

JD

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FILED

JUN 23 2005

**Judge Samuel Der-Yeghiayan
U.S. District Court**

UNITED STATES OF AMERICA)	
)	
v.)	No. 04 CR 921-4
)	
FLENORY BARNES, SR.)	Judge Samuel Der-Yeghiayan

PLEA AGREEMENT

This Plea Agreement between the United States Attorney for the Northern District of Illinois, PATRICK J. FITZGERALD, and the defendant, FLENORY BARNES, and his attorneys, STEVEN PUGH and TIFFANY FERGUSON, is made pursuant to Rule 11 of the Federal Rules of Criminal Procedure and is governed in part by Rule 11(c)(1)(C), as more fully set forth in Paragraph 17, below.

This Plea Agreement is entirely voluntary and represents the entire agreement between the United States Attorney and defendant regarding defendant's criminal liability in case 04 CR 921-4.

This Plea Agreement concerns criminal liability only, and nothing herein shall limit or in any way waive or release any administrative or judicial civil claim, demand or cause of action, whatsoever, of the United States or its agencies. Moreover, this Agreement is limited to the United States Attorney's Office for the Northern District of Illinois and cannot bind any other federal, state or local prosecuting, administrative or regulatory authorities except as expressly set forth in this Agreement.

By this Plea Agreement, PATRICK J. FITZGERALD, United States Attorney for the Northern District of Illinois, and the defendant, FLENORY BARNES, and his attorneys, STEVEN PUGH and TIFFANY FERGUSON, have agreed upon the following:

1. Defendant acknowledges that he has been charged in the superseding indictment (the “indictment”) in this case with participating in a mail fraud scheme in violation of Title 18, United States Code, Sections 1341, 1346 and 2 (Count Four).
2. Defendant has read the charge against him contained in the indictment, and that charge has been fully explained to him by his attorney.
3. Defendant fully understands the nature and elements of the crime with which he has been charged.
4. Defendant will enter a voluntary plea of guilty to Count Four of the indictment in this case.
5. Defendant will plead guilty because he is in fact guilty of the charge contained in Count Four of the indictment. In pleading guilty, defendant admits the following facts and that those facts establish his guilt beyond a reasonable doubt as to the charged offense.

Background

Defendant Flenory Barnes Sr. began working for the City of Chicago in 1966 and served in various positions in the Department of Water (hereinafter the “Department”), including Assistant to the First Deputy Commissioner and Assistant Superintendent. From in or about 2001 through his retirement in or about June 2003, defendant worked in the Sewer Department, including in the position of Deputy Commissioner. During portions of his Department employment, defendant participated in the process of requesting Hired Truck Program services on behalf of the Department district to which he was assigned. As to certain matters in his position as Assistant to the First Deputy Commissioner, defendant reported to co-defendant Donald Tomczak, the First Deputy Commissioner of the Department.

For all relevant periods, the Department was responsible for delivering potable water from pumping stations to City residents and businesses, as well as to certain suburban communities. Employing approximately 2000 employees, the Department was divided into bureaus, with separate and distinct functions. The largest of the bureaus was the Bureau of Operations and Distribution (hereinafter "Distribution"), which employed approximately 900 individuals, including the defendant. The principal function of Distribution was the installation, repair and monitoring of water delivery systems within the City. The headquarters for Distribution was the Jardine Filtration Plant, located in Chicago, where Tomczak had his principal office. Throughout his employment in the Department, defendant had an office in the South District located at 75th and Western Avenue.

The City's Hired Truck Program ("HTP") provided the Department, along with other City operating departments, with a mechanism to use trucking services on an as-needed basis to complete construction and operating obligations. As to the Department's use of the HTP, individual requests for HTP services typically were made by Department supervisors in the field (including the South District) and directed to Tomczak's office for review. After the request was reviewed and individual selections were made by Tomczak, individuals designated by Tomczak would notify the particular HTP participant as to the assignment and type of truck(s) necessary, thereby "calling out" the trucks for the Department. Upon completion of the HTP assignment or based upon further review by Tomczak, individual HTP trucking company participants would be notified that the truck was being assigned to another Department project, terminated or otherwise designated. From at least 1989 to late 2003, Tomczak exercised sole and final authority as to selection, assignment, and hiring of trucks, as well as the order in which companies would be laid off at the end of a season or project (hereinafter the "lay off process") related to the HTP business of the Department.

