STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2012 CW 1849

BOARD OF ETHICS IN THE MATTER OF JENNIFER SNEED

JMM

Judgment Rendered: OCT 07 2013

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ON APPLICATION FOR SUPERVISORY REVIEW FROM THE
DIVISION OF ADMINISTRATIVE LAW
ETHICS ADJUDICATORY BOARD- PANEL A
DOCKET NUMBER 2011-18685
STATE OF LOUISIANA

HONORABLE JOHN O. KOPYNEC
PRESIDING ADMINISTRATIVE LAW JUDGE

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BEFORE: KUHN, PETTIGREW, AND McDONALD, JJ.

Kuhn, J. concurs with reasons. (by JMM)
Pettigrew, J. concurs in the result and assigns reasons. (by JMM)

McDONALD, J.

In this Code of Governmental Ethics enforcement action, a former member of the Jefferson Parish Council challenges the Louisiana Ethics Adjudicatory Board's denial of her peremptory exception raising the objection of prescription, which she raised in response to the Louisiana Board of Ethics' charge alleging she violated La. R.S. 42:1124.2 by failing to timely file a Personal Financial Disclosure Statement. We grant a writ of *certiorari* and render judgment dismissing the case for the reasons set forth below.

FACTUAL AND PROCEDURAL BACKGROUND

Jennifer Sneed began serving as a member of the Jefferson Parish Council in January of 2004. Several years later, in 2008, the Louisiana Legislature substantially revised the Code of Governmental Ethics; included in the changes was the creation of new laws that expand the disclosure requirements applicable to public office holders like Ms. Sneed.

One of the new laws, La. R.S. 42:1124.2, requires public office holders representing a voting district with a population of five thousand or more persons to file a Personal Financial Disclosure Statement ("Statement"). The Statement requires the disclosure of personal financial information regarding both the public officer and the public officer's spouse, including information about their business ownership interests (if exceeding ten percent of the business), the amount of income they derive from their respective employers and businesses, their immovable property and investment security interests, and their loans and liabilities.[1] The statute requires that the Statement be filed by May 15th of each year during which the person holds office and by May 15th of the year following the termination of the holding of such office. Failure to timely file the Statement

[1] The statute does permit the holder of the public office or position to designate the amount by choosing the applicable range of income rather than requiring disclosure of the exact amount. See La. R.S. 42:1124.2(D).

required by La. R.S. 42:1124.2 subjects the public officer to civil and criminal penalties. *See* La. R.S. 42:1124.4.

The enacting legislation for La. R.S. 42:1124.2 provided that the statute would take effect on January 1, 2009. *See* Act 1, Section 6 of the 2008 First Extraordinary Session. However, subsequent legislation stipulated that any person holding an office or position on or after July 1, 2008 would be required to file the Statement.[2] *See* Act 162, Section 6 of the 2008 Regular Session. Act 162 was only signed into law on June 12, 2008; therefore, the legislation gave public officers like Ms. Sneed less than one month of notice before they became subject to the extensive new disclosure obligations set forth in La. R.S. 42:1124.2. *Id.*

After La. R.S. 42:1124.2 was passed into law but before it took effect, on August 22, 2008, Ms. Sneed resigned from office. Ms. Sneed did not file the Statement on or before May 15, 2009. The failure of Ms. Sneed to file the Statement in May of 2009 prompted the Louisiana Board of Ethics (the "Board") to investigate.

The first action taken by the Board was to transmit a delinquency notice to Ms. Sneed in June of 2010, more than a year after the alleged violation of La. R.S. 42:1124.2. The notice was returned to the Board unclaimed. On September 27, 2010, the Board successfully served a delinquency notice on Ms. Sneed; the notice gave Ms. Sneed fourteen business days to file the Statement or submit an answer contesting the allegations. Ms. Sneed, through counsel, timely filed an answer disputing the Board's allegation that she was required to file the La. R.S. 42:1124.2 Statement in light of the fact that she left public office before the statute took

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[2] The complete contents of Section 6 of Act 162 of the 2008 Regular Session provide:

> The provisions of Section 2 of this Act shall not require any person whose public service terminated prior to July 1, 2008, to file a financial statement in connection with such public service. However, any person holding an office or position on or after July 1, 2008, shall be required to file financial statements in connection with the holding of such office or position in accordance with the provisions of Section 2 of this Act.

effect. Ms. Sneed asserted that it would be unconstitutional to retroactively apply La. R.S. 42:1124.2 to persons who were not in office at the time the law took effect.

The Board rejected Ms. Sneed's claim that La. R.S. 42:1124.2 did not apply to her, positing that Ms. Sneed was required to file the Statement because she did not terminate her service on the Jefferson Parish Council before July 1, 2008, the pivotal date set forth by Act 162. The Board's decision was memorialized in a letter written to Ms. Sneed's counsel that was dated December 8, 2010. In its letter, the Board gave Ms. Sneed fourteen business days to file the Statement and indicated that failure to do so would subject her to an automatic late filing fee of $100 per day, up to a maximum of $2,500, and would result in the matter being placed before the Board for further action. Ms. Sneed did not file the Statement.

As a result of Ms. Sneed's failure to file the Statement, the Board voted on September 15, 2011 to issue a charge against Ms. Sneed; the charge was then filed on October 28, 2011. The charge sought civil penalties pursuant to La. R.S. 42:1124.4 on grounds that Ms. Sneed violated La. R.S. 42:1124.2 by failing to file the Statement on or before May 15, 2009.

In response to the charge, Ms. Sneed filed exceptions raising the objections of no cause of action, lack of subject matter jurisdiction, and prescription. In the no cause of action exception, Ms. Sneed contended that the charge did not state a cause of action because it was unconstitutional to apply La. R.S. 42:1124.2 to her given that she no longer held public office when this statute took effect. In the lack of subject matter jurisdiction exception, Ms. Sneed contended that the Louisiana Ethics Adjudicatory Board (the "Adjudicatory Board") lacked jurisdiction to decide the constitutional issue raised by the application of La. R.S. 42:1124.2 to her. And lastly, in the prescription exception, Ms. Sneed contended that the Board exceeded the two-year prescriptive period set forth in La. R.S. 42:1163, which

requires the Board to take action to enforce a provision of the Code of Governmental Ethics within two years following the discovery of the occurrence of the alleged violation, because she contended the period commenced to run on May 15, 2009, the date her Statement was allegedly due, yet the Board did not file its charge until October 28, 2011, more than two years later.

The hearing on Ms. Sneed's exceptions began on July 13, 2012. Rather than conclude the hearing on that date, the Adjudicatory Board ordered the Board to supplement the record with evidence with respect to when it discovered that Ms. Sneed had not filed a Statement, recessed the hearing, and ordered that the hearing resume in September. Before the hearing resumed, the Board filed into the record the affidavit of a Board employee, with a computer log attached thereto, as evidence that the Board discovered Ms. Sneed's failure to file the Statement on February 19, 2010. The hearing concluded on September 28, 2012.

The Adjudicatory Board subsequently denied Ms. Sneed's exception of prescription in a decision issued on October 9, 2012. The Adjudicatory Board based its decision on its finding that the Board discovered the alleged violation on February 19, 2010, and took action to enforce the provision on September 15, 2011, less than two years later. The Adjudicatory Board pretermitted consideration of the peremptory exceptions of no cause of action and lack of subject matter jurisdiction in light of the constitutional issues raised therein.

Ms. Sneed now requests review of the Adjudicatory Board's October 9, 2012 decision pursuant to our supervisory jurisdiction.

