

2011 MAY 11 AM 11:04

TRIAL COURT ADMINISTRATOR

BY 

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF UMATILLA

STATE OF OREGON,

Plaintiff,

v.

DEAN FRANCIS GUSHWA,

Defendant.

Case No. CR110268

INFORMATION OF MISDEMEANOR

The above-named defendant is accused by this INFORMATION of the crimes listed below and committed as follows:

Count 1—Official Misconduct in the First Degree (Class A Misdemeanor; ORS 162.415)

The Defendant, on or about August 1, 2008, in Umatilla County, Oregon, while employed as a public servant, did unlawfully and with intent to obtain a benefit, to wit: financial benefit, knowingly perform an act constituting an unauthorized exercise in official duties, to wit: use his employment as District Attorney and/or as a government employee to receive a reduced hotel rate; contrary to statute and against the peace and dignity of the State of Oregon.

Dated this 11 day of May, 2011.



Erin S. Greenawald, OSB#99054
Sr. Assistant Attorney General
Oregon Department of Justice

2011 MAY 11 AM 11:05

TRIAL COURT ADMINISTRATOR

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR UMATILLA COUNTY

State of Oregon,

Plaintiff,

v.

Dean Francis Gushwa,

Defendant.

) Case No. CR110268

) TRIAL MEMORANDUM

Mr. Gushwa is not guilty of any criminal conduct, because he was not acting in his official capacity when he obtained a hotel room discount available only to governmental employees. Further, the amount of the financial benefit to Mr. Gushwa was a mere \$6.

Official Misconduct in the First Degree

ORS 162.415 requires that the public servant be acting in his official capacity and must knowingly perform an act that is an *abuse* of powers, responsibilities, or opportunities of office while in that capacity. *State v. Florea*, 296 Or. 500 , 503-04 (1984); *State v. Davis*, 189 Or. App. 436, 440-41 (2003). The public servant must be acting under "color of law." *Id.* at 442

Davis states, at 442:

A police officer is not catapulted into active duty merely by letting someone see her or his badge while on private time, any more than verbally identifying one's livelihood as a police officer would have that effect. To be sure, display of a badge serves to validate a police officer's assertion of official authority when the display is made simultaneously with an assertion of such authority—as, for example, when an officer displays a badge as identification in the course of an official investigation or execution of a warrant. But making a badge visible, in and of itself, without doing or saying anything more, does not

1 transform either that act or whatever an off-duty police officer next says or does
2 into conduct that is within the course of the police officer's official job, done
3 pursuant to official capacity, or otherwise under "the color of law."⁴ See Williams
4 v. United States, 341 U.S. 97, 99, 71 S.Ct. 576, 95 L.Ed. 774 (1951) (misconduct
5 engaged in under "color of law" involves "[m]isuse of power, possessed by virtue
6 of state law and made possible only because the wrongdoer is clothed with the
7 authority of state law") (citation omitted); see also Screws v. United States, 325
8 U.S. 91, 111, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945) ("[U]nder 'color' of law means
9 under 'pretense' of law. Thus acts of officers in the ambit of their personal
10 pursuits are plainly excluded."); State v. Ju Nun, 53 Or. 1, 6, 97 P. 96 (1908)
11 (actions are taken under "color of law" if done with "semblance of legal authority"
12 even if that legal authority is invalid).

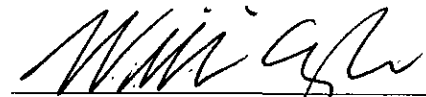
13 Mr. Gushwa was not acting in his official capacity. He did not abuse a power of his
14 office. Therefore, he did not violate ORS 162.415.

15 **Official Misconduct in the Second Degree**

16 Mr. Gushwa did not violate ORS 162.405, because he did not violate any statute related
17 to his office. Although ORS 244.010 *et. seq.* apply to the office of District Attorney, the
18 financial benefit received is not prohibited by any statute. The amount of the financial benefit he
19 obtained was \$6. ORS 244.042 proscribes the receipt by a public official of items valued in
20 excess of \$50. ORS 244.042(3)(a) specifically excludes from its application items valued less
21 than \$50.