Defendant's Duties and Responsibilities

While they were employees of the City and pursuant to the Chicago Governmental Ethics Ordinance, defendant, Tomczak and co-defendant Gerald Wesolowski (collectively, the "City Employees") each owed a duty of honest services to the City and the people of the City in the performance of their respective public duties. Illinois law and City of Chicago ordinances defined that duty, providing limitations on the acceptance of payments and the solicitation of political contributions from persons doing business with the City. Defendant acknowledges that the City employees could not accept gifts (particularly gifts in excess of \$50) or solicit political contributions from persons in the HTP Program. Defendant was also aware of certain restrictions governing City employees, including restrictions imposed by the *Shakman* decree in which City employees were:

- (1) prohibited from compelling or coercing political financial contributions by any City employee, contractor, or supplier, to any individual or organization;
- (2) prohibited from compelling or coercing political activity by any City employee; and
- (3) permanently enjoined from directly or indirectly, in whole or in part:
 - (A) conditioning, basing, or knowingly prejudicing or affecting any term or aspect of City employment, with respect to one who is at the time already a City employee, upon or because of any political reason or factor; and
 - (B) knowingly causing or permitting any City employee to do any partisan political work during the regular working hours of his or her City employment, or during time paid for by public funds.

Beginning no later than late 1998 and continuing through approximately late 2003, defendant, along with Tomczak and others who worked at Tomczak's direction, devised and intended to devise, and participated in, a scheme and artifice to defraud the people of the City, and the City, of money, property and the intangible right to the honest services of Tomczak and other officials, employees

and agents of the City and the Department, by means of materially false and fraudulent pretenses, representations, promises and material omissions, and in furtherance thereof used the United States mails and other interstate carriers.

In particular, Tomczak performed and authorized official Department actions to benefit the financial interests of certain trucking companies that participated in the HTP (hereinafter the "Department Trucking Companies") by awarding, and authorizing the award of, assignments to perform HTP work for the Department; and providing business opportunities in the selection, hiring, assigning and lay off process for HTP Department projects. In return, with defendant's assistance, representatives of two Department Trucking Companies, namely, Company C and LR&C, provided cash for the benefit of Tomczak, defendant and third parties associated with Tomczak, with the defendant knowing that such benefits were provided with intent to influence and reward Tomczak in the performance of his official acts related to the HTP.

Financial benefits from the representatives of the two Department Trucking Companies were provided to Tomczak through the defendant, who also obtained cash for himself from representatives of those Department Trucking Companies. Specifically, for certain periods beginning in the mid 1990s through approximately late 2003, defendant received the following benefits for the benefit of himself and Tomczak:

Payments Made on Behalf of Company C

Defendant received cash payments and other things of value, principally on behalf of Tomczak, from representatives of Company C, in return for, and in connection with, Tomczak authorizing and providing Company C with HTP business opportunities on a regular basis.

In or about the early 1990s, defendant arranged for a meeting with Tomczak, defendant and representatives of Company C at a Chicago restaurant owned by representatives of Company C. At the meeting, Individual C and Trucking Representative 2, both of whom participated in the operations of Company C, requested Tomczak's assistance in obtaining HTP work in the Department. At some point after the meeting, after a financial arrangement had been made between the representatives of Company C and Tomczak, Tomczak requested that defendant pick up an envelope from representatives of Company C. Defendant did as instructed and after receiving the envelope, which he understood contained a cash payment relating to Company C obtaining HTP work, delivered it to Tomczak. Thereafter on an occasional basis at Tomczak's direction, defendant picked up envelopes of cash from the two representatives of Company C, often at the Chicago restaurant, and delivered each to Tomczak, typically at the Jardine Facility. In or about 1996, after defendant had a dispute with Tomczak over cash he had received for his own personal benefit from representatives of Company C, defendant ceased picking up the envelopes from representatives of Company C on behalf of Tomczak. During this same period in which defendant obtained envelopes for Tomczak, Trucking Representative 2 provided cash payments to defendant totalling approximately \$3,000 for defendant's role in serving as the intermediary for Tomczak.

