

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2013 CA 1602

LOUISIANA BOARD OF ETHICS

IN THE MATTER OF  
PAUL ANTHONY BOURGEOIS AND  
ANTHONY'S FEED AND FARM SUPPLY, INC.

Judgment Rendered: MAR 21 2014

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Appealed from the  
Ethics Adjudicatory Board  
The Division of Administrative Law  
State of Louisiana  
Docket Number 2012-8682-Ethics-A

Administrative Law Judges:  
John O. Kopynec, Alycia G. O'Bear, and Suzanne K. Sasser

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Inc.

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**BEFORE: WHIPPLE, C.J., WELCH, AND CRAIN, JJ.**

## **WELCH, J.**

The Louisiana Board of Ethics (Ethics Board) appeals an order of the Louisiana Ethics Adjudicatory Board (EAB) granting a motion to dismiss based upon an exception of prescription filed by defendants, Paul Anthony Bourgeois and Anthony's Feed and Farm Supply, Inc. (Anthony's). We affirm in part, reverse in part, and remand.

### **BACKGROUND**

On May 18, 2012, the Ethics Board filed charges in the Division of Administrative Law against Mr. Bourgeois and Anthony's (sometimes collectively referred to as "defendants"), asserting that they continuously violated La. R.S. 42:1111C(2)(d) of the Louisiana Code of Governmental Ethics (Ethics Code) during Mr. Bourgeois' tenure on the Louisiana State Racing Commission (Commission). Specifically, the charges alleged that Mr. Bourgeois, a member of the Commission from August 1, 2008, through June 29, 2011, exercised control over Anthony's during his entire tenure on the Commission. The Ethics Board charged that from August 1, 2008 through June 29, 2011, Anthony's routinely sold Keith Bourgeois, a licensed horse trainer regulated by the Commission, horse supplies and horse feed. Thus, the Ethics Board asserted that during his entire tenure on the Commission, Mr. Bourgeois and Anthony's received a thing of economic value for services provided to or for Keith Bourgeois in violation of the Louisiana Code of Governmental Ethics.

Mr. Bourgeois and Anthony's filed a motion to dismiss the charges on the basis of prescription. Therein, they asserted that on November 17, 2008, the Ethics Board issued an advisory opinion regarding the exact charges that form the basis of this action after Mr. Bourgeois brought the issue of his ownership of a 37.5% interest in Anthony's to the Commission prior to his being sworn into office in 2008. They claimed that the Ethics Board knew about the alleged violations by

Mr. Bourgeois for a period of 3 years and 6 months, well in excess of the two-year prescriptive period provided for in La. R.S. 42:1163, which states that no action to enforce any provision of the Ethics Code shall be commenced after the expiration of two years following the discovery of the alleged violation, or four years after the occurrence of the alleged violation, whichever period is shorter.

In support of their exception of prescription, defendants submitted a copy of the charges filed by the Ethics Board on May 18, 2012, and a September 24, 2008, letter from the Commission to the Ethics Board requesting an advisory opinion on two issues pertaining to Mr. Bourgeois. First, it asked the Ethics Board whether the Commission could adjudicate an alleged infraction by Keith Bourgeois, a horse trainer licensed by the Commission and Mr. Bourgeois' son, when Mr. Bourgeois was an appointed member of the Commission. Secondly, it asked the Ethics Board whether an appointed member of an agency may hold an economic interest in a business which is licensed and/or approved by the agency to conduct business with other persons or entities licensed by the agency. The advisory opinion request sets forth the following facts:

In August of 2008, Governor Bobby Jindal appointed twelve new members to the Racing Commission... Paul Anthony Bourgeois of Church Point is [a] newly appointed member At-Large of the Commission. Mr. Bourgeois is Keith Bourgeois' father. Mr. Bourgeois also holds a 37.5% interest in Anthony's Feed and Farm Supply, Inc., a Louisiana Corporation. He is listed as a director and the registered agent for the corporation with the Secretary of State. Anthony's Feed and Farm Supply and/or its owners, including Mr. Bourgeois, are or have been licensed by the Commission as vendors. By virtue of the vendor's license, Anthony's Feed and Farm Supply, or its employees, may access the backside of a racetrack for the purposes of transacting business with other Commission licensees, such as the racetrack, horse owners, trainers and the like. The percentage of business and sales by Anthony's Feed and Farm Supply, which is generated by persons licensed by the Commission, cannot be readily determined.

