

CONFIDENTIAL REPORT

Town Board of Shelter Island
County of Suffolk
State of New York

Jeffrey D. Smith, J.D.
Investigator
November 17, 2020

Table of Contents

Introduction.....	2
Findings of Fact.....	3
Alleged Incident of 10/19/20.....	3
Submission of Complaint Forms.....	7
First Amendment Rights.....	7
Claim of Hostile Work Environment/Harassment.....	8
Town Policy.....	9
Conclusions.....	10
Recommendations.....	12
Exhibits	
1. Appointment of Jeffrey D. Smith.....	13
2. Individuals Interviewed.....	14
3. Complaint Ronald Jernick.....	15
4. Complaint Wesley Congdon.....	16
5. Complaint Zachary Starzee.....	17
6. Weingarten Letters.....	18
7. Town Policy Article III #18-30 to 18-39.....	19
8. Statement from James Colligan.....	20
9. Article Shelter Island Reporter.....	21

INTRODUCTION

At the Shelter Island Town Board Meeting of October 27, 2020, I was appointed (Exhibit #1) to review the circumstances surrounding an incident which is alleged to have occurred at the Recycling Center on October 19, 2020 and to prepare a report of my findings. The alleged incident involved three employees of the Town Highway Department (Wesley Congdon - Zachary Starzee - Ronald Jernick) and Councilman James Colligan.

The Town of Shelter Island is located between the North and South Forks of eastern Long Island. It is a Township within the County of Suffolk in the State of New York. Shelter Island is 12.5 square miles in area and has a year-round population of 2,800. That figure rises to 8,000 during the summer season. The Town provides typical municipal services to the residents through sixteen departments, including the Department of Highway Maintenance and Recycling. The Town has a budget in excess of ten million dollars. The governance of the Town is vested in an elected Town Board comprised of one Councilwoman (Amber Brach-Williams), three Councilmen (Albert Dickson - James Colligan - Mike Bebon) and one elected Town Supervisor (Gerry Siller). The Town employs its own attorney, Robert DeStefano Esq., as well as outside counsel, Richard Zuckerman Esq.

The allegations surrounding the incident arise from the employees' display of Trump-Pence flags on their personal vehicles while those vehicles were parked on Town property and Councilman Colligan's expression of his displeasure with that display. The three employees have filed Complaint Forms with the Town asserting infringement of their First Amendment right to display political banners on their personal vehicles and expressing their concern about Councilman Colligan's manner in addressing them and the issue (Exhibits #3 #4 #5).

In order to prepare a comprehensive analysis, I first discussed the nature of the complaints with the Town Attorney, Robert DeStefano, Esq. I interviewed (virtually) the three Highway Department employees on November 2, 2020. On November 4, 2020, I interviewed (virtually) Councilman Colligan and Superintendent of Highways Brian Sherman. On November 6, 2020 I interviewed the Town Supervisor, Gerry Siller (Exhibit # 2).

I have reviewed the Complaint Forms submitted by the three employees, Councilman Colligan's written statement, the Collective Bargaining Agreement between the Town and the Shelter Island Highway Benevolent Association, Inc. and Shelter Island Town Policy.

FINDINGS OF FACT

The Incident of October 19, 2020

The Town of Shelter Island maintains a Recycling Center for the use of the residents. It consists of facilities to manage recyclables, household trash, landscaping clippings, brush and tree trimmings as well as equipment for compacting and distribution of mulch.

On the date of the alleged incident the three Town employees who have filed Complaint Forms were on duty at the Recycling Center.

Wesley Congdon is a laborer. He generally works with the road crew of the Highway Department but can be reassigned to the recycling center, as was the case on October 19, 2020. He has been in his position since March of 2019. He is a life-long resident of Shelter Island.

Zachary Starzee is a part-time laborer (thirty hours per week). He has been an employee of the Town for the past two months. He is a life-long resident of Shelter Island.

Ronald Jernick is a foreman assigned to the Recycling Center. He has been a Town employee for twenty-two years. He is a life-long resident of Shelter Island.

James Colligan is a Town Councilman. He has been on the Town Board for five years. He is serving in the first year of his second four-year term. He has been a resident of Shelter Island for fourteen years. He is the Town Council liaison to the Highway Department.

