

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2012 CA 2040

SCOTT C. FRANK

VERSUS

LOUISIANA STATE BOARD OF PRIVATE INVESTIGATOR EXAMINERS

Judgment Rendered: **OCT 09 2013**

On Appeal from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Docket No. 607,567

Honorable R. Michael Caldwell, Judge

George R. Knox
Lafayette, LA

Counsel for
Plaintiff/Appellant
Scott C. Frank

Joseph N. Lotwick
Baton Rouge, LA

Counsel for
Defendant/Appellee
Louisiana State Board of
Private Investigator
Examiners

BEFORE: PARRO, GUIDRY, AND DRAKE, JJ.

Handwritten signatures of George R. Knox and Joseph N. Lotwick. The signature of George R. Knox is at the top, and the signature of Joseph N. Lotwick is below it. The initials 'RHP' are written to the left of the signature of Joseph N. Lotwick.

GUIDRY, J.

This is an appeal of a judgment on judicial review that affirmed a decision of an administrative board finding a licensed private investigator guilty of professional incompetence. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

In September 2009, Scott Frank, a licensed private investigator from the Lafayette area, was hired to conduct surveillance in conjunction with a domestic matter. Based on his surveillance, Mr. Frank was called to testify in a divorce proceeding on August 4, 2010, in the Fifteenth Judicial District before the Honorable Edward R. Rubin. During his testimony, Mr. Frank stated that he had observed the husband leaving a wedding party accompanied by a female. Counsel for the husband objected to Mr. Frank's testimony regarding the female, because Mr. Frank had not mentioned observing the husband with a female in his surveillance log. In order to substantiate his statement, Mr. Frank presented a DVD on which he had recorded his surveillance of the husband; however, the portion of the DVD that was played for Judge Rubin did not show the husband leaving with a female as Mr. Frank had testified. Because the portion of the DVD viewed by Judge Rubin did not substantiate Mr. Frank's testimony, Judge Rubin instructed counsel to proffer the remainder of Mr. Frank's testimony, stating:

I'm not going to believe anything else he says because what I just saw, he emphatically told me what was going to be revealed on that DVD, and that's not the case. This witness, I have absolutely no faith in. Absolutely none. So you can proffer his testimony when we're done.

Thereafter, Judge Rubin signed an order on August 11, 2010, stating that he believed Mr. Frank had offered "perjured testimony ... for the sole purpose of influencing the court and thereby affecting the outcome of this case. For that reason, it is the order of this court that Scott Frank will not be allowed to offer any testimony in Division D of the 15th JDC pending further order of this court."

In November 2010, Rick Williams, a private investigator who also worked in the Lafayette area, reported the incident to Delbert Hahn, an investigator for the Louisiana State Board of Private Investigator Examiners ("Board"). Based on Mr. Hahn's investigation, Pat Englade, the executive director of the Board, sent a memo to Mr. Frank on December 2, 2010, advising him that a complaint file had been opened. Thereafter, on September 6, 2011, a formal administrative complaint was filed against Mr. Frank by Bruce Childers, the investigatory officer for the Board. In the administrative complaint, Mr. Childers alleged that Mr. Frank committed the following violations of statutory and administrative rules: (1) professional incompetency or gross negligence in violation of La. R.S. 37:3519(A)(5); (2) rendering, submitting, subscribing, or verifying false, deceptive, misleading, or unfounded opinions or reports in violation of La. R.S. 37:3520(A)(6); (3) committing a criminal act or any other act that reflects adversely on the investigator's honesty, trustworthiness, or fitness as an investigator in violation of LAC 46:LVII.725(2); (4) engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of LAC 46:LVII.725(3); and (5) violating any provision of the Private Investigators Law, La. R.S. 37:3501-3525, or any Board rule or regulation contained under Title 46, part LVII of the Louisiana Administrative Code.

On November 15, 2011, a hearing on the administrative complaint against Mr. Frank was held before the Board. At the conclusion of the hearing, the Board adopted the statement of the Board's counsel, Angelique Freel, as the Board's findings. In the formal opinion and order rendered by the Board, and signed by the hearing officer, Calvin "Trey" Fayard, III, on February 15, 2012, the Board determined that Mr. Frank did not commit perjury; however, the Board found:

Scott Frank was clearly ill prepared for court, which resulted in the adverse Order from the court. This coupled with his inability to testify to the Board as to the purpose and objective of the investigation

he was conducting; omission from a private investigator report/surveillance log the fact that a man left with an unknown female in a divorce proceeding where the private investigator was retained to obtain surveillance to show possible infidelity; and the poor quality of the investigatory report/surveillance log that Scott Frank prepared for the *Flint* case, all demonstrate professional incompetency under La. R.S. 37:3519(A)(5).

