

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

BOSTON MUNICIPAL COURT
Dorchester Division
Docket No.: 2013 CV 0004

THOMAS M. FINNERAN,

Plaintiff,

v.

STATE BOARD OF RETIREMENT,

Defendant.

DORCHESTER DIVISION

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DECISION AND ORDER ON THE PARTIES' CROSS MOTIONS FOR JUDGMENT ON THE PLEADINGS

FACTUAL AND PROCEDURAL BACKGROUND

The following factual/procedural backgrounds are taken from the underlying administrative record (citations omitted) and are not materially disputed by the parties.

Finneran was elected to the Massachusetts House of Representatives ("House") in 1978, and became a member of the House in 1979, serving the 12th Suffolk District. He was re-elected every two years, and he served as a member of the House until his resignation in October 2004. The House elected Finneran Speaker of the House five times, and he served in that capacity until he resigned, and at all times pertinent to the events underlying this appeal. As a member of the House, Finneran took an oath of office in which he pledged to support the Constitution of the Commonwealth of Massachusetts and the United States Constitution and to perform his duties as representative "agreeably to the rules and regulations of the Constitution and Laws of the Commonwealth."

The Redistricting Act of 2001 (St. 2001, c. 125) was enacted during Finneran's tenure as Speaker. As of result on the 2000 decennial census, the Legislature established a joint special committee (the "Committee") to review existing legislative districts and formulate revisions and alterations to reflect the increase in the Commonwealth's population. The House members of the Committee were responsible for reviewing and redrawing the House districts and the Senate members were responsible for the Senate districts. Finneran, as Speaker, appointed both the House members of the Committee and the House Chair of the Committee. The process of redrawing district lines is required, following population changes reflected in a decennial census, by the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, to comply with the one-person, one-vote requirement. The Legislature enacted a final redistricting plan, and, on November 8, 2001, the Governor signed the Redistricting Act into law. Among other changes, the plan increased the proportion of eligible white voters in Finneran's 12th Suffolk District.

In June 2002, African-American and Latino voters filed a lawsuit in the Federal District Court challenging the Redistricting Act as it applied to House districts in the Boston area. The lawsuit claimed that the Redistricting Act, which redrew the boundaries of state House seats in 2001, "super-packed" black and other minority voters into a few districts already represented by minority incumbents while increasing the percentage of white voters in the districts represented by white incumbents. The Plaintiffs claimed that Finneran's district was redrawn to remove certain minority precincts and add other primarily white precincts. The suit alleged that the districts were redrawn with the constitutionally impermissible purpose of limiting the voting power of African-American and Latino voters and had the effect of discriminating against such voters, contrary to the Voting Rights Act, 42 U.S.C. § 1973(b). The lawsuit named the

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Defendants in their official capacities, among others, Finneran as Speaker of the House, William F. Galvin as Secretary of the Commonwealth, and Jane Swift as Governor. In May 2003, an amended complaint only named Secretary Galvin as defendant, but Finneran was deposed in the course of the lawsuit and testified at trial in November 2003.

At trial, Finneran testified to the actions he took, and the knowledge that he had, on the drafting and passage of the Redistricting Act, both in his role as Speaker of the House and as a member and representative from the 12th Suffolk District. Specifically, Finneran testified that, as Speaker, he had appointed the Committee Chair and recommended the Committee hire Attorney Lawrence DiCara during the process as counsel and that he had conversations with both the Chair and Attorney DiCara during the process. Finneran falsely testified at the trial that he did not review the Committee's redistricting plan during the drafting process and that he first saw the redistricting after the plan was filed with the House Clerk. At the time of entering his guilty plea, Finneran attributed his false testimony to finding the allegations of intentional discrimination "very, very troubling," "offen[sive]," and "anger[ing]."

