

## US prosecutors considering appeal of Probation ruling - The Boston Globe



Federal prosecutors have asked for more time to consider whether to challenge an appellate court decision overturning the high-profile convictions of former Probation Department supervisors.

Prosecutors would typically have 14 working days to file a notice that they plan to appeal the Dec. 19 decision of the US Court of Appeals for the First Circuit, which means they would need to file their intent by Jan. 10.

While the prosecutors' request did not say whether they will appeal the ruling, they asked for an extension until Feb. 16 to file a petition either for a new hearing before the three-judge panel that overturned the case or for a hearing before all of the six active judges on the appeals court in Boston, known as an en banc hearing.

Anthony E. Fuller, a former public corruption prosecutor in the US attorney's office, said in an interview Friday that the request for an extension shows that local prosecutors are weighing their options.

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"It tells me they're really considering it," he said.



Lawyers for the defendants said they believe the request for an extension of time is standard and they are not worried the appeals court decision would be reversed.

In asking for the extension, authorities said the decision to seek an en banc hearing would have to be approved by the US solicitor general, which could be a lengthy process.

"Not surprisingly, the solicitor general makes this important decision only after the issues presented by an adverse decision are considered thoroughly by a number of people at many levels of review," the court motion states. "This thoughtful and comprehensive vetting process is critical for all involved in ensuring that the government's decisions about what cases to pursue on rehearing, and what issues to present in any rehearing petition, are prudent ones. This process has not been completed in this case."

The request also notes that the lead appellate lawyer who handled the case on behalf of the US Department of Justice has left the office, meaning someone new from the appeals division will have to review the case.

According to the appeals court's guidelines, the court disfavors granting en banc hearings, and such hearings are granted only to make sure that the court's opinions are consistent with one another and when the "proceeding involves a question of exceptional importance."

A lawyer for former probation commissioner John O'Brien would not comment on the court filing Friday.

John Amabile, an attorney for one of O'Brien's deputies, William Burke III, said he did not believe an appeal would be successful. Martin Weinberg, an attorney for the third defendant, Elizabeth Tavares, said the review by the solicitor general could be expected because of the high-profile nature of the case and some of the legal issues involved, but he said he does not expect the appeals court would hear the matter.

“I think it’s routine that the Department of Justice would want to review any decision of the profound importance to the construction of federal criminal law as this one, so I’m not surprised,” Weinberg said, adding that “I’m very optimistic that [the case] would withstand” any further review.

A jury convicted O’Brien, Burke, and Tavares of fraud for running a rigged hiring system that favored politically connected candidates, though their lawyers said their actions were simply political patronage typical of Beacon Hill politics.

The case had been one of US Attorney Carmen M. Ortiz’s signature indictments in her seven years as the region’s top federal prosecutor, and she had declared the convictions would put an end to a pay-to-play culture on Beacon Hill.

But the appeals court panel found that federal authorities overstepped their authority by stretching federal laws in an attempt to criminalize political acts that should be governed by state authorities. The decision parallels a recent US Supreme Court decision that overturned the conviction of former Virginia governor Bob McDonnell on corruption charges. In that case, the justices found that federal prosecutors have been overstepping their authority in investigating state affairs.

According to Fuller, the process could be lengthy, requiring several layers of review under the solicitor general. The Department of Justice will ultimately want to consider whether the recent McDonnell decision is applicable to the probation case, he said.

*Milton J. Valencia can be reached at [milton.valencia@globe.com](mailto:milton.valencia@globe.com). Follow him on Twitter [@miltonvalencia](https://twitter.com/miltonvalencia).*