22 Mr. Gushwa should be found not guilty of this charge.

23 Submitted this 11 day of May, 2011.

24 
25 _____
26 William E. Perkinson, OSB No. 05346
Attorney for Gushwa

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Memorandum on:

Erin Greenawald
DOJ

by the following indicated method or methods:

by **mailing** a full, true, and correct copy thereof in a sealed, first-class, and postage prepaid envelope, addressed to the attorney(s) shown above at the last-known office address of the attorney(s) via the United States Postal Service at Pendleton, Oregon on the date set forth below.

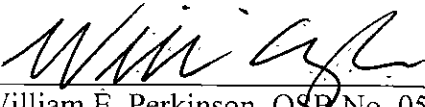
by causing a full, true, and correct copy thereof to be **hand-delivered** to the attorney.

by sending a full, true, and correct copy thereof via **overnight courier** in a sealed, prepaid envelope, addressed to the attorney(s) shown above at the last-known office address of the attorney(s) on the date set forth below.

by **faxing** a full, true, and correct copy thereof to the attorney(s) shown above at the fax number shown above, which is the last-known fax number for the attorney's(s') office(s), on the date set forth below. The receiving fax machine was operating at the time of service and the transmission was properly completed.

by **e-mailing** a full, true, and correct copy thereof to the attorney(s) shown above at the e-mail address provided by the attorney after having confirmed with the attorney(s) their consent to e-mail service and having requested and received a confirmation of receipt.

Dated this 11 day of May, 2011.



William E. Perkinson, OSB No. 05346
Attorney for Gushwa

FILED
UMATILLA COUNTY
CIRCUIT COURT

MAY 11 PM 12:23

In the Circuit Court of the State of Oregon
for Umatilla County

TRIAL COURT ADMINISTRATOR

BY JK

THE STATE OF OREGON,

Plaintiff,

vs.

DEAN FRANCIS GUSHWA,

Defendant.

Case no. CR110268

State's Summary of Law

COMES NOW the STATE OF OREGON, by and through Senior Assistant Attorneys General Erin S Greenawald and Jennifer K Gardiner, Specially Appointed Deputy District Attorneys for Umatilla County, and offers the following Summary of Law in support of the State's argument for conviction in the above entitled case.

SUMMARY OF LAW

The case law has clearly established the parameters within which conduct becomes criminal under ORS 162 415(1)(b).

In *State v Florea*, 296 Or. 500 (1984), the Court set forth the elements that must be proven to convict an offender for the crime of Official Misconduct

- 1) The defendant must be a public servant
- 2) He or she must knowingly perform an act
- 3) The act must be performed "in" his or her official duties; that is to say, in the defendant's official capacity, exercising the powers or opportunities available by virtue of his or her official position.
- 4) The act must be an unauthorized exercise of his official capacity, power, or opportunity
- 5) The act must be done with the intent to obtain a benefit or to harm another.

The benefit received can be de minimus, for a third party, or not even actualized: it is sufficient if the actor have only the *intent* to receive a benefit. See *State v. Petersen*, 234 Or. App. 609 (2010), *State v. Gove*, 128 Or. App. 239 (1994), *State v. Rodda*, 56 Or. App. 580 (1982)

1 In clarifying the legislative intent behind that statutory phrasing "knowingly performs an act
2 constituting an unauthorized exercise of his official duties," the Supreme Court in *Florea* explained:
3 "We think the use of the word "in" means to forbid knowing performance of an act that constitutes an
4 unauthorized exercise of the powers or opportunities of one's official position" *Florea at.503*.

