

STATE OF NEW YORK
COUNTY COURT

COUNTY OF MONROE

THE PEOPLE OF THE STATE OF NEW YORK

-vs-

Indictment No. 2009-0770

ANDREW MOORE,
Defendant.

APPEARANCES: MICHAEL C. GREEN, ESQ.
Monroe County District Attorney
WILLIAM GARGAN, ESQ., Of Counsel
Attorney for People

CERULLI, MASSARE & LEMBKE
MATTHEW R. LEMBKE, ESQ., Of Counsel
Attorney for Defendant

DECISION AND ORDER

RICHARD A. KEENAN, J.

Pursuant to CPL 210.20, 210.30 and 210.35 defendant has moved for inspection of the grand jury minutes and dismissal of the indictment herein based on, *inter alia*, lack of legally sufficient evidence and defective grand jury proceedings. Count One of the indictment, charging Rewarding Official Misconduct, was previously withdrawn and dismissed at the request of the People due to a purported lack of evidence. The remaining counts charge Official Misconduct (Counts Two and Three; Penal Law §195.00[1]) and Coercion in the Second Degree (Count Four; Penal Law §135.60[8]). Upon a thorough review of the proof presented to the grand jury the Court concludes that these counts must likewise be dismissed due to insufficient evidence.

The counts themselves are couched in the general language of the relevant Penal Law statutes and do not provide specific factual allegations describing defendant's alleged criminal conduct aside from a date—September 10, 2007—and a reference to a Christopher Gorman as the

ostensible victim in the Coercion count. The two Official Misconduct counts are identical except that the first (Count Two) expressly alleges accomplice liability (Penal Law §20.00), indicating that another perpetrator was involved (or possibly multiple additional perpetrators). From the outset of the case defendant has requested further specificity as to the substance of his alleged criminal conduct; i.e., the People's theory as to just how he supposedly committed the charged crimes, including the identity of any accomplices. The People finally provided some information in this regard some two months after defendant's initial request, responding to defendant's request(s) for a bill of particulars in their response to his omnibus motion. According to the People defendant had, along with a Robert Morone, a supervisor for the Monroe County Department of Environmental Services, improperly compelled/induced the aforementioned Christopher Gorman to endorse a political candidate (David Malta) by causing Gorman to fear that if he did not do so Morone would "adversely affect" his job. It was the People's contention that defendant did so in order to maintain his existing "employment and/or employment title". (The People declined an opportunity to elaborate on their theory at the last court appearance in this matter.)

The proof presented to the grand jury further fleshed out the People's theory. In essence, the People contend that in the fall of 2007 defendant, as head of the Republican staff in the Monroe County Legislature, acting through Robert Morone, improperly pressured Christopher Gorman, a former Democratic candidate for the County Legislature then working under Morone's supervision, to endorse (via letter) a Republican candidate (David Malta) in the Independence party primary in a race for a legislative seat on pain of losing his job if he did not comply. (Gorman had been the Independence party candidate in the most recent race for the seat but was not running in the current race.) Defendant did so, the People theorize, because the

Republicans were in danger of losing their majority in the Legislature that election year and had that happened defendant's position as Chief of Staff would have been adversely affected. However, while this theory itself, although multifaceted and somewhat elaborate, might be plausible in the abstract the evidence submitted to support it fell well short of proving its actual existence in concrete terms.