On October 19, 2020, all three employees were present at the Recycling Center. The three pick-up trucks owned by the employees were parked appropriately in an employee parking space at the Recycling Center. The area where the trucks were parked is on Town property.

Two of the trucks displayed both the Trump-Pence flag and the American flag. One of the trucks had only the Trump-Pence flag. Each of the flags was approximately three feet by five feet. They were on poles attached to the rear of the truck beds. The area where the trucks were parked was clearly visible to anyone entering the Recycling Center. The Town has received complaints from some residents concerned that the display of the political flags on Town property is inappropriate.

I interviewed the three Town employees, individually. Each employee was given a “Weingarten” letter prior to the interview (Exhibit # 6). Before conducting my interview, I advised each of the employees that I was appointed by the Town Board to conduct this investigation and to prepare a report of my findings. I indicated that any conversations between each of them and myself would be considered confidential and that I intended to conduct this process as a neutral with complete impartiality. I also explained that I was not an employee of either the Town of Shelter Island or the Law Firm of Lamb & Barnosky, LLP. I informed each of them that when my report was completed, it would be sent to the Town Attorney (Robert DeStefano, Esq.) and the Town Board’s outside counsel (Richard Zuckerman, Esq.). At that juncture, the decision concerning the distribution of the report will be made by the Town Board. **The following represents the employees’ recollection of the events that occurred on October 19, 2020.**

On October 19, 2020, all three men were in the Scale House at the Recycling Center. Zachary Starzee was at the customer window. Wesley Congdon was in the building and Ronald Jernick was in the doorway of the building. At approximately 3:45, Councilman Colligan arrived at the Recycling Center in his blue Toyota pick-up. A female passenger accompanied him. He drove onto the scale. Zachary Starzee and Councilman Colligan had a discussion about what the Councilman wanted to drop off. The material in the truck was landscaping clippings and light brush. Mr. Starzee said there would be no charge but Councilman Colligan insisted on paying the minimum fee of two dollars.

After the transaction was complete and while Councilman Colligan was still on the scale, he said to Mr. Starzee, “What’s the deal with the flags?” Mr. Starzee replied, “What about them?” To which Mr. Colligan replied, “This is a public area and there shouldn’t be any political stuff. You don’t see me riding around town or to work with my Biden stickers.” Mr. Starzee made no comment. Councilman Colligan then said, “Make sure you tell everyone to take down the flags and tell them that came from Jim Colligan himself.”

Councilman Colligan drove off the scale and proceeded to dump his leaves and clippings at the appropriate spot. Upon completion of the disposal, Councilman Colligan drove away. A short time later, he returned and parked his truck around the circle at the Recycling Center. On seeing Mr. Jernick, he exited his vehicle. He called out to Ronald Jernick, "Hey." The two men were approximately seventy-five to one hundred feet apart. Mr. Jernick turned to face Mr. Colligan.

Councilman Colligan said, "What the hell is the story with the flags? Are you guys trying to make a political statement?" Mr. Jernick responded by saying, "It's no different than bumper stickers." In an agitated state Councilman Colligan said, "that's bullshit, don't expect any more f----- favors from me." Mr. Jernick then said, "the way you are acting is unbecoming to a councilman."

At that point Councilman Colligan drove away. Mr. Congdon, Mr. Starzee and Mr. Jernick gathered to discuss the situation. They decided to involve their Union and to file Complaint Forms with the Town. They have not had any confrontational contact with Councilman Colligan since that time. They have seen Councilman Colligan as he comes and goes at the Recycling Center. Mr. Jernick did report the incident, in general terms, to the Superintendent of Highways, Brian Sherman, when he arrived at the Recycling Center shortly after the incident.

About ten days later Mr. Starzee did have occasion to speak with Councilman Colligan. Addressing Mr. Starzee, while in his truck on the scale, Councilman Colligan said, "It wasn't right for me to have said what I said the other day. I am older and should have known better. I understand you'll have to do whatever you have to do."