The Board, therefore, ordered that Mr. Frank retake a forty-hour training course and pay a \$500.00 fine.

Mr. Frank timely sought judicial review of the Board's decision, which decision was affirmed by the district court. This appeal followed.

STANDARD OF REVIEW

Once a final judgment is rendered by the district court, an aggrieved party may seek review of same by appeal to the appropriate appellate court. On review of the district court's judgment, no deference is owed by the court of appeal to factual findings or legal conclusions of the district court, just as no deference is owed by the Louisiana Supreme Court to factual findings or legal conclusions of the court of appeal. Maraist v. Alton Ochsner Medical Foundation, 02-2677, pp. 3-4 (La. App. 1st Cir. 5/26/04), 879 So. 2d 815, 817. Thus, an appellate court sitting in review of an administrative agency reviews the findings and decision of the administrative agency and not the decision of the district court. Smith v. State, Department of Health and Hospitals, 39,368, p. 4 (La. App. 2d Cir. 3/2/05), 895 So. 2d 735, 739, writ denied, 05-1103 (La. 6/17/05), 904 So. 2d 701.

Our review of the district court's judgment is governed by La. R.S. 49:964(G), which statute provides:

The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;

- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
- (6) Not supported and sustainable by a preponderance of evidence as determined by the reviewing court. In the application of this rule, the court shall make its own determination and conclusions of fact by a preponderance of evidence based upon its own evaluation of the record reviewed in its entirety upon judicial review. In the application of the rule, where the agency has the opportunity to judge the credibility of witnesses by first-hand observation of demeanor on the witness stand and the reviewing court does not, due regard shall be given to the agency's determination of credibility issues.

DISCUSSION

In his first assignment of error, Mr. Frank argues that the director of the Board, Mr. Englade, should have been sequestered from the hearing and that Mr. Englade, Lance Wallace, or Angelique Freel should not have been allowed to be present during the Board's deliberation.

We find no error in the Board's failure to sequester Mr. Englade from the hearing. As explained by Ms. Freel at the hearing, Mr. Englade, as executive director, is designated by La. R.S. 37:3503(4) as the chief administrative officer of the Board, and thus, is a representative of the Board. Therefore, in accordance with La. C.E. art. 615(B)(2), Mr. Englade's presence in the hearing was excepted from the rule of sequestration.

Also in this assignment of error, Mr. Frank asserts that it was improper for Mr. Wallace, Mr. Englade, and Ms. Freel to be present during the Board's deliberations. Further, Mr. Frank contends that Ms. Freel should not have been allowed to participate in the adjudication by arguing against pre-trial motions. We will first address Ms. Freel's participation in the administrative proceedings.

As previously stated, Ms. Freel was present at the hearing as counsel and advisor to the Board. Also present at the hearing was a hearing officer, Mr. Fayard, and prosecuting counsel (referred to as "complaint counsel"), Joe Lotwick. A review of the pretrial proceedings reveal that Ms. Freel did offer advice to the Board and the hearing officer, Mr. Fayard; however, argument in opposition to the motions was presented by Mr. Lotwick, and the final decision on each pre-trial motion was made by Mr. Fayard. In providing advice to the Board and Mr. Fayard, Ms. Freel questioned counsel for Mr. Frank to seek clarification regarding the pre-trial motions, but at no time did she rule on any of the motions or direct how any motion should be decided. As Ms. Freel was not engaged in the "performance of investigative, prosecuting, or advocating functions," we do not find that Ms. Freel's presence and offers of advice during the proceedings violated La. R.S. 49:960(A). Moreover, we further find no violation of the aforementioned statute, as counsel for Mr. Frank participated in all of the pre-trial communications with the hearing officer and the Board. See Ogg v. Louisiana Board of Chiropractic Examiners, 602 So. 2d 749, 753-54 (La. App. 1st Cir. 1992).