5 The court clarified that "the act be performed in one's official capacity or in exercising the
6 power of one's official position " *Id.*

7 With regard to what constitutes an unauthorized act, the *Florea* court notes that it can be a
8 conclusion of law or a question of fact. *Id.* Additionally, evidence presented in a case can support the
9 inference that a public servant was using the benefits or power derived from his position to obtain a
10 benefit and thus the act was unauthorized *State v Gove*, 128 Or App 239, 243 (1994)

11 In further illustration of this point, the court in *Gove*, held that a police department's policy on
12 sexual harassment was relevant on the issue of whether the officer's conduct was authorized *Id at*
13 239.

14 Pertinent to the case at point, the State would direct the court to ORS 244 040, found in the
15 Government Ethics section, labeled "Prohibited Actions " That statute codifies essentially what the
16 crime of Official Misconduct sets forth

17 A public official may not use or attempt to use official position or office to obtain financial gain or
18 avoidance of financial detriment for the public official, a relative or member of the household of the
19 public official, or any business with which the public official or a relative or member of the household
20 of the public official is associated, if the financial gain or avoidance of financial detriment would not
21 otherwise be available but for the public official's holding of the official position or office

22 The statute contains a number of exceptions that do not apply.

23 The following is a case law summary that governs the crime of official misconduct and supports the
24 State's position that the benefit received need not be personal or even actualized, and thus any de
25 minimus benefit would suffice or even simply the intent to receive a benefit Additionally, that the
26 unauthorized act includes not only acts performed in one's official capacity BUT also when a public
27 servant exercises the powers of that official position in a way not authorized by that office

28 State v. Petersen, 234 Or App 609 (2010)

29 **Facts:** Defendant police dispatcher received a call from her husband on the business line, reporting
30 that he had chased a dog from their property by shooting it was an arrow, which was still lodged in
31 the dog Defendant contacted a deputy, relaying the information, but omitting the fact of injury to the

1 dog Defendant convicted of Official Misconduct, 162 415 (1)(a) for failing to relay to the officer, in a
2 complete and truthful manner, the call from her husband in which he injured a dog.

3 **Issue:** Sufficiency of evidence of benefit received or intended; sufficiency of evidence of mental state

4 **Holding:** Conviction affirmed

- 5 • Statute does not require that a benefit actually be obtained, but only that the failure to perform a duty be done "with intent to obtain a benefit." *Petersen* at 613.

6 State v. Davis, 189 Or App. 436 (2003)

7 **Facts:** Defendant, a reserve police officer traveling for personal reasons unrelated to her position as
8 a reserve police officer, was arrested after engaging in a dispute with a train conductor. In the course
9 of the argument, an intoxicated defendant pulled her police badge out of her pocket, fiddled with it,
10 and, at one point, began to thump it on the table. Defendant was convicted of Official Misconduct and
11 Disorderly Conduct.

12 **Issue:** The meaning of the statutory language "unauthorized exercise in official duties" and the range
13 of conduct it was intended to encompass.

14 **Holding:** Conviction for Official Misconduct overturned. Defendant was not on active duty, at no time
15 did she purport to undertake any police responsibility, duty or role. The act of pulling out her badge
16 and handling it in such a way to show that she was a police officer, without making any verbal
17 statement of authority, was not "action taken in the course of exercising official police duties or
18 functions."

- 19 • As relevant to the facts of this case, the court cited to the Supreme Court's decision in *State*
20 *v. Florea*, 296 Or 500 (1984), explaining that the legislature meant "" to forbid unauthorized
21 acts by officials in the course of exercising their official functions.... requirement that the act
22 be performed in one's official capacity or in exercising the power of one's official position."
23 *Davis* at 441, *Florea* at 503
- 24 • Statute requires that "the act be performed in one's official capacity or in exercising the power
25 of one's official position " *Davis* at 441, citing to *Florea* at 503-04
- 26 • A defendant must have been acting in an official capacity and must have abused the powers,
27 opportunities, or responsibilities of his or her office while in that capacity *Id* at 443

