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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. NOTIFY SUPERIOR COURT
CIVIL ACTION
No. 2084CV2105

NOTICE SENT
5/19/2021
S.E.C.
T.M.M.
E.S.
CEK B.
M.F.
T.R.K.

STEPHEN COMTOIS
vs.
STATE ETHICS COMMMISSION OF MASSACHUSETTS

MEMORANDUM OF DECISION AND ORDER ON CROSS MOTIONS FOR JUDGMENT ON THE PLEADINGS

(sc)

After an adjudicatory hearing, the State Ethics Commission (Commission) found that Stephen Comtois (Comtois) violated G. L. c. 268A, §§ 19 and 23(b)(2)(ii) in connection with his purchase of certain real property while serving as Chair of the Town of Brookfield (Brookfield or the Town) Board of Selectman (BOS). Comtois seeks judicial review pursuant to G. L. 268B, § 4(k) and G. L. c. 30A, § 14 of that decision. Before the Court are cross-motions for judgment on the pleadings. See Superior Court Standing Order 1-96(1). After hearing and review, and for the reasons stated below Comtois' Motion is **DENIED** and the Commission's Motion is **ALLOWED**.

BACKGROUND

Factual Background

Beverly Granger (Granger) owned a parcel of undeveloped land in Brookfield (Property). The Town determined the Property was buildable and taxed her on that basis over many years. Granger sought tax abatements from the Town, which were denied. In July 2016, Granger met with the Town's Assistant Assessor, Alan Jones (Jones), to explain that she did not want to pay taxes on the Property any longer. Granger also explained that she had tried to sell the Property, but the sale fell through

because of title issues. Jones explained to Granger that she could possibly donate the Property to the town. After the meeting, Jones researched the title issues.

Shortly after that first meeting, Granger met again with Jones, this time accompanied by her friend, Marita Tasse (Tasse), who was a real estate broker. Jones, Granger, Tasse, and one other individual discussed several possibilities regarding the Property, including the possibility that Granger could donate the Property to the Town. In a follow-up email to Tasse, Jones wrote that he had spoken with Clarence Snyder (Snyder), a member of the BOS, who said that the Town would accept the Property as a gift. Thereafter, in a letter dated August 7, 2016, Granger wrote to the BOS and stated that she "would like to donate my property . . . to the town of Brookfield for any use that the town would like."

Jones did additional research on the title issues and, after some communications with members of the BOS, obtained an opinion from a lawyer that Granger held cleartitle via adverse possession to the property. He also communicated with the three members of the BOS who stated that they believed a donation would have to go to Town Meeting. On December 5, 2016, Jones emailed the members of the BOS, including Comtois, forwarding the legal opinion he had obtained. He wrote:

> This message is in regard to the parcel . . . that Beverly Granger would like to donate to the Town of Brookfield. It sounds like it just needs a title piece to be done and maybe a deed to correct or something along that line. . . . Please let me know if you have any questions before we give them the go ahead for the title work.

Comtois responded: "I believe this would have to be approved at a Town Meeting."

The BOS considered the donation at its December 13, 2016 BOS meeting over which Comtois presided. Jones spoke at the meeting and recommended the Town acquire the Property. Comtois pressed Jones about why the Town should pay the estimated $500 to fix the title issues. Jones responded that the Town would have to deal with the title issues regardless, because Granger did not intend to pay any more taxes

on the Property. Snyder stated his belief that the "best route" to take was to get Town approval to accept the donation at Town Meeting and then spend the money to fix any title issues. A motion to that effect was approved by the BOS. Jones asked if a member of the BOS would send a letter to Granger to tell her about the BOS vote regarding the donation. Comtois responded that he would call her and asked for the contact information. Jones gave Comtois Tasse's contact information. Comtois knew that Tasse was involved in the donation. Comtois had known Tasse for nearly twenty years and considered Tasse a friend. He had also conducted real estate transactions with Tasse in the past.

