

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

SUFFOLK, ss.

**COMMISSION ADJUDICATORY
DOCKET NO. 08-0018**

IN THE MATTER

OF

JOHN F. SCOTT

Appearances: Karen Beth Gray, Esquire
Counsel for Petitioner

John F. Scott, *pro se*

Commissioners: Swartwood, Ch., Kane, Kempthorne, Veator & King

Presiding Officer: Commissioner Matthew N. Kane

DECISION AND ORDER

On November 18, 2008, Petitioner initiated these proceedings by issuing an Order to Show Cause under the Commission's Rules of Practice and Procedure.^{1/} An amended Order to Show Cause ("OTSC"), allowed on April 29, 2009, alleges that Respondent John F. Scott ("Scott"), a developer, violated G.L. c. 268A, §§ 2(a) and 3(a) in May 2006, by offering Jeffrey Kane ("Kane"), then the Conservation Commission ("ConCom") Chairman for the Town of Norfolk ("Town"), a free week's stay at his fly-fishing cabin in Pennsylvania while he was seeking certain approvals from, and was subject to ongoing oversight from the ConCom in connection with a particular real estate development in Norfolk. Scott filed Answers denying the factual allegations in the OTSC, and that he had violated §§ 2(a) and 3(a).

An evidentiary hearing was held on April 29, 2009. The parties declined to make closing arguments. In rendering this Decision and Order, the Commission has considered the testimony, the evidence in the public record, the arguments of the parties, and their post-hearing submissions.

I. FINDINGS OF FACT

A. *Background*

1. Scott is the President of Pine Creek Development Corporation ("Pine Creek"), which develops properties.

^{1/} 930 CMR 1.00 *et seq.*

2. On March 15, 2004, Scott, as President of Pine Creek, signed a Purchase and Sale Agreement (“P&S”) for property located in Town on Applewood Road (“Property”). Scott intended to purchase and develop the Property.
3. Any work done in or around wetlands is required by law to be reviewed by the ConCom, which has the power to approve, disapprove or conditionally approve a project. The ConCom has wide discretion to impose conditions on a project under both the Wetlands Protection Act, G.L. c. 131, § 40, and local wetland bylaws (“Order of Conditions”). Among other things, the conditions imposed by the ConCom can affect a developer’s finances, time and construction sequence. After it issues an Order of Conditions on a project, the ConCom retains continuing oversight over these projects. This oversight includes ongoing inspections with the authority to reject work, require the applicant to redo the work or pull the bond and have the work done by a third party.
4. On or about May 7, 2005, a Notice of Intent was filed with the ConCom to construct a home with related infrastructure and driveway on the Property (“the Project”).^{2/} Because the Project involved a number of significant wetland issues, including disruption of wetlands, flooding, groundwater, wildlife and rare species, the ConCom hired a peer consultant to review it.
5. Kane was the ConCom Chairman during the Project. He is a civil engineer with sixteen years of expertise in wetlands and construction. Kane had no relationship with Scott other than as a ConCom member and its Chairman.
6. The Project went through a review process involving both Scott’s and the ConCom’s wetland experts. As of the April 12, 2006 ConCom hearing on the Project, several outstanding issues remained, including delineation of the deed-restricted area, erosion, mitigation planting, construction sequencing, construction materials and viability of the stream restoration inside the culvert. On April 12, 2006, the ConCom voted to close the public hearing and decided to handle these outstanding issues in deliberations and with the special conditions.
7. At approximately 10:00 p.m. on April 12, 2006, after the ConCom meeting, Kane told Scott that the review process had been closed, but that the ConCom had not yet voted to issue an Order of Conditions.
8. The Project was on the agenda for the April 26, 2006 ConCom meeting; however, the ConCom was unable to act on the Order of Conditions due to a full agenda involving other business.

^{2/} Although then Applewood property owners Eldon Langley and his wife Charlotte filed the Notice of Intent with the ConCom, Scott and/or Scott’s corporation was ultimately to be the developer/owner of the property and Scott had site control over the property by virtue of the purchase and sale agreement.