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***Economic Interest:*** Secondly, the Commission seeks an advisory opinion regarding Anthony's Feed and Farm Supply. May the Commission continue to license and/or approve the business and/or its operators to conduct business with other persons or entities

licensed by the Commission? If permissible under the Code of Ethics, as amended, are there any restrictions on the approval?

Mr. Bourgeois and Anthony's also submitted documentary evidence demonstrating that at its November 13, 2008 meeting, the Ethics Board considered the request for an advisory opinion related to Mr. Bourgeois' recent appointment to the Commission and issued an advisory opinion on November 17, 2008. Therein, the Ethics Board concluded that Anthony's was prohibited from doing business with persons licensed by the Commission while Mr. Bourgeois served on the Commission under Section 1111C(2)(d) of the Ethics Code, which prohibits a public servant and any legal entity in which the public servant exercises control or owns an interest in excess of 25% from providing compensated services to a person that has or is seeking a business, contractual, or financial relationship with his agency or who is regulated by his agency.<sup>1</sup>

In response to the exception of prescription, the Ethics Board urged that the issuance of the advisory opinion in 2008 is not the date which began the running of the two-year prescriptive period set forth in La. R.S. 42:1163. The Ethics Board argued that the mere issuance of an advisory opinion does not constitute "knowledge" that a potential violation of the Ethics Code has occurred. It submitted that at the time it receives a request and renders an opinion, it has no way of knowing whether the requesting party has or will engage in the conduct described in the request. The Ethics Board insisted that the defendant's contention that the matter was "discovered" by it on the date of the advisory opinion request from the Commission is flawed and would lead to absurd results, as the entire purpose of the advisory opinion is to provide advice to an individual concerning a future course of action he is anticipating. However, if an advisory opinion request

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<sup>1</sup> In their motion to dismiss, defendants also argued that upon receipt of the advisory opinion by Mr. Bourgeois on November 24, 2008, Mr. Bourgeois immediately ended his exercise and control over Anthony's, selling 30% of his company on December 1, 2008, only six days after discovering his possible violation, leaving him with only a 7.5% interest in Anthony's from that date to the present.

served as the date of discovery of possible violations, the Ethics Board would be forced to initiate investigations to ensure that individuals requesting its advice were actually heeding it.

Moreover, the Ethics Board asserted that the advisory opinion sought by the Commission in this case did not involve the specific allegations contained in its charges against defendants. The Ethics Board insisted that the advisory opinion did not contain information that would suggest that the Board had knowledge of the existence of the facts that are the subject matter of its charges filed against defendants. Rather, the Ethics Board was merely asked whether Mr. Bourgeois would violate the Ethics Code if he engaged in business with persons regulated by the Commission while he had a controlling interest in Anthony's. The Ethics Board urged that in connection with the issuance of the advisory opinion, at no time did it consider, nor was it presented with actual knowledge, that defendants would actually engage in business with Keith Bourgeois, a person regulated by the Commission, while Mr. Bourgeois exercised control over Anthony's, the subject matter of the instant charges filed against defendants.