Defendant acknowledges that the government could prove that, in receiving the payments from representatives of Company C, Tomczak was influenced and rewarded in the performance of his official acts related to the HTP. As a result of Tomczak and the defendant's actions as it related to Company C, Company C received HTP business on a regular basis in the Department.

Defendant further acknowledges that the government could prove that, after defendant ceased to be the intermediary on behalf of Tomczak, the representatives of Company C continued to make

cash payments and campaign contributions to Tomczak, directly and through Wesolowski, through in or about late 2003.

LR&C

Defendant received cash payments and other things of value, on behalf of Tomczak and the defendant, from co-defendants Leroy Peters and Commelie Peters, the principal operators of LR&C, in return for, and in connection with, Tomczak authorizing and attempting to provide LR&C with HTP business opportunities on a regular basis.

In or about the late 1990s, defendant, Leroy Peters and Tomczak agreed that defendant would collect cash payments from representatives of LR&C in return for Tomczak providing LR&C ongoing business opportunities in HTP. Defendant and Tomczak also agreed to split the cash payments from LR&C. Thereafter, on approximately a monthly basis beginning in the late 1990s and continuing to in or about late 2003, defendant met with Leroy Peters and/or Commelie Peters and received an envelope containing cash in the amount of \$1,500-\$2,500. After receiving the envelope, defendant took out a portion of the proceeds for himself and delivered the remaining amount to Tomczak at the Jardine Filtration Plant. Beginning in or about late 2002 and continuing through late 2003, defendant met co-defendant Gerald Wesolowski near defendant's place of work in the Sewer Department to pass off Tomczak's monthly share of the payments received from LR&C.

Defendant acknowledges that the government could prove that, in receiving the payments from LR&C representatives, Tomczak was influenced and rewarded in the performance of his official acts related to the HTP. As a result of Tomczak and the defendant's actions as it related to LR&C, LR&C received HTP business on a regular basis in the Department.

The defendant acknowledges that the government could prove that, a reasonable estimate of the total amount of payments that defendant received, for his own benefit and the benefit of Tomczak, from representatives of Company C and LR&C exceeded \$100,000 but was less than \$120,000.

Performing Political Work on City Time and Granting Work-Related Benefits for Political Work

As part of the scheme, in addition to serving as an intermediary for Tomczak to obtain cash payments from two HTP companies while a City employee, defendant also participated in “field” political work on behalf of Tomczak’s political organization, which organization consisted of over 100 individuals, most of whom were Department employees. (The field work, which typically occurred on weekends during election cycles, consisted of handing out literature and doing door-to-door activities on behalf of the particular political campaign). After Tomczak received direction from City officials as to the particular field work his organization was to conduct, Tomczak typically called a meeting of certain Department employees, including the defendant, during the business day to notify them of the particular political campaign they would be supporting and to discuss the intended work plan. Following the meetings, at Tomczak’s direction, one of the Department employees would contact defendant and provide him his field assignment for the upcoming election cycle. Upon receiving the assignment, defendant contacted individual Department employees who worked for him in the Department to obtain “volunteers” for the field activities that Tomczak’s organization had directed him to perform. During the field activities, defendant maintained sign up lists and otherwise tracked the political performances of his Department “volunteers.”

Typically, after an election cycle in which defendant and his Department employees had participated on behalf of Tomczak in field activities, defendant met with Tomczak and one or more

of Tomczak's political coordinators at Jardine during the business day and reviewed the individual political performances of defendant's Department employees during the campaign cycle. The purpose of these performance reviews was to provide specific information to Tomczak in order to obtain work-related benefits for the Department employees who had performed political work for the Tomczak organization. In conjunction with these meetings and thereafter, defendant sought to obtain raises and promotions into *Shakman* covered positions, as well as overtime, for these Department employees as a reward for their political work on behalf of Tomczak's political organization. In this context, defendant was aware of certain official actions that were taken to ensure that individual City employees who had performed political work received promotions and favorable treatment in return for their political work.