LAW AND ANALYSIS

Louisiana Revised Statutes 42:1163 sets forth the following two prescriptive periods to limit the time within which the Board may bring an action to enforce the Code of Governmental Ethics:

> No action to enforce any provision of [the Code of Governmental Ethics] shall be commenced after the expiration of two years following the discovery of the occurrence of the alleged violation, or four years after the occurrence of the alleged violation, whichever period is shorter.

At issue herein is when the discovery of the occurrence of the alleged violation occurred to trigger the running of the two-year prescriptive period and when the Board took action to enforce La. R.S. 42:1124.2, the provision of the Code of Governmental Ethics that Ms. Sneed allegedly violated.

The Board argued, and the Adjudicatory Board agreed, that the two-year period commenced to run on February 19, 2010, the date the Board actually discovered Ms. Sneed's failure to file the Statement according to the evidence the Board filed into the record. Ms. Sneed argued that the two-year prescriptive period commenced to run on May 15, 2009, the date the Statement was allegedly due, because this is the date the Board should have known that the alleged violation occurred. Ms. Sneed's argument is based on her contention that the discovery rule embedded in the doctrine of *contra non valentem* applies to this prescriptive period, and she is thereby raising the novel argument that *contra non valentem* should be applied to diminish (rather than enlarge) the time available to bring an action. Ms. Sneed alternatively argues that the Board failed to present sufficient evidence to prove that that the Board discovered the occurrence of the alleged violation on February 19, 2010.

The Board also argued, and the Adjudicatory Board agreed, that the Board took action to enforce La. R.S. 42:1124.2 on September 15, 2011, the date the Board voted to issue a charge against Ms. Sneed. Ms. Sneed argued that the Board took action to enforce La. R.S. 42:1124.2 on October 28, 2011, the date the Board filed the formal charge against her.

The Louisiana Board of Ethics

The Board is charged with administering and enforcing the Code of Governmental Ethics. La. R.S. 42:1132(C). The purpose of the Code of Governmental Ethics is to further the public interest by ensuring that the law protects against conflicts of interest on the part of Louisiana's public officials and state employees by establishing ethical standards to regulate the conduct of those persons. *See* La. R.S. 42:1101; *In re Arnold*, 2007-2342 (La. App. 1st Cir. 5/23/08), 991 So.2d 531, 536. In furtherance of that purpose, the Louisiana Legislature passed a new law in 2008 requiring each person holding a public office who represents a voting district having a population of five thousand or more persons to annually file a Personal Financial Disclosure Statement. La. R.S. 42:1124.2.[3]

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[3] The information required to be included in the Statement, as set forth in La. R.S. 42:1124.2(C), is as follows:

(1) The full name and mailing address of the individual who is required to file.

(2) The full name of the individual's spouse, if any, and the spouse's occupation and principal business address.

(3) The name of the employer, job title, and a brief job description of each full-time or part-time employment position held by the individual or spouse.

(4)(a) The name, address, brief description of, and nature of association with and the amount of interest in each business in which the individual or spouse is a director, officer, owner, partner, member, or trustee, and in which the individual or spouse, either individually or collectively, owns an interest which exceeds ten percent of that business.

(b) The name, address, brief description of, and nature of association with a nonprofit organization in which the individual or spouse is a director or officer.

(5)(a)(i) The name, address, type, and amount of each source of income received by the individual or spouse, or by any business in which the individual or spouse, either individually or collectively, owns an interest which exceeds ten percent of that business, which is received from any of the following:

(aa) The state or any political subdivision as defined in Article VI of the Constitution of Louisiana.

(bb) Services performed for or in connection with a gaming interest as defined in R.S. 18:1505.2(L)(3)(a).

(ii) Notwithstanding the provisions of Subsection D of this Section, amounts reported pursuant to this Subparagraph shall be reported by specific amount rather than by category of value.

(b) The name and address of any employer which provides income to the individual or spouse pursuant to the full-time or part-time employment of the individual or spouse, including a brief description of the nature of the services rendered pursuant to such employment and the amount of such income, excluding information required to be reported pursuant to Subparagraph (a) of this Paragraph.

(c) The name and address of all businesses which provide income to the individual or spouse, including a brief description of the nature of services rendered for each business or of the reason such income was received, and the aggregate amount of such income, excluding information required to be reported pursuant to Subparagraph (a) or (b) of this Paragraph.

(d) A description of the type of any other income, exceeding one thousand dollars received by the individual or spouse, including a brief description of the nature of the services rendered for the income or the reason such income was received, and the amount of income, excluding information required to be reported pursuant to Subparagraph (a), (b), or (c) of this Paragraph.

(6) A brief description, fair market value or use value as determined by the assessor for purposes of ad valorem taxes, and the location by state and parish or county of each parcel of immovable property in which the individual or spouse, either individually or collectively, has an interest, provided that the fair market value or use value as determined by the assessor for purposes of ad valorem taxes for such parcel of immovable property exceeds two thousand dollars.

The Statement is required to be filed by May 15th of each year during which the person holds an office or position and by May 15th of the year following the termination of the holding of such office or position. La. R.S. 42:1124.2. If a person fails to timely file the Statement as required by La. R.S. 42:1124.2, the Board shall notify the person of such failure by sending the individual a notice of delinquency immediately upon discovery of the failure. La. R.S. 42:1124.4.

The Board's Enforcement Authority

The Board may, by a two-thirds majority vote of its membership, consider any matter that it has reason to believe may be a violation of the Code of Governmental Ethics. La. R.S. 42:1141(B)(1)(a). The chairman of the Board may assign a matter to the appropriate panel for investigation, in which case the panel shall conduct a private investigation to elicit evidence upon which the panel shall determine whether to recommend to the Board that a public hearing be conducted or that a violation has not occurred. *Id.* Following an investigation, if the Board

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(7) The name and a brief description of each investment security having a value exceeding five thousand dollars held by the individual or spouse, excluding variable annuities, variable life insurance, variable universal life insurance, whole life insurance, any other life insurance product, mutual funds, education investment accounts, retirement investment accounts, government bonds, and cash or cash equivalent investments. This Paragraph shall not be deemed to require disclosure of information concerning any property held and administered for any person other than the individual or spouse under a trust, tutorship, curatorship, or other custodial instrument.

(8) A brief description, amount, and date of any purchase or sale by the individual or spouse, in excess of five thousand dollars, of any immovable property and of any personally owned tax credit certificates, stocks, bonds, or commodities futures, including any option to acquire or dispose of any immovable property or of any personally owned tax credit certificates, stocks, bonds, or commodities futures. This Paragraph shall not be deemed to require disclosure of information concerning variable annuities, variable life insurance, variable universal life insurance, whole life insurance, any other life insurance product, mutual funds, education investment accounts, retirement investment accounts, government bonds, cash, or cash equivalent investments.

(9) The name and address of each creditor, and name of each guarantor, if any, to whom the individual or spouse owes any liability which exceeds ten thousand dollars on the last day of the reporting period excluding:

(a) Any loan secured by movable property, if such loan does not exceed the purchase price of the movable property which secures it.

(b) Any liability, secured or unsecured, which is guaranteed by the individual or spouse for a business in which the individual or spouse owns any interest, provided that the liability is in the name of the business and, if the liability is a loan, that the individual or spouse does not use proceeds from the loan for personal use unrelated to the business.

(c) Any loan by a licensed financial institution which loans money in the ordinary course of business.

(d) Any liability resulting from a consumer credit transaction as defined in R.S. 9:3516(13).