In June 2005, a federal grand jury indicted Finneran for three counts of perjury and one count of obstruction of justice (Count Four), based on his false testimony at deposition and trial in the Voting Rights lawsuit. Count Four of the Indictment charged that Finneran made false or misleading statements about (a) whether he had received a redistricting plan prior to the filing of the Committee plan with the Clerk of the House of Representatives; (b) when he first had information about the Committee's proposed changes to his district; (c) whether he spoke to Representative Thomas Petrolati, House Chairman of the Joint Special Committee on the Redistricting and Reapportionment, about the plan prior to its release to the full House; (d) whether he had knowledge of the scope of work performed by Lawrence DiCara, counsel to the

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Committee, in the development of the plan; (e) whether he had information within his custody and control regarding the racial characteristics of the precincts his district lost and gained in the redistricting beyond that included in his deposition; (f) the extent of his knowledge, at the time of his deposition, regarding neighborhoods that had been removed from or added to the 12th Suffolk District during redistricting and the racial characteristics of those neighborhoods; and (g) whether he had within his possession a calendar that would evidence campaign activities or events. On January 5, 2007, Finneran pleaded guilty to Count Four, in violation of 18 U.S.C. § 1503, and was sentenced to probation for 18 months and ordered to pay a \$25,000 fine. The remaining counts were dismissed. The charge to which Finneran pleaded guilty "was that [Finneran] willfully had made misleading and false statements under oath while testifying in his capacity as Speaker in [the] Federal voting rights lawsuit." The remaining counts of the Indictment were dismissed.

In January 2007, the State Retirement Board (the "Board") ceased paying Finneran's retirement allowance due to his conviction. The Board scheduled a hearing before a hearing officer, and a hearing was ultimately held on April 24, 2012. Based on the exhibits submitted, the hearing officer concluded that Finneran's conviction involved a violation of laws applicable to his office or position. Among other things, the hearing officer concluded that Finneran "... was acting in his official capacity when he took the actions that gave rise to [his] conviction. He was sued in his official capacity . . . The subject matter of his testimony was also directly tied to his official duties: The questions and answers that gave rise to Count Four of the Indictment concerned actions he took or may have taken, as a Member and Speaker of the House of Representatives, with respect to the development of a legislative proposal to reapportion voting districts that has the potential to - and did - become the law in Massachusetts". The hearing

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officer found that, consistent with his oath to uphold the Constitutions, Finneran was required to give truthful testimony to a Court assessing the constitutionality of a legislative act such that his conviction warranted forfeiture of his retirement allowance. On October 25, 2012, the Board voted to accept the Hearing Officer's decision and recommendation that Finneran be found ineligible for a retirement allowance. This appeal ensued in accordance with G.L. c. 32, § 16(3).

STANDARD OF REVIEW

My review of the Board's decision is limited to the record before the Board and whether the Board has committed an error of law or whether substantial evidence support its conclusions. "Substantial evidence" is "such evidence as a reasonable mind might accept as adequate to support a conclusion. Doherty v. Retirement Bd. of Medford, 425 Mass. 130, 135 (1997)(citations omitted). Under the substantial evidence test, a reviewing court may not make *de novo* determinations of facts, to make different credibility choices, or to draw inferences from the facts found by the agency. Doherty, 425 Mass. 135, 141. Since this Court's review is limited to the record before the Board, judgment on the pleadings is appropriate. Mass. R. Civ. P. 12(c).

The contested issue in the instant case relates to the parties' opposing contentions as to the scope and applicability of G. L. c. 32, § 15 (4) to Finneran's ostensible accrued retirement allowance. G.L. c. 32, § 15(4) ("§ 15(4)") provides in relevant part:

In no event shall any member after final conviction of a criminal offense involving violations of the laws applicable to his office or position, be entitled to receive a retirement allowance . . . nor shall any beneficiary be entitled to receive any benefits . . . on account of such member. The said member or his beneficiary shall receive, unless otherwise prohibited by law, a return of his accumulated deductions . . .

Emphasis added.