Initially, with respect to the notion that the "benefit" defendant intended to obtain (for purposes of the Official Misconduct charges) was to "maintain his current employment and/or employment title" as specified in the People's bill of particulars, there was simply no proof that defendant's position as Republican Chief of Staff for the Legislature—the Republicans being the majority party at the time—was in jeopardy depending on the outcome of the election race in which Christopher Gorman's assistance was enlisted. The proof in fact showed that both Republicans and Democrats each had a Chief of Staff regardless of which party was the majority at the time. To the extent that the People's theory in this regard could be construed as also including the notion that defendant's actual compensation (i.e., salary) would have been affected by a change in party status from majority to minority—although as noted the People specifically referred only to defendant's "employment and/or employment title"—the proof was merely that while overall party legislative staff budgets were impacted by the party's status as majority or minority (with of course the majority party receiving more funding) each party still had complete discretion as to how to allocate those funds for specific items within their overall budget, providing for at least the possibility that a party, even if seeing its funding reduced by losing majority status, could still choose to compensate its Chief of Staff at a similar level by reducing funding for other budgetary items (such as salary for support staff, office supplies, etc.). While perhaps improbable there was nothing to show that this was impossible or nearly so; notably,

there was almost no proof whatsoever presented as to actual monetary figures for, e.g., Legislature party budgets or Chief of Staff salaries, including any historical data to show fluctuations from year-to-year and/or between the parties, depending upon their status as majority or minority party. The only figure mentioned at all was a reference to a party's budget increasing by perhaps \$15,000-\$17,000 "per legislator" upon that party attaining majority status, but without any of the other aforementioned figures for comparison purposes this reference did not have sufficient context to be truly meaningful. (In fact, it is not even clear whether the reference to "per legislator" was to every member of the party, i.e., the total number of that party in the legislature, or instead only to the number of legislators that gave the party the majority, i.e., the number difference between the parties.)

In any event, there was also insufficient proof that the particular County Legislature race which defendant allegedly sought to influence—a seat from Webster held by the incumbent Republican David Malta—would have impacted the Republican staff budget depending on its outcome. According to Mr. Malta himself the makeup of the Legislature at the time (fall 2007) was 16 Republicans and 14 Democrats, while defendant testified at one point that it was 17 Republicans and 13 Democrats and at another point he said it was 17 Republicans and 14 Democrats. Of course, none of these figures could be accurate as the Legislature has only 29 members, not 30 or 31. Regardless of these discrepancies there was no proof that a loss by Mr. Malta in the race in question would have by itself reduced the Republican party to minority status in the Legislature. The possibility that the Republicans may have ultimately lost majority status in that election based on its *overall* results, i.e., the outcome of other individual races regarding which there are no allegations of misconduct by defendant is, the Court believes, too remote and speculative a basis on which to ground criminal liability for the specific charges laid here.

Furthermore, the Official Misconduct charges also require as an element of that crime that defendant “*commit an act relating to his office but constituting an unauthorized exercise of his official functions*” (Penal Law §195.00 [emphasis added]; see, *People v Perlman*, 121 AD2d 765 [3rd Dept 1986] [defendant spoke to subordinate in his capacity as mayor and his threats to fire her if she testified against his wife were unauthorized exercise of his official functions]). Here there was a critical lack of proof that defendant, in contacting Robert Morone to inquire about Christopher Gorman’s willingness to endorse David Malta, was acting “in relation to his office”, i.e., as Chief of Staff of the Republican caucus in the County Legislature. Instead, the only proof was that defendant was acting in his capacity as a volunteer for the Monroe County Republican Committee who was actively involved in Mr. Malta’s campaign. Defendant was a long-time volunteer for the party who because of his experience had at least some measure of authority in overseeing campaigns, including Mr. Malta’s. In fact, according to Christopher Gorman himself, when Robert Morone approached him about signing the endorsement letter and Gorman inquired as to its source Morone told him it was from defendant “at party headquarters”.