Comtois called Tasse the next day and had an approximately five-minute conversation with her. Comtois told Tasse that the donation had to go to Town Meeting, which, he said, was not scheduled. This was not true, as Town Meeting has a set schedule in May. He also told Tasse that there was no open warrant and no article concerning the prospective donation. Comtois told Tasse that he would not support the donation and that the BOS was "*not* willing to take the donation because it was a detriment to the town." As discussed, infra, the Commission found these statements to Tasse to have been deceptive. Comtois then offered to purchase the Property and discussed a potential purchase price with Tasse. Comtois testified to the Commission that he formed the intent to purchase the Property only during that call, i.e., the day after the BOS meeting – or on December 14, 2016. He also testified to the Commission that Tasse recommended that Comtois purchase the property.

Believing that Comtois was communicating with Granger and Tasse on behalf of the BOS and the Town, Jones emailed Comtois on December 27, 2016 asking for an update. Comtois responded via email, "I am actually dealing with [Tasse], and should be resolved shortly." Jones emailed Comtois again on January 9, 2017 asking for an update and Comtois responded, "Feel free to call me when you have a chance." Jones believed that Comtois was discussing and "dealing with" Tasse about the donation of

the Property to the Town. Comtois never told Jones that Comtois intended to purchase the property.

Sometime in January 2017, Comtois and Granger agreed that Comtois would purchase the Property for $200 and the payment of all legal costs necessary to correct any possible defects in title. The Quitclaim deed was signed February 1, 2017 and recorded February 7, 2017. Sometime in early February 2017, Jones learned that the Property had been sold and, after searching the registry of deeds, determined that it had been sold to Comtois.

Procedural History

During a BOS meeting on February 21, 2017, a townsperson approached the BOS and said that Comtois' purchase of the Property was unethical. On August 24, 2018, Tasse wrote to the Ethics Commission and explained that after Granger had offered the Property to the Town, Comtois offered to buy it from her. The Ethics Commission issued an Order to Show Cause on April 11, 2019 alleging that Comtois had violated three sections of the conflict of interest law: G. L. c. 268A, §§ 19, 23(b)(2)(ii), and 23(b)(3). The Commission held an evidentiary hearing on November 22, 2019. Four people testified and thirty-two exhibits were admitted into evidence. The parties presented closing arguments on February 27, 2020.

On August 18, 2020, the Commission issued its decision. The Commission found that Comtois violated G. L. c. 268A, § 19, which prohibits municipal employees from participating as such in any matter in which they have a financial interest, when he participated in the BOS discussion about Granger's proposed donation of the Property to the Town and voted in favor of the motion to place the issue before Town Meeting. The Commission specifically found that Comtois was acting as a Selectman when he (i) volunteered to contact Granger to convey the BOS's decision, (ii) called Tasse on December 14, 2016 on behalf of the BOS, and (iii) communicated with Jones by email on his BOS email account, by text, telephone and in person concerning the status of

Comtois' discussions regarding the Property. Further, the Commission did not find Comtois credible. In particular, the Commission concluded that Comtois was not honest with Tasse during their December 14, 2016 telephone call and was not truthful when he testified that Tasse suggested that Comtois purchase the Property. The Commission concluded that Comtois' "misrepresentations and omissions during the call, as well as his disingenuous characterization of what he said to Tasse, support that he had a financial interest in the Property when he spoke with Tasse on December 14, 2016."

The Commission also rejected Comtois' legal argument that he could not have violated section 19 because it requires simultaneity, and he did not have a "financial interest" in the Property before he finalized the purchase. Instead, the Commission relied on its interpretation of "financial interest" as described:

> Section 19 encompasses any financial interest without regard to the size of that interest and whether the financial interest is positive or negative. The financial interest, however, must be direct and immediate or reasonably foreseeable. Financial interests that are remote, speculative or not sufficiently identifiable do not require disqualification under the conflict of interest law.

(Decision at 7).

The Commission further found that Comtois violated section 23(b)(2)(ii), which prohibits municipal employees from using their official positions to secure "privileges or exemptions which are of substantial value and which are not properly available to similarly situated individuals[.]" The Commission did not find Comtois violated section 23(b)(3) and that issue is not before me. Having concluded that Comtois violated the state ethics law, the Commission ordered Comtois to pay $10,000 as a civil penalty for each violation, for a total of $20,000.

