STATE OF NEW YORK
COUNTY OF ALBANY COUNTY COURT

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

DECISION AND ORDER
Indictment No.: AG-1-8228

ROBERT ORTT,

Defendant.

APPEARANCES

For the People

ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL OF THE
STATE OF NEW YORK
THE CAPITOL
ALBANY, NEW YORK 12224

CHRISTOPHER BAYNES AND
DANIEL BAJGER, ASSISTANT
ATTORNEYS GENERAL

For the Defendant

O'CONNELL AND ARONOWITZ
54 State Street
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STEPHEN R. COFFEY, ESQ.
SCOTT W. ISEMAN, ESQ.
MICHELE BERGEVIN, ESQ., Of counsel

LYNCH, J. Defendant, by Omnibus motion, moves for the following relief:

1. DISMISSAL FOR WANT OF JURISDICTION UNDER EXECUTIVE LAW §63 (3)

Defendant moves to dismiss on the grounds that the attorney general lacks jurisdiction to prosecute pursuant to Executive Law §63 (3). Executive Law §63 (3) provides that the "head" of an agency can request that the attorney general conduct a criminal investigation of any violation

of law that the requesting party is required to execute; upon such request and investigation, the attorney general is authorized "to prosecute the person or persons believed to have committed the same and any crime or offense arising out of such investigation or prosecution or both". Absent strict compliance with the provisions of Executive Law §63 (3), it is well settled that the attorney general lacks jurisdiction to prosecute (People v. Gilmour, 98 N.Y. 2d 126 [2002]).

Defendant argues the record fails to evidence that the head of the Board of Elections (BOE) requested prosecution by the Attorney General. It is undisputed that the prosecution request came by letter dated December 15, 2015 from the Chief Enforcement Counsel (hereinafter Counsel) to the BOE (see, Movant's Exhibit "D"- hereinafter referred to as "request"). In the request, Counsel states that same date, the BOE conducted a meeting and voted to accept her recommendation that a criminal investigation be commenced against George Maziarz, co-defendant herein. Counsel also states that two (2) of the BOE commissioners delegated authority to her to request the subject investigation and prosecution by the attorney general.

The BOE is an "agency" (Election Law §3-100 (3)). The BOE is comprised of four commissioners, and any official action requires the affirmative vote of three (3) commissioners ((Election Law §3-100 (1) (4)). Defendant cites Counsel's claim that her prosecution request was authorized by two Commissioners, thus failing to evidence the request was officially authorized by the BOE.

Defendant's reliance on People v. Gilmour, supra., is misplaced. In Gilmour, counsel's prosecution request letter made no reference whatsoever to indicate the request was made at the direction of the department head. Standing alone, the Court held, "a request made by the counsel for a department does not satisfy the requirements of Executive Law §63 (3)" (People v. Gilmour, supra. At 133; see also, People v. Fox, 253 A.D. 2d 192, at 194 [3d. Dept. 1999]).

Here, as distinguished, it is manifest that Counsel's request specifically referenced the affirmative vote of the BOE authorizing the criminal investigation by the Attorney General. As such, the request does appear to satisfy the requirements of Executive Law §63 (3) (see People v. Stuart, 263 A.D. 2d 347 [3d. Dept. 2000], where the Court held that Counsel's request satisfied the provisions of Executive Law §63 (3) because counsel's letter named the DEC commissioner as one of the persons copied on the correspondence).

Once the affirmative vote was made at the BOE meeting, Counsel was mandated by Election Law §3-104 (5) (b) to "refer such matter to the attorney general or district attorney with jurisdiction over such matter to commence a criminal action" (underscored emphasis added). The provisions of Executive Law §63 (3) and Election Law §3-104 (5) (b) must be harmonized to implement the clear legislative intent, that prosecution referral to the attorney general must come from the agency head, and is not left to the discretion of counsel (see McKinney's Statutes §98). Here, notwithstanding Counsel's referral letter, the record does contain the minutes of the December 15, 2015 BOE meeting, evidencing an affirmative vote of 3 Commissioners. (Exhibit "5")[1].

This Court finds that the action was properly referred to the Attorney General for enforcement, and Defendant's motion to dismiss for lack of jurisdiction is denied.

