


NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

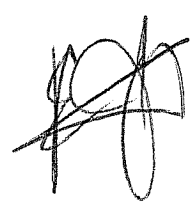
NUMBER 2006 CA 0958



IN RE:

LORRI BURGESS

Judgment Rendered: March 23, 2007



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Appealed from the
Louisiana Board of Ethics
In and for the State of Louisiana
Docket Number 2005-245

Robert L. Roland, Chairman
Hon. John W. Greene; Hon. E.L. Guidry, Jr.; Gwendolyn Hamilton; Michael
Johnson; R.L. Hargrove, Jr.; Michael Kantrow, Sr.; Joseph Maselli;
Henry C. Perret, Jr.; Ascension Delgado Smith; Dr. Dolores Spikes

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BEFORE: KUHN, GAIDRY, AND WELCH, JJ.

WELCH, J.

This is an appeal by Lorri Burgess of an opinion of the Louisiana Board of Ethics, which found that she violated the Code of Ethics. After a thorough review of the record and applicable law, we reverse.

On December 28, 2006, this panel of this court rendered **Burgess v. The City of Baton Rouge**, 2005-2565 (La. App. 1st Cir. 12/28/06), ___ So.2d ____. In that case, we determined the trial court erred in finding that Lorri Burgess, a member of the Metropolitan Council of the consolidated government of the City of Baton Rouge, Parish of East Baton Rouge (the City-Parish), had violated certain sections of the City-Parish's Plan of Government. Specifically, we found that Ms. Burgess' actions in voting, as a council member, for herself for the position of President Pro Tempore in elections held in January of 2005¹ were not prohibited by Section 2.10 of the City-Parish's Plan of Government, and we reversed the summary judgment to the contrary.²

Presently, Ms. Burgess appeals a separate opinion rendered by the Louisiana Board of Ethics on February 9, 2006, by a majority vote finding that Ms. Burgess' actions – participating as a council member in the vote on January 3 and again on January 12, 2005, to elect herself Mayor Pro Tem, when the person elected would receive additional compensation in the amount of \$1,500.00 per month for serving in that capacity – violated Section 1112A of the Code of Governmental Ethics (La. R.S. 42:1101 *et. seq.*), which prohibits a public servant from participating in a transaction in which he or she has a personal substantial economic interest.

This matter was initiated by a letter sent by the Board to Ms. Burgess, dated September 21, 2005, charging her with alleged violations of Section 1112A and

¹ There were two elections held; one on January 3 and another on January 12, 2005, but neither candidate received the majority vote necessary for election.

² A more complete and detailed history of this matter is set forth in this court's prior opinion, cited above.

ordering a public hearing on January 12, 2006, to further explore the charges against her. The basis for the charges is the fact that in 1997, the Council passed Ordinance No. 13142, adopting the City-Parish pay plan, providing a salary for the position of Mayor Pro Tem of \$1500.00 per month.³ The issue for decision is whether the payment of that salary constitutes a “personal substantial economic interest” such that if a council member like Ms. Burgess votes for herself in an election for that paid position, she has “participated in a transaction” prohibited by Section 1112A.

A hearing was held on January 12, 2006, after which the Board voted 5-2 that Ms. Burgess had violated the Code of Ethics. The Board, however, unanimously declined to impose a civil fine for the violation, giving consideration to the fact that Ms. Burgess was relying on the most current precedent, a March 14, 2003, advisory opinion from the Board holding conduct such as hers was not in violation of Section 1112A of the Code, as well as the fact that Ms. Burgess ceased voting in any election after the Board reversed its prior opinion, in a subsequent opinion rendered on January 18, 2003, (after the elections and alleged violations at issue).⁴

³ As noted in our earlier opinion, the City-Parish Plan of Government provides that the Council shall be presided over by a President Pro Tem, one of its members, who also acts as acting Mayor-President (Mayor Pro Tem) in the event of the Mayor’s absence or disability or the temporary vacancy of that office. The President Pro Tem has historically received compensation, fixed by ordinance after each election, for serving as Mayor Pro Tem. From 1981 to 1997, this consisted of per diem payments. With the passage of the 1997 ordinance, the compensation has been \$1500.00 per month.

⁴ In December of 2004, prior to the elections for Mayor Pro Tem in which Ms. Burgess voted, Councilman David Boneno requested an advisory opinion from the Board on the propriety of a council member voting for him/herself for Mayor Pro Tem in the upcoming January elections. Unfortunately, the Board did not render that opinion, Ethics Board Docket No. 2004-903, until January 18, 2005, after the elections questioned. That opinion held that a councilman may not participate in the vote to select himself to that position. However, the advisory opinion dated March 14, 2003, condoning conduct such as Ms. Burgess’, was the latest available pronouncement from the Board on the issue at the time of her voting. The record additionally reflects that Ms. Burgess herself filed a Petition for Declaratory Relief on December 17, 2004, seeking a ruling from the district court on whether her voting for herself in the upcoming elections was violative of the Plan of Government; however, this ruling was also not rendered prior to the elections at issue. (Indeed, as noted earlier, this court subsequently reversed that

In finding that Ms. Burgess violated Section 1112A of the Code of Ethics, the Board rejected Ms. Burgess' reliance on the exception provided in Section 1102(21), defining "substantial economic interest" as "an economic interest which is of greater benefit to the public servant or other person than to a general class or group of persons" and exempting from that definition "the interest that the public servant has in his position, office, rank, salary, per diem, or other matter arising solely from her public employment or office." The Board found the exception not applicable "since the position of Mayor Pro Tem constitutes a new position for an elected member of the [City-Parish Council]." The Board held that by voting for herself, as a nominee for Mayor Pro Tem, Ms. Burgess participated in a transaction in which she had a personal substantial economic interest, violating Section 1112A of the Code of Ethics. This appeal follows.