The Ethics Board argued that the correct date on which prescription began to run for the purpose of the two-year prescriptive period set forth in La. R.S. 42:1163 is March 24, 2011, the date on which it received a confidential agency report from the Commission concerning the defendants. Under this scenario, the Ethics Board had two years, or until March 24, 2013, to initiate an action against the defendants to enforce any provision of the Ethics Code, making its filing of the charges in the Division of Administrative Law on May 18, 2012 timely. The Ethics Board also argued that the filing of the charges was timely under La. R.S. 42:1141C(3)(c), which provides that the Ethics Board must issue charges within one year from the date it votes to consider a matter. It submitted that the issuance of the charges on May 18, 2012, less than one year from May 19, 2011, the date on which it

considered the report, was within the one-year prescriptive period established by La. R.S. 42:1141C(3)(c) and therefore timely.

In support of its opposition to the prescription exception, the Ethics Board submitted the affidavit of Deborah Scott Grier, its executive secretary, who attested that the Ethics Board's records pertaining to the charges brought against Mr. Bourgeois and Anthony's indicate that it received a confidential agency head report from the Commission on March 24, 2011. She further attested that she reviewed the minutes of the Ethic Board's May 19, 2011 meeting which indicate that after a review of the confidential agency head report received on March 24, 2011, the Ethics Board unanimously resolved to investigate whether Mr. Bourgeois and Anthony's violated La. R.S. 42:1111C(2)(d).<sup>2</sup>

The EAB issued an order granting the exception of prescription and dismissing the charges against defendants. In written reasons, the EAB concluded that the Ethics Board discovered the occurrence, within the meaning of La. R.S. 42:1163, of Mr. Bourgeois and Anthony's alleged violations at the latest, on November 13, 2008, when the Ethics Board considered the Commission's request for an advisory opinion. The EAB found that the facts in the advisory opinion gave rise to knowledge of actual, not hypothetical conduct, and provided information regarding current, ongoing conduct by defendants. The EAB stressed that the opening paragraph of the advisory opinion request was for an opinion as to whether Anthony's, a company in which Mr. Bourgeois owned a 37% interest, could **continue** to conduct business with other entities licensed by the Commission. This language, the EAB concluded, provided the Ethics Board with knowledge in 2008 that Mr. Bourgeois was an agent of Anthony's and its operators conducted business with individuals licensed by the Commission. The EAB

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<sup>2</sup> After the hearing on the exception, but prior to the date on which the EAB ruled on it, the Ethics Board filed into the record a redacted copy of the agency report.

further stressed that the Ethics Board's April 2012 charges are based on Mr. Bourgeois' exercise and control over Anthony's and Anthony's sale of supplies to a licensed individual. Finding that the Ethics Board did not file charges until after the expiration of two years from the date of the discovery of defendants' alleged violations, the EAB granted the defendants' prescription exception and dismissed the charges. The Ethics Board now appeals that ruling, contending that the EAB erred as a matter of law in concluding that prescription began to run on its charges against defendants when it reviewed the Commission's 2008 advisory opinion request and not the date on which it considered the agency head report detailing the defendants' alleged violations.

### DISCUSSION

The Ethics Board is charged with enforcing the Ethics Code. La. R.S. 42:1132(C). The purpose of the Ethics Code 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. La. R.S. 42:1101(B); **Duplantis v. Louisiana Board of Ethics**, 2000-1750 (La. 3/23/01), 782 So.2d 582, 586. To achieve this end, the Ethics Board is given the authority to investigate and pursue formal charges against individuals and entities for alleged violations of the Ethics Code. La. R.S. 42:1134. The Ethics Board is also authorized to render advisory opinions regarding interpretations of the Ethics Code. La. R.S. 42:1134(E).

In **Duplantis**, 782 So.2d at 587-590, the supreme court noted the difference between advisory opinions issued pursuant to La. R.S. 42:1134(E) and a finding of a violation by the Ethics Board issued pursuant to La. R.S. 42:1141 as follows:

An advisory opinion is usually sought by correspondence to the Board by an applicant. In the request, the applicant presents a set of facts upon which the Board bases its opinion, which is usually researched and prepared by the Board's staff. There is no investigation by the Board, nor is there an adversary hearing. The

applicant is placed in no different position after he receives the advisory opinion as he was before the issuance of advice. In fact, the resulting advice might have been much different had a full investigation and adversary hearing been held.