DISCUSSION

I. Standard of Review

Although G. L. c. 268B, § 4(k), which provides for judicial review of Commission decisions, does not specifically incorporate G. L. c. 30A, 14, the standard of review of decisions of the Commission is governed by G. L. c. 30A. See McGovern v. State Ethics Comm'n, 96 Mass. App. Ct. 221, 226, review denied, 483 Mass. 1108 (2019) ("Our role in reviewing an administrative agency's final decision and order is defined in G. L. c. 30A, § 14 (7)"). When reviewing an agency's decision pursuant to G. L. c. 30A, § 14, I may reverse only if the decision is, among other reasons, based on an error of law, unsupported by substantial evidence, or is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. G. L. c. 30A, § 14(7); see also McGovern, 96 Mass. App. Ct. at 226-227; Energy Express, Inc. v. Department of Pub. Utils., 477 Mass. 571, 575 (2017). Here, Comtois bears the burden to demonstrate the invalidity of the administrative decision. Energy Express, Inc., 477 Mass. at 574; Forman v. Director of the Office of Medicaid, 79 Mass. App. Ct. 218, 221 (2011).

Chapter 30A review is "highly deferential," McGovern, 96 Mass. App. Ct. at 229 n.18, and the Commission "as the State agency charged with administering G. L. c. 268A, is due 'substantial deference in its reasonable interpretation of the statute[.]'" Id. at 227, citing Sikorski's Case, 455 Mass. 477, 480 (2009). Such deference, however, is not unlimited because, at the end of the day, statutory interpretation is for the Courts. Id.; see also Flint v. Commissioner of Pub. Welfare, 412 Mass. 416, 420 (1992), citing G. L. c. 30A, § 14(7) (court must accord "due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it.") Thus, I "review questions of statutory interpretation de novo [while] giving substantial deference to a reasonable interpretation of a statute by the administrative agency charged with its administration and enforcement." Burke v. Board of Appeal on Motor Vehicle Liab. Policies & Bonds, 90 Mass. App. Ct. 203, 205–

206 (2016), citing Anawan Ins. Agency, Inc. v. Division of Ins., 459 Mass. 592, 596 (2011); see also Flemings v. Contributory Ret. Appeal Bd., 431 Mass. 374, 375 (2000), quoting Dowling v. Registrar of Motor Vehicles, 425 Mass. 523, 525 (1997) ("The duty of statutory interpretation is for the courts . . . but . . . [where the agency's] statutory interpretation is reasonable . . . the court should not supplant [it with its own] judgment.").

II. Analysis

A. Violation of G. L. c. 268, § 19

Section 19(a) of the conflict of interest law provides:

> a municipal employee who participates as such an employee in a particular matter in which to his knowledge he, his immediate family or partner, a business organization in which he is serving as officer, director, trustee, partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest, shall be punished by a fine of not more than $10,000, or by imprisonment in the state prison for not more than 5 years, or in a jail or house of correction for not more than 2 1/2 years, or both.

G.L. c. 268A, § 19(a).

A "particular matter" is defined in G. L. c. 268A as "any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding . . . ." G. L. c. 268A, § 1(k). To "participate" in a particular matter means "personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise." Id. § 1(j).

Here, there is no dispute that Comtois participated in the matter of the donation of the Property when he presided over the BOS meeting on December 13, 2016. The Commission also found that Comtois participated in that same particular matter – the donation of the Property – when he volunteered to call Granger, when he spoke with

Tasse, and when he communicated with Jones. Finally, as noted, the Commission concluded that Comtois had a financial interest in the Property when he participated in the December 13, 2016 BOS meeting, when he called Tasse, and when he communicated with Jones.

Comtois argues that the Commission committed an error of law because none of his conduct in his role as a member of the BOS occurred when he had an existing "financial interest" in the Property. Comtois argues that the phrase "has a financial interest" in section 19 must means an extant legal or equitable claim to or right in property and cannot mean a reasonably foreseeable, non-speculative future interest. I disagree.