In any event, given the nature of the position of Chief of Staff in the Monroe County Legislature an attempt to distinguish between acts “related and unrelated” to that office and between “authorized and unauthorized official functions” would seem to be problematic when the acts/functions are imbued with political overtones, at least in the context of the limited proof presented here. The Legislature is by its very nature a political body and notably, instead of having a single, “neutral” Chief of Staff overseeing a similarly single and neutral body of support staff (legislative assistants) who are, e.g., randomly assigned to the legislators (or at least assigned without regard to any political factors), each party is permitted to have its own Chief of Staff and assistants, who one must assume are partisan to the party for whom they serve,

particularly in the case of the Chief of Staff. Indeed, presumably assistance and loyalty to the party are prerequisites for appointment to such a position. As such, it would seem that the notion that one can always clearly categorize a particular act as relating or not to the office of Chief of Staff or constituting an authorized or unauthorized exercise of that office's official functions is a fallacy, at least under the circumstances here where the only proof pertaining to the functions of the office was that it involved overseeing the legislative assistants. Beyond this there was no evidence of, e.g., any job duties or ethical restrictions regarding the position, either official or unofficial, formal or informal, or contemporary or traditional (*cf.*, e.g., *People v Haywood*, 201 AD2d 871 [4th Dept 1994] [town's code of ethics sufficiently incorporated into defendant's job description by proof]). By way of example, there was evidence that David Malta routinely discussed election campaign issues with defendant in the "legislative office" (i.e., the County Legislature) as opposed to party headquarters, and defendant has not been criminally charged in relation to such, nor so far as the Court can tell is there even a suggestion that such was in any way inappropriate. Thus it also may well be that even assuming defendant was acting in relation to his office and that his actions were not authorized the proof would still fail to show that he *knew* his actions were unauthorized (*see*, *People v DiMattina*, 261 AD2d 412 [2nd Dept 1999]).

The Court notes that defendant was charged with two counts of Official Conduct based on the same underlying incident involving the endorsement letter. The People's theory with respect to one of the counts (Count Three) is that defendant was the principal and Morone the accomplice and that the acts related to *defendant's* office, while in the other count (Count Two) they theorize that defendant was an accomplice to Morone and that the acts related to *Morone's* office. Putting aside the issue as to whether such a "splitting" of principal and accomplice liability is proper so as to support multiple counts of the same crime when the underlying

conduct is exactly the same, there was a similar lack of proof that Morone (who of course like defendant was active in Republican party politics) was acting in relation to his office when he approached Gorman about the letter (see also the further discussion regarding the Coercion charge, *infra*). In any event, the People, instead of claiming that *Morone* intended to obtain a benefit, contend that defendant—even though he was an accomplice to Morone—did so for *his own* benefit (pertaining to his Chief of Staff position), the same allegation as in the other count of Official Misconduct. Thus the People appear to have melded the concepts of accomplice and principal liability within the same count, which would seem improper, particularly since there was no proof at all of any benefit that *Morone* intended to obtain. (In other words, if defendant was an accomplice to Morone the latter had to have committed the crime as a principal, yet the People did not even allege, let alone prove, that Morone acted with the intent required for the crime, i.e., to obtain or deprive another of a benefit [either for himself or defendant].) Even assuming such was proper, however, as previously explained there was insufficient proof of defendant's intent to obtain his own benefit.

Finally, with respect to the Coercion charge it is the People's theory that defendant was an accomplice to Robert Morone, the principal actor who supposedly forced Christopher Gorman to sign the endorsement letter (authored by defendant) by threatening Gorman's job. There was however no credible, objective proof of the latter, let alone any such proof that defendant knowingly aided and abetted such an endeavor. Robert Morone did not appear before the grand jury and Gorman himself provided very few details in terms of how Morone actually presented the proposed letter to him. Instead, he merely described how Morone, one of his supervisors, "approached" him with the letter, and when he asked Morone where it came from Morone said it was from defendant at party headquarters. In terms of the actual interaction between the two