In or about 2001, when defendant transferred to the Sewer Department, he received his political assignments from other City officials, and in turn, solicited Sewer Department employees under his charge to assist him in his political assignments. As with the Tomczak organization, after an election cycle, defendant communicated the political performance of his individual political workers to one or more City officials for the purpose of obtaining raises, promotions into *Shakman* covered positions and favorable treatment for the employees as a reward for their political work. In this context, defendant was aware of certain official actions to ensure that individual City employees who had performed political work received promotions and favorable treatment in return for their political work.

On behalf of Tomczak and other City officials, through his tenure as a political coordinator in the Water Department and Sewer Department, defendant participated in certain field activities with City employees on behalf of the campaigns affiliated with Jeff Tomczak; Chicago mayoral

candidate Richard Daley; Aldermanic candidates Terry Gabinski, Walter Burnett and Terry Peterson; and the 2002 statewide Democratic party ticket, among others.

It was reasonably foreseeable to the defendant that, in furtherance of the scheme to defraud that, on or about October 24, 2000, at Chicago, in the Northern District of Illinois, Eastern Division, an envelope containing a City warrant addressed to LR&C at a Blue Island, Illinois, address, was delivered by United States mail according to the direction thereon, in violation of Title 18, United States Code, Sections 1341, 1346 and 2.

The above statement of facts is not an exhaustive account of the defendant's knowledge of the events described, nor does it describe all of the government's evidence regarding the count of conviction. Rather, it is a true and accurate summary of facts necessary to establish a factual predicate for the defendant's plea of guilty.

6. For purposes of calculating the guidelines promulgated by the United States Sentencing Commission pursuant to Title 28, United States Code, Section 994, the parties agree on the following points:

- (a) The Guidelines are calculated pursuant to the November 1998 edition of the Guidelines Manual.
- (b) Pursuant to Guidelines Sections 2B1.1(c)(3)(C) and 2C1.1(a), the base offense level is level 10.
- (c) Pursuant to Guidelines Section 2C1.1(b)(1), the offense level is increased by 2 levels because the offense involved more than one bribe payment.

(d) Pursuant to Guidelines Section 2C1.1(b)(2)(B), the offense level is increased by 8 levels because the offense involved a payment for the purpose of influencing an official holding a high-level decision making position, namely the position of First Deputy Commissioner.

(e) Defendant has clearly demonstrated a recognition and affirmative acceptance of personal responsibility for his criminal conduct. If the government does not receive additional evidence in conflict with this provision, and if the defendant continues to accept responsibility for his actions, within the meaning of Guideline Section 3E1.1, a two-level reduction in the offense level is appropriate.

(f) Defendant has provided timely complete information concerning his own involvement in the offense, and notified the government timely of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the Court to allocate its resources efficiently, within the meaning of Guideline Section 3E1.1(b); an additional one-point reduction in the offense level is therefore appropriate, provided the Court determines the offense level to be 16 or greater prior to the operation of Guideline Section 3E1.1(a).

(g) Based on the facts known to the government, the defendant's criminal history points equal 1 and the defendant's criminal history category is I; and

(h) The defendant and his attorney and the government acknowledge that the above calculations are preliminary in nature and based on facts known to the government as of the time of this Agreement. The defendant understands that the Probation Department will conduct its own investigation and that the Court ultimately determines the facts and law relevant to sentencing, and that the Court's determinations govern the final Sentencing Guidelines calculation. Accordingly,

the validity of this Agreement is not contingent upon the probation officer's or the Court's concurrence with the above calculations.

7. The defendant understands that the Sentencing Guidelines are advisory, not mandatory, and that the Court must consult those Guidelines and take them into account when sentencing the defendant.

8. Errors in calculations or interpretation of any of the guidelines may be corrected by either party prior to sentencing. The parties may correct these errors or misinterpretations either by stipulation or by a statement to the probation office and/or Court setting forth the disagreement as to the correct guidelines and their application. The validity of this Agreement will not be affected by such corrections, and the defendant shall not have a right to withdraw his plea on the basis of such corrections.

