SHORT FORM ORDER

INDICTMENT NO. 02727-2005

County Court of the County of Suffolk
Part 7 - State of New York

PRESENT:
Hon. JAMES HUDSON

PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

-against-

MARIE MOFFETT,

Defendant.

ORIG. RETURN DATE: 01/17/06
FINAL SUBMIT DATE: 01/23/06

PLTF'S/PET'S ATTY:
HON. THOMAS J. SPOTA
Suffolk County District Attorney
By: LAURA P. NEWCOMBE, ESQ.
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Riverhead, New York 11901

DEFT'S/RESP'S ATTY:
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One Suffolk Square - Suite 500
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Upon the following papers numbered 1 to 3 and 1-9 read on this motion to dismiss and request to review grand jury minutes
Notice of Motion and supporting papers 1-3; 1-2 ; Affirmation/affidavit in opposition and supporting papers 4; 3 ; Affirmation/affidavit in reply and supporting papers 5-6 ; Other 7-8; 9 ; ~~(and after hearing counsel in support of and opposed to the motion)~~ it is,

In the late 13th/early 14th century text, "Commentarius Juris Anglicani," by the author Fleta, the following phrase can be found "*Tempus enim modus tollendi obligationes et actiones, quia tempus curit contra desides et sui juris contemptores*"* (Fleta, 1.4, c 5 Sec.12). The reason for the inclusion of this venerable passage is to demonstrate that this principle has continued over the centuries, finds modern expression in CPL 30.10(1)(b) and determines the resolution of the controversy before us.

The defendant has requested the Court to review the Grand Jury minutes for sufficiency and to dismiss the indictment on the basis of the charges against the defendant being barred by the statute of limitations. The defendant's application was brought under two separate motions. Both applications have been addressed in this decision. Initially, the Court would like to take this opportunity to commend counsel for the thoroughness and eloquence of their respective arguments. Such advocacy is a credit to the legal profession.

It is averred, *inter alia*, that in August of 1994 the defendant, Ms. Moffett (who was employed by the Connetquot School District as a school bus driver and dispatcher), submitted falsified insurance forms to the School District by adding a person to her family health insurance plan who she

falsely claimed was her husband. This resulted in unentitled medical coverage being given to this gentleman in the amount of $113,234.23. The defendant was indicted on four felony counts. Count one of the indictment alleges that Ms. Moffett committed Grand Larceny in the Second Degree between February 1996 and December 1997, count two alleges Ms. Moffett committed Insurance Fraud in the Second Degree between August 1994 and December 1997, count three alleges Ms. Moffett Offered a False Instrument for Filing in the First Degree on August 8, 1994, and count four alleges that Ms. Moffett Defrauded the Government between August of 1994 through December of 1997. Ms. Moffett was arraigned on these charges on December 16, 2005.

The defendant argues that the five-year statute of limitations (CPL 30.10(1)(b)) to prosecute has passed and the indictment should be dismissed. The People do not dispute that more than five years have passed since the commencement of this criminal action. Instead, they argue that the five-year statute of limitations is tolled by CPL 30.10(3)(b). This statute provides:

> "A prosecution for any offense involving misconduct in public office by a public servant may be commenced at any time during the defendant's service in such office or within five years after the termination of such service ..."

The defendant is currently employed by the Connetquot School District. The People contend that since the defendant is a public servant, the statute of limitation is tolled. The defendant does not deny that she is a public servant. She asserts, however, that the tolling statute only applies to individuals in "public office" and not mere public employees. The defendant cites to *People ex rel. Dawson v. Knox* (231 A.D. 490 [3rd Dept., 1931], *affd* 267 N.Y. 565 [1935]), wherein the court held, "[t]he holder of a public office is in the employment of the public, but all those who are in the public employment are not public officials and do not hold public office. The duties of a public official involve some exercise of sovereign power—those of a public employee do not. The one has independent official status; the other has rights under a contract of employment" (*People ex rel. Dawson v. Knox*, at 492; see also *Held v. Hall*, 191 Misc.2d 427, 442 [Westchester Supreme, 2002]).

Based upon this distinction, relevant case law has opined that there are many public servants who have been found not to be in public office, including sanitation workers (*Matter of DePaolo v. Bronstein*, 45 A.D.2d 691, 692 [1st Dept., 1974], *lv denied* 35 N.Y.2d 642 [1974]), administrators of a county Civil Service Employees' Association benefit fund (*People v. Confoy*, 110 Misc.2d 252, 259 [Suffolk Supreme, 1981]), automobile facilities inspectors, motor vehicle inspectors or investigators and motor vehicle license examiners with the State Department of Motor Vehicles (*Matter of County of Suffolk v. State of New York*, 138 A.D.2d 815, 817 [3rd Dept., 1988], *affd* 73

N.Y.2d 838 [1988]), and executive directors of a housing authority (*Matter of Lake v. Binghamton Hous. Auth.*, 130 A.D.2d 913, 914 [3rd Dept., 1987]).