(e) Any loan from an immediate family member, unless such family member is a registered lobbyist, or his principal or employer is a registered lobbyist, or he employs or is a principal of a registered lobbyist, or unless such family member has a contract with the state.

(10) A certification that such individual has filed his federal and state income tax returns, or has filed for an extension of time for filing such tax returns.

determines that a public hearing should be conducted, the Board shall issue charges. La. R.S. 42:1141(C)(3)(a).

Failure to file the Statement required by La. R.S. 42:1124.2 subjects the public officer to an assessment of penalties of one hundred dollars for each day until the Statement is filed. La. R.S. 42:1124.4(C)(2). If it is found that the public officer has willfully and knowingly failed to file the Statement, then the public officer shall be subject to prosecution for a misdemeanor. La. R.S. 42:1124.4(D)(1)(a).

Standard of Review

Whenever a person is aggrieved by any action taken by the Board or the Adjudicatory Board, she may appeal to the First Circuit Court of Appeal. La. R.S. 42:1142. Except as otherwise provided in the Code of Governmental Ethics, all proceedings conducted by the Board shall be subject to and in accordance with the Louisiana Administrative Procedure Act ("APA"), La. R.S. 49:950-972. La. R.S. 42:1143; *In re Ark-La-Tex Antique and Classic Vehicles, Inc.*, 2005-1931 (La. App. 1st Cir. 9/15/06), 943 So.2d 1169, 1173, *writ denied*, 2006-2509 (La. 1/12/07), 948 So.2d 151.

The APA specifies that judicial review is confined to the record, as developed in the administrative proceedings. La. R.S. 49:964(F). The reviewing court may reverse or modify the agency decision if substantial rights of the appellant are 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, capricious, or an abuse of discretion; or 6) not supported and sustainable by a preponderance of evidence as determined by the reviewing court. La. R.S. 49:964(G). On legal issues, the reviewing court gives no special weight to the findings of the

administrative tribunal, but conducts a *de novo* review of questions of law and renders judgment on the record. *In re Ark-La-Tex*, 943 So.2d at 1173.

A. PRESCRIPTION

Generally, the party pleading prescription has the burden of proving the facts supporting the exception. *Peak Performance Physical Therapy & Fitness, LLC v. Hibernia Corporation*, 2007-2206 (La. App. 1st Cir. 6/6/08), 992 So.2d 527, 531, *writ denied*, 2008-1478 (La. 10/3/08), 992 So.2d 1018. However, if prescription is evident on the face of the pleadings, the burden shifts to the plaintiff to show the action has not prescribed. *Straub v. Richardson*, 2011-1689 (La. App. 1st Cir. 5/2/12), 92 So.3d 548, 552, *writ denied*, 2012-1212 (La. 9/21/12), 98 So.3d 341, *cert. denied*, __U.S.__, 133 S.Ct. 1805, 185 L.Ed.2d 811 (2013).

In this case, the face of the charge did not indicate the date on which the Board discovered Ms. Sneed's failure to file the Statement; the charge only alleged that Ms. Sneed failed to file her Statement on or before May 15, 2009; that Ms. Sneed was served with a Notice of Delinquency on October 12, 2010; and that Ms. Sneed failed to file the Statement after receiving the Notice of Delinquency. Since the charge only reflected the date of the alleged violation, the Board possessed the burden of proving that its action had not prescribed.[4] *See, e.g., Doe v. Delta Women's Clinic of Baton Rouge*, 2009-1776 (La. App. 1st Cir. 4/30/10), 37 So.3d 1076, 1080, *writ denied*, 2010-1238 (La. 9/17/10), 45 So.3d 1055.

The evidence the Board filed into the record included the affidavit of Board employee Robin Gremillion, who averred that another member of the staff of the Ethics Disclosure Division who was no longer working for the Board made the discovery of the alleged violation on February 19, 2010. The affidavit was signed by Ms. Gremillion on August 16, 2012, more than a year after the Board contends

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[4] We reject the Board's contention that no violation of La. R.S. 42:1124.2 could occur until after the public officer receives and fails to respond to a Notice of Delinquency. The violation occurs on the date the Statement is due.

it discovered the violation. Affixed to Ms. Gremillion's affidavit was a verified copy of a computer log from the electronic filing system maintained by the Board. The log, entitled "Failure to File Report: 2008 PFD: Annual for Councilmember-Jefferson Parish, District 5", contained a notation dated February 19, 2010, that stated, "Rccvd Candidate election record indicating failure to file." Each page of the computer log reflected the signature of the Board's executive secretary verifying that it was a true copy.

Ms. Sneed contends that the Adjudicatory Board improperly considered Ms. Gremillion's affidavit because it was not made on personal knowledge and it failed to establish sufficient evidence that the charge was timely filed. For the reasons set forth below, we find that the evidence presented by the Board was sufficient to establish that the Board's actual date of discovery of the alleged violation was February 19, 2010.

The Adjudicatory Board may take evidence and require the production of any records that the Board or panel deems relevant or material to the investigation or hearing. La. R.S. 42:1141.4(B)(1). Also, in adjudication proceedings, evidence, including records and documents in the possession of the agency of which it desires to avail itself, shall be offered and made a part of the record, and all such documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference. La. R.S. 49:956(2). Agencies may admit and give probative effect to evidence that possesses probative value commonly accepted by reasonably prudent men in the conduct of their affairs. La. R.S. 49:956(1). A more relaxed standard for the admissibility of evidence is the general rule in administrative proceedings. *Spreadbury v. State, Dep't of Public Safety*, 99-0233 (La. App. 1st Cir. 11/5/99), 745 So.2d 1204, 1209 (citing *Chaisson v. Cajun Bag & Supply Co.*, 97-1225 (La. 3/4/98), 708 So.2d 375, 381).

While the usual rules of evidence need not apply in administrative hearings,

the findings must be supported by competent evidence. *See Brouillette v. State, Dep't of Public Safety, License Control and Driver Imp. Div.*, 589 So.2d 529, 532 (La. App. 1st Cir. 1991). Courts have determined the competency of the evidence presented at an administrative hearing by considering the degree of reliability and trustworthiness of the evidence presented and by considering whether it is of the type that reasonable persons would rely upon. *Spreadbury*, 745 So.2d at 1209 (citing *Chaisson*, 708 So.2d at 382 and *Brouillette*, 589 So.2d at 533).

In this case, the Board presented the affidavit testimony of Ms. Gremillion and a Board computer log as evidence that it discovered the occurrence of the alleged violation on February 19, 2010. We initially note that the affidavit testimony of Ms. Gremillion alone does not constitute competent evidence because it was prepared by a representative of the Board more than a year after the date the Board purports to have discovered the alleged violation and also because Ms. Gremillion lacked personal knowledge with respect to the date of the Board's discovery of the alleged violation. In sum, the affidavit testimony of Ms. Gremillion was inherently subjective evidence that did not suggest reliability and trustworthiness; to satisfy the requirement of competent evidence in the context of a Board proceeding, the evidence presented must be more objective in nature.

Although we find the affidavit testimony of Ms. Gremillion alone to be deficient, we find that the computer log presented by the Board did constitute sufficiently competent evidence for the following reasons. First, the entry on the computer log reflects that it was made on the day the Board contends it discovered the alleged violation. Also, the computer log presented by the Board was a verified copy, signed by the Board's executive secretary. Finally, Ms. Gremillion's testimony that the Board employee who made the February 19, 2010 entry in the computer log no longer works for the Board explains why the Board did not present that employee's affidavit. For these reasons, we find that the

Board's computer log, in tandem with the affidavit of Ms. Gremillion, constituted competent evidence sufficient to establish that the Board actually discovered the alleged violation on February 19, 2010.