As for the presence of Mr. Englade, Mr. Wallace, and Ms. Freel during the Board's deliberations, we first observe that in judicial review of an adjudication proceeding, the court may reverse the decision of the agency "if substantial rights of the appellant have been prejudiced." La. R.S. 49:964(G). Further, as observed by this court in Hall v. State, Department of Public Safety and Corrections, 98-0726, p. 10 (La. App. 1st Cir. 4/1/99), 729 So. 2d 772, 778 (citations to case law omitted):

An impartial decision maker is essential to an administrative adjudication that comports with due process, even if *de novo* review is available. To this end, the Louisiana Administrative Procedure Act attempts to prevent partiality or bias in adjudicative settings by prohibiting *ex parte* consultations and requiring recusal of subordinate deciding officers or agency members from proceedings in which they

cannot accord a fair and impartial hearing or consideration. LSA-R.S. 49:960.

The Louisiana Supreme Court has identified five possible kinds of "bias" calling the decisionmaker's impartiality into question:

- (1) A prejudgment or point of view about a question of law or policy ...
- (2) a prejudgment about legislative facts that help answer a question of law or policy ...
- (3) Advance knowledge of adjudicative facts that are in issue ...
- (4) A personal bias or personal prejudice, that is, an attitude toward a person, as distinguished from an attitude about an issue ...
- (5) One who stands to gain or lose by a decision either way ... [or] a conflict of interest.

A party challenging the constitutionality of an administrative adjudication on the grounds of bias or prejudice of the decisionmaker must overcome the strong presumption of honesty and integrity in those serving as adjudicators. That party must present *convincing evidence* that the combination of functions in the same individual poses such a risk of actual and substantial bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be preserved. The party must demonstrate some *particular bias*, which goes beyond the mere combination of functions in a single agency.

See also La. R.S. 49:960(A).

In this case, Mr. Frank merely asserts that he was prejudiced by the presence of Mr. Englade, Mr. Wallace, and Ms. Freel, but he has not shown how their presence caused the voting Board members to prejudge or be biased in adjudicating his case. As previously discussed, Ms. Freel was present as counsel to the Board. A separate hearing officer presided over the proceedings. Thus, her presence and offers of advice, without a showing of some type of impropriety by Ms. Freel or the Board, is insufficient to constitute a denial of due process. See Ogg, 602 So. 2d at 753.

In regard to the presence of Mr. Englade and Mr. Wallace, a board member who recused himself from the proceedings due to his prior business dealings with Mr. Frank, several Board members declared that the gentlemen "didn't say anything" during the deliberations. Considering "the strong presumption of honesty and integrity in those serving as adjudicators," see Butler v. Department of Public Safety and Corrections, 609 So. 2d 790, 793-94 (La. 1992), and the

assurances of the Board members that the gentlemen did not participate in the deliberations, we do not find that the mere presence of these men rendered the adjudication unconstitutional.

In his second assignment of error, Mr. Frank protests the failure of the hearing officer to grant his motion in limine to exclude from evidence the order issued by Judge Rubin barring Mr. Frank from giving testimony in his courtroom, alleging that such evidence was highly prejudicial to his case. We find no merit in this contention. The Board's specific finding that Mr. Frank had not committed perjury belies this assertion.

Mr. Frank further argues that the hearing officer erred in denying his motion to compel discovery and his motion for continuance. Mr. Frank propounded discovery on Mr. Lotwick, as complaint counsel, on September 30, 2011, and filed a motion to compel discovery on October 27, 2011. Mr. Frank alleges that informal and incomplete discovery responses were provided by Mr. Lotwick on November 3, 2011. Thus, he filed a motion for continuance. Both the motion to compel and the motion for continuance were denied by Mr. Fayard on November 15, 2011, just prior to the hearing before the Board.¹

Administrative proceedings are not ordinarily governed by the strict rules of judicial proceedings. The key to pleading and procedure in the administrative process is the opportunity to prepare. Generally, inadequacies in pleading and notice may be cured if the record establishes that a full hearing was had after proper preparation. Hopping v. Louisiana Horticulture Commission, 509 So. 2d 751, 756 (La. App. 1st Cir. 1987). Still, due process does not require that a party

¹ Louisiana Administrative Code title 46, part LVII, sections 911 and 913 govern the Board's receipt and consideration of pre-hearing motions. Section 913(B), regarding a motion for continuance, provides that the motion may be granted if there are "substantial legitimate grounds that the hearing should be continued balancing the right of respondent to a reasonable opportunity to prepare and present a defense to the complaint and the board's responsibility to protect the public health, welfare, and safety."

be allowed to propound and enforce discovery in the form and manner set forth in the Louisiana Code of Civil Procedure in administrative proceedings. Delahoussaye v. Board of Supervisors of Community and Technical Colleges, 04-0515, p. 16 (La. App. 1st Cir. 3/24/05), 906 So. 2d 646, 655.

