

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2018 CA 1106

MICHELLE BARNETT

VERSUS

LOUISIANA BOARD OF ETHICS

Judgment Rendered: JUN 20 2019

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Appealed from the
Ethics Adjudicatory Board
State of Louisiana, Division of Administrative Law
Docket No. 2015-0662-Ethics-B

Administrative Law Judges
Sabra Matheny, Janet Waguespack and Patrick Moore

* * * * *

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* * * * *

BEFORE: GUIDRY, THERIOT, AND PENZATO, JJ.

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GUIDRY, J.

Michelle Barnett appeals from a decision of the Ethics Adjudicatory Board (EAB) denying her exception raising the objection of prematurity.¹ For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

Michelle Barnett is an employee of the Louisiana Department of Health and Hospitals (DHH). Barnett was originally hired by DHH as a Medicaid Program Manager 2 in the Medical Vendor Administration. (R. 430-436) Barnett was subsequently promoted to Program Manager 2 in the Office of Behavioral Health (OBH), Division of Development, Business Intelligence Section in September 2011. (R. 437) In this capacity, Barnett served as manager of the Electronic Behavioral Health Record System (EBHRS), where she was responsible for managing an effective, ongoing data exchange with the Statewide Management Organization (SMO). SMO manages behavioral health services for Medicaid and Non-Medicaid eligible populations served by OBH. (R. 438) Magellan Health Services (Magellan) was selected SMO and entered into a contract with DHH/OBH on November 17, 2011. In July 2012, Tom Barnett, Barnett's husband, was hired by Magellan as a Senior Network Business Analyst, with job duties including analysis and production of reports in support of the Magellan provider network for OBH. (R. 3)

In February 2013, Barnett's job duties were reclassified to provide that she would be working with a team, including SMO staff, to create reports and summaries based on data submitted by Magellan to measure the performance of the SMO. (R. 316-319) Barnett thereafter disclosed to DHH in October 2013 that her husband worked for Magellan, and DHH subsequently moved Barnett to

¹ Barnett has confined her appeal to review of the trial court's denial of her exception raising the objection of prematurity.

another Program Manager 2 position that was not involved in the Magellan contract. The DHH-Bureau of Legal Services thereafter reported the foregoing to the Ethics Administrator for review for potential violations of the Code of Governmental Ethics (Code of Ethics). (R. 422-423)

At its March 2014 meeting, the Louisiana Board of Ethics (BOE) voted to instruct its staff to conduct a confidential investigation into whether Barnett violated La. R.S. 42:1111(C)(2)(d) by virtue of her receipt of a thing of economic value from Magellan at a time when her agency had a business, contractual or financial relationship with Magellan.² (R. 262) Following an investigation, the BOE completed an investigative report on October 31, 2014. (R. 253)

The BOE subsequently filed charges against Barnett on January 16, 2015, for a potential violation of La. R.S. 42:1111(C)(2)(d), which provides that no public servant and no legal entity in which the public servant exercises control or owns an interest in excess of twenty-five percent shall receive anything of economic value for or in consideration of services rendered, or to be rendered, to or for any person during his public service unless such services are neither performed nor compensated by any person from whom such public servant would be prohibited by La. R.S. 42:1115(A)(1) or (B) from receiving a gift. The BOE alleged that Barnett violated the foregoing statute by virtue of her receipt of a thing of economic value for services provided by Magellan by her husband at a time when she was employed by DHH and at a time when Magellan had a contractual or other business or financial relationship with DHH. The BOE requested that the EAB conduct a hearing on these charges, determine whether Barnett violated La. R.S. 42:1111(C)(2)(d), and assess appropriate penalties. (R. 6)

Barnett thereafter filed exceptions raising the objections of prescription and prematurity. Barnett asserted that the charges were prescribed before they were

² The BOE also voted to investigate a violation of La. R.S. 42:1112.

filed because the BOE failed to file the charges within one year of the date on which it received a sworn complaint. Additionally, Barnett asserted that the charges were premature, because the BOE had not completed its investigation and could not establish a prima facie case in support of the charges at the time it filed them. (R. 135)

The EAB conducted a hearing on Barnett's exceptions on May 25, 2017, and subsequently signed an order on June 9, 2017, denying Barnett's exceptions. The clerk's certificate indicated that a copy of the order had been transmitted to all parties. However, during a telephone status conference on October 4, 2017, counsel for Barnett indicated that he did not receive the June 9, 2017 order. The EAB resent the order to counsel's email on October 6, 2017. (R. 1)

