

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2012 CA 1096

NNANTA FELIX NGARI

VERSUS

OFFICE OF GROUP BENEFITS

*PH
JW
WK*

**On Appeal from a Decision of the
State Civil Service Commission
Docket No. S-17010**

**Honorable David Duplantier, Chairman;
John McLure, Vice-Chairman;
C. "Pete" Fremin, G. Lee Griffin, D. Scott Hughes,
Kenneth Polite, and Sidney Tobias, Members**

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State of Louisiana,
Office of Group Benefits**

BEFORE: PARRO, WELCH, AND KLINE,¹ JJ.

Judgment rendered MAY 31 2013

¹ Judge William F. Kline, Jr., retired, is serving as judge ad hoc by special appointment of the Louisiana Supreme Court.

PARRO, J.

Nnanta Felix Ngari appeals a final decision of the Louisiana Civil Service Commission (the Commission), denying his appeal and upholding the disciplinary action taken by the Office of Group Benefits (OGB) to terminate his employment for failure to disclose a potential conflict of interest. Based on our review of the record, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Ngari was hired by OGB on December 19, 2008, as an Auditor 3 in its internal audit division. Before accepting this position, he had been the owner, president, and director of Unique Medical Solution, Inc. (Unique), a provider of power wheelchairs to Medicare recipients. Unique had contracts with OGB dating back to April 2005. According to Ngari, Unique went out of business in December 2007. However, the record shows that Ngari, acting as president of Unique and on its behalf, had signed and submitted a contract to provide wheelchairs to OGB for the period of July 1, 2007, through June 30, 2009;

When he was hired, Ngari was given a copy of OGB's Permanent Policy No. 28, which had the purpose of ensuring "integrity in our operations and to implement the objectives and policies of the *Louisiana Code of Governmental Ethics*."² Policy No. 28 defined "Conflicts of Interest," as:

situations in which financial or other personal considerations may compromise, involve the potential for compromising, or may have the appearance of compromising an elected official or public employee's objectivity in meeting duties or responsibilities.

It further stated:

[OGB] requires its employees to disclose immediately on discovery, and to resolve any actual or possible conflicts of interest arising from activities in which they engage. Failure to report a conflict of interest constitutes a violation of employment responsibilities and could result in disciplinary action.

According to OGB's Permanent Policy No. 28, a conflict of interest issue may arise when an employee is:

[F]inancially interested in, or in any manner connected with, any contract or bid for furnishing supplies, material, services, and equipment of any kind to the Program.

² Louisiana Revised Statutes 42:1101-1170 comprise the Louisiana Code of Governmental Ethics.

Ngari listed Unique as his prior place of employment when he applied for the position with OGB, but did not show that he was the owner/director of Unique. He also did not disclose Unique's past contractual relationship with OGB or the existence of the July 1, 2007, through June 30, 2009 contract. OGB employees were required to certify on an annual basis that they met the conflict of interest requirements of Policy No. 28. On June 26, 2009, Ngari signed a disclosure certificate, stating that he had no position of influence as owner, manager, or board member in any business with which OGB had transactions during the period July 1, 2008 to the present, and also that he had not "bid on or entered into" or had any interest in any contract with OGB that would result in a violation of LSA-R.S. 42:1113(A).³

On or about July 16, 2010, Ngari was confronted at the OGB offices by federal law enforcement agents in connection with their investigation into irregularities in Medicare billing by Unique. They served Ngari with a summons outlining federal indictments on multiple counts of conspiracy to commit health care fraud against the Medicare program in his capacity as owner and operator of Unique. That same day, OGB advised Ngari that he was being suspended with pay pending an investigation. After discovering Ngari's former position with Unique and Unique's contractual agreements with OGB, OGB informed him in a letter dated August 20, 2010, that disciplinary action against him was being considered, up to and including termination of his employment, for his "failure to report a potential conflict of interest." Ngari's attorney responded, advising that Unique had ceased operations at the end of 2007 or beginning of 2008 and that Ngari was not engaged in business activities or deriving any business revenues from Unique when he applied for employment or when he completed the disclosure certificate. In a letter to Ngari on September 13, 2010, OGB said it had considered the information provided by his attorney, but was terminating his employment, effective September 21, 2010, for his failure to report a potential conflict

³ The applicable version of Louisiana Revised Statute 42:1113 stated, in pertinent part:

A. (1) No public servant ... or legal entity in which he has a controlling interest shall bid on or enter into any contract, subcontract, or other transaction that is under the supervision or jurisdiction of the agency of such public servant.

of interest.