9. Subsequently, at its May 11, 2006 meeting, the ConCom considered and revised the draft Order of Conditions.^{3/} The ConCom found that the project had six areas of significance covered by the Massachusetts Wetlands Protection Act, G.L. c. 131, § 40.^{4/}
10. At its May 11, 2006 meeting, the ConCom voted to approve the revised draft Order of Conditions and signed the document.
11. Following the May 11, 2006 meeting, the ConCom Clerk was responsible for typing up the handwritten notations and changes made to the Order of Conditions during the meeting. After incorporating these changes, the Clerk sent a draft of the Order of Conditions back to the ConCom members for their review to ensure that the changes were accurate, and to make any needed further changes. The Order of Conditions, which specified nineteen special conditions to be met by the applicant, was subsequently released a few days later.^{5/}

B. *The Cabin Offer*

12. In addition to his work at Pine Creek Development Corporation, Scott is also the President, Chief Executive Officer and a Director of The Freestone Sportsman Group Inc., which owns a hunting and fishing cabin in Pennsylvania (“Cabin”).

^{3/} The ConCom staff typically creates a draft Order of Conditions prior to the ConCom meeting. The draft is then edited and amended by the ConCom members during their meeting.

^{4/} The areas were: public water supply; private water supply; groundwater supply; storm damage prevention; prevention of pollution; protection of wildlife habitat; and flood control.

^{5/} Significant modifications of the Order of Conditions made at the May 11, 2006 meeting included:

Special Condition 4 required wetland replication be constructed in full and conditionally approved prior to the original wetlands being disturbed and prior to construction of any structures such as driveways or buildings.

Special Condition 13 required the applicant to provide a final planting plan for ConCom approval prior to the commencement of any work at the site.

Special Condition 16 required a stabilized construction entrance which went beyond the original application.

Special Condition 19 was a \$5,000 cash security bond. Although such bonds are not always required, the ConCom felt “very strongly about because there was a significant amount of disturbance.”

13. Scott is a one third owner of the Cabin. Robert Brown (“Brown”), who is Scott’s business partner on another subdivision in Town, is a one third owner. The other one third owner of the Cabin is Michael Connolly (“Connolly”). Connolly is also a real estate broker in Scott’s company selling residential real estate. Scott is married to Connolly’s sister.
14. Scott is responsible for marketing the Cabin to rent. The weekly cabin rental rate is \$700. The Cabin is managed by a rental agent, Diane Prince (“Prince”), who handles the scheduling, bookings, rental payments and maintenance for the Cabin. Friends and family members of Scott, Brown and Connolly go through Prince to rent the Cabin. In the ordinary course, the owners charge family members to use the Cabin, although they may rent it at a discounted rate.
15. Scott sent an e-mail to Kane on the morning of May 12, 2006 (“the e-mail”), offering him a week’s stay at the Cabin. At the time the e-mail was sent, Scott was awaiting an Order of Conditions from the ConCom regarding the Property. The e-mail stated as follows (errors in original):

Jeff, I know that every time you click on my e-mail address you say to yourself now what.I am leaving on my fly-fishing trip to my cabin in pa for a week.if and when my order of conditions is approved and written I have tasked my wife to pick them up and get them to my attorney so they can be recorded at the registry of deeds.Jeff I know that this is above and beyond your duties,however when they are done could you or Marie most likely you call my home . . . and inform my wife sandy that she can pick them up at the commissions office.lastly when you step down from the commission so no one in this dame town can say anything about anything my cabin is yours for a week with your family.it is near Williamsport little league world series park, Hershey park and Amish country.the best trout fishing in the east and great for the kids.Jeff no bribe just a thanks for being on the up and up with us regardless of how this all plays out.I am not doing anything differently than you would when some people are messing with how I feed my family and servive...thanks jack scott...

16. When Kane read the words in the e-mail “cabin is yours for a week with your family,” he understood that Scott was offering him the Cabin for a week at no cost.
17. At 10:24 a.m. on May 12, 2006, Kane responded to Scott’s e-mail as follows (errors in original):

Jack,
Thanks for the offer.

