

Appeals court overturns convictions in Probation Department scandal - The Boston Globe



By Milton Valencia Globe Staff December 19, 2016

In a direct rebuke to federal prosecutors, a United States appeals court in Boston on Monday threw out the 2014 convictions of three former Probation Department officials who were accused of rigging their department's hiring system for their own political gain — saying that while their actions may be judged distasteful, they were not a federal crime.

“We find that the government overstepped its bounds in using federal criminal statutes to police the hiring practices of these Massachusetts state officials and did not provide sufficient evidence to establish a criminal violation of Massachusetts law under the government's theory of the case,” stated the ruling, written by Appeals Court Judge Juan R. Torruella.

The appeals court agreed that the defendants “misran the Probation Department and made efforts to conceal the patronage hiring system” but cited previous court rulings that have established that “Bad men, like good men, are entitled to be tried and sentenced in accordance with law.”

The 37-page ruling, which absolved former probation commissioner John O'Brien and his top deputies Elizabeth Tavares and William Burke III of any criminal wrongdoing, comes after the US Supreme Court

found in a separate case that federal prosecutors have been overstepping their authority in prosecuting state affairs.

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O'Brien and Tavares stepped down months after their questionable hiring system was exposed [in a 2010 Globe Spotlight report](#), which led to reforms in the probation system. Burke had already retired. They were later convicted on charges including racketeering and mail fraud.

The appeals court decision is an immediate stain on the legacy of US Attorney Carmen M. Ortiz, who made the probation prosecution her signature political indictment in her eight years in office. It also raised questions about the future ability of the US attorney's office to curb public corruption.

Christina Diorio-Sterling, a spokeswoman for the US attorney's office, said Ortiz was disappointed by the decision but noted that the court agreed that "the defendants 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."

She added that the office "will continue to fulfill our responsibility to protect the public from corrupt officials by vigorously investigating and prosecuting public corruption in appropriate cases."

The appeals court in Boston is also weighing a separate high-profile case: Ortiz's prosecution of actions by labor unions. The outcome in that case could play a role in the decision to move forward with other similar cases, including an investigation into City Hall's involvement in union business.

Stellio Sinnis, one of the attorneys for O'Brien, said Monday's appeals court decision on the probation case correctly found insufficient evidence to support the convictions.

"We have maintained from the outset that the case did not warrant federal criminal prosecution and are pleased that the [appeals court] agreed," he said.

Federal prosecutors had alleged the defendants committed mail fraud as part of a rigged hiring system. After a 47-day trial, the three were convicted of racketeering for running an elaborate scheme that made it appear as though they were following a legitimate hiring process, when instead they had preselected politically favored candidates who were endorsed by leading state legislators.

O'Brien was also convicted of bribery-related charges for directing Probation Department jobs to candidates favored by state legislators who endorsed House Speaker Robert DeLeo's election to that leadership position. In return, according to the government theory put forth at trial, O'Brien's Probation Department received generous budget increases, boosting his political clout.

After hearing oral arguments in the case in July, the appeals court ruled Monday that the actions did not

violate state law, including the gratuity laws cited by prosecutors, negating the government's ability to levy federal racketeering and fraud charges.

In a rare signal that the appeals court was dubious of the government's case, the court in January 2015, only months after the trial concluded, deferred O'Brien's 18-month prison sentence and Tavares's three-month sentence, meaning they have served no prison time. Burke was sentenced to probation.

Martin Weinberg, an attorney for Tavares who was central in the appeal for the defendants, said Monday, "A good win today. Liz Tavares's long legal nightmare is over."

He added that the decision followed a [landmark US Supreme Court ruling in June](#) that found federal prosecutors have been overstepping their authority in bringing federal charges against state officials engaged in state business.

That decision overturned the conviction of former Virginia governor Robert McDonnell, who accepted \$175,000 in gifts and loans from a businessman, and set new limits on the type of conduct required to prove official wrongdoing in exchange for a gift or bribe.

"Today's opinion provides protection for state public officials from an overextension of federal criminal law," Weinberg said. "What McDonnell [case] did is basically elevate the criteria for federal criminalization of state political conduct, it elevated the threshold requirements, and this case did the same."

John Amabile, an attorney for Burke, said the decision was just. "I didn't think they proved any criminal conduct, and that finally has been borne out from a legal standpoint," he said.

Ortiz has not indicted any high-ranking elected official in her tenure, though one of the prosecutors in the case — Fred Wyshak, the chief of the public corruption unit — alleged during the trial that 30 people, including state legislators such as DeLeo, were unindicted participants in O'Brien's conspiracy.

DeLeo was never charged and maintained that he did nothing wrong, lambasting prosecutors for tainting his name in the press without affording him the opportunity to defend himself in court.

On Monday, he said he was pleased that the convictions were reversed. "It is unfortunate that for six and a half years other legislators and I have lived under the cloud of suspicion of having been involved in illegal activity," he said.

Martin Healy, chief legal counsel to the Massachusetts Bar Association, said the case could have been handled administratively at the state level.

"The fact remains that many reputations and individuals have been indelibly harmed by an overly aggressive prosecution and criminalization of purely political acts," he said.

Jeanne Kempthorne, a former federal prosecutor who also served on the state Ethics Commission, said

she believed the probation case was “a reach,” but she understood why Ortiz’s office pursued it.

“I think it was in the public’s interest to push this issue, to raise serious questions about patronage hires to this extent,” she said. “Of course you are looking to see where you can bring federal law to bear on clearly unsavory practices. I don’t really blame them for trying. How do we move forward as a society defining our ethical sense if we don’t push?”

Kemphorne said Supreme Court rulings over the past 15 years have made it nearly impossible for federal authorities to target public corruption in the absence of a bribe.

After the Probation Department trial, [US District Judge William G. Young said that O’Brien and his deputies were the product of a broken system that allowed political patronage to flourish](#). He refused to hand out the six-year sentence O’Brien faced under sentencing guidelines, however, saying the case was an indictment of the state system that allowed the patronage to continue.

After O’Brien was convicted, no state legislators publicly came to his defense or wrote letters to the judge, which is common in a criminal case.

But House majority leader Ronald Mariano, a Quincy Democrat and a close friend of DeLeo, said the ruling vindicates DeLeo. “All the connections [federal prosecutors] were trying to draw, and the inferences they were trying to make about the way the budget process workers here weren’t true — they just didn’t make any sense if you knew the system,” he said.

“O’Brien had the obligation to try to get as much money for his program as he could and that’s what he was doing.”

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