In terms of statutory interpretation, the SJC has made clear, where a reviewing court is

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called upon to interpret the terms of a statute, the court must look "to the intent of the Legislature ascertained from all [the statute's] words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished." Hanlon v. Rollins, 286 Mass. 444, 447 (1934), and cases cited. See also Sullivan v. Brookline, 435 Mass. 353, 360 (2001). Moreover, because § 15(4) is penal in nature, the interpretation thereof must be narrow, so as not to exceed the scope or reach of the penalty as contemplated by the Legislature. Garney v. Massachusetts Teachers' Retirement System, 469 Mass. 384, 389 (2014); State Bd. of Retirement v. Bulger, 446 Mass. 169, 174-175 (2006); Collatos v. Boston Retirement Bd., 396 Mass. 684, 686-687 (1986) (G. L. c. 32, § 15, "imposes a penalty on employees" and "enforce[s] the criminal law by suspending the sword of retirement benefits forfeiture over those employees who otherwise might be tempted to transgress").

Massachusetts appellate authority has further focused a reviewing court's § 15(4) analysis by holding that "[t]he substantive touchstone [of G. L. c. 32, § 15 (4)], intended by the General Court is criminal activity connected with the office or position. . . . [T]he General Court did not intend pension forfeiture to follow as [an automatic consequence] of any and all criminal convictions. Only those violations related to the member's official capacity were targeted. Looking to the facts of each case for a *direct link* between the criminal offense and the member's office or position best effectuates the legislative intent of § 15 (4)" (emphasis added). Gaffney v. Contributory Retirement Appeal Bd. 423 Mass. 1, 4-5 (1996). This "direct link" requirement "does not mean that the crime itself must reference public employment or the employee's particular position or responsibilities," Maher v. Justices of the Quincy Div. of the Dist. Court Dep't., 67 Mass. App. Ct. 612, 616 (2006), or that the crime necessarily must have been

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committed at or during work. Durkin v. Boston Retirement Bd., 83 Mass. App. Ct. 116, 119 (2013). Where the crime itself does not reference public employment or bear a direct factual link through use of the position's resources, however, there must be some direct connection between the criminal offense and the employee's official capacity by way of the laws directly applicable to the public position. Garney, 469 Mass. at 389.

DISCUSSION

Introduction

Turning to the issue whether the Board's decision that Finneran must forfeit his pension is legally tenable, I conclude that it is not. Although the record indicates that Finneran's conviction referenced his public employment, inasmuch as the position Finneran held at the time of his perjured testimony and at all times relevant thereto, there is no substantial evidence to support the Board's conclusion that Finneran's conviction bore a direct factual link to his position as a House Member and/or Speaker. Additionally, there is also no substantial evidence to support the Board's conclusion that Finneran's conviction violated a core function of his position as a House Member and/or Speaker because there is no evidence in the record of any code, rule or law applicable to Finneran's public position that connects his conviction with his office.

Accordingly, the Board's decision must be reversed.

Discussion

A. No Direct Link

First, there is no substantial evidence in the record to conclude that there is a direct link between Finneran's conviction and his position as a Member and/or Speaker of the House. The Board concluded otherwise, stating in relevant part:

In this case, the facts show that the link between Mr. Finneran's position and the offense for which he was convicted is both direct and clear. It is irrefutable that Mr. Finneran

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was acting in his official capacity when he took the actions that gave rise to this conviction. He was sued in his official capacity . . . and he was called to testify in his official capacity. The subject matter of his testimony was also directly tied to his official duties: The question and answers which gave rise to Count Four of the Indictment concerned actions he took or may have taken, as a Member and Speaker of the House of Representatives, with respect to the development of a legislative proposal to reappoint voting districts that has the potential to – and did – become the law in Massachusetts. It is inescapable that the core function of a legislator is to introduce, consider, and vote on legislation. It is equally clear that the role of Speaker adds additional responsibilities to ensure that the legislative process is conducted in a manner that ensures important legislation is fairly evaluated and considered.

