicly televised BOE meeting on October 28, 2013, Mr. Kelly stated that he would:

Like to add additional information about his [Mr. Henderson's] job qualifications.

¹ Notably, the Commission had offered to assist the parties with the subpoena process at the outset of the investigation and both sides declined the offer.

Further, Mr. Kelly stated that Mr. Henderson was asked to summarize his qualifications to serve as an internal auditor for Trumbull at a prior Board of Finance meeting on August 15, 2013 at which Mr. Kelly was present.

Mr. Kelly noted that Mr. Henderson, when asked about his job qualifications, did not mention at any point in time:

That in his prior job he had been dismissed for poor performance and that he had filed a lawsuit against his prior employer alleging age discrimination.

Accordingly, Mr. Kelly stated that:

It is relevant to ask him to expand upon his qualifications he listed at the Board of Finance meeting which reported to demonstrate his credibility because he didn't mention that . . . in that discussion.

IV. DISCUSSION

Based upon the evidence presented, the Commission determined, by unanimous vote, that Mr. Kelly's remarks were improper and unfair for the following reasons:

1. Mr. Kelly's remarks were inaccurate.

Mr. Kelly claimed that his comment concerning Mr. Henderson's dismissal by his former employer for "poor performance" was an accurate statement of fact. However, he offered no credible evidence in support of that claim.

Mr. Kelly testified that his remarks were based on the findings of facts set forth in the August 31, 2011 Memorandum of Decision issued by Judge Warren Eginton in a federal age discrimination case Mr. Henderson brought against his former employer, EBM-Papst. According to Judge Eginton's opinion, Mr. Henderson's former employer "decided to terminate [Henderson], characterizing the decision as part of a restructuring."

In addition, according to the Court's opinion, at the time of the termination Mr. Henderson had "informed [his former employer] that he was looking for a new job, and [his former employer] offered his assistance." This evidence suggests that Mr. Henderson and his former employer mutually decided to part ways.

It is clear from Judge Eginton's opinion that Mr. Henderson's job performance at EBM-Papst was unsatisfactory, and that EBM-Papst *could have* dismissed him for poor performance had it chosen to do so. However, it chose instead to characterize Mr. Henderson's termination "as part of a restructuring" and therefore, Mr. Kelly's remarks in that regard were inaccurate.

2. Mr. Kelly's public attack on Mr. Henderson's credibility was unfair.

During the August 15, 2013 meeting of the Board of Finance, Mr. Henderson was asked by the Board of Finance to summarize his qualifications as an internal auditor. Mr. Henderson told the Board of Finance that he had over 40 years of private and public sector accounting experience, and summarized some of the positions he held.

According to Mr. Kelly, Mr. Henderson's failure to disclose that he had been dismissed by the former employer for poor performance and that he had filed a lawsuit against his former employer demonstrated a lack of credibility on Mr. Henderson's part, or adversely impacted his job qualifications. We disagree.

During his testimony before the Commission, Mr. Kelly admitted that the filing of a lawsuit has no bearing on one's job qualifications. It is also undisputed that, during the previous Board of Finance meeting, Mr. Henderson was only asked to summarize his qualifications, and he did so. Mr. Henderson was not asked to provide the reason why he left his prior employer, nor was he ever asked whether or not he had sued a previous employer.

Accordingly, the Commission finds that Mr. Henderson had no duty or reason to reveal either matter. Therefore, Mr. Henderson's decision not to voluntarily offer such information should not reflect negatively on him. Mr. Kelly's public claim to the contrary was improper and unfair.

3. Mr. Kelly's public remarks were reckless and irresponsible.

It is also the Commission's determination that Mr. Kelly failed to conduct, or attempt to conduct, adequate due diligence before making the public remarks regarding Mr. Henderson.

According to the testimony of Mr. Kelly and Attorney Stephen Wright, a day or two before the BOE meeting, Mr. Wright gave Mr. Kelly a copy of Judge Eginton's opinion and they discussed it. Mr. Kelly testified that, during the discussion, Mr. Wright opined that Mr. Henderson had been dismissed for poor performance.

Mr. Kelly further testified that, based solely on Mr. Wright's opinion and on Mr. Kelly's own unsupported assumptions after reading Judge Eginton's opinion, Mr. Kelly concluded that Mr. Henderson had been dismissed for poor performance. Mr. Kelly himself testified that there must have been human resource documents that might have addressed his concerns, but he made no attempt to see if such documents were available for review.

Accordingly, Mr. Kelly's accusation during a publicly televised BOE hearing that Mr. Henderson had been previously "dismissed for poor performance," without ever speaking to the former employer or Mr. Henderson, and without conducting – or attempting to conduct – any due diligence whatsoever, was unfair and irresponsible.

4. **Mr. Kelly's remarks were unnecessary.**

If Mr. Kelly truly had concerns about Mr. Henderson's job qualifications, all Mr. Kelly had to do was say so without mischaracterizing the District Court Judge's opinion. He simply could have noted for the record that, based upon his reading of the opinion (a matter of public record), he would ask the BOE to consider requesting Mr. Henderson to appear and further expand on his qualifications.

Moreover, as noted above, there was no legitimate reason for Mr. Kelly to mention Mr. Henderson's lawsuit against his former employer. During his testimony, Mr. Kelly admitted the lawsuit had no bearing on Mr. Henderson's job qualifications. Nevertheless, Mr. Kelly decided to make the above-referenced gratuitous remarks, and we find the remarks were improper, unfair and unnecessary.

V. DETERMINATION OF VIOLATION

Based upon the foregoing, the Commission finds by unanimous vote, that the respondent, Mr. Thomas Kelly, violated Section III (B) (3) of the Trumbull Code of Ethics.

VI. SANCTION

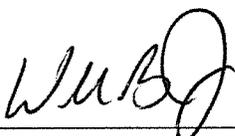
Based upon the violation noted above, and in accordance with Section XI, the Commission, by unanimous vote, imposes a sanction of public reprimand.

TRUMBULL ETHICS COMMISSION

Martin McCann, Esq. (Acting Chairman) *mm*
William Brown, Esq. (Presiding Judge) *wb*
Joseph Piccirillo, Rev. *J.P.*
James Stapleton, Esq. *J.S.*
Robert Miller *RM*

Tom Lee, Esq., Chairman (RECUSED)
Eric Gross, Esq. Vice Chairman (ABSENT)

Respectfully Submitted,

By: 
William Brown, Esq.
Presiding Judge