First, while the conflict of interest law does not define the term "financial interest," Graham v. McGrail, 370 Mass. 133, 138 (1976), the Commission has long interpreted that phrase to include a reasonably foreseeable, non-speculative, non-remote financial interest. See Vineyard Conservation Society, Inc. v. State Ethics Commission, Civ. No. 0284CV02076, at * 3 (Mass. Super. Feb. 2, 2004) ("I agree with the Commission's interpretation of 'financial interest'") (Brady, J). I conclude that the Commission's interpretation of "financial interest" is not unreasonable and, therefore, is entitled to deference. That is particularly so where the "conflict of interest law was enacted as much to prevent giving the *appearance* of conflict as to suppress all tendency to wrongdoing." Starr v. Board of Health of Clinton, 356 Mass. 426, 429 (1969) (quotation omitted) (emphasis added). Further, in interpreting "financial interest," I must consider the statute as a whole and effectuate the "presumed intention of the Legislature." Flemings v. Contributory Ret. Appeal Bd., 431 Mass. 374, 375, (2000). Given that the Legislature was concerned about the appearance of impropriety, it cannot be that a member of the BOS can act on a matter concerning a particular property, while intending to undercut the Town and seek his own financial benefit with respect to the same property. The parade of horribles Comtois raises, and which may

be of some concern, namely, that people will be disinclined to participate in government if their future conduct will be curtailed, is greatly limited by the Commission's interpretation of "financial interest" to non-speculative and non-remote interests.

Second, the same language is included in the federal conflict of interest law, which prohibits a federal officer or employee from participating in a matter in which he "has a financial interest." 18 U.S.C. § 208(a). Federal courts interpreting section 208 have concluded that "financial interest" includes a future, non-speculative benefit. United States v. Gorman, 807 F.2d 1299, 1303 (6th Cir. 1986), citing Office of Government Ethics Advisory Opinion, 83 OGE 1 (January 7, 1983) ("A financial interest exists . . . where there is a real possibility of gain or loss as a result of developments in or resolution of a matter. Gain or loss need not be probable for the prohibition against official action to apply. All that is required is that there be a real, as opposed to a speculative, possibility of benefit or detriment.").

Comtois' arguments to the contrary are unavailing. First, Comtois relies on two non-precedential cases, neither of which is analogous. In the first, the Supreme Court of Pennsylvania was not construing an ethics law, but the state Gaming Act which provided that "[n]o slot machine licensee . . . may possess an ownership or financial interest that is greater than 33.3% of another slot machine licensee . . . ." SugarHouse HSP Gaming, L.P. v. Pennsylvania Gaming Control Bd., 162 A.3d 353, 360–361 (Pa. 2017), quoting 4 Pa. C.S. § 1330. Likewise, the Missouri Court of Appeals was not dealing with a state ethics law in JAM Inc. v. Nautilus Ins. Co., 128 S.W.3d 879, 893 (Mo. Ct. App. 2004), but was construing an insurance contract.

Comtois next points to the annual financial disclosure forms that public officials and employees in the Commonwealth must file pursuant to G. L. c. 268B, § 5. Comtois argues that, because those forms limit the disclosure of a financial interest in real estate to property owned directly or indirectly as of the date of filing, the forms support his

argument that the phrase "financial interest" in G. L. c. 268A, § 19 means current ownership of real property. I disagree. G. L. c. 268B was enacted more than a decade after the conflict of interest law. It requires a yearly financial snapshot of public employees' financial interests available to the public. It does not eliminate or even address the possibility that a future financial interest, that is non-remote and non-speculative, may not present a conflict or the appearance of a conflict with the public inters. See "An Act to Control Conflicts of Interest by Public Officials," House No. 5151 at § 1 (1978).

Third, neither Moskow v. Bos. Redevelopment Auth., 349 Mass. 553 (1965) nor Graham v. McGrail, 370 Mass. 133 (1976) assist Comtois. Moskow involved the propriety of a taking of property located on State Street and, as relevant here, a claim of bias by a City Council member whose family member had a nearby business. The Court found no issue under the ethics law where the business was not located on State Street. Id. at 567. And Graham simply declined to find that "interests shared with a substantial segment of the public" should be "treated as 'financial interests' under s 19(a)" a position that was later statutorily codified. 370 Mass. at 139.