Moreover, the Complaint . . . raised the issue of the constitutionality of state legislation, and the impact that the legislation would have on one of the most fundamental rights in our democracy: the right to vote. Mr. Finneran has taken an oath to uphold both the Constitution of the United States and the Constitution of the Commonwealth of Massachusetts. As applied to his office, that required Mr. Finneran to use his best ability to ensure the constitutionality of all legislation that might be passed by the House. That responsibility did not end at the State House door; it continued to apply to the 2001 Redistricting Act when affected voters brought their claims to the U.S. District Court. At that point, adherence to the Oath of Office required Mr. Finneran to assist the Court, to the best of his ability, to fairly and objectively assess the constitutionality of the 2001 Redistricting Act and the process that led to its enactment. Mr. Finneran's duties as a legislator and the mandate of his oath thus gave him a heightened obligation to be forthcoming with the Court, in order to enable it to make a fair decision on the questions before it.

Instead, Mr. Finneran's testimony led to a conviction for "corruptly endeavoring to obstruct the due administration of justice by making knowing and willful false or misleading statements or declarations under oath on November 14, 2003, while testifying at trial in the United States District Court". A critical issue before the U.S. District Court was the actions the Legislature had taken in developing the redistricting plan; obstructing the administration of justice was not just a criminal act, it was a violation of Mr. Finneran's obligations and his oath as an elected member of the General Court of the Commonwealth.

I therefore find that the crime for which Mr. Finneran has been convicted is a crime involving laws applicable to his office or position.

See Administrative Record at pp. 305-306 (internal citations omitted).

I disagree. Although the Board concluded that Finneran's oath to uphold both the United States and Massachusetts Constitutions required him to use his best ability to ensure the constitutionality of all legislation that might be passed by the House, the record does not indicate

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that any such duty existed. Moreover, Finneran was not charged with, nor pleaded guilty to, any wrongdoing in connection with the legislative process leading up to the House redistricting and reapportionment plan or whether the plan was unconstitutional.¹ The Board's "direct factual link" analysis seems to adopt a "but for" standard for the forfeiture of Finneran's pension benefits. The assumption is that "but for" Finneran's status as a Member and/or Speaker of the House when he testified on November 14, 2003, about events that happened in 2001, he would not have been in a position to perjure himself at trial. The obvious problem with such an assumption is the generality of its application to *any* crime that Finneran may have participated in that is unconnected to his work as a legislator, but that can always be connected to his status as a legislator. The Board's seeming "but for" standard cannot be reconciled to the plain language of the statute which mandates that the conviction of a criminal offense involve violation of the laws applicable to the office or position, and not merely be incidental thereto. Gaffney, 423 Mass. at 4 (§ 15(4) "is considered penal and, therefore, its language must be construed narrowly, not stretched to accomplish an unexpressed result."). Stated differently, if Finneran's employment status alone is all that is needed to establish the statutorily mandated nexus between the crime and the office, there will never be a situation where a legislator can be convicted of a crime, unrelated to his legislative duties and functions, without forfeiting his or her pension. Perforce, the nexus requirement of § 15(4) is rendered meaningless².

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¹ It bears noting that the Federal court invalidated the plan for violating section 2 of the Voting Rights Act. The court did not reach the federal constitutional issues.

² Several recent cases have underscored the fatality to retirement forfeiture claims absent the statutorily required factual link. See, e.g., Retirement Bd. of Maynard v. Tyler, 83 Mass. App. Ct. 109, 113 (2013) (no forfeiture where fire fighter sexually abused boys because offenses were "personal in nature, occurring outside the firehouse while [fire fighter] was not on duty," and "no evidence that [fire fighter] used his position, uniform, or equipment for the purposes of his indecent acts"); Scully v. Retirement Bd. of Beverly, 80 Mass. App. Ct. 538, 543, 545 (2011) (no forfeiture where public library employee convicted of possession of child pornography because offenses occurred at home on personal

The underlying facts are clear. The Redistricting Act was enacted in 2001 when Finneran was still Speaker. The lawsuit was filed in 2002 when Finneran was still Speaker and he was sued in his official capacity as Speaker. In 2003, while Finneran was still Speaker he was deposed in the course of the lawsuit and testified at trial in November 2003. There is no dispute that he falsely testified at the trial that he did not review the redistricting plan during the drafting process, and that he first saw the redistricting plan after it was filed with the House Clerk, and that he subsequently was indicted in 2005 and pleaded guilty to Court Four, inter alia, for "making false or misleading statements" about seven different actions he had taken as a House Member and Speaker. Nevertheless, the record does not support the conclusion that Finneran either used his office to commit the crime, or that he was performing any official duties as Member or Speaker of the House when he testified at trial.