Ms. Sneed also argues that the date of the Board's actual discovery is not determinative because the discovery rule embedded in the doctrine of *contra non valentem* should apply to La. R.S. 42:1163. As indicated above, La. R.S. 42:1163 sets forth the following two prescriptive periods to limit the time within which the Board may bring an action to enforce the Code of Governmental Ethics:

> No action to enforce any provision of [the Code of Governmental Ethics] shall be commenced after the expiration of two years following the discovery of the occurrence of the alleged violation, or four years after the occurrence of the alleged violation, whichever period is shorter.

The parties dispute whether constructive notice pursuant to the discovery rule should apply to ascertain the date of "the discovery of the occurrence of the alleged violation," or whether the trigger for the two-year prescriptive period should be the actual date of discovery. The question of whether the discovery rule should be applied to La. R.S. 42:1163 is a *res nova* issue. As the party asserting the benefit of *contra non valentem*, Ms. Sneed bears the burden of proof of its requisite elements and applicability. *See Peak*, 992 So.2d at 531.

Courts created the doctrine of *contra non valentem* as an exception to the general rules of prescription. *Doe v. Roman Catholic Diocese of Lafayette*, 2008-1088 (La. App. 1st Cir. 12/23/08), 2008 WL 5377639, p. 4 (unpublished). It is an equitable doctrine of Roman origin, with roots in both civil and common law, and it is notably at odds with the public policy favoring certainty underlying the doctrine of prescription. *Id.* The principles of equity and justice that form the mainstay of the doctrine demand that under certain circumstances, prescription be suspended because the plaintiff was effectually prevented from enforcing his rights for reasons external to his own will. *Id.* Generally, the doctrine of *contra non*

valentem suspends prescription where the circumstances of the case fall into one of four categories. *Id.* at 5. Pertinent to this case is the fourth category, which provides that prescription commences on the date the injured party discovers or should have discovered the facts upon which his cause of action is based. *Id.* The discovery rule in common law is the equivalent to the discovery rule embedded in the fourth category of Louisiana's *contra non valentem* exceptions. *See Peak,* 992 So.2d at 532-533.

This case is unique in that Ms. Sneed seeks to apply the discovery rule to a civil enforcement action, not to an action of an injured party.[5] The United States Supreme Court has directly addressed whether the discovery rule should apply in the context of a civil enforcement action and, in a unanimous opinion, declined to do so. *See Gabelli v. Securities and Exchange Commission,* ___U.S.___, 133 S.Ct. 1216, 185 L.Ed. 297 (2013). The issue presented in *Gabelli* was whether the discovery rule could be applied to 28 U.S.C. § 2462 to suspend the commencement of the five-year statute of limitations applicable to a civil enforcement action brought by the Securities and Exchange Commission.[6] In declining to graft the discovery rule onto this statute, the court noted that the rule exists in part to preserve the claims of victims who do not know they are injured and who reasonably do not inquire as to any injury. The court found that such a justification did not exist when the plaintiff was the government bringing an enforcement action for civil penalties. The court also found that grafting the discovery rule onto § 2462 would leave defendants exposed to government enforcement actions not only for five years after their misdeeds, but for an additional uncertain period into the

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[5] We find that *Doe,* 37 So.3d at 1080, is distinguishable on this basis.

[6] 28 U.S.C. § 2462 provides as follow:

> **§ 2462. Time for commencing proceedings**
> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

future. *Gabelli*, 133 S.Ct. at 1222-23. Moreover, the court found that to reach the opposite conclusion and require a court to determine what a government entity reasonably *should have known* would be far more challenging than considering what a defrauded victim should have known. After all, the court noted that it is unclear whether and how courts should consider agency priorities and resource constraints in applying this test to government enforcement actions.

The reasons addressed in *Gabelli* apply with equal force in the present case. While adopting the discovery rule in the case before this court would not enlarge the time available to the Board to bring this enforcement action, it could enlarge the time for the Board to bring an action if it were applied to the four-year period also contained in La. R.S. 42:1163. Additionally, by refusing to apply the discovery rule to La. R.S. 42:1163, this court furthers Louisiana's public policy of favoring certainty that underlies the doctrine of prescription. *See Doe*, 2008-1088, 2008 WL 5377639, p. 4. Finally, requiring courts to apply the "should have known" test to the actions of a government entity is a challenging endeavor that would place an undue burden on courts.

The language of the statute itself also indicates that the discovery rule should not be applied to La. R.S. 42:1163. It is well settled that in interpreting any statute, when the law is clear and unambiguous, the law shall be applied as written. *McDonald v. Louisiana State Board of Private Investigator Examiners*, 2003-0773 (La. App. 1st Cir. 2/23/04), 873 So.2d 674, 675. Further, it is presumed that every word, sentence, or provision in the law was intended to serve some useful purpose, that some effect is to be given to each such provision, and that no unnecessary words or provisions were used. *Id.* Conversely, it will not be presumed that the lawmaker inserted idle, meaningless, or superfluous language in the law or that it intended for any part or provision of the law to be meaningless, redundant, or useless. *Id.*

Applying these principles of statutory construction to La. R.S. 42:1163, we find that the obvious intent of the legislature by choosing "discovery" of the occurrence of the alleged violation as the trigger for the two-year period was to provide the Board with two years from the date of the Board's actual discovery of the alleged violation. This interpretation is reasonable in light of the additional prescriptive period contained in the statute, which creates an outside limit of four years from the date of the occurrence of the alleged violation.[7] Furthermore, our interpretation of La. R.S. 42:1163 creates an appropriate balance between promoting the public policy favoring certainty in the law and acknowledging the reality that it may be impossible for the Board to fulfill its duty to enforce the Code of Governmental Ethics if the two-year prescriptive period commences to run as soon as the violation occurs.

Our interpretation of La. R.S. 42:1163 is further supported by comparing this statute to La. R.S. 9:5628, the statute that creates the prescriptive period governing medical malpractice actions, which provides in pertinent part that no medical malpractice action shall be brought unless filed within one year from the date of the alleged act, omission, or neglect, *or* within one year from the date of discovery of the alleged act, omission, or neglect:

> A. No action for damages for injury or death against any physician, chiropractor, nurse, licensed midwife practitioner, dentist, psychologist, optometrist, hospital or nursing home duly licensed under the laws of this state, or community blood center or tissue bank as defined in R.S. 40:1299.41(A), whether based upon tort, or breach of contract, or otherwise, arising out of patient care shall be brought unless filed within one year from the date of the alleged act, omission, or neglect, or within one year from the date of discovery of the alleged act, omission, or neglect; however, even as to claims filed within one year from the date of such discovery, in all events such claims shall be filed at the latest within a period of three years from the date of the alleged act, omission, or neglect.

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[7] We find that the four-year period commenced to run in this case on May 15, 2009, the date the Statement was due. We also find that the four-year time period set forth in La. R.S. 42:1163 is akin to the medical malpractice prescriptive period in that the four-year period is nominally prescriptive, yet acts as a peremptive period in that it cannot be interrupted or suspended. *See e.g. Shaw v. Murtagh*, 2009-2239 (La. App. 1st Cir. 1/13/11), 2011 WL 199118, p. 5 (unpublished), *writ denied*, 2011-0320 (La. 4/1/11), 60 So.3d 1255.