Finally, Comtois argues that I must construe section 19 strictly because it provides for criminal penalties, and under the rule of lenity, I may not expand the statute by reading into it the words "reasonably foreseeable." That maxim "is a guide for resolving ambiguity, rather than a rigid requirement that we interpret each statute in the manner most favorable to defendants." Edgartown v. State Ethics Comm'n, 391 Mass. 83, 89–90 (1984), quoting Simon v. Solomon, 385 Mass. 91, 102–103 (1982). It arguably applies to those charged with criminal conduct, and, in any event, is not applicable unless a statute is ambiguous. See Commonwealth v. Carrion, 431 Mass. 44, 45-46 (2000), quoting Commonwealth v. Roucoulet, 413 Mass. 647, 652 (1992) (rule of lenity requires a criminal defendant to be given the benefit of ambiguous statutory language). I agree that "financial interest" in section 19 is not ambiguous. It includes

an existing plan to purchase a piece of property that had been offered as a donation to the Town. For the same reasons, I do not find the Commission's interpretation of the term unconstitutionally vague. Reasonable municipal employees would understand that, if a person offers to donate land to a town, a member of the Board of Selectmen cannot approve such a donation while simultaneously planning to offer to purchase that property the very next day.

B. Violation of G. L. c. 268, § 23(b)(2)(ii)

General Laws c. 268A, § 23(b)(2)(ii) provides that no current municipal employee "shall knowingly . . . use or attempt to use such official position to secure for such officer, employee or others unwarranted privileges or exemptions which are of substantial value and which are not properly available to similarly situated individuals[.]" The Commission found that "Comtois' purchase of the Property secured for him an unwarranted privilege because, for his own selfish purpose, he used his position as Chair of the Board to 'sabotage' Granger's decision to donate the Property to the Town and the Townspeople's opportunity to decide whether to accept it."

Comtois argues that the Commission erred as a matter of law because it collapsed certain elements, namely, that the Commission dispensed with the requirement that Comtois have secured an "unwarranted privilege" "not available to similarly situated individuals." The argument is unavailing.

Comtois used his official position when, at the BOS hearing on December 13, 2016, Comtois offered to call Granger to explain that the BOS had voted to put the donation before the Town for a vote. He used his official position when, during that call with Tasse the next day, and while representing the BOS, he misled Tasse into believing the donation would not be accepted by the BOS. The "unwarranted privilege" was the private purchase of the Property before the Town could vote or act on the donation. That privilege was not available to others because no one else would

have had the authority to mislead Granger / Tasse that the donation would be unlikely to proceed quickly or at all. Finally, Comtois was acting in his official capacity when he placated Jones and did not disclose to Jones that Comtois was negotiating to purchase the Property before the donation could be effectuated. Put elsewise, Comtois was in a unique position to mislead Granger about the likelihood of a donation and Jones about the status of the donation.

Finally, I find the Commission's decision to have been based on substantial evidence. I must leave to the Commission the "task of making credibility determinations and factual findings . . . ." Boston Police Dep't v. Civil Serv. Comm'n, 483 Mass. 461, 474 (2019). "Even if this court would have come to a different conclusion on the evidence presented on a de novo review, fact finding is the role of the commission and not the reviewing court." Id. at 476, citing Labor Relations Comm'n v. University Hosp., Inc., 359 Mass. 516, 521 (1971) ("A court may not displace an administrative board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo").

Here, there was more than sufficient evidence before the Commission to conclude that – after he voted as Chair of the BOS to approve the motion to put the donation of the Property Town meeting for a vote – Comtois asked to communicate with Tasse so that he could offer to purchase the Property, that he made misrepresentations to Tasse while communicating with her on behalf of the BOS to induce her and Granger to consider his offer rather than donation, and that he acted in his role as a member of the BOS when he did not communicate his negotiations to Jones when asked for an update.

Notice sent
5/19/2021

ORDER

(sc)

For the foregoing reasons, the Plaintiff's Motion for Judgment on the Pleadings is **DENIED**. The Defendant's Cross-Motion for Judgment on the Pleadings is **ALLOWED**.

Debra A. Squires-Lee
Justice of the Superior Court

DATED: May 17, 2021