As the Appeals Court noted, § 15(4) "is not triggered where some work-related conduct sparks an investigation, but where there is 'a direct link between the public position and the offense for which the member is convicted'." Scully, 80 Mass. at 543. In accordance with the narrow statutory construction, only a conviction arising out of the legislative process itself (and Finneran's role as a legislator) would establish the requisite "direct link" to trigger pension forfeiture. While I do not ignore the seriousness of Finneran's conviction, nor the consequential

computer, and employee did not use position to facilitate crime); Herrick v. Essex Regional Retirement Bd., 77 Mass. App. Ct. 645, 646-647, 654 (2010) (no forfeiture where housing authority custodian convicted of indecent assault and battery of daughter because offense not committed on public property or against anyone who resided there, and otherwise had no connection to custodian's official position). Contrast Gaffney, 423 Mass. at 4, 5 (forfeiture where superintendent of town water and sewer department convicted of larceny because superintendent tasked with managing budget and stole from own department); Durkin, 83 Mass. App. Ct. 116 (2013) (forfeiture where police officer convicted of assault and battery by means of dangerous weapon for shooting another officer with department-issued firearm while intoxicated off duty); Maher, 67 Mass. App. Ct. at 616-617 (forfeiture where city inspector convicted of breaking into city hall and stealing documents from own personnel file because "multiple, direct links" between offenses and position).

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impact that certainly had on the public trust, given the narrow interpretation of § 15(4) by our appellate courts, I am constrained to conclude that the facts underlying his conviction do not present the "type of direct link intended by the Legislature." *Id.*

B. Core Function As A Legislator

Aside from the "direct factual link" argument, the Board alternately contends that Finneran's pension must be forfeited because his conviction violated a "core function" of his position that violated a clear rule of his position. Absent a direct factual link (as I conclude is the case here), § 15(4) may only be applied to a criminal conviction based upon off-duty conduct if the facts underlying the conviction are determined to violate a central function of the public employee's position as articulated in applicable laws, thereby creating a direct link to the position. *Garney*, 469 Mass. at 391. Even under this alternative theory, I find that no substantial evidence supports the Board's conclusion and its decision cannot stand.

The Board defined a legislator's core function as:

... the core function of a legislator is to introduce, consider, and vote on legislation. It is equally clear that the role of Speaker adds additional responsibilities to ensure that the legislative process is conducted in a manner that ensures important legislation is fairly evaluated and considered.

The record includes no citation to any authority to support the Board's definition of a House Member's core function, or any additional responsibilities of the House Speaker. Even if I accept the Board's definition of a legislator's core function, however, the record does not indicate any specific rule, code, regulation or statute that directly applied to Finneran as a House Member and/or Speaker to support the "nexus" requirement to justify forfeiture. Again, the only applicable oaths supported by the record is the general oaths Finneran swore to uphold the United States and Massachusetts Constitutions, and to perform his duties as a legislator "agreeably to the rules and regulations" of the Commonwealth. Aside from these general oaths,

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the record is silent as to any specific statute, rule, regulation, decision, ethics code or clear public policy that Finneran breached with his conviction. Cf. Bulger, 446 Mass. at 179 (“When Bulger committed the crimes of perjury and obstruction of justice, he violated the fundamental tenets of the code and of his oath of office . . .”). Finneran was not convicted of violating any state laws, rules, regulations or constitutional provisions for his false statements, nor can these general oaths be reasonably construed as a clear rules or laws applicable to Finneran’s core responsibilities as a legislator or Speaker.