It stands to reason that if the legislature wished to entirely incorporate the discovery rule into La. R.S. 42:1163, it would have drafted the statute in the manner it drafted La. R.S. 9:5628, creating the option of two years from the date of the occurrence of the alleged violation *or* two years from the date of the discovery of the occurrence of the alleged violation. The fact that the legislature did not, further demonstrates that the legislature intended that the two-year prescriptive period should commence to run on the actual date of discovery of the alleged violation.

For these reasons, we find that Ms. Sneed failed to satisfy her burden to prove that the discovery rule applies to La. R.S. 42:1163. Hence, the two-year prescriptive period commenced to run on February 19, 2010, the date the Board discovered the alleged violation.

The second question with respect to the interpretation of La. R.S. 42:1163 is when the Board took action to enforce La. R.S. 42:1124.2, which would constitute the date prescription accrued. Although this determination does not affect the outcome of this case, we do not find that the Board took an action to enforce the alleged violation on September 15, 2011, the date the Board voted to issue a charge against Ms. Sneed. Rather, we find that the date the Board takes action to enforce an alleged violation is the date the Board files the formal charges. *See* La. C.C. art. 3462 and *In re Marceaux*, 96-1215 (La. App. 1st Cir. 2/14/97), 689 So.2d 670, 673.

In sum, we find that the Board's enforcement action has not prescribed because the two-year prescriptive period commenced to run on February 19, 2010, and the Board filed formal charges on October 28, 2011, less than two years later. However, we find that a more fundamental problem exists with respect to the Board's enforcement action against Ms. Sneed in that it fails to state a cause of action.

B. NO CAUSE OF ACTION

In its enforcement action, the Board alleges that Ms. Sneed violated La. R.S. 42:1124.2 by failing to timely file her Statement. Before the Adjudicatory Board, Ms. Sneed filed an exception raising the objection of no cause of action on grounds that it would be unconstitutional to apply La. R.S. 42:1124.2 to her. Specifically, Ms. Sneed argued that because she no longer held public office when La. R.S. 42:1124.2 became effective on January 1, 2009, the retroactive application of the statute to her would disturb her vested rights of due process and privacy and would constitute a violation of the *ex post facto* clauses of the federal and state constitutions. The Adjudicatory Board pretermitted consideration of Ms. Sneed's exception in light of the constitutional issues raised therein.

Noting the unique posture of this case in that an exception of no cause of action has been filed and both parties have briefed the constitutional issues pertaining to Ms. Sneed's exception of no cause of action, we choose to invoke our authority to raise the exception of no cause of action on our own motion. *See* La. C.C.P. art. 927(B). The function of the exception of no cause of action is to test the legal sufficiency of the petition by determining whether the law affords a remedy on the facts of the pleading. A court must review the petition and accept all well pleaded facts as true, and the only issue is whether, on the face of the petition, plaintiffs are legally entitled to the relief sought. *Clavier v. Our Lady of the Lake Hospital, Inc.*, 2012-0560 (La. App. 1st Cir. 12/28/12), 112 So.3d 881, 885, *writ denied*, 2013-0264 (La. 3/15/13), 109 So.3d 384.

We furthermore note our authority to consider the exception of no cause of action because the issue presented is the constitutionality of a statute *as applied to Ms. Sneed*, not the *per se* constitutionality of the statute. *Burmaster v. Plaquemines Parish Government*, 2007-2432 (La. 5/21/08), 982 So.2d 795, 802, (citing *D & A Construction Company v. Jefferson Davis Parish School Board*, 203

So.2d 712 (La. 1967)). And given our finding that the Board's action has not prescribed, we have been unable to dispose of this case on non-constitutional grounds. *See Burmaster*, 982 So.2d at 805. We therefore proceed to consider the merits of this issue.

In considering whether it is constitutional to apply La. R.S. 42:1124.2 to Ms. Sneed, we must first resolve the question of whether La. R.S. 42:1124.2 may be retroactively applied to her in light of the fact that Ms. Sneed was no longer in office on the effective date of the statute, or whether such retroactive application would unconstitutionally divest Ms. Sneed of vested rights. When determining whether a statute should be applied retroactively, a court must defer to the legislature's intent. *Bourgeois v. A.P. Green Industries, Inc.*, 2000-1528 (La. 4/3/01), 783 So.2d 1251, 1257. In this case, it is clear that the legislature intended for the newly-adopted La. R.S. 42:1124.2 to be retroactively applied as evidenced by the retroactivity provision contained in Act 162, Section 6, which provided that persons holding office on or after July 1, 2008 would be required to file the Statement. *See, e.g., M.J. Farms, Ltd. v. Exxon Mobil Corporation*, 2007-2371 (La. 7/1/08), 998 So.2d 16, 30.

However, even where the legislature has expressed its intent to give a law retroactive effect, that law may not be applied retroactively if it would impair contractual obligations or disturb vested rights. *See Bourgeois*, 783 So.2d at 1257. Ms. Sneed contends that retroactive application of La. R.S. 42:1124.2 to her would disturb her constitutionally protected due process right to fair notice and her constitutionally protected right to privacy. We agree.

Under the Fourteenth Amendment to the United States Constitution and La. Const. Art. I, § 2 of the Louisiana Constitution of 1974, a person is protected against a deprivation of his life, liberty, or property without "due process of law." *See Fields v. State Department of Public Safety and Corrections*, 98-0611 (La.

7/8/98), 714 So.2d 1244, 1250. For due process to apply, the private interest that will be affected by state action must be constitutionally cognizable. *Id.* If it is, then it becomes necessary to evaluate what specific process is due under the particular circumstances presented. *Id.* Due process is flexible and calls for such procedural protection as the particular situation demands. *Id.* (citing *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972)).

In this case, Act 162 indicated that La. R.S. 42:1124.2, which had an effective date of January 1, 2009, would be retroactively applied to a person holding public office on or after July 1, 2008. Incredibly, Act 162 was not signed into law until June 12, 2008, giving public officers like Ms. Sneed less than one month of notice to leave office before they became subject to the extensive new disclosure obligations set forth in La. R.S. 42:1124.2. Considering that La. R.S. 42:1124.2 created substantial new obligations, that the statute was not passed until after Ms. Sneed assumed her office, that Ms. Sneed was given less than one month of notice of the new obligations, and that the law had not even become effective when Ms. Sneed left public office, we find that the retroactive application of this statute to Ms. Sneed would violate her due process right to sufficient notice. *See, e.g., Smith v. City of New Orleans*, 2010-1464 (La. App. 4th Cir. 7/6/11), 71 So.3d 525, 531.

Additionally, Article I, § 5 of the Louisiana Constitutional provides in pertinent part that every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable invasions of privacy. Courts have described the right to privacy in Louisiana as "the right to be 'let alone,'...and to be free from 'unnecessary public scrutiny.'" *Broderick v. State, Department of Environmental Quality*, 2000-0156 (La. App. 1st Cir. 5/12/00), 761 So.2d 713, 715, *writ denied*, 2000-1714 (La. 9/15/00), 768 So.2d 1284 (citing *Capital City Press v. East Baton Rouge Parish Metropolitan Council*,

96-1979 (La. 7/1/97), 696 So.2d 562, 566). Further, "[t]he right to privacy protects varied interests from invasion. Among the interests protected is the individual's right to be free from unreasonable intrusion into his seclusion or solitude, or into his private affairs." *Parish National Bank v. C.E. Lane*, 397 So.2d 1282, 1286 (La. 1981). In ascertaining whether individuals have a reasonable expectation of privacy that is constitutionally protected, a court must determine not only whether the individual has an actual or subjective expectation of privacy, but whether that expectation is also of a type that society at large is prepared to recognize as being reasonable. *Angelo Iafrate Construction, L.L.C. v. State Department of Transportation and Development*, 2003-0892 (La. App. 1st Cir. 5/14/04), 879 So.2d 250, 255, *writ denied*, 2004-1442 (La. 9/24/04), 882 So.2d 1131. Our court has previously found that society at large is prepared to recognize as reasonable an expectation of privacy in detailed personal financial information when coupled with names and home addresses. *Iafrate*, 879 So.2d at 260.

