

December 21, 2016

## First Circuit Affirms Narrow Scope of Federal Criminal Statutes in Reversing Patronage Convictions of Massachusetts Probation Officials

On December 19, 2016, the Court of Appeals for the First Circuit issued its decision in *United States v. Elizabeth V. Tavares, John J. O'Brien, and William H. Burke, III*.<sup>1</sup> In 2014, three officials of the Massachusetts Office of the Commissioner of Probation (“OCP”), the office in charge of hiring probation employees throughout Massachusetts, were convicted of racketeering, conspiracy, and mail fraud violations for a scheme in which they catered to hiring requests from state legislators in hopes of obtaining favorable legislation and funding for OCP and the Massachusetts Department of Probation. However, the First Circuit reversed the convictions and entered acquittal for the officials—the Commissioner of Probation (O’Brien) and two deputies (Tavares and Burke)—finding that there was insufficient evidence to sustain the convictions. In its opinion, the appellate court cabined the government’s ability to use federal criminal law to cover state political practices, finding that the government “overstepped its bounds in using federal criminal statutes to police [state] hiring practices.” More broadly, the First Circuit limited the government’s ability to criminalize conduct not typically within the ambit of federal criminal statutes.

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### Background

Since 2001, OCP had a standardized process for hiring candidates for Probation Department positions, which was put in place to select, according to OCP’s procedures, “the most qualified individuals.” First, candidates would submit applications on the Massachusetts trial court website, and a human resources professional would complete a preliminary screening of those applications. Second, qualified candidates would go through successive rounds of interviews with panels of Probation Department officials, and those interviews would often consist of standardized questions. Then, O’Brien would select final candidates and submit them to a state judge for final approval and signature.

The jury found, however, that the defendants did not adhere to OCP’s hiring process to find the most qualified candidates and instead “abused the hiring process to ensure that favored candidates were promoted or appointed in exchange for favorable budget treatment from the state legislature and increased control over the Probation Department.” Specifically, the defendants regularly received referrals from legislators and kept those referred names on a list, and told interviewers to pass some of those candidates on to subsequent rounds of interviews. The defendants also passed on to final round interviewers instructions on how to rank candidates even before those candidates were interviewed, favoring those with political connections and referrals. The defendants understood that this patronage system prevented the most qualified candidates from obtaining positions, with one defendant noting that passing over the best applicants was the “political thing” that “had to be done.” Further, the defendants retaliated against subordinates who did not acquiesce to their demands.

<sup>1</sup> Nos. 14-2313, 14-2314, 14-2315 (1st Cir. Dec. 19, 2016).

## The Appellate Court's Decision

Judge Juan R. Torruella, writing on behalf of Judges William J. Kayatta, Jr. and David J. Barron, reversed the trial court convictions and entered acquittal for the defendants on both the racketeering and mail fraud convictions.

The First Circuit first addressed the racketeering convictions, which incorporated violations of the Massachusetts bribery statute as predicate acts. The Massachusetts bribery statute, similar to the federal bribery statute, requires that something of “substantial value” be offered or promised to a government official “for or because of any official act performed or to be performed” by that official. Relying on the Supreme Court’s 1999 opinion in *United States v. Sun-Diamond Growers of California*, the appellate court required the government to show a link between the thing of value and the “official act” and stated that it was not enough to demonstrate merely “that the gratuity was given ‘to build a reservoir of goodwill that ultimately might affect one or more of a multitude of unspecified acts, now and in the future.’”

Under that standard, the appellate court found that the government failed to evidence “adequate linkage between the thing of ‘substantial value’ conferred by [defendant] O’Brien (the jobs) and an ‘official act’ performed or to be performed.” The government presented evidence that OCP had hired the wife of a state legislator about seven months after the legislator had proposed a budget amendment to increase funding for positions in OCP. The appellate court found no adequate linkage between the legislator’s wife’s hire and the funding amendment because of the passage of time between the hire and the amendment proposal, and also because of the lack of evidence either that O’Brien was aware of the legislator’s connection to the budget amendment or that the legislator changed his vote in anticipation of his wife’s hiring.

The government also presented evidence that O’Brien allowed Representative Robert DeLeo to refer people for Probation jobs (who would then be hired) so that DeLeo could use those referrals to gain support for his run for Speaker of the House of Representatives, and that O’Brien met with DeLeo to propose legislation regarding O’Brien’s duties, tenure, and salary. The appellate court rejected the government’s argument that the legislation was an “official act” exchanged for O’Brien’s hiring of DeLeo’s referrals. The appellate court found no evidence that DeLeo took any action on the proposals that O’Brien brought up at his meeting with DeLeo, and that under the Supreme Court’s 2016 decision in *McDonnell v. United States*, the meeting by itself could not be considered an “official act.” The appellate court found no connection between the hiring and any official act that DeLeo undertook and instead concluded that the evidence demonstrated that O’Brien merely was building general legislative support.

The appellate court then turned to the mail fraud convictions. The federal mail fraud statute requires the government to prove not only a fraud, but also that the U.S. mails were used “in furtherance of” that fraud. Although the use of the mails does not have to be an indispensable part of the fraud, it has to “at least have some tendency to facilitate the execution of the fraud.” The appellate court found that, even if the government had proved a fraud, they failed to prove that any mail was used in furtherance of that fraud. The government pointed to letters of rejection that OCP had sent out to unsuccessful candidates, and argued that these letters were “in furtherance of” the defendants’ scheme since the letters helped “maintain a facade of a merit-based system.” The appellate court rejected this argument, concluding that the letters made no difference since applicants who did not receive a letter would likely just have assumed that they were rejected and would not have come to a different opinion about OCP’s hiring system. The appellate court also dispensed with the argument that the letters made rejected applicants less likely to call OCP to check on their employment status, thereby making it less likely that calls from these applicants would lead to an inquiry that would uncover the fraud. The appellate court stated that the hypothesis that rejected applicants’ phone calls would have led to the discovery of the fraud “rests on nothing more than rank speculation.” Accordingly, the letters, though sent as part of the scheme, “furthered neither the perpetration nor the perpetuation of the” fraud, and thus were not sent “in furtherance of” the fraud.

## Implications

This decision, although fact-based, indicated the First Circuit's strict approach in white-collar cases, adding teeth to the "in furtherance of" requirement of the mail fraud statute and the requirement of a tangible link between an "official act" and "thing of substantial value" for the Massachusetts bribery statute. As to the "in furtherance requirement" of mail fraud, the First Circuit appears to find it insufficient for the government to prove that mail was used merely as part of a fraud. Instead, the government must prove that mail actually facilitated the fraud in some way. And, mere speculation without any evidence about how a mailing could have facilitated the fraud is unsatisfactory to meet the "in furtherance of" requirement. As to bribery, it is not enough to show that an "official act" is done to build goodwill; instead, the "official act" must be linked to a specific thing of value given in exchange for that official act.

More broadly, this decision limits the types of behavior that fall under corruption and white-collar statutes, and it provides a meaningful check on the government's ability to use criminal statutes creatively to capture behavior that does not fall squarely within the ambit of those statutes. The appellate court found that the defendants "misran the Probation Department and made efforts to conceal the patronage hiring system," and that the conduct at issue "may well be judged distasteful, and even contrary to Massachusetts personnel laws." Nevertheless, the appellate court, noting that "not all unappealing conduct is criminal," reaffirmed that the function of the federal courts is "limited to determining whether [the defendants] violated the federal criminal statutes charged."

If you have any questions, or would like to discuss the above or any related matter, please contact the Ropes & Gray attorney with whom you regularly work.