The Board’s reliance on Bulger is misplaced. Bulger, like Finneran, swore a general oath to uphold the United States and Massachusetts Constitutions. Unlike Finneran, however, Bulger, as a Clerk-Magistrate, was subject to the Code of Professional Responsibility for Clerks of the Courts (the “Code”), S.J.C. Rule 3:12, as amended, 427 Mass. 1322. Although the Board in Bulger similarly argued that Bulger violated his oaths to uphold the two constitutions, the thrust of the Board’s argument, and an important focus of the SJC’s decision in upholding forfeiture, was Bulger’s violation of the Code – specific rules and regulations applicable to the position of Clerk-Magistrates – as it related to a Clerk-Magistrate’s core function. As Justice Cordy explained:

Our decision in Bulger . . . did not call for forfeiture whenever a special public trust is violated. Rather, the court concluded that forfeiture was warranted where a clerk-magistrate’s specific criminal conduct, perjury and obstruction of justice, was directly contrary to the most fundamental tenets of his position, to ensure truth-telling in judicial matters and proceedings and to uphold the integrity of the judicial system. Id. These tenets and responsibilities were embodied in the Code of Professional Responsibility for Clerks of the Courts, S.J.C. Rule 3:12, as amended, 427 Mass. 1322 (1998) (code), a law applicable to his position.

Garney supra at 392 (emphasis added)(citations omitted).

Similarly in Retirement Bd. of Somerville v. Buonomo, 467 Mass. 662 , 663 (2014), the SJC concluded that a register of probate violated the laws applicable to his office by committing

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larceny, embezzlement, and associated crimes, because the code requires clerks and registers "to contribute to the preservation of public confidence in the integrity, impartiality, and independence of the courts" and to "comply with the laws of the Commonwealth." Buonomo, 467 Mass. at 670-671. Accordingly, the SJC determined that his conduct "compromised the integrity of and public trust in the office of register of probate" and therefore explicitly violated the core function of his position as embodied in the provisions of the code. Buonomo, *supra* at 671.

Here, the record does not indicate any substantial evidence to conclude that Finneran's specific criminal conduct, obstruction of justice, was directly contrary to the most fundamental tenets of his position as a House Member and/or Speaker, nor does the record indicate any such cognate code, rule or court decision, etc., applicable to House Members and/or Speakers that would provide the requisite nexus between the offending acts and the public position as there was in Bulger and Buonomo. Even if it could be argued that as a House Member and/or Speaker, Finneran violated the public trust implicit, if not explicit, to his position as an elected member of the Massachusetts House of Representatives, the narrow basis for the SJC's holdings in Bulger and Buonomo make clear that G. L. c. 32, § 15 (4), requires something more specific than a general violation of the public trust in the particular public position. Criminal conduct that is merely inconsistent with a concept of special public trust placed in the position or defiant of a general professional norm applicable to the position, but not violative of a fundamental precept of the position embodied in a law applicable to it, may be adequate to warrant dismissal, but it is insufficient to justify forfeiture under G. L. c. 32, § 15 (4). Bulger, 446 Mass. at 179-180; Gaffney, 423 Mass. at 4-5. (emphasis added). The general oaths that Finneran took are not sufficiently specific to his office or position for the Court to conclude that the Board has

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sustained its burden of substantial evidence concerning this prong of the § 15(4) analysis. The plain language of § 15 (4), requires a direct link between the criminal offense and a violation of the laws applicable to the office and I do not find that exists in this case.

CONCLUSION

The Board's underlying decision is not based on substantial evidence. Therefore, the Board's decision is **HEREBY** set aside and **REVERSED** and its motion for judgment on the pleadings is **DENIED**. The plaintiff's motion for judgment on the pleadings is **ALLOWED** and Finneran's retirement allowance is hereby ordered **REINSTATED** retroactive to the date of the Board's termination.

So ordered.



Serge Georges, Jr.
Associate Justice
BMC - Dorchester Division

Dated: October 9, 2015

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