

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2014 CA 0337

LOUISIANA BOARD OF ETHICS
IN THE MATTER OF SCOTT FONTENOT

Judgment Rendered: DEC 30 2014

JMM
RAP (by JMM)
WJC (by JMM)

APPEALED FROM THE DIVISION OF ADMINISTRATIVE LAW
THE ETHICS ADJUDICATORY BOARD
STATE OF LOUISIANA
DOCKET NUMBER 2012-10612

ADMINISTRATIVE LAW JUDGES
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BEFORE: PARRO, McDONALD, AND CRAIN, JJ.

McDONALD, J.

In this case, the Louisiana Board of Ethics (BOE) appeals an order of the Ethics Adjudicatory Board dismissing the BOE's charges against Scott Fontenot and Fontenot & Associates and finding, as a matter of law, that Mr. Fontenot and Fontenot & Associates were not public employees subject to the Code of Governmental Ethics. For the reasons that follow, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On June 15, 2012, the BOE filed charges against Scott Fontenot (president of Fontenot & Associates), asserting that, at a time when Mr. Fontenot was contracted as an insurance consultant for the Jefferson Parish government, he received income from Coventry Insurance, in 2006, 2007, 2008, 2009, and 2010, for services rendered by his spouse Eugenie Fontenot, to or for Coventry Insurance, at a time when Coventry Insurance had or was seeking a contractual, business, or financial relationship with his agency, the Jefferson Parish government, as defined by La. R.S. 42:1115, in violation of La. R.S. 42:1111C(2)(d). The BOE requested that the Ethics Adjudicatory Board conduct a hearing on the charges, determine that Mr. Fontenot had violated La. R.S. 42:1111C(2)(d) with respect to the charges, and assess an appropriate penalty.

On August 30, 2013, Scott Fontenot and Fontenot & Associates filed a motion for summary judgment, asserting that the BOE did not have jurisdiction over them, because they were not public employees subject to the Code of Governmental Ethics.¹

The Ethics Adjudicatory Board heard the charges brought by the BOE against Scott Fontenot, case 2011-9164, and the charges brought by the BOE

¹ We note that the BOE filed a motion for summary judgment, which is found in the appellate record in this case. However, that motion for summary judgment was filed in docket number 2011-9164, which corresponds to the charges filed in the companion case, **Louisiana Board of Ethics in the Matter of Scott Fontenot**, 2014-0336 (La. App. 1 Cir. 12/30/14) (not published), and not this case, which is 2012-10612.

against Scott Fontenot and Fontenot & Associates, case 2012-10612, at a hearing on November 7, 2013, and afterward, took the matters under advisement. The Ethics Adjudicatory Board rendered orders on the companion cases on December 5, 2013, finding that, as a matter of law, Mr. Fontenot and Fontenot & Associates were not public employees subject to the Code of Governmental Ethics. The Ethics Adjudicatory Board denied the motion for summary judgment filed by the BOE, granted the motion for summary judgment filed by Mr. Fontenot and Fontenot & Associates, and ordered that all of the charges against Mr. Fontenot and Fontenot & Associates be dismissed. The BOE appealed that ruling.

MOTIONS

The BOE filed a motion for leave to file a reply brief with this court after the deadline for doing so had passed, and attached a reply brief to its motion. Mr. Fontenot and Fontenot & Associates filed a motion to strike the BOE's reply brief. After consideration, we deny the motion for leave to file a reply brief. Accordingly, the motion to strike the BOE's reply brief is moot.

THE STANDARD OF REVIEW

Because the Ethics Adjudicatory Board dismissed the BOE's charges by summary judgment, our standard of review is *de novo*, using the same criteria used by the underlying tribunal. A motion for summary judgment is a procedural device used to avoid a full-scale trial when there is no genuine issue of material fact. **Dep't. of Health & Hospitals Bureau of Appeals v. New Orleans Health Corp.**, 2008-1801 (La. App. 1 Cir. 5/13/09), 17 So.3d 419, 422.