2. **DISMISSAL OF THE INDICTMENT FOR ALLEGED INSUFFICIENCY OF THE EVIDENCE BEFORE THE GRAND JURY / RELEASE OF MINUTES/ DEFECTIVE GRAND JURY PROCEEDINGS/INTEREST OF JUSTICE**

Release of the Grand Jury minutes to legal counsel is not necessary to assist the Court in making its determination on the motion. See CPL § 210.30(3). Motion denied.

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1 The Court has elected not to disclose Exhibit "5" at this time for it simply identifies the three (3) commissioners who voted in favor of the referral and one commissioner who recused.

The Court finds that the proceedings before the Grand Jury substantially conformed to the requirements of Article 190 of the Criminal Procedure Law. Motion denied.

The Court has inspected the Grand Jury minutes and finds the evidence before the Grand Jury was legally insufficient to establish the offenses charged, all as more fully set forth below. See CPL § 190.65(1) and 70.10(1).

Defendant is charged in Counts 6, 7, and 8 of the Indictment, with three (3) counts of Offering a False Instrument for Filing in the First Degree, in violation of Penal Law §175.35, all Class E felonies, respectively. In Count 6, it is alleged that on or about July 17, 2012 that the defendant knowingly filed, with intent to defraud, a false 2012 July periodic campaign financial disclosure report for the "Niagara County Republican Committee", with the New York State Board of Elections. In Count 7, it is alleged that on or about January 17, 2013 that the defendant knowingly filed, with intent to defraud, a false 2013 January periodic campaign financial disclosure report for the "Niagara County Republican Committee", with the New York State Board of Elections. In Count 8, it is alleged that on or about July 12, 2013 that the defendant knowingly filed, with intent to defraud, a false 2013 July periodic campaign financial disclosure report for the "Niagara County Republican Committee", with the New York State Board of Elections.

The elements of Offering a False Instrument for Filing in the First Degree "are "(1) knowledge that the instrument is false, (2) intent to defraud the State or any of its subdivisions, and (3) presentation of the instrument for filing" (*People v Chaitin*, 94 AD2d 705, 705, 462 N.Y.S.2d 61, *affd* 61 NY2d 683, 460 N.E.2d 1082, 472 N.Y.S.2d 597; *see* Penal Law § 175.35[1]; *People v Larue*, 129 AD2d 904, 905, 514 N.Y.S.2d 540).

The People's case theory is that it is a violation of the election law to intentionally report an expenditure made to a third party (here Synor Marketing/Regency Communications), to

conceal the identity of the true recipient of the funds, Meghan Ortt. It is the People's further case theory, that the campaign finance report of expenditures made to Synor Marketing/Regency Communications corresponding to monies ultimately paid to Meghan Ortt, constituted the filing of a false instrument. The case was presented with legal instructions concerning accessorial liability, and accomplice testimony.

A review of the record testimony evidences the following. The signer on the Key Bank account records for the Niagara County Republican Committee (hereinafter NCRC) was Michael Norris, Chairperson of the NCRC. The signer on the M & T Bank account records for the Niagara County Republican Committee (hereinafter NCRC) was Scott Kiedorowski. The USAA Federal Savings Bank records for Defendant and his wife, Meghan, were also received in evidence. The NCRC campaign finance report filed July 17, 2012, January 17, 2013, and July 12, 2013 were received in evidence.

In early 2009, Henry Wojtaskek, former Chairman of the NCRC from 2000-2009 and an active member of Maziarz campaigns, met with Defendant Ortt at Granny's restaurant. The purpose of the meeting was to recruit Defendant Ortt to run for Mayor. Defendant Maziarz was also at that meeting. At that meeting, Defendant Ortt expressed that he would take a $5,000 pay reduction if he ran for Mayor. After the meeting ended, Wojtaszek met outside the restaurant with the Defendant Ortt, and told him that "we" could put Meghan to work. Defendant Ortt responded that his wife had a background in graphic design. Notably, the People elicited opinion testimony from a witness who opined that Defendant Ortt understood that "we" meant the NCRC and that Defendant Ortt understood the money to be paid to Meghan was meant to make up the for the salary loss corresponding to the Mayoral position.

There is nothing in the record that Wojtaszek, nor anyone else for that matter, ever advised Defendant Ortt, or his wife, that the source of the money being paid to Meghan Ortt was

the NCRC. Wojtaszek never spoke to Defendant Ortt about Synor or Regency Commuications making payments to Meghan Ortt. Notably, when Wojtaszek spoke to Defendant Ortt and to Tim Synor, his intent was that Meghan Ortt would work for the monies to be paid to her. In fact, the record evidences that Wojtaszek told Synor that he wanted Meghan Ortt to work on campaigns, that the NCRC would pay Synor for his campaign work, and Synor, in turn, would pay Meghan Ortt for her work.