Order was approved last night. FYI, it was not completed by our agent so we pretty much wrote it as we sat there. Allot of GD work. And we addressed the outstanding issues one by one to get to the point of being comfortable that they were not deal breakers. Just so you know, I've seen plans rejected in other towns when items minor items were not addressed as requested. That could have been the case here, and you probably know that. But anyway, water under the bridge.

Our agent has to type it up, not Marie, and she will get starting on this one and the other 3 on Monday. So it will not be available Monday.

I will, as requested, call your wife. Please let her know to contact me if she has not heard from me by Wednesday.

Good luck with the fly fishing.
Jeff.

18. Kane did not take any action to stay at the Cabin.
19. On May 17, 2006, the Order of Conditions was hand delivered to Scott's representative. The next day, Pine Creek purchased the Property.
20. In October 2007, Kane reported the e-mail and Scott's offer to use the Cabin to the Commission.

II. DECISION

A. *The Section 2(a) Allegation*

Section 2(a) provides, in relevant part, that an individual may not directly or indirectly, corruptly give, offer or promise anything of value to a municipal employee to influence any official act or any act within the official responsibility of such employee. In order to establish a violation of § 2(a), Petitioner must prove by a preponderance of the evidence that: (1) Scott, directly or indirectly, *corruptly* gave, offered or promised; (2) anything of value; (3) to a municipal employee; (4) with intent; (5) to influence any official act^{6/} or any acts within the official responsibility^{7/} of such employee or to do or omit to do any act in violation of his lawful duty. Only elements (1), (4), and (5) are disputed by the parties. We find that Petitioner has failed to prove by a preponderance of the evidence that Scott violated § 2(a).

^{6/} “‘Official act,’ any decision or action in a particular matter” G. L. c. 268A, § 1(h).

^{7/} “‘Official responsibility’, the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and whether personal or through subordinates, to approve, disapprove or otherwise direct agency action.” G. L. c. 268A, § 1(i).

The first issue is whether Scott “corruptly” offered the Cabin to Kane to use for one week “with intent to influence any official act or any act within the official responsibility” of Kane or “to do or omit to do any acts in violation of” his “lawful duty.” The Supreme Judicial Court has said that “Under G. L. c. 268A, § 2 . . . bribery requires proof of ‘corrupt intent’ . . . Bribery also typically involves a quid pro quo, in which the giver *corruptly* intends to influence an official act through a ‘gift,’ and that ‘gift’ motivates an official to perform an official act. In effect, what is contemplated is an exchange, involving a two-way nexus.”^{8/}

“Corrupt” has been defined as “of debased political morality: characterized by bribery, the selling of political favors, or other improper political or legal transactions or arrangements.”^{9/} “Bribe” is defined as “a price, reward, gift, or favor bestowed or promised with a view to pervert the judgment or corrupt the conduct esp. of a person in a position of trust (as a public official).”^{10/}

We find that Petitioner has failed to establish by a preponderance of the evidence that Scott’s offer to Kane to use the Cabin was made with corrupt intent to influence Kane with respect to his official actions as a ConCom member.