28 State v. Gove, 128 Or App. 239 (1994)

29 **Facts:** Defendant police officer, while on duty, made requests to a civilian that she engage in a
30 sexual relationship with him, along with other comments of a sexual nature Defendant and the victim
31 did not have sexual contact more advanced than touching or back rubbing Defendant was convicted
32 of Official Misconduct

33 **Issue:** Defendant argues the trial court erred in denying his motion for judgment of acquittal, stating
34 there was insufficient evidence that he "knowingly performed an act which constituted an
35 unauthorized exercise of the power or opportunities" of his official position *Id* at 241

1 **Holding:** Convictions affirmed.

- 2 • Police Department's policy on sexual harassment was relevant on the issue of whether the
- 3 officer's conduct was authorized and whether he had knowledge that his act was not an
- 4 authorized exercise of his official position
- 5 • The fact that defendant performed an act- soliciting sexual relations- while performing his
- 6 duties creates a permissible inference that a law officer who seeks sexual gratification from a
- 7 citizen in the course of performing his duties has "knowledge that the act is not an authorized
- 8 exercise of his official position " *Id* at 242
- 9 • Evidence supported an inference that "defendant was using his office in an unauthorized
- 10 manner to advance his quest, and the he was fully aware that he was doing so." *Id* at 243.
- 11 • Defendant need only intend to obtain sexual gratification or another benefit, the statute does
- 12 not require that he succeed *Id*

11 State v. Moffitt, 104 Or. App. 340 (1990)

12 **Facts:** Defendant police officer was acquitted of sodomy but convicted of Official Misconduct
13 Defendant responded to a domestic disturbance and found the victim, intoxicated, minimizing the
14 incident so as to protect her boyfriend Defendant and another officer agreed that defendant would
15 drive victim to a neighboring truck stop. Defendant then ordered victim into his car and, believing she
16 was under arrest, she complied Defendant drove the victim down the road, pulled over, unzipped his
17 pants and, per the victim, ordered her to commit oral sodomy The victim complied, afraid defendant
18 would kill her or leave her in the area Defendant argued the sexual contact was consensual.

17 **Issue:** Defendant argues that the verdicts are inconsistent, as "sodomy" was listed as basis for
18 Official Misconduct charge

18 **Holding:** Affirmed. The Official Misconduct charge alleged that defendant "knowingly performed an
19 act, to wit having [victim] perform oral sodomy upon him, which act constituted an unauthorized
20 exercise of his official duties," with no allegation of forcible compulsion As such, the verdicts were
21 not inconsistent, as the fact finder could conclude that the defendant did not use force or compulsion,
22 per Sodomy 1, but did commit official misconduct by engaging in "oral copulation." *Id.* at 343, 344.

- 22 • A purely personal benefit (sexual gratification, in this case) does satisfy ORS 162.415.

23 State v. Florea, 296 Or. 500 (1984)

24 **Facts:** Defendant police chief was convicted of Theft and Official Misconduct after transferring
25 firearms confiscated in police investigations to a third party Record is silent as to whether this act
26 was committed during working hours.

26 **Issue:** Meaning of statutory phrasing "knowingly performs an act constituting an unauthorized
27 exercise in his official duties."

Holding: Statute not unconstitutionally vague; convictions affirmed

- 1 • Court states that the use of the word "in" means "to forbid knowing performance of an act that
2 constitutes an unauthorized exercise of the powers or opportunities of one's official position.
Id. at 503
- 3 • The statute requires three elements: 1) The defendant must be a public servant 2) He or
4 she must knowingly perform an act 3) The act must be performed "in" his official duties, that
5 is to say, in the defendant's official capacity, exercising the powers or opportunities available
6 by virtue of his or her official position (4) the Act must be an unauthorized exercise of this
7 official capacity, power or opportunity. (5). The act must be done with "intent to obtain a
8 benefit or to harm another "" *Id.* at 503-04.
- 9 • The court goes on to reiterate that "the act be performed in one's official capacity or in
exercising the power of one's official position *Id.* at 504
- 10 • What is "unauthorized" may be a conclusion of law or may be an issue of fact *Id.*