As part of my investigation, I have spoken with Councilman Colligan on two occasions. While his recollection of the facts differs somewhat from the employees with regard to some specific allegations, he readily acknowledges that this interaction took place. **The following is his recounting of the events.** On the day in question when Mr. Colligan drove onto the Town property at the recycling center, the flags on the three employee trucks were very noticeable. His recollection included the conversation with Zachary Starzee. He recalls asking Mr. Starzee, "What's the story with flags?" This was followed by Councilman Colligan's comment that they are inappropriate and don't belong on Town property. He told Mr. Starzee that he could tell the men that Jim Colligan said so. By his account, he did not insist that the flags be removed.

Following the disposal of his leaves and brush, Councilman Colligan went to see Brian Sherman, Superintendent of Highways. He was unable to locate Superintendent Sherman. He drove back toward the Recycling Center and parked his truck around the circle. When he saw Mr. Jernick, he got out of his car and said, "Hey." Mr. Jernick turned and faced Councilman Colligan. They were about seventy-five feet apart. He asked Mr. Jernick why it was necessary to have the flags in full view to everyone entering the facility. Councilman Colligan recalls Mr. Jernick saying something about the display of the flags being similar to bumper stickers and that there was nothing wrong with it. Councilman Colligan said it was still inappropriate. His recollection was that Mr. Jernick responded by saying something to the effect "that is how you run the town council." To which Councilman Colligan responded, "That's bullshit." At that point he returned to his car and drove off. Councilman Colligan denies the use of the profanities except for the response of "bullshit". He has no recollection of saying anything about not doing any more favors. He claims his wife, who was in the truck, did not hear any statement from him about not doing any more favors. He does not recall Mr. Jernick saying his conduct was unbecoming for a Town Councilman. Following the incident, Councilman Colligan went to the Office of the Town Supervisor and advised him of what had taken place. At that time, he also offered to apologize for the episode. Councilman Colligan acknowledges that his role in the interchange was inappropriate and should have been handled differently. He feels he has always been a supporter of the Highway Department both in terms of recognizing their work and supporting their demands in negotiations.

During each of the individual interviews with the employees, they each referenced Councilman Colligan's comment about "not doing any more favors", even though only Mr. Jernick is alleged to have heard that comment. None of the men understood what the comment meant. They were not able to identify anything that they thought was a "favor" in their past dealings with Councilman Colligan and were therefore at a loss to explain what the comment meant. The Union took the position that it was a reference to the negotiation process and implied that the Councilman would not look favorably on any of their demands in that process.

At the time of my interviews with each of the employees, they were accompanied by Mike Mitchell, the Vice-President of the Shelter Island Highway Benevolent Association Inc. I discussed with each employee, individually, what they thought was the proper outcome, as a result of this interchange. They each stated they felt the appropriate remedy would be for Councilman Colligan to resign.

Of his own volition, Councilman Colligan has provided a statement with respect to the events of October 19, 2020 (Exhibit # 8). In that document he recounts the events of that day, in substantially in the same manner as he explained them at the time of our interview. In his narrative he expresses regret for the incident, recognizes some of his language was inappropriate and that the interaction could have been conducted in a better way. Neither in his statement nor in his interview did he question or become argumentative with respect to any possibly different version of the facts which might be provided by the employees.

I had the opportunity to discuss the incident with the Town Supervisor, Gerry Siller (Exhibit # 2). He confirmed that Councilman Colligan had come to see him shortly after the incident and that he expressed his regret about his conduct and his willingness to apologize. On October 20th, the Town Attorney and the Town Supervisor met with the Union. At that meeting the Union emphasized the seriousness of the event and indicated their members were being harassed. When offered an apology as a possible settlement, they refused. Their proposed remedy was the resignation of Councilman Colligan. The Union leadership indicated that they might have pro bono legal representation and raised the possibility of the involvement of the media.

Supervisor Siller acknowledged there have been taxpayer complaints about the flags and that there had recently been an article in the Shelter Island Reporter (Exhibit # 9). He also acknowledged having a “Stop Trump” sticker on his car.

Submission of Formal Complaint Forms First Amendment Rights

The Town of Shelter Island has available a Complaint Form to be used when employees have a concern. The forms are generic and are not complaint specific. Following the meeting between the Union and the Town Supervisor, each of the three employees involved in the October 19, 2020 incident submitted Town of Shelter Island Complaint Forms, individually.