On October 25, 2017, counsel for Barnett filed a Notice of Intent to Apply for Supervisory Writs, requesting the EAB to set a return date for filing an application for writs with this court. (R. 555) The BOE filed an opposition based on untimeliness, but the trial court denied the BOE's opposition and set a return date. (R. 589) This court, finding that the order denying Barnett's exceptions was appealable pursuant to La. R.S. 42:1142, granted Barnett's writ application for the sole purpose of remanding the matter to the EAB with instructions to grant an appeal to Barnett pursuant to the October 25, 2017 Notice of Intent to Apply for Supervisory Writ. (R. 597). Barnett thereafter filed a motion for devolutive appeal with the EAB. (R. 601)

DISCUSSION

Standard of Review

Pursuant to La. R.S. 42:1143, all proceedings conducted by the EAB shall be subject to and in accordance with the Louisiana Administrative Procedure Act (APA), La. R.S. 49:950, *et seq.* The APA specifies that judicial review shall be confined to the record as developed in the administrative proceedings. La. R.S.

49:964(F). A reviewing court may reverse or modify the decision of the EAB only 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 agency's statutory authority; (3) made upon unlawful procedure; (4) affected by other error of law; (5) arbitrary, capricious, or an abuse of discretion or clearly unwarranted exercise of discretion; or (6) not supported and sustainable by a preponderance of the evidence. 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. Ellis v. Louisiana Board of Ethics, 14-0112, p. 7 (La. App. 1st Cir. 12/30/14), 168 So. 3d 714, 721, writ denied, 15-0208 (La. 4/17/15), 168 So. 3d 400.

Motion to Dismiss Appeal

On September 4, 2018, the BOE filed with this court a Motion to Dismiss Untimely Appeal, asserting that Barnett's appeal is untimely because it was not filed within the delays prescribed by La. R.S. 42:1142. This court issued an interim order on December 17, 2018, ordering that the case be remanded to the EAB for the limited purpose of holding an evidentiary hearing to determine whether or not the notice of the order signed on June 9, 2017, was properly transmitted pursuant to La. R.S. 42:1142 and La. Admin. Code tit. 1, Pt. III, § 309. This court noted that although the record reveals a certification by the clerk of court that the order had been transmitted on June 9, 2017, the record does not reveal the manner in which it was transmitted. This court ordered that the appellate record be supplemented with two certified copies of the EAB's ruling within forty-five days.

Upon remand, the EAB held an evidentiary hearing on January 24, 2019, wherein the parties submitted documents and gave oral argument. (R. 637). The

EAB thereafter issued an order, finding that the EAB transmitted the June 9, 2017 order via email to Barnett's counsel at the email address belonging to counsel's secretary. The EAB further found that it was undisputed by the parties that the email was received and downloaded on June 12, 2017, by the email address belonging to counsel's secretary. Accordingly, the EAB found that the June 9, 2017 order was properly transmitted pursuant to La. R.S. 42:1142 and La. Admin. Code tit. 1, Pt. III, § 309(B) on June 9, 2017.

Louisiana Revised Statute 42:1142 provides, in pertinent part:

A. (1) Whenever action is taken against any public servant or person by order of the Board of Ethics, or panel thereof, or by a final decision of the Ethics Adjudicatory Board, or by an agency head by order of the Board of Ethics, or panel thereof, or by a final decision of the Ethics Adjudicatory Board, or whenever any public servant or person is aggrieved by any action taken by the Board of Ethics, or panel thereof, or the Ethics Adjudicatory Board, he may appeal to the Court of Appeal, First Circuit.

(a) An order of the Board of Ethics, or panel thereof, may be appealed by filing a written motion with the Board of Ethics within thirty days after the signing and transmission of the notice of the order.

(b) A final decision of the Ethics Adjudicatory Board may be appealed by filing a written motion with the Ethics Adjudicatory Board within thirty days after the signing and transmission of the notice of the final decision, or if a rehearing is requested, within thirty days after the transmission of the notice of the decision of the Ethics Adjudicatory Board on the rehearing.

With regard to notice, La. Admin. Code tit. 1 Pt. III, § 309(B) provides, in pertinent part:

Notices shall be sent by postal mail or transmitted by electronic means unless otherwise required by law. Notices may be sent to the counsel of record only. Otherwise, notices are sent to the party's last known physical, postal or electronic address as filed in the adjudicatory record.

In the instant case, the EAB transmitted notice of its June 9, 2017 order denying Barnett's exceptions raising the objections of prescription and prematurity electronically to counsel for Barnett at a work email address belonging to counsel's secretary. According to the record, counsel's secretary had communicated with the

EAB on behalf of counsel and had provided the EAB with her email address as a means of contacting counsel. (R. 34, 66) However, the record further demonstrates that after the EAB sent a notice for hearing on a motion to quash to the email address provided by counsel's secretary, counsel appeared before the EAB at that hearing and provided the EAB with his email address. It is this email address to which the EAB sent notice for the hearing on Barnett's exceptions raising the objections of prescription and prematurity. (R. 234)

Furthermore, when counsel appeared for the subject hearing before the EAB, as well as at the prior hearing, counsel was required to complete an appearance sheet, which stated:

Instructions:

Please enter your appearance and status (i.e., attorney, owner, witness). An attorney who represents a party in these proceedings must be licensed to practice law in Louisiana, or co-counsel a Louisiana attorney.

