

To: Wendy Graves, Interim Town Administrator, Town of Fairhaven
From: Richard Massina, Esq., Labor Counsel, Clifford & Kenny, LLP
Re: [REDACTED] Complaint/Investigation
Date: October 26, 2021

**INVESTIGATION OF COMPLAINT
FINDINGS OF FACT, CONCLUSIONS AND RECOMMENDATIONS**

I. INTRODUCTION

This report is the result of an investigation of the complaint made by [REDACTED] against Wayne Hayward ("Mr. Hayward"), a member of the Planning Board ("Board"). The Town of Fairhaven ("Town") engaged this investigator to determine whether any violations of the Town's Policies occurred and if so, to provide recommendations for corrective action.

II. SUMMARY OF ALLEGATION AND SCOPE OF INVESTIGATION

On July 16, 2021, [REDACTED] reported [REDACTED] complaint to the Town's Clerical Union concerning Mr. Hayward's behavior. In said complaint, [REDACTED] alleged Mr. Hayward made an inappropriate and sexual comment that was embarrassing and upsetting on July 16, 2021, while [REDACTED] was working in the Town Hall.

III. WITNESSES INTERVIEWED

1. [REDACTED];
2. [REDACTED];
3. [REDACTED];
4. Wayne Hayward – Member of Town Planning Board.

IV. DOCUMENTS REVIEWED

1. Town of Fairhaven Policies – Unlawful Discrimination and Harassment.
2. Complainant Email from [REDACTED], dated July 16, 2021.

V. TOWN OF FAIRHAVEN POLICIES

Town of Fairhaven's Policy Against Unlawful Harassment, Sexual Harassment, and Discrimination (in pertinent part):

Policy Statement:

It is the goal of the Town of Fairhaven to promote a workplace that is free of unlawful harassment, sexual harassment, and/or discrimination in any form. The Town will not tolerate unlawful harassment, sexual harassment, and/or discrimination of employees occurring in the workplace, or in other settings in which employees may find themselves in connection with their employment. Further, any retaliation against an individual who has complained about unlawful harassment, sexual harassment, and/or discrimination, or retaliation against individuals for cooperating with an investigation of an unlawful harassment, sexual harassment, and/or discrimination complaint is similarly unlawful and will not be tolerated.

Employees are protected from harassment and discrimination on the basis of their race, color, religion, national origin, ancestry, sex, age, handicap (disability), participation in discrimination complaint-related activities, sexual orientation, gender identity, genetics, or active military or veteran status. Prohibited behavior includes slurs or other derogatory comments, objects, pictures, cartoons, or demeaning gestures connected to one's membership in a protected group.

To achieve our goal of providing a workplace free from unlawful harassment, sexual harassment, and/or discrimination, the conduct that is described in this policy will not be tolerated. Because the Town of Fairhaven takes allegations of unlawful harassment, sexual harassment, and/or discrimination seriously, we will respond promptly to complaints of this type of conduct where it is determined that such inappropriate conduct has occurred, we will act promptly to eliminate the conduct and impose such corrective action as is necessary, including disciplinary action where appropriate up to and including termination.

This policy shall apply to all employees, appointees, elected officials and volunteers of the Town of Fairhaven. Any individual violating this policy shall be subject to appropriate discipline.

Please note that while this policy sets forth our goals of promoting a workplace that is free of unlawful harassment, sexual harassment, and/or discrimination, the policy is not designed or intended to limit our authority to discipline or take remedial action for workplace conduct which we deem unacceptable, regardless of whether that conduct satisfies the definition of unlawful harassment, sexual harassment, and/or discrimination.

Definitions:

1. Discrimination: Discrimination is any decision that is made or action taken that is motivated by a bias because of an employee's:

- Age
- Disability
- Gender
- Gender Identity/Expression
- Genetics
- Military Status

- National Origin or Ancestry
- Race or Color
- Religion
- Retaliation
- Sexual Orientation

...

3. Sexual Harassment: Sexual Harassment is specifically defined in Massachusetts law and means sexual advances, requests for sexual favors, and verbal or physical conduct of a sexual nature when:

- (a) submission to or rejection of such advances, requests or conduct is made either explicitly or implicitly a term or condition of employment or as a basis for employment decisions; or,
- (b) such advances, requests or conduct have the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, humiliating, or sexually offensive work environment.