Ngari appealed to the Commission, which appointed a referee to hear the appeal, and an evidentiary hearing was held on December 19, 2011. The referee issued his findings and decision on February 17, 2012, denying the appeal. Ngari's application for review by the Commission was denied, thereby making the decision of the referee the final decision of the Commission. Ngari then appealed that decision to this court, pursuant to LSA-Const. Art. X, § 12.

LAW AND ANALYSIS

Article X of the Louisiana Constitution of 1974 establishes the State Civil Service and the State Civil Service Commission. Article X, § 12(A) places exclusive original jurisdiction to adjudicate removal and disciplinary cases in the Commission, with the attendant power to appoint referees to hear and decide cases. Section 12 allows the classified employee the right to an administrative appeal from the referee's decision to the Commission itself, with the right to judicial review in the court of appeal where the Commission is located. Article X, § 8 prohibits disciplinary action against classified employees, except for cause, prohibits discrimination against a classified employee, grants employees the right to bring an appeal concerning such actions to the Commission, and sets out the burden of proof for each type of action. Louisiana Dep't of Agric. & Forestry v. Sumrall, 98-1587 (La. 3/2/99), 728 So.2d 1254, 1256-57.

In Bannister v. Department of Streets, 95-0404 (La. 1/16/96), 666 So.2d 641, the Louisiana Supreme Court described the standard of review in civil service disciplinary cases, as follows:

In civil service disciplinary cases, an appellate court is presented with a multifaceted review function. First, as in other civil matters, deference will be given to the factual conclusions of the Commission. Hence, in deciding whether to affirm the Commission's factual findings, a reviewing court should apply the clearly wrong or manifest error rule prescribed generally for appellate review

Second, in evaluating the Commission's determination as to whether the disciplinary action is both based on legal cause and commensurate with the infraction, the court should not modify the Commission's order unless it is arbitrary, capricious, or characterized by abuse of discretion. "Arbitrary or capricious" means the absence of a rational basis for the action taken.

Employees with permanent status in the classified civil service may be disciplined only for cause expressed in writing. "Cause" for the dismissal of such a person includes conduct prejudicial to the public service involved or detrimental to its efficient operation. Stated differently, disciplinary action against a civil service employee will be deemed arbitrary and capricious unless there is a real and substantial relationship between the improper conduct and the "efficient operation" of the public service. (Citations omitted).

Bannister, 666 So.2d at 647; Wopara v. State Employees' Group Benefits Program, 02-2641 (La. App. 1st Cir. 7/2/03), 859 So.2d 67, 69-70.

Ngari's appeal to this court states that the referee and the Commission erred in finding that he had a potential conflict of interest that he failed to disclose when he accepted employment with OGB and further erred in allowing his employment to be terminated as a result. He contends that, because Unique had ceased operations before he was hired by OGB, he had no duty to disclose its past or present contractual arrangements with OGB as an actual or potential conflict of interest. He argues that OGB's position is based on the contract Unique submitted to provide services to OGB from July 1, 2007, to June 30, 2009, and is based on four assumptions, all of which are flawed. The first assumption is that Unique was an operating business when Ngari sought employment; second, that the contract with OGB was executed and binding on the parties; third, that OGB was unaware that Ngari was associated with Unique; and fourth, that Ngari's position with Unique would conflict with his position at OGB.