The counsel of record shall be that person designated by a party as its official representative in these proceedings and *to whom all notices and pleadings shall be sent*. If a party has no counsel of record, he/she shall designate his/her official representative in these proceedings for the purpose of participation, notice and service of process. [Italics added.]

In completing this form, counsel for Barnett again provided his email address.

From our review of the record, we find that while counsel's secretary may have initially provided her email address as a means by which to reach counsel, counsel subsequently provided his email address to the EAB, and the EAB forwarded subsequent notices and communications to counsel's email address. Furthermore, particularly relevant in this case, is the appearance sheet that the EAB asks counsel to complete at each hearing. This sheet solicits contact information from counsel (or a party's representative) for the express purpose of providing notice, and counsel consistently provided his email address for this purpose. Accordingly, we find the EAB's determination, finding notice of its

order denying Barnett's exceptions was properly transmitted in accordance with La. R.S. 42:1142 and La. Admin. Code tit. 1 Pt. III, § 309(B) to counsel at his secretary's email address, is not supported by a preponderance of the evidence. See La. R.S. 49:964(G).

Furthermore, because the EAB did not send proper notice of its order denying Barnett's exceptions to counsel's email address until October 6, 2017, and Barnett filed a notice of intent to apply for supervisory writs on October 25, 2017, we find that the appeal is timely in accordance with La. R.S. 42:1142(A)(1).³ Therefore, we deny the BOE's motion to dismiss Barnett's appeal.

Prematurity

Louisiana Code of Civil Procedure article 926(A)(1) provides for the dilatory exception raising the objection of prematurity, which is intended to retard the progress of the action, rather than to defeat it. La. C.C.P. art. 923. An action is premature if it is brought before the right to enforce the claim sued on has accrued. La. C.C.P. art. 423. The objection of prematurity raises the issue of whether the judicial right of action has yet to come into existence because some prerequisite condition has not been fulfilled. It's Golden, LLC v. Watercolors Unit 6, LLC, 16-1362, p. 3 (La. App. 1st Cir. 6/2/17), 223 So. 3d 545, 547. Prematurity is determined by the facts existing at the time the suit is filed. Dutrey v. Plaquemine Manor Nursing Home, 12-1295, p. 10 (La. App. 1st Cir. 6/17/13), 205 So. 3d 934, 942.

Before the BOE is allowed to file formal charges against someone for violation of the Code of Ethics, it must first determine that there are factual grounds for the charges. See La. R.S. 42:1141(C); La. Admin. Code tit. 52, pt. I, §§ 802, 803, and 808. A private investigation shall be conducted to elicit evidence

³ As previously noted, after Barnett filed her notice of intent, this court granted Barnett's writ application for the sole purpose of remanding the matter to the EAB with instructions to grant an appeal to Barnett pursuant to the October 25, 2017 notice of intent to apply for supervisory writ.

upon which the BOE shall determine whether a public hearing should be conducted or that a violation has not occurred. The accused and the complainant shall be given written notification of the commencement of the investigation not less than ten days prior to the date set for the commencement of the investigation. La. R.S. 42:1141(C)(1).

Upon completion of an investigation, an investigative report shall be presented to the BOE, which shall decide if further investigation is necessary, if charges should be filed, if a consent opinion should be offered, or if the file should be closed because no violation has occurred. La. Admin. Code tit. 52, pt. I, §§ 802, 803, and 808. If the BOE determines following an investigation that a public hearing should be conducted, the BOE shall issue charges. A public hearing shall be conducted to receive evidence relative to the facts alleged in the charges and to determine whether any violation of any provision of law within the jurisdiction of the BOE has occurred. La. R.S. 42:1141(C)(3)(a).

In Ellis, 14-0112 at p. 12, 168 So. 3d at 724, this court analyzed the statutory language of La. R.S. 42:1141(C) and determined that the BOE must complete its investigation before filing formal charges against an individual accused of violating the Code of Ethics. The court further found that in order for an investigation to be complete, the BOE must possess evidentiary support to establish a prima facie case before filing formal charges. Ellis, 14-0112 at p. 14, 168 So. 3d at 725. If the BOE files formal charges against an individual without first obtaining evidentiary support to establish a prima facie case, then the investigation is incomplete and the charges are subject to dismissal on an exception raising the objection of prematurity. Ellis, 14-0112 at p. 14, 168 So. 3d at 725.