The gravamen of the People's argument centers on the purpose of CPL 30.10(3)(b), i.e., to combat the inherent difficulty of discovering crimes involving misconduct in public office by public servants and cite to the Practice Commentary by Peter Preiser, McKinney's Consolidated Laws of New York (2003), CPL 30.10(3)(b) . The People further argue that the term "misconduct in public office" was inserted by the legislature to distinguish misconduct by public servants in private life from the misconduct of a public servant in public office; thereby avoiding draconian situations such as a public school teacher losing the benefit of a five-year statute of limitation for driving while intoxicated, like any other private citizen would, just because she is a public servant. This is an interesting contention. It is made, however, without any supporting case law or statutory authority.

A search of the 1970 Session Laws, the year CPL 30.10(3)(b) was enacted, reveals a dearth of information regarding the category of individuals encompassed by this law. The Court notes, however, that the McKinney's Practice Commentary by Peter Preiser, relied on by the People was originally derived from Judge Denzer's Practice Commentary to the section in the 1971 edition of McKinney's Consolidated Laws of New York (pg. 69). Judge Denzer wrote:

> "... Because of the inherent nature of the circumstances under which such offenses are committed, their commission is often not discovered until the *incumbent public servant has left office,* which may be some time after the normal statute of limitations has run. Out of these considerations, the new provision extend the regular period of limitation to a point five years beyond the public servant's *tenure of office* ..." (emphasis added by this Court).

The language used by Judge Denzer seems to indicate that the tolling statute does not apply to every public servant, but rather to those who are in "office." Furthermore, "public officer" is included under the definition of "public servant" in Penal Law 10.00(15). By specifying "misconduct in public office by a public servant," it is clear that the legislature intended to distinguish the two terms. To embrace the people's interpretation would render the phrase "public office" a redundancy when used in conjunction with "public servant." When construing a statute the Court must assume that every provision thereof was intended for some useful purpose (McKinney's Statutes Section 144, see also *Allen v. Stevens* (161 N.Y. 122 [1899]; *People v. Minowitz*, 13 N.Y.S.2d 937 [Rochester City Court, 1939]; *In re Christopher "F"*, 260 A.D.2d 97 [3rd Dept., 1999]), witness the immortal Coke's maxim "*verba debent intelligi ut aliquid operentur*"** (8 Coke, 94[a]), and a statute must not be construed in such a way that would result in the Legislature having performed a useless or vain act

(McKinney's Statutes Section 144); see also *In re Alexandra C.*, 157 Misc.2d 262 [Family Court, Queens County, 1993]).

A Court is obliged to interpret a statute in a way that implements both the will of the Legislature and the specific problem that the provision was adopted to remedy (McKinney's Statutes Section 96, see also *Wetherill v. Eli Lilly & Co. (In re N.Y. County DES Litig.)*, 89 N.Y.2d 506 [1997]). Distinguishing public officials from regular public servants as it applies to the tolling of the statute of limitations in CPL 30.10(3)(b) would closely tailor the purpose of the law. As the people have pointed out, the purpose of the law is to combat the inherent difficulty of discovering crimes involving misconduct in public office by public servants. The reason why it is inherently difficult to discover crimes by public officials in public office is because a public official's work, in many cases, is independent. There is no employer, supervisor or board of directors overseeing their work. A public official usually *is* the supervisor who manages the public funds and directs and monitors the actions of the other public servants below him/her. With little or no oversight, a public official can more easily conceal his or her crimes. Regular public servants, however, invariably have a supervisor overseeing their work. They do not have the same ability to conceal a crime that a public official would. A regular public servant is in no more of a favorable position to commit a crime in the course of his or her employment than a regular employee in the private sector. For example, if a cashier at the town clerk's office, a public servant, was stealing from the register, the crime could be discovered just as easily as a grocery store cashier who steals from the register. Both the town cashier and the grocery store cashier work under supervisors who oversee their work. A public official, however, usually does not have this level of oversight. In such an atmosphere a public official's criminal activity is more easily concealed and may not be discovered until they are replaced when a new public official takes office in their stead.

The defendant in our case was a school bus driver and dispatcher. She was not elected or appointed, nor did she take an oath of office. Her duties at work are to drive a school bus and to direct drivers on their routes. She did not exercise any sovereign powers or have a term of office. By all accounts she is a regular public servant equivalent to a regular bus driver or dispatcher employee in the private sector.

Based on the reasons above, this Court does not find that the tolling statute contained in CPL 30.10(3)(b) is applicable to the defendant in the case at bar. Since the charges against the defendant were brought beyond the applicable statute of limitation, all four counts of the indictment are dismissed. It is

PEOPLE V. MOFFETT
INDICTMENT NO. 02727-2005

ORDERED that all four counts under indictment number 02727-2005 are dismissed.

This constitutes the decision and order of the Court.

Dated: Riverhead, New York
March 23, 2006

JAMES HUDSON
J.C.C.

*Time is a means of destroying obligations and actions, because time runs against the slothful and contemnors of their own rights."

**"Words should be understood so as to have some operation."