On October 28, 2020, Zachary Starzee submitted a Complaint Form to the Office of the Town Attorney. In the body of that form he sets out his statement concerning what took place between himself and Councilman Colligan on October 19, 2020. In his Complaint Form he states as the basis for his complaint “Political First Amendment Statement”. Coupled with his testimony during his interview, I take this to mean that being told to remove the flags from his truck is, in his view, an infringement on his First Amendment rights to symbolically express his political views.

On the same date, Wesley Congdon submitted a Shelter Island Complaint Form. He recounts essentially the same series of events as Mr. Starzee. His concern on his Complaint Form is “Political Free Speech”. I take that to mean that his First Amendment rights have been encroached upon by a Town Councilman telling Mr. Starzee to tell all three employees to remove the political flags from their private vehicles.

Mr. Jernick submitted the Town of Shelter Island Complaint Form on October 27, 2020. He indicates that his complaint stems from “retaliation”. He recounts the events of October 19, 2020 and describes the actions of Councilman Colligan as acts of “intimidation” and suppression of his rights to express his political views. In each of their Complaint Forms the three employees identify the resignation of Councilman Colligan as the appropriate remedy.

Following the event of October 19, 2020 and up until the present time, none of the three employees have been instructed, by either their supervisor or by the Town Board or any of its members, to remove the flags from their trucks. They have not received any verbal or written instruction or directives to do so. The flags are still mounted on their personal trucks which are parked on Town property when the men are on duty.

The Town of Shelter Island has an array of adopted Policies, some of which address matters related to Personnel. There is, however, no policy, administrative regulation or supervisory memorandum which prohibits employees or members of the Town Board from displaying political banners, flags, stickers, buttons or apparel on their person or on their belongings while present in the workplace. The Collective Bargaining Agreement is silent on the topic.

Hostile Work Environment/Harassment/Intimidation

As previously noted, the Town of Shelter Island has a Complaint Form, that is available for use by any employee who feels aggrieved by some circumstance which took place at work. The Complaint Form is generic and not specific to each type of possible violation. By not being specific, it leaves to the employees the determination of how to describe their complaint. All three of the complaints filed by the employees individually with respect to the October 19, 2020 event, reference violation of their First Amendment rights. Only Mr. Jernick’s complaint references “intimidation”.

During his interview, Mr. Jernick raised the notion of a Hostile Work Environment. He claimed that was the case at the time of the interaction between himself and Councilman Colligan. Although he had not identified that issue in his written complaint, there is nothing that prevented his raising the claim orally after the form had been submitted.

The essence of the claim of a Hostile Work Environment is the result of his contentious interaction with Councilman Colligan and the fact that Councilman Colligan has the authority and power to negatively effect his employment. In the same vein, the Union has stated that Councilman Colligan's behavior constituted "harassment". At the time of the interview with Mr. Jernick, Mike Mitchell, Vice-President of the Shelter Island Highway Benevolent Association, felt the retaliation and intimidation experienced by Mr. Jernick stemmed from Councilman Colligan's position of power and authority and the impact that could have on his employment. He also raised the possibility of retaliation which might occur through Councilman Colligan's participation in the negotiations process. Both Mr. Jernick and Mr. Mitchell felt these circumstances were therefore part of the elements necessary for the claim of a hostile work environment.

Town Policy

While the Town does not have a Policy with respect to the display of political material either by Town employees or Town Board Members while on duty, there are two Policies which require review with respect to the claims of harassment, retaliation and intimidation.

Chapter 18 of the Town Code Article III "Policy Against Discrimination" Sections 18-30 through 18-35 addresses harassment. The Policy provides that employees are protected against discrimination and/ or harassment based on race, color, sex, religion, age, national origin, marital status, disability or Veteran status. Harassment is defined as any verbal or physical act against members of the protected class which effects a term or condition of employment and which interferes with their ability to do their work. The Policy makes provision for training, investigation and complaint resolution (Exhibit # 7).

Chapter 18 of the Town Code Article III Sections 18-36 through 18-39 addresses issues of workplace violence. The Policy provides that any threat or act of violence is prohibited in the workplace. Any such event will be investigated. The Policy is a statement and commitment by the Town Board to maintain a safe environment for employees and anyone else on Town property. The Policy spells out the training, reporting and investigating responsibilities for the Town.