This court further clarified in Louisiana Board of Ethics Matter of Villere, 15-1939, p. 15 (La. App. 1st Cir. 12/22/16), 208 So. 3d 940, 949, writ denied, 17-00128 (La. 3/13/17), 216 So. 3d 807, that in accordance with the jurisprudence and

the plain language meaning of “prima facie case,” the proper inquiry in these matters is whether the evidence in existence at the time of the filing of formal charges, viewed in the aggregate, establishes that the BOE fully investigated the allegations and uncovered a factual basis sufficient to substantiate a probable violation of the Code of Ethics, notwithstanding that the presumption may later be proven to be untrue. If, on the other hand, the evidence establishes that the BOE did not uncover factual support to substantiate the allegations, but rather, chose to file formal charges simply because prescription was accruing, then the charges are premature and subject to dismissal. Villere, 15-1939 at p. 15, 208 So. 3d at 949.

In the instant case, Barnett was charged with violation of La. R.S. 42:1111(C)(2)(d), which provides that no public servant and no legal entity in which the public servant exercises control or owns an interest in excess of twenty-five percent shall receive anything of economic value for or in consideration of services rendered, or to be rendered, to or for any person during his public service unless such services are neither performed for nor compensated by any person from whom such public servant would be prohibited by La. R.S. 42:1115(A)(1) or (B) from receiving a gift. BOE alleged that Barnett violated the foregoing statute by virtue of her receipt of a thing of economic value for services provided to Magellan by her husband at a time when she was employed by DHH and at a time Magellan had a contractual or other business or financial relationship with DHH.

Barnett, however, asserts that the charges against her are premature because the BOE had not completed its investigation and could not establish a prima facie case in support of the charges at the time it filed them. Particularly, Barnett claims that the BOE lacked evidence to establish that the payment of salary to her husband by his employer, Magellan, constituted anything of economic value, which she is precluded from receiving. Barnett also claims that the BOE lacked

any evidence establishing that Magellan had a contractual or other business or financial relationship with her agency.

Our review of the record demonstrates that the BOE conducted a seven-month long investigation into the allegations against Barnett. The investigation determined that Barnett was employed by DHH/OBH as a Program Manager 2. In November 2011, DHH/OBH entered into a written contract with Magellan to serve as the SMO for the Louisiana Behavioral Health Partnership (LBHP). (r. 387) The investigative report further determined, based upon occupational summaries submitted by DHH pursuant to *subpoena duces tecum*, that in her position, Barnett served as the EBHRS manager, who was responsible for managing an effective, ongoing data exchange with the SMO, Magellan, in order to manage and evaluate the SMO and to monitor and evaluate the statewide network of behavioral health services and providers. Additionally, Barnett worked with a team, including Magellan staff, to create reports and summaries to measure performance, and she was also required to create, implement, and operate a data system, of which Magellan was a critical data source. (R. 388)

Furthermore, the investigation determined that Barnett is married to Tom Barnett, with whom she has a community property regime. Tom Barnett became employed with Magellan as a senior network business analyst in July 2012 and received compensation for his services in the form of an annual salary.⁴ The investigative report further determined, based upon documents provided by Magellan pursuant to *subpoena duces tecum*, that Tom Barnett's job duties included analysis and production of reports in support of the Magellan provider network for the Louisiana Behavioral Health Partnership and that these reports were prepared for DHH/OBH. (R. 388)

⁴ See La. C.C. art. 2338; see also Louisiana Board of Ethics in re Great Southern Dredging, Inc., 15-0870 (La. App. 1st Cir. 5/27/16), 195 So. 3d 631, writ denied, 16-1208 (La. 10/17/16), 207 So. 3d 1063.

As we previously stated, in order for an investigation to be complete, the BOE should have a prima facie case against Barnett at the time of filing charges against her, meaning that the evidence in existence at the time of the filing of formal charges, viewed in the aggregate, establishes that the BOE fully investigated the allegations and uncovered a factual basis sufficient to substantiate a *probable* violation of the Code of Ethics, notwithstanding that the presumption *may later be proven to be untrue*. See Villere, 15-1939 at p. 15, 208 So. 3d at 949. From our review of the record, we do not find that the EAB was arbitrary or capricious or abused its discretion in finding that the BOE fully investigated the allegations, uncovered a factual basis sufficient to substantiate a probable violation of the Code of Ethics, and as such, established a prima facie case. (R. 551-552) As such, we likewise do not find the EAB was arbitrary or capricious or abused its discretion in denying Barnett's exception raising the objection of prematurity.

CONCLUSION

For the foregoing reasons, we deny the Board of Ethic's Motion to Dismiss Appeal as Untimely and affirm the June 9, 2017 order of the Ethics Adjudicatory Board denying Michelle Barnett's exception raising the objection of prematurity. All costs of this appeal are assessed to Michelle Barnett.

MOTION TO DISMISS APPEAL DENIED; JUNE 9, 2017 ORDER AFFIRMED.