The discovery sought by Mr. Frank mainly pertained to the procedures used in initiating and processing the complaint against him. Mr. Frank made no assertion or showing of how the discovery sought would negate in any way the evidence relied on by the Board in rendering its decision. None of the evidence sought by Mr. Frank addressed the merits of his actions in performing surveillance in the Flint case. As previously stated, the Board rejected Judge Rubin's declaration that Mr. Frank had committed perjury. Instead, the Board found Mr. Frank guilty of professional incompetence based on Mr. Frank's own testimony before the Board. The evidence relied on by the Board in finding Mr. Frank guilty of professional incompetence was his own testimony at the hearing, his surveillance log, and his testimony on August 4, 2010, before Judge Rubin. Mr. Frank was clearly aware of and knowledgeable of the evidence relied on by the Board in rendering its decision. Thus, we find Mr. Frank was not prejudiced by the hearing officer's denial of his motions to compel and for a continuance. See Hughes v. Louisiana State Board of Dentistry, 490 So. 2d 1097, 1101-02 (La. App. 4th Cir.), writ denied, 496 So. 2d 326 (La. 1986), cert. denied, 480 U.S. 933, 107 S.Ct. 1573, 94 L.Ed.2d 764 (1987).

In his final assignment of error, Mr. Frank argues that he was denied due process based on the failure of the Board to follow its own rules. We likewise reject this assignment of error.

The evidence presented at the hearing revealed that an investigation of Mr. Frank began with a phone call from Mr. Williams, a private investigator from the

Lafayette area, to the Board in November 2010.² Mr. Hahn investigated Mr. Williams' report, and based on Mr. Hahn's investigation, Mr. Englade sent a "memo" to Mr. Frank on December 2, 2010, notifying him that a complaint file had been opened on him. Thereafter, in response to an inquiry regarding whether a written complaint against Mr. Frank had been filed, Mr. Englade notified counsel for Mr. Frank that "[a]s Executive Director of the [Board], I have the authority to file a complaint against a private investigator in the state." Nonetheless, in the Board's February 15, 2012 "Opinion and Order," it states "[a] signed Order by a state trial court judge that implicates a private investigator in a crime, when received by the Board, would in and of itself meet the qualifications of a Complaint under LAC 46:LVII.111." That administrative rule provides, "[a]ny complaint to the board must be in writing, signed by the individual making said complaint, and include an appropriate means by which to contact said individual for investigative purposes."

Throughout the proceedings below, Mr. Frank argued that the proceedings against him were initiated in violation of LAC 46:LVII.111. Even assuming that the proceedings were initiated in violation of LAC 46:LVII.111, we find that such a violation, in light of the record as a whole, is not of a constitutional dimension. A breach of internal rules violates the constitution only when the procedures promised are denied in such a manner that the constitutional minimum is itself denied or an independent constitutional deprivation is effected. Department of Public Safety and Corrections, Office of Youth Services v. Savoie, 569 So. 2d 139, 143 (La. App. 1st Cir. 1990). At all times, Mr. Frank was aware of the basic charges against him and the evidence on which the charges were based. Thus, even assuming the Board breached its own rules, we cannot say such a breach

² At Mr. Frank's hearing, Mr. Hahn testified that Mr. Williams called the Board's office, and on being advised of the nature of the call, he spoke to Mr. Williams.

deprived Mr. Frank of due process under the circumstances. See Savoie, 569 So. 2d at 143.

CONCLUSION

Therefore, based on our review of the administrative record and considering the applicable law and rules governing the administrative proceedings, we affirm the decision of the Louisiana State Board of Private Investigator Examiners. All costs of this appeal are charged to the appellant, Scott Frank.

AFFIRMED.