9. Defendant understands the count to which he will plead guilty carries a maximum penalty of twenty years imprisonment and a maximum fine of \$250,000, or twice the gross gain to the defendant or loss to others, whichever is greatest; and a term of supervised release of not more than three years.

10. The defendant understands that in accord with federal law, Title 18, United States Code, Section 3013, upon entry of judgment of conviction, the defendant will be assessed \$100 on each count to which he has pled guilty, in addition to any other penalty imposed. The defendant agrees to pay the special assessment of \$100 at the time of sentencing with a check or money order made payable to the Clerk of the U. S. District Court.

11. Defendant understands that by pleading guilty he surrenders certain rights, including the following:

(a) If defendant persisted in a plea of not guilty to the charge against him, he would have the right to a public and speedy trial. The trial could be either a jury trial or a trial by the judge sitting without a jury. The defendant has a right to a jury trial. However, in order that the trial be conducted by the judge sitting without a jury, the defendant, the government, and the judge all must agree that the trial be conducted by the judge without a jury.

(b) If the trial is a jury trial, the jury would be composed of twelve laypersons selected at random. Defendant and his attorney would have a say in who the jurors would be by removing prospective jurors for cause where actual bias or other disqualification is shown, or without cause by exercising so-called peremptory challenges. The jury would have to agree unanimously before it could return a verdict of either guilty or not guilty. The jury would be instructed that defendant is presumed innocent, and that it could not convict him unless, after hearing all the evidence, it was persuaded of defendant's guilt beyond a reasonable doubt.

(c) If the trial is held by the judge without a jury, the judge would find the facts and determine, after hearing all the evidence, whether or not the judge was persuaded of defendant's guilt beyond a reasonable doubt.

(d) At a trial, whether by a jury or a judge, the government would be required to present its witnesses and other evidence against defendant. Defendant would be able to confront those government witnesses and his attorney would be able to cross-examine them. In turn, defendant could present witnesses and other evidence in his own behalf. If the witnesses for defendant would not appear voluntarily, he could require their attendance through the subpoena power of the court.

(e) At a trial, defendant would have a privilege against self-incrimination so that he could decline to testify, and no inference of guilt could be drawn from his refusal to testify. If defendant desired to do so, he could testify in his own behalf.

12. Defendant understands that by pleading guilty he is waiving all the rights set forth in the prior paragraph. Defendant's attorney has explained those rights to him, and the consequences of his waiver of those rights. Defendant further understands he is waiving all appellate issues that might have been available if he had exercised his right to trial.

13. Defendant is also aware that Title 18, United States Code, Section 3742 affords a defendant the right to appeal the sentence imposed. Acknowledging this, the defendant knowingly waives the right to appeal any sentence within the maximum provided in the statute of conviction (or the manner in which that sentence was determined), in exchange for the concessions made by the United States in this Plea Agreement, subject to the Court imposing a sentence consistent with the calculations agreed to by the parties as set forth in paragraph 17 of this Agreement. The defendant also waives his right to challenge his sentence or the manner in which it was determined in any collateral attack, including but not limited to a motion brought under Title 28, United States Code, Section 2255. The waiver in this paragraph does not apply to a claim of involuntariness, or ineffective assistance of counsel, which relates directly to this waiver or to its negotiation.

14. Defendant agrees he will fully and truthfully cooperate with the government in any matter in which he is called upon to cooperate. Defendant further agrees to provide complete and truthful information in any investigation and pre-trial preparation, and complete and truthful testimony, if called upon to testify, before any grand jury and court proceeding, and any related civil administrative or court proceeding.

15. Nothing in this Agreement shall limit the Internal Revenue Service in its collection of any taxes, interest or penalties from the defendant.

16. Defendant understands that the United States Attorney's Office will fully apprise the District Court and the United States Probation Office of the nature, scope and extent of defendant's conduct regarding the charges against him, and related matters, including all matters in aggravation and mitigation relevant to the issue of sentencing.