this was the extent of the proof supposedly showing that Morone had threatened Gorman's job if he refused to sign the letter. There was no indication of anything else Morone may have said or how he said it. Instead the People's theory is apparently that the threat was implicit based on the surrounding circumstances in that Gorman knew "how the game was played" and that he would be fired if he did not play along. However, Gorman's own testimony does not support this. Gorman was well-steeped in politics, a seasoned Democratic candidate in at least two highly contentious races for a seat on the County Legislature in the previous two elections. He was also a union tradesman (a painter). Gorman acknowledged that he knew that the Robutrad company—which employed trades workers in the construction and maintenance industries—did work exclusively for Monroe County and he also admitted that a job with Robutrad was considered very desirable and that he had been trying to land one for some six months before he was finally hired in January 2007. Supposedly it was only after this that he discovered that there was a political component to the job in that Robutrad workers were expected to aid the Republican party (by, e.g., donating money, marching in parades, etc.). (Although the notion that defendant, a known Democrat, despite being hired by what was essentially a "Republican business" working exclusively for a Republican county administration, had no knowledge of any political overtones in relation to the job borders on the preposterous. Interestingly, although Gorman denied it, around or just before the time Gorman was hired by Robutrad David Malta had heard that Gorman had talked to Republican party leadership about switching parties and was looking to get employment through the County, and so Mr. Malta, who was not enamored of Gorman due to their fractious campaign races, voiced his opposition to such within the party.) In any event, once Gorman "learned" of the political obligations there is no indication that he ever objected or complained to anyone about such, either within or outside the business. Instead

he participated in the various political activities, including public events such as marching in parades and decorating venues for fundraising parties. In fact, according to defendant he had learned Gorman was doing work for the County and had seen him helping with decorations at a Republican fundraiser and so he thought Gorman might no longer be actively involved with the Democratic party. Significantly, Gorman also acknowledged that since he had joined Robutrad some workers had done far less than others in terms of their expected political activities, yet not a single person had been laid off. Despite this, Gorman would have one believe that he had to sign the endorsement letter or he would lose his job and that by doing so his career as a Democrat "was over". It also must not be overlooked that Gorman himself was ultimately criminally charged as a result of the Robutrad scandal involving workers getting paid and/or receiving time off for doing non-County work and/or engaging in political activities—he was initially charged with Grand Larceny in the Third Degree but was allowed to plead to Petit Larceny upon entering into a cooperation agreement with the People. Given all of the circumstances Gorman's claim that when he was approached about the letter he was distraught and outraged and that by signing it he saved his job but at the same time committed political suicide rings quite hollow. Regardless of this, however, in the end there was simply insufficient proof that Morone had forced Gorman to sign the letter by threatening his job.

For his part defendant adamantly denied any knowledge of Morone's dealings with Gorman and insisted that he did not know of any improprieties involving Morone and Robutrad. There was no credible proof to the contrary, only speculation and innuendo. Thus, regardless of defendant's role in contacting Morone about the letter, at a minimum there was insufficient proof that defendant "acted with the mental culpability required for the commission [of the crime]" (Penal Law § 20.00) so as to sustain accomplice liability for the charge of Coercion in

the Second Degree.

In closing, the Court is not unmindful of the highly-charged nature of cases such as this involving alleged political corruption but it cannot be influenced by any real or perceived groundswell of public disenchantment with politicians and the political process. No doubt some, presented with the scenario at issue here, would feel there was impropriety based on a belief that they indeed know "how the game is played", where pressure is often brought to bear not directly and overtly but instead obliquely and tacitly—undoubtedly there is a basis for viewing what occurred here as highly suspicious, to say the least. However true this may be as a practical matter, though, such surmise and conjecture cannot supplant actual evidence when it comes to sustaining formal criminal charges in a court of law. Moreover, the identity of the political parties at issue here is of course irrelevant and the Court's decision would necessarily be the same had the roles of the parties been reversed. This Court is a court of law, not of public opinion, and it cannot be swayed by the latter but must instead apply the former fairly and impartially. In doing so the integrity of the judicial process, if not the political process, is preserved.

This constitutes the Order of the Court.

Dated this 9th day of March, 2010 at Rochester, New York



HON. RICHARD A. KEENAN
MONROE COUNTY COURT JUDGE