11 State v. Rodda, 56 Or. App. 580 (1982)

12 **Facts:** Defendant public official was transferring property of the State of Oregon to a private school
without requiring payment. Defendant was convicted of Official Misconduct in the First Degree

13 **Issue:** Does the benefit have to be personal

14 **Holding:** Conviction affirmed. It is sufficient if public official acts with an intent to obtain a benefit for
a third person

15 State v. Gortmaker, 60 Or. App. 723 (1982)

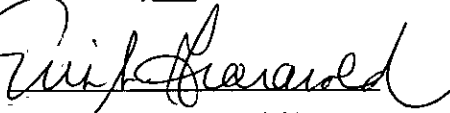
16 **Facts:** Defendant District Attorney enlisted the aid of two of his employees in the research and
17 preparation of a military paper Defendant had them called into his chief deputy's office, where they
18 were instructed on their assignment; the employees completed defendant's assigned project on
company time. Defendant was convicted of Official Misconduct.

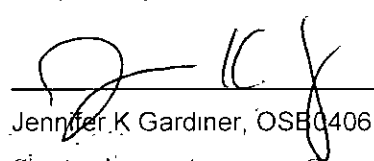
19 **Issue:** Defendant appeals his motion for judgment of acquittal, arguing that he was acting in his
20 unofficial capacity while asking fellow workers for assistance and that there was no evidence that he
knew that his request for assistance amounted to an official action as District Attorney,

21 **Holding:** Court affirms conviction, finding defendant's argument unpersuasive

22 Dated May 11, 2011

Respectfully Submitted:

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25 Erin S. Greenawald, OSB99054

Jennifer K. Gardiner, OSB040614

26 Sr. Assistant Attorney General

Sr. Assistant Attorney General

27 Special Prosecutor, Umatilla County

Special Prosecutor, Umatilla County



FILED
UMATILLA COUNTY
CIRCUIT COURT

2011 MAY 11 PM 12:23

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF UMATILLA

TRIAL COURT ADMINISTRATOR
BY [Signature]

STATE OF OREGON,
Plaintiff,

v.

Dean Francis Gushwa
Defendant.

Case No. CR110268

WAIVER OF JURY TRIAL

I ~~am~~ Dean F. Gushwa, the defendant in this matter, appearing in person and with my attorney, Wm E Perkinson, understand, and my attorney has explained to me, that:

- I have the right to a jury trial on the determination of whether I am guilty or not guilty of the crime(s) charged;
- I have the right to a jury trial on sentence-enhancement facts that the state has alleged, except as to any sentence-enhancement facts that I admit;
- If the sentence-enhancement facts relate to me and not to the crime(s) charged, I am entitled to a jury trial on those facts separately if the jury finds me guilty of the crime(s) charged;
- If I waive the right to a jury trial on the issue of guilt, I also waive the right to a jury trial on any sentence-enhancement facts; the judge would decide all issues of fact as to guilt and as to sentencing.

After being fully advised, and of my own free will, I wish to waive my rights to jury trial in this matter as follows:

I WAIVE my right to have a jury decide whether I am guilty or not guilty of the crime(s) charged and any sentence-enhancement facts.

I DO NOT waive my right to have a jury decide whether I am guilty or not guilty of the crime(s) charged, but I WAIVE my right to have a jury decide the following sentence enhancement facts (check all that apply):

- Any enhancement facts related to me as the DEFENDANT.
- Any enhancement facts related to the OFFENSES charged in the accusatory instrument.

5-11-11
Date

Defendant

[Signature]
Defense Attorney, OSB# 05346

Interpreted/translated by: _____

Printed name: _____

THE COURT FINDS: Defendant's waiver of jury trial is intelligent, knowing, and voluntary, and the court accepts that waiver.