^{8/} *Scaccia v. State Ethics Commission*, 431 Mass. 351, 356 (2000) (emphasis added). See also *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 404-05 (1999) (“The distinguishing feature of each crime is its intent element. Bribery requires an intent ‘to influence’ an official act, while illegal gratuity requires only that the gratuity be given or accepted ‘for or because of’ an official act. In other words, for bribery there must be a *quid pro quo*--a specific intent to give . . . something of value *in exchange* for an official act. An illegal gratuity, on the other hand, may constitute merely a reward for some future act . . . or for a past act.”). See e.g., *Commonwealth v. Dutney*, 4 Mass. App. Ct. 363, 367 (“I understand in politics that if you have something and I want that something, I have to pay for that something. Why should I make money and you people who gave that certain thing, not make anything on the deal?” [He] repeated the terms of the deal he had proposed the day before, stating again that he could guarantee the votes of his brother Robert and of Dutney [He] left the meeting and proceeded to his brother Robert’s apartment, where he gave Robert \$500”); *Commonwealth v. Shaheen*, 15 Mass. App. Ct. 302, 304 (1983) (defendant’s agent asked public official, “[c]an you be of any aid to me in regards to . . . this fire?” Agent later paid official.); *Commonwealth v. Favulli*, 352 Mass. 95 (1967) (clear understanding among the parties and money was exchanged); *In re Jovanovic*, 2002 SEC 1062 (decision and order finding that offer by Jovanovic of cash to state worker in exchange for favorable ruling on application Jovanovic had pending violated both sections 2(a) and 3(a)); *In re Stanton*, 1992 SEC 580 (disposition agreement fining Speaker’s business manager \$3,500 for violating § 2(b) by receiving a free \$1,600 television set from a vendor in return for approving vendor’s fraudulent invoices).

^{9/} *Webster’s Third New International Dictionary* (1993).

^{10/} *Id.*

To prove a violation of § 2(a), Petitioner must establish that Scott acted with the specific intent to give the Cabin in exchange for some official act undertaken by Kane. Here there is not sufficient evidence to conclude that Scott intended to obtain a particular outcome. There is no evidence, for example, that Kane offered the Cabin in exchange for fewer orders of conditions on the Project. Instead, Scott offered the Cabin to Kane as “a thanks . . . regardless of how this all plays out.” As a result, Petitioner has failed to establish the existence of a bribe. Rather, and as set forth below, Petitioner has proven the existence of an illegal gratuity which “may constitute merely a reward for some future act . . . or for a past act.”¹¹

Having found that Petitioner failed to demonstrate by a preponderance of the evidence that there was the requisite corrupt intent with respect to the Cabin offer, we need not reach the remaining elements of a § 2(a) violation.

B. The Section 3(a) Allegation

Section 3(a) prohibits an individual from directly or indirectly giving, offering or promising anything of substantial value to any municipal employee for or because of any official act performed or to be performed by such an employee. In order to establish a violation of § 3(a), the Petitioner must prove by a preponderance of the evidence that: (1) Scott, directly or indirectly, gave, *offered* or promised; (2) anything of substantial value; (3) to a municipal employee; (4) for or because of any official act; (5) performed or to be performed by such an employee.

As previously discussed, there is no dispute that the first element is established in that Scott sent an e-mail to Kane on May 12, 2006, in which he offered Kane the use of his cabin. Similarly, there is no dispute that Kane was a municipal employee at the time of the offer; and that the Cabin rents for \$700 a week.

Therefore, the first disputed element is whether Scott’s offer to Kane was of substantial value.^{12/} On one hand, Scott maintains that he did not offer something of substantial value. Rather, Scott contends that he merely offered to rent the Cabin to Kane subject to its availability and lease terms. To support his claim, Scott contends that a single page brochure (“brochure”), entitled “Cabin For Rent,” Waterville PA, was attached to the May 11, 2006 e-mail. The brochure lists the attributes of the Property and notes “weekly and weekend packages available.” The brochure indicates that the Cabin is for rent, but does not reference any rental rates or rental terms or conditions.^{13/}

^{11/} *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 404-405 (1999).

^{12/} Anything worth \$50 or more is of “substantial value” for purposes of § 3. *Life Insurance Association of Massachusetts, Inc. v. State Ethics Commission*, 431 Mass. 1002, 1003 (2000).