The motion for summary judgment should be granted only if the pleadings, depositions, answers to interrogatories, and admissions, together with the affidavits, if any, admitted for purposes of the motion for summary judgment, show that there is no genuine issue as to material fact, and that mover is entitled to

judgment as a matter of law. La. C.C.P. art. 966B(2). A motion for summary judgment which shows that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law shall be granted. La. C.C.P. art. 966C(1). The burden of proof remains with the movant. If the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact. La. C.C.P. art. 966C(2). Material facts are those that potentially insure or preclude recovery, affect the litigant's success, or determine the outcome of a legal dispute. Because it is the applicable substantive law that determines materiality, whether or not a particular fact in dispute is material can be seen only in light of the substantive law applicable to the case. **Dep't. of Health & Hospitals Bureau of Appeals**, 17 So.3d at 422.

THE ASSIGNMENTS OF ERROR

The BOE makes the following assignments of error.

1. It was error for Panel A of the Ethics Adjudicatory Board . . . to conclude, as a matter of law, that Scott Fontenot and Fontenot & Associates were not "public employees" as defined by the Ethics Code.
2. It was error for Panel A of the Ethics Adjudicatory Board to conclude, as a matter of law, that Scott Fontenot and Fontenot & Associates were not "engaged in the performance of a governmental function."
3. It was error for Panel A of the Ethics Adjudicatory Board to conclude, as a matter of law, that the services provided by Scott Fontenot and Fontenot & Associates, to Jefferson Parish were not a "governmental function."
4. It was error for Panel A of the Ethics Adjudicatory Board to conclude, as a matter of law, that the services provided by Scott Fontenot and Fontenot & Associates, to Jefferson Parish were not provided under the supervision or authority of an elected official or employee of Jefferson Parish.
5. It was error for Panel A of the Ethics Adjudicatory Board to conclude, as a matter of law, that the services provided by Scott Fontenot and Fontenot & Associates, to Jefferson Parish were not

done so under the control of any parish employee or elected official.

6. It was error for Panel A of the Ethics Adjudicatory Board to conclude, as a matter of law, that Scott Fontenot and Fontenot & Associates were entitled to judgment as a matter of law.

7. It was error for Panel A of the Ethics Adjudicatory Board to fail to grant the Motion for Summary Judgment as filed by the Ethics Board against Scott Fontenot and Fontenot & Associates.

DISCUSSION

The BOE is charged with enforcing the Code of Governmental Ethics. La. R.S. 42:1132C. 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. La. R.S. 42:1101B. To achieve this end, the BOE is given the authority to investigate and pursue formal charges against individuals and entities for alleged violations of the Code of Governmental Ethics. La. R.S. 42:1134. The BOE is also authorized to render advisory opinions regarding interpretations of the Code of Governmental Ethics. La. R.S. 42:1134E. **In re Krantz**, 2013-1732 (La. App. 1 Cir. 5/29/14), 147 So.3d 737, 740-41, writ denied, 2014-1363 (La. 10/3/14), __ So.3d __.

The BOE filed its appeal pursuant to La. R.S. 42:1142A(2)(a), which limits the BOE's right of appeal to questions of law in a final decision. If the BOE does not prevail in the final disposition of its appeal, the BOE shall be responsible for the payment of reasonable attorney fees and court costs of the other party inclusive of all stages of litigation and appeal. La. R.S. 42:1142A(2)(b). The amount of attorney fees shall be determined by the court of appeal and shall be set forth in the court's judgment. La. R.S. 42:1142A(2)(c).

The Ethics Adjudicatory Board made the following findings of fact.

Jefferson Parish, by a vote of the Jefferson Parish Council, contracted with Fontenot and Associates, LLC (F&A) to serve as its insurance benefits consultant for parish employee[s] and retiree

insurance. F&A was to provide “professional services to select health and welfare benefits . . . including but not limited to: collection of census and other information from [the parish]; review of information and development of strategy; selection of desired plan design, draft of RFP of [parish] need[s] and desires; evaluation of vendor proposals, outline advantages and disadvantages; [and] negotiation[s] with vendors and implementation of their contracts.”