By contrast, the procedures for instituting a complaint with the Board of Ethics are set out in La. R.S. 42:1141. Upon receiving a sworn complaint from a complainant, or voting to consider a matter which the Board believes may be a violation of any provision within its jurisdiction, the matter is assigned to a panel of the Board which then conducts a private investigation to elicit evidence in order to determine whether to recommend that the Board conduct a public hearing or to indicate that no violation has occurred....

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[I]n seeking an advisory opinion, the applicant is not adverse to the Board, nor is the Board adverse to the Board.... An advisory opinion is simply advice to the status or conduct of that person or some other person under the Code of Ethics. "It is not a ruling or action by the Commission that will affect the person whose conduct or status is questioned, and it cannot be enforced by any person."...The Board is a disinterested party merely giving advice to a party who has sought its advice pursuant to the Board's authority under 42:1134(E). This is in stark contrast to the posture of the parties upon the filing of a sworn complaint by a "complainant" against a "defendant" or the consideration of a matter that the Board has reason to believe to be a violation, and in which a private investigation is undertaken, a public hearing is held at which parties are represented by counsel, parties testify under oath and present evidence and cross-examine witnesses, and then the Board votes as to whether a violation has occurred and, if so, imposes a penalty on the former or present governmental employee.

(Citations omitted in part.)

Louisiana Revised Statute 42:1163, upon which defendants rely in support of their prescription exception, provides that "[n]o 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." At issue in this appeal is the date on which the Ethics Board discovered the occurrence of the alleged violations of the Ethics Code by defendants so as to start the running of the two-year prescriptive period set forth in La. R.S. 42:1163 to bring this action to enforce the provisions of the Ethics Code against them.

Defendants contend that the Ethics Board discovered the occurrence of their potential violations and had actual knowledge of them when it considered the



request for an advisory opinion by the Commission on November 13, 2008. They argue that the request for an advisory opinion stated that Mr. Bourgeois was a director and registered agent for Anthony's; he and the corporation were licensed by the Commission as vendors; and the percentage of Anthony's business and sales generated by persons licensed by the Commission could not be readily determined. Defendants maintain that the advisory opinion request gave the Ethics Board actual knowledge of current and ongoing acts by them that would violate the Ethics Code so as to trigger the running of the two-year prescriptive period. They further urge that the conduct complained of in the 2012 charges is the exact conduct deemed by the Ethics Board to violate the Ethics Code in 2008. Defendants argue that public policy, fairness, and due process would dictate that the Ethics Board not be allowed to have knowledge of violations by individuals and knowingly allow these violations to continue until it has the need or the desire to bring charges against them.

The Ethics Board insists that the two-year prescriptive period for enforcing the provision of the Ethics Code did not start to run until either March 24, 2011, the date it received the confidential agency report detailing the conduct engaged in by defendants that served as the basis for the 2012 charges, or May 19, 2011, the date it reviewed the confidential report and voted to consider the charges. It contends that at the time it considered the advisory opinion request, it had no knowledge that defendants had or would violate the Ethics Code. Rather, it was not until the Ethics Board reviewed the confidential report from the Commission on May 19, 2011, which contained information about defendants' conduct **after** the issuance of the advisory opinion, that it gained knowledge of potential violations of the Ethics Code. The Ethics Board submits that the EAB's ruling leads to absurd consequences because it holds that a prescriptive period begins to run against the Board for events that have not yet occurred. It argues that no

reasonable person, including the Board of Ethics, could have any knowledge of violations of the Ethics Code which have not yet happened; that no constructive knowledge of violations in 2008, 2009, 2010, and 2011 was gained from reviewing the advisory opinion request; and that there was no notice of such future events in the advisory opinion for the Ethics Board to call for an inquiry. The Ethics Board asserts that once it gained knowledge of the potential violations of the Ethics Code by defendants, it timely acted to enforce the charges on May 18, 2012, within the prescriptive periods established by law. We agree.