Under these definitions, direct or implied requests by a supervisor for sexual favors in exchange for actual or promised job benefits such as favorable reviews, salary increases, promotions, increased benefits, or continued employment constitutes sexual harassment.

The legal definition of sexual harassment is broad. In addition to the above examples, other sexually oriented conduct, whether it is intended or not, that is unwelcome and has the effect of creating a work place environment that is hostile, offensive, intimidating, or humiliating to male or female workers may also constitute sexual harassment.

While it is not possible to list all those additional circumstances that may constitute sexual harassment, the following are some examples of conduct, which if unwelcome, may constitute sexual harassment depending upon the totality of the circumstances including the severity of the conduct and its pervasiveness:

- Unwelcome sexual advances -- whether they involve physical touching or not;
- Sexual epithets, jokes, written or oral references to sexual conduct, gossip regarding one's sex life;
- Comment on an individual's body, comment about an individual's sexual activity, deficiencies, or prowess;
- Displaying sexually suggestive objects, pictures, cartoons;
- Unwelcome leering, whistling, brushing against the body, sexual gestures, suggestive or insulting comments;
- Inquiries into one's sexual experiences; and,
- Discussion of one's sexual activities.

All employees should take special note that, as stated above, retaliation against an individual who has complained about sexual harassment, and retaliation against individuals for cooperating with an investigation of a sexual harassment complaint is unlawful and will not be tolerated by the Town.

Applicability of Policy

It violates the policy of the Town of Fairhaven for any employee, male or female, to discriminate against and/or unlawfully harass another employee. Further, it is against the policy for an employee to discriminate against and/or unlawfully harass a non-employee and likewise for a non-employee to discriminate against and/or unlawfully harass an employee, provided the incident occurs in the workplace and within the jurisdiction of the Town.

The Town expressly prohibits any form of retaliatory action against an employee for filing a complaint of unlawful harassment and/or discrimination and for cooperating in an investigation of such a complaint.

Reporting and Investigation of Unlawful Harassment, Sexual Harassment, and/or Discrimination

The Town of Fairhaven encourages employees who believe they are being unlawfully harassed, and/or sexually harassed to firmly and promptly advise the actor that his or her behavior is offense and/or unwelcome. The Town recognizes that in some instances such informal communications may be uncomfortable and/or ineffective. Therefore, the Town also has additional or alternative avenues of addressing concerns as follows: If an employee believes that he or she is subject to unlawful harassment, sexual harassment, and/or discrimination of any type, he/she should report it immediately orally, or in writing to the Town Administrator at:

Wendy Graves, Interim Town Administrator
Fairhaven Town Hall
40 Center Street
Fairhaven, MA 02719
(508)- 979-4023, x 2

If an employee so chooses, due to the identity of the alleged offender and/or the circumstances of the alleged offenses, the employee has the option of making any report allegations of unlawful harassment, sexual harassment and/or discrimination to Ms. Anne O'Brien, Assistant to the Town Administrator.

All complaints will be investigated promptly under the direction of the Office of the Town Administrator. When the complaint is received we will promptly investigate the allegation in a fair and expeditious manner. The investigation will be conducted in such a way as to maintain confidentiality to the extent practicable under the circumstances.

All information disclosed in the investigation will be held in the strictest confidence and will only be disclosed on a need-to-know basis in order to investigate and resolve the matter. Our investigation will include a private interview with the person filing the complaint and with witnesses. We will also interview the person alleged to have committed unlawful harassment, sexual harassment, and/or discrimination. When we have completed our investigation, we will, to the extent appropriate, inform the person filing the complaint and the person alleged to have committed the conduct of the results of that investigation.

If it is determined that inappropriate conduct has occurred, we will act promptly to eliminate the offending conduct. Where it is appropriate, we will also impose disciplinary action up to and including termination.

Disciplinary Action

If it is determined that inappropriate conduct has been committed by one of our employees, we will take such action as is appropriate under the circumstances. Such action may range from counseling, up to and including termination from employment, and may include other forms of disciplinary action as we deem appropriate under the circumstances. In the event that inappropriate conduct has been committed by an appointed official or volunteer of the Town, the Town reserves the right to vacate such appointment and/or end volunteer status.