F&A evaluated and selected insurance proposals and provided recommendations to the members of the parish’s Insurance Advisory Council. The council considered F&A’s recommendations and voted on them. F&A was not under the supervision or authority of any specific elected official or employee of Jefferson Parish. F&A rendered its professional services as an independent contractor. Only Jefferson Parish and F&A had the authority to terminate the contract. Jefferson Parish had to provide written consent in order for F&A to assign, sublet, transfer, or subcontract the contract, or any part of it. F&A was required to maintain its own books, records and documentation verifying the performance of its services. F&A was required to secure and maintain, at its own expense, insurance to protect Jefferson Parish from worker’s compensation claims and claims for bodily injury, death, or property damage. F&A was required to provide commercial general liability insurance and professional liability insurance, with Jefferson Parish as an additional insured. F&A agreed to indemnify and hold Jefferson Parish harmless from any claims arising out of any acts or omissions by F&A. F&A was to provide Jefferson Parish an invoice for a set fee of no more than \$1,800.00 per month. Scott Fontenot was the president of F&A. (Footnotes omitted.)

Louisiana Revised Statute 42:1115 provides in pertinent part:

B. No public employee shall solicit or accept, directly or indirectly, anything of economic value as a gift or gratuity from any person or from any officer, director, agent, or employee of such person, if such public employee knows or reasonably should know that such person:

.....

(2) Has substantial economic interests which may be substantially affected by the performance or nonperformance of the public employee’s official duty.

Louisiana Revised Statute 42:1102 provides in pertinent part:

(18)(a) “Public employee” means anyone, whether compensated or not, who is:

.....

(i) An administrative officer or official of a governmental entity who is not filling an elective office.

(ii) Appointed by any elected official when acting in an official capacity, and the appointment is to a post or position wherein the appointee is to serve the governmental entity or an agency thereof, either as a member of an agency, or as an employee thereof.

(iii) Engaged in the performance of a governmental function.

(iv) Under the supervision or authority of an elected official or another employee of the governmental entity.

ASSIGNMENTS OF ERROR NOS. 4 AND 5

In these assignments of error, the BOE asserts that it was error for the Ethics Adjudicatory Board to conclude, as a matter of law, that the services provided by Scott Fontenot and Fontenot & Associates to Jefferson Parish were not provided under the supervision, authority, or control of an elected official or employee of Jefferson Parish. The Ethics Adjudicatory Board found as fact that Mr. Fontenot and Fontenot and Associates were not under the supervision or authority of an elected official or another employee of the government. Thus, this issue is not appealable by the BOE. La. R.S. 42:1142A(2)(a); **Louisiana Board of Ethics ex rel. Empower PAC**, 13-1841 (La. App. 1 Cir. 5/2/14), 145 So.3d 398, 401-402.

ASSIGNMENTS OF ERROR NOS. 1, 2, 3, 6 AND 7

In these assignments of error, the BOE asserts that the Ethics Adjudicatory Board erred in concluding, as a matter of law: that Scott Fontenot and Fontenot & Associates were not public employees, as defined by the Code of Governmental Ethics; that Scott Fontenot and Fontenot & Associates were not engaged in the performance of a governmental function; that the services provided by Scott Fontenot and Fontenot & Associates were not a governmental function; and that Scott Fontenot and Fontenot & Associates were entitled to summary judgment. Finally, the BOE contends that the Ethics Adjudicatory Board erred in failing to grant the BOE's motion for summary judgment against Mr. Fontenot and Fontenot & Associates.

The term “governmental function” is not defined in the Code of Governmental Ethics, but the case of **Commission on Ethics for Public Employees v. IT Corp.**, 423 So.2d 695 (La. App. 1 Cir. 1982), provides guidance on the definition of this term. In that case, the court found that IT Corporation, a private corporation, was a public employee subject to the Code of Governmental Ethics, because it was performing a governmental function for a governmental entity, the Louisiana Department of Natural Resources (DNR). **IT Corp.**, 423 So.2d at 700. In that case, IT Corporation entered into a contract with the DNR to conduct a feasibility study for a regional hazardous waste disposal facility, which included recommending a particular site for the facility. **IT Corp.**, 423 So.2d at 697. The Hazardous Waste Control Law enabled DNR to participate in the relocation of a waste disposal site, and under IT Corporation’s contract with DNR, it was responsible for one part of establishing the framework for the storage and disposal of hazardous waste. Because IT Corporation was responsible for providing a specific and statutorily mandated governmental function assigned legislatively to the DNR, the court determined that IT Corporation was engaged in the performance of a governmental function, and therefore, was a public employee, subject to the Code of Governmental Ethics. See IT Corp., 423 So.2d at 700.