Under La. R.S. 42:1163, discovery of the occurrence of the alleged violation triggers the two-year prescriptive period for bringing an action to enforce the Ethics Code. Typically, knowledge sufficient to commence the running of a prescriptive period can be actual or constructive. In determining whether a party has constructive knowledge of a particular action, courts generally look to the reasonableness of the party's action or inaction. See Bailey v. Khoury, 2004-0620 (La. 1/20/05), 891 So.2d 1268, 1275-76. Further, it is axiomatic that prescription cannot run against a cause of action that has not accrued. **Bailey**, 891 So.2d at 1275.

We find the EAB erred in concluding that the advisory opinion request gave the Ethics Board actual or constructive knowledge of defendants' potential Ethics Code violations arising from Mr. Bourgeois' interest in Anthony's that occurred **after** the issuance of the advisory opinion. The only knowledge the Ethics Board gleaned from reviewing the advisory opinion request was that Mr. Bourgeois, a **recent appointee** to the Commission, was seeking advice regarding whether he could continue to serve on the Commission if he continued to transact business with persons licensed by the Commission. The Ethics Board informed Mr. Bourgeois that his receipt of compensation from prohibited sources would violate the Ethics Code. Simply put, the Ethics Board had no way of knowing or

anticipating that defendants would engage in prohibited transactions with Keith Bourgeois, a person regulated by the Commission in the future, **after** it issued its opinion informing Mr. Bourgeois that such activities would violate the Ethics Code. Thus, contrary to defendants' claim, the advisory opinion does not involve the same facts and circumstances on which the charges issued by the Ethics Board are based.

Moreover, an advisory opinion issued by the Ethics Board is merely advice as to the conduct of a person under the Ethics Code; it is not a ruling or an action by the Board of Ethics that will affect a person whose status or conduct is questioned, and it cannot be enforced by any person. **Duplantis**, 782 So.2d at 590. In giving this advice, the Ethics Board acts as a disinterested party. *Id.* If the Ethics Board's review of every advisory opinion request constituted knowledge of future violations so as to commence the running of the two-year prescriptive period, the Ethics Board would be obligated to investigate every person who submits an advisory opinion request to determine whether its advice was in fact being heeded. As **Duplantis** establishes, the Ethics Board's function in reviewing requests for advisory opinions and investigating persons for violations of the Ethics Code are entirely separate and distinct.

However, we find that the September 24, 2008 request for an advisory opinion served to provide the Board with knowledge of defendants' violations of the Ethics Code that allegedly occurred **prior** to the receipt of that request. Thus, prescription to enforce the Ethics Code on the alleged past violations commenced to run on September 24, 2008, more than two years prior to the filing of the action to enforce the Ethics Code. Therefore, the charges for alleged violations occurring from August 1, 2008, the date on which Mr. Bourgeois was appointed as a Commissioner, through September 24, 2008, the date on which the Board acquired knowledge of the potential past violations, are prescribed. Accordingly, we

conclude that the trial court correctly maintained the exception of prescription as to the alleged violations occurring from August 1, 2008, through September 24, 2008.

### **CONCLUSION**

For the above reasons, we find that the Ethics Adjudicatory Board erred in dismissing all of the charges filed against defendants on the basis that they are prescribed. We reverse that portion of the judgment sustaining the exception of prescription as to alleged violations occurring after September 24, 2008. We affirm that portion of the judgment sustaining the exception of prescription as to those charges for violations occurring prior to that date. The case is remanded to the Ethics Adjudicatory Board to conduct proceedings consistent with this opinion. All costs of this appeal are assessed to appellants, Paul Anthony Bourgeois and Anthony's Feed and Farm Supply, Inc.

**AFFIRMED IN PART; REVERSED IN PART AND REMANDED.**