11 May 2011
Date

[Signature]
Judge Gregory L. Bexter

Jury Waiver OJD form in word 10-09

FILED
UMATILLA COUNTY
CIRCUIT COURT

Description

CR100577 / CR110003 / CR110268
State of Oregon v. GUSHWA, Dean Francis
Erin Greenawald & Jennifer Gardner / William Perkinson
Honorable Gregory L Baxter Presiding / Recorder RJH
Hearing / Arraignment & Court Trial
Wednesday, May 11, 2011

2011 MAY 11 PM 12:32

TRIAL COURT ADMINISTRATOR

BY *RJH*

I certify that: I was the Official Court Recorder/Reporter for this proceeding;
the record of the proceeding was digitally recorded; I tested the recording
equipment before the proceeding began and to the best of my knowledge the
equipment was functioning properly; I monitored the recording equipment
throughout the proceeding and to the best of my knowledge the entire
proceeding was accurately recorded; and I logged the proceedings pertaining
to this case.

by: *RJH*

Date 5/11/2011

Location Courtroom 2

Time	Speaker	Note
11:24:37 AM	Judge	Case Called
11:24:57 AM	AAG Ms. Greenawald	CR100577 & CR110003 to be dismissed pursuant to stipulation with Judge Luukinen
11:25:07 AM	Judge	I will let Judge Luukinen sign the stipulation; Arraign on CR110268.
11:25:38 AM	Atty Mr. Perkinson	Wv rdg adv rts; proceed to trial.
11:25:56 AM	Judge	Received stipulation and waiver of jury trial; State's Summary of Law for CR1100268 & TL Memo from DEF in CR110268.
11:26:58 AM	DEF Mr. Gushwa / Judge	(waiver of jury trial)
11:28:45 AM	AAG Ms. Greenawald	Issues illustrated in Memoranda/attached exhibits; summarize State's position.
11:36:35 AM	Atty Mr. Perkinson	Summarize Defense position.
11:42:06 AM	AAG Ms. Greenawald	Rebuttal argument.
11:44:41 AM	Atty Mr. Perkinson	
11:45:46 AM	Judge	Findings; court finds DEF guilty.
11:50:09 AM	Recess	
12:03:10 PM	Resume	
12:03:13 PM	AAG Ms. Greenawald	Summarize agreement as to consequences. Conviction will not enter at this time. No further criminal prosecution based on these investigations.
12:07:34 PM	Atty Mr. Perkinson	
12:08:29 PM	DEF Mr. Gushwa	Apology
12:08:46 PM	Judge	Stipulated agreement, therefore stipulated agreement accepted; sentence in accordance. State to submit judgment this afternoon.
12:09:58 PM	Judge	Sentence Pursuant to ORS 137.533.
12:11:35 PM	Atty Mr. Perkinson	Clarify this is finding of guilt but not conviction.
12:11:59 PM	Judge	Impose \$67 unitary. No advice of appeal rights, as no conviction has entered.
12:12:21 PM	Concluded	

2011 MAY 11 PM 12:32

TRIAL COURT ADMINISTRATOR

BY *RL*

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4 IN THE CIRCUIT COURT OF THE STATE OF OREGON
5 FOR THE COUNTY OF UMATILLA
6

7 State of Oregon

8 Petitioner/Plaintiff.

9 vs.

10
11 Dean Francis Gushwa

12 Defendant

CASE NO. CR110268

ORDER TO SEAL

13 The above-entitled matter came before the Court for a Court Trial on 5/11/2011; and the
14 Court being fully advised in the premises;

15 **IT IS HEREBY ORDERED that:**

16 The Stipulation of the Parties is filed under seal, and is not to be opened without further order
17 of the Court.

18 **IT IS FURTHER ORDERED THAT:**

19 **DONE AND DATED** this 11th day of May, 2011

20 *Charles E. Luukinen*
21

22 Charles E. Luukinen, Senior Judge
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