^{13/} Conflicting testimony was offered regarding whether the brochure was actually attached to the e-mail. Scott did not offer any testimony. For his part, Brown initially

On the other hand, Kane testified that he never had a discussion with Scott about the Cabin, thus he could not have expressed any interest in renting it. Kane also testified that a cabin stay was not his type of vacation, and that he usually takes trips to ski country or Florida.^{14/}

We are persuaded that the e-mail offered something of substantial value within the meaning of G.L. c. 268A, § 3(a) for at least four reasons. First, the language Scott used in the e-mail, “my cabin is yours” suggests the giving of something to Kane. Second, the language, “thanks for being on the up and up with us regardless of how this all plays out” suggests that this offer was a token of gratitude offered by Scott for acts Kane took as the ConCom Chair, rather than any kind of arms’-length rental. Third, the reference to “so no one in this dame town can say anything about anything” suggests that Scott himself viewed this offer as inviting some kind of scrutiny. It is unlikely that Scott would have included this language, if as he contends, he were simply making an offer to rent the Cabin. Fourth, the e-mail does not include any qualifications or mention any terms on the offer (*i.e.* yours subject to availability, rent, restrictions, etc.).

Based on the language contained in the e-mail, the circumstances surrounding its transmission, and Kane’s testimony, we do not find credible Scott’s argument that he intended to rent the Cabin to Kane, subject to its availability and a rental agreement. Scott did not provide any testimony himself on this point. Nor does the e-mail refer to any particular conditions precedent to any alleged rental. Instead, we conclude that Scott intended to offer the Cabin to Kane to use for one week *for free*, to influence Kane’s

testified that Scott had attached the brochure to the e-mail. However, he later testified that he could not be certain whether the brochure was included as an attachment. Finally, Kane testified that the brochure was not attached to the e-mail. In any event, the existence of the brochure does not change the outcome – even if it was sent to Kane. First, the brochure does not contain information about either rental rates or any rental terms and conditions. Rather, it provides highlights for the property (its proximity to Little Pine Creek State Park, beaches, hunting and trout fishing, etc.) which are all consistent with a gift. Second, Scott’s e-mail already promised Kane the Cabin “for a week,” thus the one page brochure referencing “weekly and weekend packages” appears to be solely informational.

^{14/} There was conflicting testimony concerning Kane’s alleged interest in the Cabin. Scott disputes this and contends in his brief that on May 11, 2006, he met with Kane and that during that meeting Kane asked him about the Cabin. However, Kane testified that he did not speak with Scott on May 11, 2006 and that he never discussed the Cabin with Scott and that he did not ever have any interest in renting the Cabin. Connolly, who is a 1/3 owner of the Cabin, Scott’s brother-in law, and works for Scott’s real estate company, testified that in 2005, Scott told him that Kane was interested in renting the Cabin. Brown, who is 1/3 owner of the Cabin, testified that Scott was “going to see if [Kane] wanted to rent the Cabin.” In any event, we need not resolve this dispute in view of the explicit offer of the Cabin in Scott’s e-mail, as set forth above.

official actions as the ConCom Chair with respect to the Property. Therefore, because the cost of renting the Cabin for one week is \$700, Scott's offer to Kane to use the Cabin for one week for free was an offer of something of substantial value.

Next, we consider whether the offer of substantial value was "for or because of any official act" Kane performed or would perform.^{15/} The Supreme Judicial Court has held that "it is necessary to establish a link between a gratuity and an official act."^{16/} In contrast to a bribe, "[a] gratuity in violation of [§ 3] . . . can either be provided to an official as a reward for past action, to influence an official regarding a present action, or to induce an official to undertake a future action."^{17/}

In analyzing whether a gratuity was given "for or because of an official act performed," the Commission "will weigh the totality of all of the circumstances surrounding the gratuity, drawing reasonable inferences from the circumstances."^{18/} The Commission may consider such factors as the subject matter of the pending matter and its impact on the giver, the outcome of particular votes, the timing of the gift, or changes in a voting pattern.^{19/} In addition, the Commission may consider, as discussed in *In re Life Ins. Ass'n of Mass., Inc.*, 2003 528 SEC, the following factors: whether the gift was aberrational conduct for the giver; the nature, amount and quality of the gift; whether the gift was a business expense for the giver; to whom was the gift targeted; whether there was reciprocity; the existence of personal friendship; sophistication of the parties; and whether the gift is part of a repetitive occurrence. "We will consider whether the gratuity was given substantially, or in large part was motivated by, the requisite intent to influence a present or future official act of the public official or to reward a past action."^{20/}

We find that Scott offered the Cabin for or because of Kane's specific actions on the ConCom. First, the ConCom's decision to grant or deny the Order of Conditions for the Property was a particular matter^{21/} and the process of obtaining approval from the

^{15/} "Official act" is "any decision or action in a particular matter . . ." G.L. c. 268A, § 1(h).