VI. FINDINGS OF FACT

Based on the interviews of the listed witnesses and the above referenced documents, this investigator makes the following findings of fact:

1. The Town hired [REDACTED] over twenty-three (23) years ago. [REDACTED] currently holds the position of [REDACTED] ("Office"). [REDACTED] previously worked as a [REDACTED] for the Town. (Interview of [REDACTED]).
2. At all relevant times, Mr. Hayward was a member of the Board for the Town. In 1991, Mr. Hayward was elected to the Board and began his long history of service for the Town. Mr. Hayward also served as Town Planner in 1996 and 2019. Mr. Hayward was previously the Chair of the Planning Board, but he currently holds the position of Vice Chair. (Interview of Hayward).
3. The Town hired [REDACTED] (" [REDACTED] ") approximately fifteen (15) years ago. While [REDACTED] has worked in several offices throughout Town Hall, at all relevant times [REDACTED] was an [REDACTED]. [REDACTED] and Mr. Hayward have socialized both in and out of the office since they worked together in the Planning Department approximately ten (10) years ago. [REDACTED] considers [REDACTED] Mr. Hayward's friend. (Interview of [REDACTED]).
4. [REDACTED] (" [REDACTED] ") is the [REDACTED] for the Town. (Interview of [REDACTED]).
5. The Office is designed with a front counter and a small corridor that leads to where employees sit. [REDACTED] and [REDACTED] co-worker, [REDACTED], sit on either side of the room. [REDACTED], has a seat at the back of the room. Due to COVID-19, the Town installed plexiglass on the front counter for employee protection. [REDACTED] and [REDACTED] are generally the only employees present in the [REDACTED] because [REDACTED]'s boss currently works from home. (Interview of [REDACTED]).
6. According to Mr. Hayward, he was instructed to come into Town Hall at 11:00 AM on July 16, 2021, by email the day prior. Mr. Hayward said the purpose of the email was to notify the

Planning Board members to physically come into Town Hall to endorse plans previously approved by the Planning Board during a prior remote meeting. (Interview of Hayward).

7. Mr. Hayward stated he arrived at [REDACTED]'s office to discuss an application with the Planning Board. He and [REDACTED] searched in [REDACTED]'s office for historical maps and information regarding easements on the property. According to Mr. Hayward, [REDACTED]'s own files were limited, and [REDACTED] suggested they search for the relevant information at the Office. (Interview of Hayward).
8. According to [REDACTED], [REDACTED] asked Mr. Hayward to stay behind the plexiglass at the front counter. (Interview of [REDACTED]). While Mr. Hayward stated that he felt uncomfortable, he and [REDACTED] stepped around the employees' plexiglass rather than staying on the public side. (Interview of Hayward).
9. [REDACTED] searched for information on the proposed plan for approximately forty-five (45) minutes, but [REDACTED] never found a definitive answer for [REDACTED] and Mr. Hayward. (Interview of [REDACTED]).
10. At some point during the search for pertinent records, [REDACTED] left the Office because [REDACTED] had another meeting to attend. (Interview of [REDACTED]).
11. Sometime after [REDACTED] left, [REDACTED] went down on one knee to retrieve a file. (Interviews of [REDACTED]). As [REDACTED] kneeled, Mr. Hayward said, "Look, I got [REDACTED] on [REDACTED] knees." (Interview of [REDACTED]). Mr. Hayward and [REDACTED] disagreed with [REDACTED]'s recollection of the quote, but both affirmed that Mr. Hayward made a comment about [REDACTED] being on [REDACTED] knees. (Interviews of Hayward and [REDACTED]).
12. [REDACTED] stated that [REDACTED] was the only other person within earshot when Mr. Hayward made the alleged statement. Immediately following Mr. Hayward's statement, [REDACTED] heard laughter which confirmed to [REDACTED] that the statement was made in a joking manner at [REDACTED] expense. Hearing the statement followed immediately by laughter made [REDACTED] feel extremely embarrassed and sick to [REDACTED] stomach. (Interview of [REDACTED]).
13. Once [REDACTED] heard Mr. Hayward and the laughter, [REDACTED] abruptly stood up and slammed the books down with a loud thud on the counter. (Interview of [REDACTED]). At this time, [REDACTED] ceased [REDACTED] search and made no further contact with Mr. Hayward. Mr. Hayward left the Office shortly thereafter and subsequently left Town Hall. (Interviews of [REDACTED] and Hayward).
14. Immediately following the incident, [REDACTED] was extremely upset and spoke to several co-workers about what happened. (Interviews of [REDACTED]).
15. [REDACTED] said [REDACTED] also spoke to [REDACTED] after the incident about what Mr. Hayward said. According to [REDACTED], [REDACTED] was upset and asked [REDACTED], "Did you hear what your friend Wayne said to me?" [REDACTED] responded, "Yes." (Interview of [REDACTED]).