17. At the time of sentencing, the government shall make known to the sentencing judge the extent of defendant's cooperation, and, assuming the defendant's full and truthful cooperation, shall move the Court, pursuant to Sentencing Guideline 5K1.1 to depart from the applicable sentencing guidelines range and to impose the specific sentence agreed to by the parties as outlined below. Defendant understands that the decision to depart from the applicable guidelines range rests solely with the Court. However, this Plea Agreement is governed, in part, by Federal Rule of Criminal Procedure 11(c)(1)(C). That is, the parties have agreed that the sentence imposed by the Court shall include a term of imprisonment in the custody of the Bureau of Prisons of two-thirds of the low end of the applicable sentencing guidelines. Other than the agreed term of incarceration, the parties have agreed that the Court remains free to impose the sentence it deems appropriate. If the Court accepts and imposes the agreed term of incarceration set forth, the defendant may not withdraw this plea as a matter of right under Federal Rule of Criminal Procedure 11(d) and (e). If, however, the Court refuses to impose the agreed term of incarceration set forth herein, thereby rejecting the Plea Agreement, or otherwise refuses to accept the defendant's plea of guilty, this Agreement shall become null and void and neither party will be bound thereto.

18. The defendant understands that Title 18, United States Code, Section 3664 and Sections 5E1.1 and 5E1.2 of the Sentencing Guidelines set forth the factors to be weighed in setting a fine and in determining the schedule, if any, according to which any restitution is to be paid in this case. The defendant agrees to provide full and truthful information to the Court and United States Probation Officer regarding all details of his economic circumstances in order to determine the proper fine and restitution schedule according to which the defendant may be ordered to pay. Defendant understands that providing false or incomplete information may be prosecuted as a violation of Title 18, United States Code, Section 1001, or as a contempt of the court.

19. Defendant understands that his compliance with each part of this Plea Agreement extends throughout and beyond the period of his sentence, and failure to abide by any term of the Plea Agreement is a violation of the Agreement. He further understands that in the event he violates this Agreement, the government, at its option, may move to vacate the Plea Agreement, rendering it null and void, and thereafter prosecute the defendant not subject to any of the limits set forth in this Agreement, or to resentence the defendant. The defendant understands and agrees that in the event that this Plea Agreement is breached by the defendant, and the Government elects to void the Plea Agreement and prosecute the defendant, any prosecutions that are not time-barred by the applicable statute of limitations on the date of the signing of this Agreement may be commenced against the defendant in accordance with this paragraph, notwithstanding the expiration of the statute of limitations between the signing of this agreement and the commencement of such prosecutions.

20. After sentence has been imposed on the count to which defendant pleads guilty as agreed herein, the government will move to dismiss the one count of the initial indictment as to the defendant.

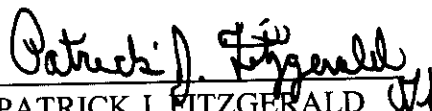
21. Defendant and his attorney acknowledge that no threats, promises, or representations have been made, nor agreements reached, other than those set forth in this Agreement, to cause defendant to plead guilty.

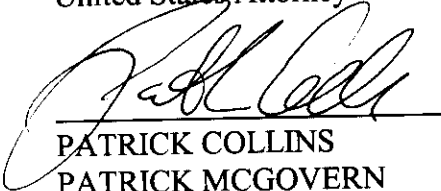
22. Defendant agrees this Plea Agreement shall be filed and become a part of the record in this case.

23. Should the judge refuse to accept the defendant's plea of guilty, this Agreement shall become null and void and neither party will be bound thereto.

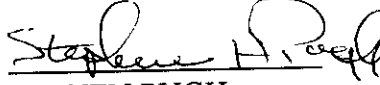
24. Defendant acknowledges that he has read this Agreement and carefully reviewed each provision with his attorney. Defendant further acknowledges that he understands and voluntarily accepts each and every term and condition of this Agreement.

AGREED THIS DATE: 6/23/05


PATRICK J. FITZGERALD
United States Attorney


PATRICK COLLINS
PATRICK MCGOVERN
Assistant United States Attorneys


FLENORY BARNES
Defendant


STEVEN PUGH
TIFFANY FERGUSON
Attorneys for Defendant