Ms. Sneed contends that the retroactive application of La. R.S. 42:1124.2 to her constitutes an unreasonable invasion of her privacy because she no longer held public office when the statute became effective. Furthermore, La. R.S. 42:1124.2 requires extensive disclosure of not only her own financial affairs, but also the financial affairs of her husband. In fact, Ms. Sneed contends that had she known before becoming a city council member that she would have to disclose her private financial information, then she would not have run for public office because compliance with the financial disclosure requirements is impossible for her in light of the fact that she and her husband are separate in property, as well as the fact that her husband's attorney will not provide her husband's financial information because her husband is presently under federal investigation. Given the particular facts of this case, particularly that Ms. Sneed no longer held public office when La. R.S. 42:1124.2 became effective and because Ms. Sneed assumed public office

before the new financial disclosure requirements were passed into law, we find that it would be an unreasonable invasion of her privacy rights to retroactively apply La. R.S. 42:1124.2 to Ms. Sneed. We emphasize that this holding is limited to the unique facts of this case and is in no way intended to find that there is a violation of constitutional privacy rights generally with respect to the application of the Code of Governmental Ethics to persons who are not public servants or public officers.

We therefore find the application of La. R.S. 42:1124.2 to Ms. Sneed is unconstitutional because its retroactive application to Ms. Sneed, who resigned from office before La. R.S. 42:1124.2 became effective, impermissibly disturbed Ms. Sneed's vested rights.

We also note that La. R.S. 42:1124.2 should not be applied retroactively to Ms. Sneed because the statute is penal in nature, as evidenced by the fact that violations incur the assessment of significant civil penalties and criminal prosecution is possible. *See* La. R.S. 42:1124.4; *Doe v. Louisiana Board of Ethics*, 2012-1169, 2012-1170 (La. App. 4th Cir. 3/13/13), 112 So.3d 339, 346, *writ denied*, 2013-0782 (La. 8/30/13), ___ So.3d ___. Louisiana jurisprudence has long held that penal laws are strictly construed, and that any ambiguity in the language found within such statutes must be resolved with lenity and in favor of the individual subject to the penalty. *Doe*, 112 So.3d at 346. Statutes that are penal in nature have no retroactive application. *Del-Remy Corporation v. Lafayette Insurance Company*, 616 So.2d 231, 232 (La. App. 5th Cir. 1993), *writ denied*, 617 So.2d 941 (La. 1993).

For the foregoing reasons, we find that the Board failed to state a cause of action cognizable in law against Ms. Sneed because it would be unconstitutional to retroactively apply La. R.S. 42:1124.2 to Ms. Sneed. Furthermore, we find that no amendment to the factual allegations of the Board's action could cure this

fundamental flaw in the purported cause of action. *See, e.g., Johansen v. Louisiana High School Athletic Association*, 2004-0937 (La. App. 1st Cir. 6/29/05), 916 So.2d 1081, 1088. Thus, the Board is not entitled under La. C.C.P. art. 934 to amend its petition to attempt to state a cause of action.

DECREE

Finding on our own motion that the Board's enforcement action fails to state a cause of action, we render judgment sustaining the exception of no cause of action and dismissing with prejudice the charge against Ms. Sneed in Ethics Board Docket No. 2011-18685. The Louisiana Board of Ethics is cast with all costs of this grant of *certiorari*.

WRIT OF *CERTIORARI* GRANTED; JUDGMENT RENDERED; DISMISSED WITH PREJUDICE.

BOARD OF ETHICS

IN THE MATTER OF

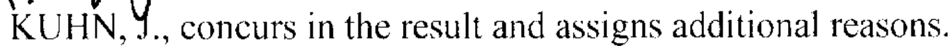
JENNIFER SNEED

FIRST CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

NO. 2012 CW 1849



KUHN, J., concurs in the result and assigns additional reasons.

I concur for the purpose of pointing out that, in addition to failing to state a cause of action against Ms. Sneed, the charge filed by the Board also was untimely. The crucial issue in making this determination is the date on which the two-year time limitation for enforcement actions provided by La. R.S. 42:1163 commenced.[1] Since the charge was filed on October 28, 2011, it was untimely if the time limitations commenced on any date prior to October 28, 2009.

In setting forth the applicable time limitation for enforcement actions, La. R.S. 42:1163, provides:

> No action to enforce any provision of this Chapter shall be commenced after the expiration of two years **following the discovery of the occurrence of the alleged violation**, or four years after the occurrence of the alleged violation, whichever period is shorter.

(Emphasis added.)

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[1] The time limitations provided in La. R.S. 42:1163 are peremptive. In determining whether a provision is peremptive or prescriptive in nature, courts look to the language of the statute, the purpose behind the statute, and the public policy mitigating for or against suspension, interruption or renunciation of that time limit. ***State Board of Ethics v. Ourso***, 02-1978 (La. 4/9/03), 842 So.2d 346, 349; ***State Through Division of Administration v. McInnis Brothers Construction***, 97-0742 (La. 10/21/97), 701 So.2d 937, 946. Although "'some weight' should be given to the use of the term 'prescription' in the body or title of a statute, 'it is the legislative purpose sought to be achieved by a particular limitation which is the most significant and determinative factor in distinguishing a peremptive statute from a prescriptive one.'" ***State Board of Ethics***, 842 So.2d at 351 (quoting ***McInnis***, 701 So.2d at 946 n.8). Although the title of La. R.S. 42:1163 references "prescription," consideration of its language and a balancing of the legislative purpose of providing a sufficient period for the Board to bring enforcement actions against the public policy of providing certainty and finality to public officials faced with potential charges, leads to the conclusion that the time limitations delineated therein are peremptive in nature. Nevertheless, because the result would be the same in the instant case regardless of whether the time limitations provided by La. R.S. 42:1163 are prescriptive or peremptive, out of an abundance of caution, we will refer to these time limitation throughout as "prescriptive or peremptive."

The starting point in the interpretation of any statute is the language of the statute itself. ***City of New Orleans v. Louisiana Assessors' Retirement and Relief Fund***, 05-2548 (La. 10/1/07), 986 So.2d 1, 17. Words and phrases are to be read in their context and to be accorded their generally prevailing meaning. See La. C.C. art. 11; La. R.S. 1:3. When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written, and the letter of it shall not be disregarded in search of the intent of the legislature or under the pretext of pursuing its spirit. See La. C.C. art. 9; La. R.S. 1:4.