In actuality, however, OGB did not base its decision on those four assumptions. The evidence presented to the referee demonstrates that OGB's decision was based on the language of Policy No. 28, the reasons underlying that policy, and the significance of Ngari's position as an OGB auditor whose job duties included investigating and reporting on the precise kind of actual or potential conflict that he failed to disclose.

At the evidentiary hearing, Belynda Gauthier, the Human Resources Director for OGB, testified that when Ngari was employed, he was advised about the conflict of interest policies of OGB and signed a form showing his receipt of a copy of Policy No. 28. Despite the fact that the policy required immediate disclosure of any potential conflict, Ngari did not disclose his interest in Unique or its contractual relationship with OGB when he was employed or when he signed the disclosure certificate in June 2009.

Gauthier also discussed Ngari's job description as an Auditor 3, which showed that approximately 78% of his time would be spent performing audits to verify compliance with laws and regulations and to verify the efficacy of internal controls of operations and functions. Ngari's job description also included reviewing potential fraud situations and reporting any such findings to the audit director and, if necessary, to the legal division for further action. Gauthier testified that the Unique contract for the period from July 1, 2007, to June 30, 2009, had been executed on behalf of OGB and was on file at the OGB offices. However, the issue for OGB was not whether that contract had been executed by OGB, but the fact that it had been submitted by Ngari on behalf of a company in which he had a controlling interest. She explained that OGB's investigation of him did not follow the procedures it would normally use when an employee self-disclosed a potential or actual conflict of interest, because Ngari had not self-disclosed, but had lied on his disclosure certificate by not reporting the existence of the contract.

Stan Hurder, Deputy General Counsel for OGB, also testified at the hearing. Hurder was the supervisor of the OGB fraud unit. After the federal officers had confronted Ngari, OGB decided it needed to look closely to see if there were any contractual or financial involvements between Ngari's business interests and OGB. When Hurder learned of the existence of the Unique contract and Ngari's relationship to that company, he was greatly alarmed. He said the fraud unit was responsible for investigating unusual situations that might relate to fraud or an appearance of some great impropriety, such as Ngari's situation. Hurder also said that, like an attorney, an internal auditor is held to a high duty to make certain that there is no impropriety and no appearance of impropriety in OGB's handling of public funds. OGB had a fiduciary duty to closely guard its funds and the 250,000 social security numbers, addresses, and names in its records. Hurder said the existence of the contract with Unique created the potential for conflict, because a claim could have been submitted by Unique for providing a wheelchair to an eligible employee or retiree, and OGB would have paid that claim or would have paid the portion of the claim that was not covered by Medicare. He said it was essential for OGB to know that one of its employees, a high-ranking

auditor, had a "side business" that had a contract with OGB under a corporate name that did not use his name.

Roslyn Johnson, an Audit Director 2 for OGB, testified that she was the head of the internal audit division. That division was responsible for auditing all of the business functions of OGB as it related to compliance, performance, and transactions. Johnson stated that the internal audit division could not authorize or terminate a contract, but if the auditors found a problem with a contract, those findings were reported in writing to management, which then made whatever decision was appropriate. The internal audit division also conducted an annual review of related party transactions and conflicts of interest. Most of that annual review was done by Johnson and her administrative assistant, with some assistance from other auditors, when requested. Although Ngari was one of only three staff auditors working in the internal audit division, he had not handled anything relating to the disclosure review during the time he worked under her. Johnson said her only involvement with the investigation of Ngari was retrieving the annual disclosure certificates he had signed and providing them to the legal division. Because of the circumstances of Ngari's indictment on federal fraud charges relating to Medicare, the investigation of Ngari was conducted by the fraud unit of the legal division and was not handled by Johnson under OGB's usual procedures when an employee self-disclosed a potential conflict.