Tim Synor is the owner of Synor Marketing, which is engaged in the business of graphic design and marketing for various businesses, including political candidates. Synor Marketing received a monthly retainer from the NCRC. The record evidences that Henry Wojtaskek asked Synor to work with Meghan Ortt, in her capacity as a graphic designer. Synor agreed to work with Meghan Ortt, in consideration of work opportunities in the political field. Synor talked to Megan Ortt about performing services many times and she showed interest, albeit no work was actually performed. Part of the NCRC monthly retainer included an additional $500.00/month, which Synor used to make $500.00 month payments to Meghan Ortt. Between April 1, 2010 and December 20, 2012, Synor Marketing paid a total of $15,500.00 to Meghan Ortt. The Court notes that there was opinion testimony offered to the effect that (1) but for being asked by Henry Wojtasek, Synor probably would not have hired Meghan Ortt (2) that she had a "no-show job", and (3) that Synor `was a conduit for funds to be paid to her.

Michael Norris, as Chairman of the NCRC, was told by Henry Wojtasek, to make payments to Meghan Ortt, to make up the salary difference that Defendant Ortt would experience if elected Mayor of North Tonawanda, i.e. Ortt's position as City Treasurer paid $5,000.00 more per year than the Mayoral position. Norris was told that Meghan Ortt would go to work for Synor Marketing. Norris was personally familiar with Defendant Ortt and his wife, through political activities. The record evidenced that Synor Marketing did consulting work for the Committee.

Norris did not have any knowledge of what work, if any, that Meghan Ortt did at Synor. Norris agreed to pay the additional money to Synor, for he did not want to show direct payments to the mayor's wife on the campaign finance reports. It is noted that opinion testimony was elicited to the effect that the payments were allotted to Meghan Ortt to compensate for Defendant Ortt's salary loss.

The record evidences that Henry Wojtaszek also told Glen Aronow, through his company Regency Communications, to write two (2) $3,000.00 checks to Meghan Ortt. He did so because Synor was in the hospital and unable to conduct business. Aronow did not inquire as to the reason for the payments. Meghan Ortt did not perform any work for Regency Communications.

The record evidences that Meghan Ortt was engaged in the business of sales and design. Defendant told his wife that Synor had design work for her to do and would be paying her a retainer. Meghan Ortt was not told that she would be paid by Synor simply to compensate for her husband's salary decrease, but that she would be paid for her skill set. Meghan Ortt and Tim Synor did talk about the fact that Synor would send her work on a number of occasions, but he did not do so. Meghan Ortt was never told that that the NCRC was paying money to Synor to cover the Synor payments to her.

As monies were received from Synor, the checks were deposited in the joint account of defendant Ortt and his wife. Several of the checks were endorsed by defendant to make the deposit. Meghan Ortt acknowledged receiving payments from Glen Aronow (Regency) and thought it was taking over Synor's business when Tim Synor became ill. Following the last payment in January 2014, Meghan Ortt did not receive any further payments, and simply thought that the retainer was over.

Exhibit 24 consisted of a Chart depicting total payments in the sum of $21,500.00 made by Synor and Regency to Meghan Ortt. The record evidences that each year Synor issued a 1099 to Meghan Ortt, and the monies were reported on their joint income tax return.

Defendant Ortt testified before the Grand Jury. He acknowledged that he was approached in 2008 by defendant Maziarz, Bill Patton, and Henry Wojtaszek, then Chairman of the Niagara County Republican Committee, to run for Mayor. At a subsequent meeting in 2009 with Wojtaszek, Defendant Ortt expressed concerns about the drop in pay if he took the Mayoral job. Wojtaszek suggested that he could get Meghan Ortt a job working for Synor Marketing, so she could earn extra money. Defendant Ortt knew that Synor and Wojtaszek were friends, and that Synor had been doing campaign work for Candidates. Defendant acknowledged his wife's receipt of the payments from Synor, as an advance retainer for digital and graphic design work to be performed by her. Both defendant and his wife spoke to Synor about his sending work to her, which he represented he would do. In 2014, Henry Wojtaszek advised defendant that Synor was sick and would no longer be able to continue to pay Meghan Ortt or send any work to her. The record evidences that Defenant and his wife thought Regency Communications was taking over for Synor, but Defendant Ortt did not have any contact with Regency. Defendant Ortt did not have any knowledge where Synor or Regency received funds from in order to pay his wife.