Moreover, because the provision Ms. Sneed is charged with violating, La. R.S. 42:1124.2, can result in the assessment of a civil penalty pursuant to La. R.S. 42:1124.4(C), the statute is penal in nature and, together with the statute setting forth the applicable time limitations for enforcement, must be strictly construed.[2] See ***Matter of Insulation Technologies, Inc.***, 95-1184 (La. App. 1st Cir. 2/23/96), 669 So.2d 1343, 1350, writ denied, 96-0749 (La. 5/3/96), 672 So.2d 692; ***Doe v. Louisiana Board of Ethics***, 12-1169, 12-1170 (La. App. 4th Cir. 3/13/13), 112 So.3d 339, 346-47, writ denied, 13-0782 (La. 8/30/13), ____ So.3d ____. See also ***Villere v. Louisiana Board of Ethics***, 11-1309, pp. 7-9 (La. App. 1st Cir. 3/30/12) (Kuhn, J., dissenting) (unpublished), writ denied, 12-0963 (La. 6/22/12), 91 So.3d 970. In addition to being strictly construed, any doubt in the interpretation of a penal statute must be resolved with lenity and in favor of the person subject to the penalty. ***Doe***, 112 So.3d at 346-47. Finally, because the charge against Ms. Sneed appears untimely on its face, having been filed more than two years after the Statement's May 15, 2009 due date, the Board bears the burden of showing it was

[2] The failure to file a Statement as required by La. R.S. 42:1124.2 exposes a public official to a potential civil fine of $100.00 per day. See La. R.S. 42:1124.4(C)(2). Additionally, criminal sanctions also are available pursuant to La. R.S. 42:1124.4(D) against a person who willfully and knowingly fails to timely file a financial disclosure statement; any such criminal action must be filed by the district attorney or the attorney general.

filed timely.[3] See ***Doe v. Delta Women's Clinic of Baton Rouge***, 09-1776 (La. App. 1st Cir. 4/30/10), 37 So.3d 1076, 1080, writ denied, 10-1238 (La. 9/17/10), 45 So.3d 1055.

The Board contends the two-year time limitation for filing a charge did not commence until February 19, 2010, when one of its employees actually discovered Ms. Sneed's failure to file the Statement due on May 15, 2009. In opposition, Ms. Sneed contends that the delay commenced when the Board acquired constructive knowledge of the alleged violation, which she asserts happened on the date the Statement allegedly was due to be filed with the Board (*i.e.*, May 15, 2009). This contention is based on Ms. Sneed's claim that the "discovery rule," which is one component of the doctrine of *contra non valentem*, is applicable in this matter.

Contra non valentem is a jurisprudential doctrine that delays the commencement of prescription in certain instances where the plaintiff is prevented from enforcing his rights through no fault of his own. ***Wimberly v. Gatch***, 93-2361 (La. 4/11/94), 635 So.2d 206, 211. One of these instances, known as the "discovery rule," is applicable when the cause of action is neither known nor reasonably knowable by the plaintiff. See ***Clavier v. Our Lady of the Lake Hospital, Inc.***, 12-0560 (La. App. 1st Cir.12/28/12), 112 So.3d 881, 890, writ denied, 13-0264 (La. 3/15/13), 109 So.3d 384. Under the "discovery rule," prescription does not commence until a plaintiff obtains either actual or constructive knowledge of facts indicating to a reasonable person that he or she is the victim of a tort. ***Campo v. Correa***, 01-2707 (La. 6/21/02), 828 So.2d 502, 510.

In the instant case, there is no merit in Ms. Sneed's contention that *contra non valentem* is applicable. Normally, *contra non valentem* is asserted by the plaintiff for the purpose of preventing the tolling of prescription. In this case, not

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[3] There is no merit in the Board's contention that no violation of La. R.S. 42:1124.2 occurred until after Ms. Sneed received and failed to respond to the Notice of Delinquency she was served with on October 12, 2010. Any violation that occurred took place on the date the Statement was due.

only is Ms. Sneed asserting this doctrine as the defendant in this matter, she is also attempting to utilize *contra non valentem* to commence the tolling of the applicable time limitation, contrary to its normal function of preventing the tolling thereof. The doctrine of *contra non valentem* has no application under such circumstances.[4]

Nevertheless, based on our statutory interpretation of the language of La. R.S. 42:1163, keeping in mind the strict construction and rule of lenity required by its penal nature, we agree with Ms. Sneed that the two-year time limitation commenced on the earliest date that the Board obtained either actual *or* constructive knowledge of the alleged violation. Under this provision, the two-year time limitation commences upon the "discovery" of the alleged violation. As noted, statutory terms must be given their commonly prevailing meaning. In the context of prescription, the term "discovery" commonly has been construed as encompassing either actual knowledge *or* constructive knowledge of the relevant event. Thus, in instances where prescription commences upon "discovery" of an event, actual knowledge is not required. See ***Stansbury v. Accardo***, 03-2691 (La. App. 1st Cir. 10/29/04), 896 So.2d 1066, 1069-70, writ denied, 04-2898 (La. 2/4/05), 893 So.2d 881; ***Medical Review Panel Proceeding of Williams v. Lewis***, 08-2223 (La. App. 1st Cir. 5/13/09), 17 So.3d 26, 29; ***Ford v. Rapides Healthcare System, L.L.C.***, 06-1539 (La. App. 3d Cir. 5/2/07), 957 So.2d 258, 261, writ denied, 07-1533 (La. 10/12/07), 965 So.2d 403.

In reaching this conclusion, a review of the jurisprudence interpreting La. R.S. 9:5628(A) is helpful, since that provision employs the identical term "discovery" in setting forth the time limitation applicable to medical malpractice claims. Specifically, it provides that the claim must be filed either "within one

[4] Although the doctrine of *contra non valentem* is not technically applicable herein, arguably one could conclude that by designating the date of discovery as the commencement of the time limitations for enforcement actions, the Legislature intended to incorporate the discovery rule into La. R.S. 42:1163. *See* ***Campo***, 828 So.2d at 509 (reaching a similar conclusion with respect to the use of the term "discovery" in the statute delineating the time limitations for medical malpractice claims).

year from the date of the alleged act, omission, or neglect, or within one year from the date of **discovery** of the alleged act, omission, or neglect," although, in no event, longer than three years from the date of the alleged act, omission, or neglect. La. R.S. 9:5628(A) (Emphasis added.) This provision has been construed to mean that actual notice is unnecessary and that prescription commences whenever a plaintiff first obtains either actual *or* constructive knowledge of facts sufficient to put them on notice that a claim might exist. Constructive knowledge is notice sufficient to excite attention, put a party on guard and call for inquiry. ***Campo***, 828 So.2d at 510-11; ***Stansbury***, 896 So.2d at 1070. Moreover, constructive knowledge is tantamount to knowledge or notice of everything to which a reasonable inquiry may lead. ***Campo***, 828 So.2d at 510; ***Medical Review Panel Proceeding of Williams v. Lewis***, 08-2223 (La. App. 1st Cir. 5/13/09), 17 So.3d 26, 29.

The Louisiana Supreme Court reached a similar conclusion in ***City of New Orleans v. Elms***, 566 So.2d 626 (La. 1990). The issue before the Supreme Court was whether actual knowledge was required in a situation where the applicable statute provided that prescription commenced when the City "first obtained knowledge" of an alleged zoning violation. Although this language is different than the statutory language in the instant case, the date that a party "first obtained knowledge" of an event is functionally equivalent to the date that a party "discovered" that event. Further, in applying the applicable language, the Supreme Court held that, even though the evidence failed to establish actual knowledge, constructive knowledge of the alleged violation was sufficient to trigger the commencement of prescription. ***City of New Orleans***, 566 So.2d at 633.