^{16/} *Scaccia*, 431 Mass. at 355.

^{17/} *Id.* at 356.

^{18/} *In re Life Ins. Ass'n of Mass., Inc.*, 2003 SEC 528.

^{19/} *Scaccia*, 431 Mass. at 357.

^{20/} *In re Life Ins. Ass'n of Mass., Inc.*, 2003 SEC 528.

^{21/} "Particular matter" means "any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for

ConCom for the project involved several official actions by the ConCom, in which Kane participated. The ConCom could have voted to deny Scott the permit at its May 11, 2006 meeting, or it could have created conditions that made development improbable and/or too costly to proceed. Further, the May 11, 2006 vote to approve the draft Order of Conditions was not the final official act by the ConCom members concerning the Project. A final version of the nineteen special conditions had not yet been created in final form, and the ConCom still had the opportunity to review and finalize the Order of Conditions and the nineteen special conditions after the May 11, 2006 vote. Therefore, the ConCom could have acted on the Order of Conditions after the May 11, 2006 vote if deemed necessary. Moreover, the evidence was clear that Scott did not know that the ConCom had acted on his Order of Conditions on May 11, 2006 at the time he sent the e-mail on May 12, 2006.

Second, the ConCom retained significant oversight of the Project after the Order of Conditions was delivered. In particular, the ConCom maintains jurisdiction until completion of a project and can enter and inspect the Property to ensure compliance with the conditions. The ConCom can reject work, require the work be redone, or pull the bond and have the work done by a third party. Kane played an active role in such matters because he was the ConCom Chairman and had extensive knowledge of wetland construction.

We therefore find that the Petitioner has established by a preponderance of the evidence that Scott's May 12, 2006 offer for Kane to use the Cabin was offered to reward Kane for past actions he had taken, and future actions he would take, as ConCom Chair related to the Property and the Order of Conditions. Accordingly, we conclude that there is a preponderance of evidence that Scott offered the Cabin to Kane for or because of his official actions as ConCom Chair related to the Property.

IV. Conclusion

In conclusion, Petitioner has proved, by a preponderance of the evidence, that Scott violated G. L. c. 268A, § 3(a) by offering something of substantial value to a municipal employee for or because of official acts performed or to be performed by him. Petitioner has failed to prove by a preponderance of the evidence that Scott violated G.L. c. 268A, § 2(a).

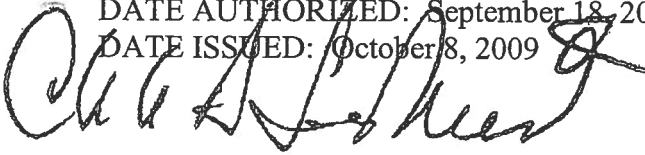
V. Order

Having concluded that Respondent John F. Scott violated G.L. c. 268A, § 3(a) and pursuant to the authority granted it by G.L. c. 268B, § 4(j), the State Ethics Commission hereby **ORDERS** John F. Scott to pay a civil penalty of \$2,000.

special laws related to their governmental organizations, powers, duties, finances and property." G.L. c. 268A, § 1(k).

DATE AUTHORIZED: September 18, 2009

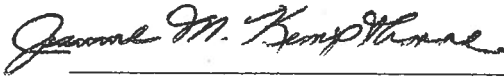
DATE ISSUED: October 8, 2009



Charles B. Swartwood III, Chairman



Matthew N. Kane



Jeanne M. Kempthorne



David L. Veator



Patrick J. King

NOTICE OF APPEAL

Respondent is notified of his right to appeal this Decision and Order pursuant to G.L. c. 268B, § 4(k) by filing a petition in Superior Court within 30 days of the issuance date.

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(by mail)

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