16. Later that same day, ██████ sent an email to ██████ Union representative to notify them of the incident and ██████ complaint. (Interview of ██████). ██████ wrote that ██████ was helping ██████ and Mr. Hayward from the Planning Board. ██████ email stated, "The last thing was to pull the folder on the property which is on the bottom of the filing cabinet. I kneeled down to retrieve the folder and Mr. Hayward said 'look I got ██████ on ██████ knees' at this point someone laughed. I find this offensive and for me surprisingly upsetting." (Complainant Email from ██████, July 16, 2021).

VII. CONCLUSION

Based on the findings above, it is my conclusion that there is sufficient credible evidence to find that Mr. Hayward violated the Town's policy on Sexual Harassment. The policy states, in part:

It is the goal of the Town of Fairhaven to promote a workplace that is free of unlawful harassment, sexual harassment, and/or discrimination in any form. The Town will not tolerate unlawful harassment, sexual harassment, and/or discrimination of employees occurring in the workplace, or in other settings in which employees may find themselves in connection with their employment.

...

The legal definition of sexual harassment is broad. In addition to the above examples, other sexually oriented conduct, whether it is intended or not, that is unwelcome and has the effect of creating a work place environment that is hostile, offensive, intimidating, or humiliating to male or female workers may also constitute sexual harassment.

...

- Sexual epithets, jokes, written or oral references to sexual conduct, gossip regarding one's sex life;
- Comment on an individual's body, comment about an individual's sexual activity, deficiencies, or prowess.

In the context of the situation at hand, Mr. Hayward's verbal conduct was made in a joking manner and was clearly of a sexual nature. His statement also had the effect of unreasonably interfering with ██████'s work performance by creating a hostile, humiliating, and sexually offensive work environment.

By stating something to the effect of, "Look, I got ██████ on ██████ knees" in a joking manner about ██████ while ██████ was kneeling to retrieve a folder, a reasonable person would believe Mr. Hayward was attempting to make an off-color joke drawing the similarities between ██████ in that position and a person performing oral sex "on their knees." Such a statement is clearly sexual in nature and the fact that it evoked laughter from at least one (1) witness adds credence to that understanding. During his interview, Mr. Hayward disputed that his comment was meant to be a sexually charged joke, stating that he made the comment

out of his admiration for how hard [REDACTED] was working. However, this investigator does not find Mr. Hayward's framing of his statement credible, as remarking about [REDACTED] on [REDACTED] knees in the workplace is not a common compliment. Even if Mr. Hayward made the statement in praise of [REDACTED]'s work, the reactions from [REDACTED] and [REDACTED] show that the statement was reasonably perceived as a sexually charged joke. Additionally, Mr. Hayward made the statement about [REDACTED] rather than stating it directly to [REDACTED]; if Mr. Hayward had actually meant to pay [REDACTED] a compliment, he would have made the statement directly to [REDACTED]. As such, Mr. Hayward clearly created a humiliating and sexually offensive work environment for [REDACTED].

In addition to the specific conduct violation set forth above, this investigator notes that Mr. Hayward's comment about [REDACTED] was unprofessional and conduct that should not be tolerated in a civilized working environment.

VIII. RECOMMENDATIONS

This investigator recommends that the following actions be taken as a result of the above-stated findings and conclusions:

- (1) Mr. Hayward should be required to attend training regarding unlawful sexual harassment. As part of this training, Mr. Hayward should be advised of the potential for personal liability under M.G.L. c. 151B.
- (2) Mr. Hayward should be required to receive counseling on professionalism and civility in the workplace.
- (3) Mr. Hayward should be advised to stay away from the [REDACTED]. To the degree that Mr. Hayward needs to receive files or information in order to perform his duties as a member of the Planning Board, or as a member of the public, he can either have another Planning Board member retrieve the information or request the information via email.
- (4) This report should be filed with the Planning Board and the Board of Selectmen. Members of both boards should consider whether or not public censure of Mr. Hayward is appropriate.