While not specifically spelled out in the Policy, the common understanding of workplace violence include acts of a sufficiently threatening nature which occur over some period of time and which substantially interfere with an employee's ability to do their job.

CONCLUSIONS

Even though there are discrepancies between the testimony of the parties, I found them all to be credible. The disparities in recounting the events of that day have possibly arisen out of normal differences in recollection or as an attempt to enhance a claim or minimize one's responsibility. In any event, the discrepancies are not material in determining a final outcome.

The interaction between Councilman Colligan and the three employees on October 19, 2020 was inappropriate and should not have occurred. There is no question that the events, as they have been described by the individuals involved, occurred on October 19, 2020. Councilman Colligan has admitted his responsibility in creating the situation and is remorseful that it occurred.

I do not find that the First Amendment rights of the employees have been violated. The topic of the removal of the flags has not been mentioned since the time of the incident. There have been no instances of any attempt to curtail the employees' ability to exercise their free speech by anyone in authority in the Town. Even if Councilman Colligan had directed the flags be removed from the employees' private vehicles, he had no authority, acting as one member of a five-person Board, to make or enforce such a request. An inquiry into what was behind the flying of the flags in and of itself does not equate with denying to any of the employees the right to display political material. There has been no request since the incident either by any supervisor or the Town Board to remove the flags from the trucks or to remove the trucks from Town property when they displayed political information. There is no evidence of recrimination or retribution against any of the employees for their actions.

In the absence of a policy, regulation or directive prohibiting employees from the display of political material, there is no way to find any insubordination on the part of the employees with respect to their engaging in the display of the flags.

I do not find support for the claim of harassment. The Policy which prohibits discrimination and harassment is meant to apply to members of a protected class. The complainants are not included in that definition. There is no evidence that any acts alleged to have been committed against the complainants have stemmed from any intent to be discriminatory or harassing based on race, color, sex, religion, marital status, age, disability or veteran status.

I do not find that there was a hostile work environment. The incident of October 19, 2020 was a one-time occurrence. At the time of the occurrence between Mr. Jernick and Councilman Colligan, they were far apart. There certainly was no possibility or threat of physical harm. The event was not continuous, not sufficiently threatening and did not interfere with the employees' terms of employment or ability to perform their duties, all of which would be required to support a claim of a Hostile Work Environment.

There is no evidence of any history of discord between the employees and their Union versus Councilman Colligan. In fact, Councilman Colligan is thought of as an advocate for the Highway Department and its employees. I am not able to explain why the Union and the employees insist on the resignation of Councilman Colligan as the only possible resolution.

RECOMMENDATIONS

I would recommend that the Town Board of Shelter Island consider the following:

1. Councilman Colligan should not be asked to resign or be otherwise disciplined for the events that occurred on the October 19, 2020. Removal from the Town Board would constitute a penalty disproportionate to the offense.
2. A letter of apology should be prepared by Councilman Colligan and sent to each of the three employees individually. Before transmittal, that letter should be reviewed by the Town Attorney and outside Counsel.
3. Copies of that letter should be sent to the Union and the Town Board.
4. Councilman Colligan should not remain as the liaison to the Highway Department. He should not participate, directly, in any future collective bargaining between the Town of Shelter Island Highway Benevolent Association, Inc.
5. If the Town Board wishes to enact a Policy limiting the display of political material at the workplace by employees and/or members of the Town Board, the feasibility of such a Policy should be reviewed by the Town Attorney and outside Counsel.

Respectfully Submitted,

Jeffrey D. Smith, J.D.
November 17, 2020

Cc. Robert DeStefano, Esq.
Richard Zuckerman, Esq.

INTERVIEWS

Robert DeStefano Esq., Town Attorney - October 19, 2020

Wesley Congdon, Laborer - November 2, 2020

Zachary Starzee, P/T Laborer - November 2, 2020

Ronald Jernick, Foreman - November 2, 2020

Brian Sherman, Supt. of Highways - November 4, 2020

James Colligan, Town Councilman, November 4, 2020

Gerry Siller, Town Supervisor - November 6, 2020

All interviews were conducted virtually or telephonically

Exhibit #1

Exhibit #2

Exhibit #3

Exhibit # 4

Exhibit # 5

Exhibit # 6

Exhibit # 7

Exhibit # 8

Exhibit # 9