The record evidences that Defendant Ortt never personally filed any Board of Elections filings. Rather, his Treasurer filed his Campaign filings.

Pursuant to CPL § 190.65(1), "a grand jury may indict a person for an offense when (a) the evidence before it is legally sufficient to establish that such person committed such offense, provided, however, such evidence is not legally sufficient when corroboration that would be required, as a matter of law, to sustain a conviction for such offense is absent, **and** (b) **competent admissible evidence** before it provides reasonable cause to believe such person

committed such offense" (emphasis added). Pursuant to CPL § 70.10(1), "legally sufficient evidence means competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant's commission thereof; except that such evidence is not legally sufficient when corroboration required by law is absent.

Here, there is nothing in the record to evidence that defendant Ortt personally prepared, signed or filed the disclosure reports. Rather, the People instructed the Grand Jury on accessory liability (Penal Law § 20.00), and the rules of evidence on accomplice testimony, including corroboration (CPL §60.22).

"Courts assessing the sufficiency of the evidence before a grand jury must evaluate "whether the evidence, viewed most favorably to the People, if unexplained and uncontradicted--and deferring all questions as to the weight or quality of the evidence—would warrant conviction" (People v. Mills, 1 N.Y. 3d 269, 274-275; People v. Jensen, 86 N.Y. 2d 248 [1995]). In fine, if competent evidence presented to the Grand Jury, "accepted as true, would establish every element of an offense charged and the defendant's commission thereof", then the evidence is legally sufficient (see e.g. People v. Castaldo, 146 A.D. 3d 797, 799 [2d Dept. 1/11/2017], where the Court held that the evidence was legally sufficient to support the charge of Offering a False Instrument for Filing in the First Degree).

"The term competent evidence …means relevant evidence admissible in a particular action; that is, relevant evidence not subject to the operation of any exclusionary rule "(see Prince, Richardson on Evidence, 11th Ed., §4-101). The aforementioned opinion evidence presented to the Grand Jury was not competent evidence "(see Prince, Richardson on Evidence, 11th Ed., §7-201 and 202).

The fundamental flaw in the presentation before the Grand Jury, however, is that there was no evidence whatsoever that Defendant Ortt knew the source of monies paid by

Synor/Regency to Meghan Ortt was NCRC. Penal Law §20.00 provides: When one person engages in conduct which constitutes an offense, another person is criminally liable for such conduct when, **acting with the mental culpability required for the commission thereof**, he solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct" (emphasis added). Absent proof that Defendant knew the money source was NCRC, there is no proof that defendant had the mental culpability for the commission of the charged crimes. Moreover, absent knowledge of the money source, there is no evidence to establish the elements of the charged crimes, i.e. (1) knowledge that the campaign finance reports were false, (2) intent to defraud the State or any of its subdivisions, and (3) presentation of the campaign finance reports for filing". It is this Court view, that there was no valid line of reasoning and permissible inferences which could lead a rational Grand Juror to issue an Indictment in this case. Based on the foregoing, the Court need not reach the issue of whether the corroboration element was satisfied (CPL §60.22).

It is the Decision and Order of the Court, that Defendant Ortt's motion to dismiss the Indictment against him is in all respects, ***GRANTED***, and Counts 6, 7, and 8 are hereby ***DISMISSED***.

This memorandum constitutes both the decision and order of the Court.

Dated: Albany, New York
June 27, 2017

PETER A. LYNCH, JCC

PAPERS CONSIDERED:

1. Notice of Motion (Omnibus) and Affirmation of Stephen R. Coffey dated May 15, 2017 in support thereof (with annexed exhibits);
2. Memorandum of Law in Opposition to Defendant's Omnibus Motion by Eric T. Schneiderman, Attorney General of the State of New York dated May 31, 2017, with Exhibits 1-5 submitted under Seal;
3. Affirmation in Reply to the People's Opposition of defendant's Omnibus Motion of Stephen R. Coffey dated June 8, 2017;
4. Grand Jury Transcripts March 9 and 22, 2017 (in camera review).