In the present case, Mr. Fontenot and Fontenot & Associates were performing consulting services for Jefferson Parish in a private contractor capacity.

Jefferson Parish has a home rule charter and plan of government adopted in accordance with Article XIV, § 3(c) of the 1921 Louisiana Constitution and Article VI, § 4 of the 1974 Louisiana Constitution.² Jefferson Parish has all the powers, rights, privileges, and authority vested in parishes, parish governments, and parish

² Although the plan of government has not been filed in the record, this court may take judicial notice of its provisions under the authority of La. R.S. 13:3712(B); **City of Baton Rouge v. Bethley**, 09-1840 (La. App. 1 Cir. 10/29/10), 68 So.3d 535, 539 n. 3, writ denied, 11-1884 (La. 11/4/11), 75 So.3d 927.

officers by the Louisiana Constitution and laws of the state of Louisiana. Code of Ordinances, Jefferson Parish, Louisiana, Art. 1, § 1.01.

The Jefferson Parish Code of Ordinances lists sixteen core functions that Jefferson Parish provides to the public, including levying and collecting property taxes, enacting plans for development and zoning, maintaining roads, controlling traffic, and providing law enforcement services. Code of Ordinances, Jefferson Parish, Louisiana, Art. 1, §1.01.

Providing insurance benefits for employees is not listed among Jefferson Parish's sixteen core functions in the Jefferson Parish Code of Ordinances. The affidavit of Feleciano Mendoza, Jr., the Human Resources (HR) Director for Jefferson Parish from December 27, 2000 to March 18, 2011, establishes that neither the HR Director nor any of the HR Department's employees were responsible for providing insurance brokerage and placement of insurance services for Jefferson Parish. Jefferson Parish utilized the outside services and recommendations of an insurance consultant to broker and place employee and retiree insurance. The brokerage services included evaluating and selecting insurance proposals and policies from qualified insurance providers. Jefferson Parish did not employ anyone in HR licensed with the Department of Insurance or associated with any insurance companies.

Mr. Fontenot and Fontenot & Associates were not performing a specific and statutorily-mandated governmental function. Thus, we find that Mr. Fontenot and Fontenot & Associates were not engaging in a governmental function and were not acting as public employees, and their actions were not governed by the Code of Governmental Ethics. For the foregoing reasons, the December 5, 2013 orders of the Ethics Adjudicatory Board are affirmed.

ATTORNEY FEES AND COSTS

As the BOE did not prevail in the final disposition of its appeal, this court

shall award costs and attorney fees. La. R.S. 42:1142A(2)(b); La. R.S. 42:1142A(2)(c). Factors to be taken into consideration in determining the reasonableness of attorney fees include: (1) the ultimate result obtained; (2) the responsibility incurred; (3) the importance of the litigation; (4) the amount of money involved; (5) the extent and character of the work performed; (6) the legal knowledge, attainment, and skill of the attorneys; (7) the number of appearances involved; (8) the intricacies of the facts involved; (9) the diligence and skill of counsel; and (10) the court's own knowledge. These factors are derived from Rule 1.5(a) of the Rules of Professional Conduct. **Rivet v. State, Dept. of Trans. and Dev.**, 96-0145 (La. 9/5/96), 680 So.2d 1154, 1161. There is no evidence in the record showing the amount of attorney fees and costs incurred. Therefore, we have no way of determining any of these factors. However, we can make a reasonable estimate of the time involved in this appeal, and we find that \$4,000.00 is a reasonable amount for attorney fees in this case. The cost of this appeal, in the amount of \$816.25, is also assessed against the Louisiana Board of Ethics.

MOTION TO FILE REPLY BRIEF DENIED, MOTION TO STRIKE REPLY BRIEF RENDERED MOOT, JUDGMENT RENDERED AND AFFIRMED.