Ngari testified that Unique was not in operation during any part of 2008, when he was hired. The last year he filed an annual report for Unique with the Secretary of State was 2007; this was also the last year he filed a tax return for Unique. Ngari stated that the last time Unique had a signed, completed contract with OGB was for the period ending in March 2007. The new contract that he had signed and submitted for the period July 1, 2007, through June 2009 was completed by him and mailed to OGB without the proper insurance documentation, because Unique's policy had expired and had not been renewed.⁴ The OGB contract stated that it would not be approved unless every requirement was met, so he did not believe it had been approved by OGB, due to

⁴ Despite his assertions about the lack of insurance coverage, Ngari introduced into evidence an insurance policy covering Unique for the period of September 7, 2007, to September 7, 2008. He did not explain why such a policy was needed for a business that was closed in early 2008.

the lack of current insurance documentation. Ngari said he closed the business in 2008 and had no intention of conducting any outside business while employed by OGB as an auditor. Therefore, he said he felt no need to disclose anything about Unique's contracts or his ownership interest in the company.

The referee's written decision states the following:

The evidence adduced at the hearing shows that Mr. Ngari failed to disclose to OGB that he was the Director of [Unique], and that he, on behalf of [Unique], had entered into a contract with OGB for the provision of wheelchairs. The contract's term was from July 1, 2007, through June 30, 2009. Mr. Ngari began working for OGB on December 9, 2008, while the contract was still in effect. Not only did Mr. Ngari fail to immediately disclose his interest in [Unique] when he began his employment with OGB, he also failed to disclose his interest in the company on the "Office of Group Benefits Related Party Disclosures and Compliance with the Code of Governmental Ethics" form he executed on June 26, 2009.

* * *

OGB did not learn of the potential conflict of interest until it was notified by state and federal law enforcement agents that Mr. Ngari was being investigated for alleged irregularities with Medicare billing.

Mr. Ngari failed to report a potential conflict of interest to OGB when he failed to report his connection to [Unique], both when he was initially employed and when he executed the June 26, 2009 "Office of Group Benefits Related Party Disclosures and Compliance with the Code of Governmental Ethics" form. Mr. Ngari was an Auditor 3. Part of his job duties was to audit contracts and report the results to OGB management, who made decisions based on the audits. Mr. Ngari's having a personal interest in an OGB contract while possibly auditing his competitors' contracts is clearly a potential conflict of interest. His failure to report this potential conflict of interest was detrimental to the state service, as it created the appearance of impropriety. OGB has thus proved cause for discipline against Mr. Ngari.

There is evidence in the record supporting the factual findings and conclusions of the referee, and the record as a whole does not indicate that those findings were manifestly erroneous. See Stobart v. State, through Dep't of Transp. and Dev., 617 So.2d 880, 882 (La. 1993). Moreover, stating an untruth in answering a material and important Department of Civil Service query, even if only negligently done, bears a real and substantial relation to an employee's qualifications for public work requiring reliability and trustworthiness. Board of Trustees, State Employees Group Benefits Program v. Moncrieffe, 93-1393 (La. App. 1st Cir. 10/7/94), 644 So.2d 679, 681 (citing Cottingham v. Department of Revenue, 232 La. 546, 94 So.2d 662 (1957)). The position of internal auditor requires the highest degree of reliability and trustworthiness,

because an OGB auditor is responsible for examining the transactions of persons and entities who contract with the agency to ensure that all internal controls and procedures are being followed and that public funds are being responsibly expended. An appearance of impropriety for someone in that crucial position would undermine public confidence in the functioning of the agency. Had Ngari disclosed his interest in Unique and its former or current contractual relationship with OGB when he was hired or when he completed the annual disclosure certificate, his situation would have been investigated by his superiors and he would then have had the opportunity to make his arguments concerning the fact that Unique was no longer in operation. However, his concealment of the relationship and its ultimate exposure as a result of the federal indictments resulted in a completely untenable situation for the OGB. We conclude that there was a real and substantial relationship between Ngari's failure to disclose his ownership interest in Unique and OGB's ability to function effectively in the public interest. Therefore, OGB established that it had legal cause to terminate his services; its disciplinary action was commensurate with the infraction and was not arbitrary and capricious.

CONCLUSION

For the above reasons, the disciplinary decision of the Commission is affirmed. All costs of this appeal are assessed to Ngari.

AFFIRMED.