Therefore, based on the commonly prevailing meaning of the term "discovery," constructive knowledge is sufficient to commence the tolling of prescription or peremption under La. R.S. 42:1163. The Adjudicatory Board

committed legal error in concluding that actual knowledge was required to commence tolling of the time limitations under this provision. In order to determine if the charge was timely, the earliest date on which the Board obtained either actual *or* constructive knowledge of the alleged violation by Ms. Sneed must be established.

The Board's claim that it did not obtain actual knowledge of the alleged violation until February 19, 2010, illustrates the inherent problem in attempting to objectively establish institutional knowledge or lack of knowledge. In order to prove that it did not discover the alleged violation until February 19, 2010, the Board relied on an affidavit from one of its employee who averred that a former Board employee "discovered" the alleged violation on that date. Setting aside the question of whether an affidavit that was not based on the affiant's personal knowledge should have been considered, we find the affidavit lacked probative value. The fact that an individual employee may have "discovered" Ms. Sneed's alleged violation on February 19, 2010, has no probative value as to what other Board employees knew or should have known prior to that date. Accepting such evidence would allow the Board to take no action for almost four years and then file a charge shortly before the expiration of the maximum four-year limitation period[5], claiming it had no knowledge of an alleged violation based on what an individual Board employee knew, without regard to the knowledge of other employees. Such a result would pervert the public policy favoring finality and certainty that underlies the doctrines of prescription and peremption and cause an injustice to the public official involved. Cf. ***Jenkins v. Starns***, 11-1170 (La. 1/24/12), 85 So.3d 612, 623.

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[5] Louisiana Revised Statutes 42:1163 requires that an enforcement action be brought within two years of the discovery of an alleged violation, but in no event longer than four years after the occurrence of the alleged violation.

In any event, regardless of the Board's claim that it actually discovered the alleged violation on February 19, 2010, the applicable time limitations may have begun tolling earlier if the Board possessed constructive knowledge of the alleged violation before that date. To make this determination, this Court must evaluate the reasonableness of the Board's inaction in light of the facts and information available to it. Other relevant circumstances, such as the Ms. Sneed's conduct, must also be considered. See ***Stansbury***, 896 So.2d at 1070.

The record establishes that the Board had actual knowledge of Ms. Sneed's status in 2008 as an elected public official due to multiple candidate reports she filed with the Board. These reports disclosed that she was unopposed at the primary held on October 20, 2007, for a seat on the Jefferson Parish Council. Included among the reports was one for the 2008 calendar year filed on February 6, 2009, three months before the May 15 due date of the Statement, and another filed on May 18, 2009, three days after the due date. Additionally, the Board had actual knowledge of the Statement's due date, since that date was specifically set forth in La. R.S. 42:1124.2(B)(1).

The basis of the charge against Ms. Sneed was her failure to file a Statement as allegedly required by La. R.S. 42:1124.2. The present situation is not one where facts were hidden from the Board or it was prevented from discovering the alleged violation by Ms. Sneed. To the contrary, Ms. Sneed filed multiple candidate reports with the Board disclosing her status as a public official in 2008, including a report filed on May 18, 2009, three days after the due date for the Statement. Moreover, the Board either knew or should have known that Ms. Sneed did not file a Statement by May 15, since that information was contained within the Board's own records. Further, in claiming that it did not discover Ms. Sneed's failure to file the Statement until February 2010, the Board points to no new information that it obtained in February 2010 that was not already available to it in May 2009.

Accordingly, by May 15, 2009, or in no event later than May 18, 2009, when Ms. Sneed filed yet another candidate report with the Board disclosing her status in 2008 as a public official, the Board possessed sufficient information within its own records to constitute constructive knowledge that an alleged violation of La. R.S. 42:1124.2 may have occurred due to Ms. Sneed's failure to file a Statement by May 15, 2009. Yet, despite the Board's actual knowledge of both Ms. Sneed's status as a public official and her failure to file a Statement, the Board made no further inquiry into the matter. Considering these circumstances, any failure of the Board to obtain actual knowledge of the alleged violation by Ms. Sneed was due to its own inaction and lack of diligence. In this respect, it is significant that the administrative rule outlined in LAC 52:I.1201(A) requires the Board's staff to mail a notice of delinquency "within four business days *after the due date* for any report or statement, of which the staff knows *or has reason to know* is due" and which has not been timely filed. (Emphasis added.) This rule illustrates the Board's duty to act reasonably and with diligence regarding information ascertainable from its own records.

Given the totality of actual and constructive knowledge possessed by the Board regarding Ms. Sneed's status as a public official and her failure to file a Statement on the due date, the two-year time limitation for the Board to file an enforcement action commenced on May 15, 2009, or in no event later than May 18, 2009, due to the Board's constructive knowledge of a potential violation of La. R.S. 42:1124.2. Accordingly, the time limitation expired no later than May 18, 2011, over five months before the Board filed the instant charge against Ms. Sneed on October 28, 2011. The Adjudicatory Board erred in overruling Ms. Sneed's exception of prescription as the charge was untimely when filed.

Additionally, it should be noted that the Board in brief blatantly misrepresented this Court's holding in ***Villere v. Louisiana Board of Ethics***,

11-1309 (La. App. 1st Cir. 3/30/12) (unpublished), writ denied, 12-0963 (La. 6/22/12), 91 So.3d 970. Specifically, the Board incorrectly asserted that "[t]his Court, in *Villere v. Louisiana Board of Ethics* determined that the proceedings of the Ethics Board are **not** penal in nature." First, the discussion in ***Villere*** regarding the nature of the Ethics Board proceedings was not part of the Court's holding and was merely dicta. The discussion was unnecessary to the result reached since the majority previously had concluded that the Board established "good cause" for its second requested deposition of Mayor Villere, which was the dispositive issue under review.

Second, contrary to the Board's assertion, the ***Villere*** majority never stated that Ethics Board proceedings were not penal in nature. Rather, the majority opined that such proceedings were not *criminal* in nature. The Board's assertion ignores the basic fact that "penal" and "criminal" are not synonymous terms. An inquiry into whether a statute is criminal in nature is not the same as an inquiry into whether it is penal in nature. A crime is any conduct so defined by the Criminal Code, by other acts of the legislature, or by the Louisiana Constitution. La. R.S. 14:7. See also *Black's Law Dictionary* 402 (8th ed. 2004). However, "penal" is a broader term meaning "[o]f, relating to, or being a penalty or punishment...." *Black's* at 1168. Therefore, a statute may be penal in nature without also being criminal. For example, a statute is penal if its violation potentially may result in the imposition of a civil penalty. See ***Matter of Insulation Technologies, Inc.***, 669 So.2d at 1350. See also ***Doe***, 112 So.3d at 346 (holding that a provision of the election finance law is penal in nature because it is directed to the enforcement of civil prohibitions and the collection of civil penalties).

For the reasons outlined, I concur in the granting of a writ of certiorari and the dismissal with prejudice of the charge filed against Ms. Sneed.

BOARD OF ETHICS IN THE MATTER OF
JENNIFER SNEED

NUMBER 2012 CW 1849

COURT OF APPEAL

FIRST CIRCUIT

STATE OF LOUISIANA

J.T.P. (by JMM)

BEFORE: KUHN, PETTIGREW, AND McDONALD, JJ.

PETTIGREW, J., CONCURS IN THE RESULT, AND ASSIGNS REASONS.

I agree with the authoring judge's treatment of the legal issue of the retroactive application of La. R.S. 42:1124.2. I disagree with the authoring judge's treatment of the prescription issue. It is my humble opinion that prescription and/or peremption began to run on May 15, 2009, since the Board is the legal and public custodian of the records. I further agree with the concurring opinion of Judge Kuhn.