In Ms. Burgess' prior appeal, where we reversed a finding that her actions in voting for herself violated the Plan of Government, the issues raised were very similar, differing only slightly in the wording of the applicable provisions. Whereas the Code of Ethics prohibits participating in transactions wherein a council member has a "personal substantial economic interest," the Plan of Government prohibits council members who have "any personal or private pecuniary interest" in a matter from voting on the same. Our analysis there resolved the issue of whether the additional compensation (or salary) for a council member serving as Mayor Pro Tem constituted a "personal or private pecuniary interest" within the meaning of Section 2.10 of the plan of government, thus prohibiting that member from seeking that position or voting in the election. We find the phrases "personal substantial economic interest" and "personal or private pecuniary interest" sufficiently similar to warrant application of the same analysis.

Additionally, we also addressed, in dicta, the provisions in the Code of Ethics in

ruling and held her actions were *not* in violation of the Plan of Government. See Burgess, supra, 2005-2565 (La. App. 1st Cir. 12/28/06), ___ So.2d ___.

our earlier opinion, which we find directly applicable herein and adopt in pertinent part:

The foregoing considerations, however, do not conclude our analysis. Section 2.10 serves a purpose similar to those of La. R.S. 42:1120, part of the Louisiana Code of Governmental Ethics, La. R.S. 42:1101, *et seq.*, and La. R.S. 14:140, the criminal statute prohibiting public contract fraud. Laws on the same subject matter must be interpreted in reference to each other. La. C.C. art. 13.

Louisiana Revised Statutes 14:140 was enacted in 1942, but covered considerations addressed in earlier statutes, including Acts 1906, No. 200, §§ 1 and 2, regulating police jurors and municipal council members voting on ordinances in which they had an interest. Section 2.10 was adopted by referendum in 1949, and has not been amended since that time. In 1964, the original version of the Louisiana Code of Governmental Ethics was enacted. When our present state constitution was adopted in 1974, it authorized existing home rule charters or plans of government to remain in effect “[e]xcept as inconsistent with this constitution.” La. Const. Art. 6, § 4. It further provided that the compensation or method of fixing the compensation of an elected official of a local governmental subdivision with a home rule charter or plan of government is governed by that charter. La. Const. art. 6, § 12. It also included a mandate to the legislature to “enact a code of ethics for all officials and employees of the state and its political subdivisions.” La. Const. art. 10, § 21. The legislature fulfilled that mandate by amending and reenacting the Louisiana Code of Governmental Ethics in its present form in 1979. *See* La. R.S. 42:1101(A).

The primary objective of the Code of Governmental Ethics is to prevent public officers and employees from becoming involved in conflicts of interest. *In re McJunkins*, 99-0326, p. 6 (La. App. 1st Cir. 3/31/00), 794 So.2d 845, 848. Such a conflict of interest is present “when a conflict exists between the *private* interests of an elected official . . . and his duties as such.” La. R.S. 42:1101(B). (Emphasis supplied.)

Like Section 2.10, La. R.S. 42:1120 addresses the issue of when an elected official should recuse himself from voting on a matter in which he arguably has a conflict of interest. This statute requires self-recusation only when the official’s vote on the matter “would be a violation of R.S. 42:1112.” La. R.S. 42:1120(A).

Louisiana Revised Statutes 42:1111(A)(1), addressing payment of a public servant’s services from nonpublic sources, generally provides that “[n]o public servant shall receive anything of economic value, *other than compensation and benefits from the governmental entity to which he is duly entitled*, for the performance of the duties and responsibilities of his office or position” (Emphasis supplied.) In line with that general principle, a “thing of economic value” is generally defined as “money or any other thing having

economic value,” La. R.S. 42:1102(22)(a), but specifically excludes “salary and other emoluments of the office held by [an] elected official.” La. R.S. 42:1102(22)(c).⁵

Louisiana Revised Statutes 42:1112(A) further provides that “[n]o public servant, except as provided in R.S. 42:1120, shall participate in a transaction in which he has a *personal* substantial economic interest of which he may be reasonably expected to know involving the governmental entity.” (Emphasis supplied.)

At the time of the alleged violations in this case, a “substantial economic interest” was defined in La. R.S. 42:1102(21):

(21) “Substantial economic interest” means an economic interest which is of greater benefit to the public servant or other person than to a general class or group of persons, except:

(a) *The interest that the public servant has in his position, office, rank, salary, per diem, or other matter arising solely from his public employment or office.*

(b) The interest that a person has as a member of the general public.⁶

(Emphasis supplied.)

The position or office of President Pro Tem is required to be filled by a member of the Metropolitan Council, and its additional salary or compensation would therefore amount to an “interest . . . in . . . [a] matter arising solely from [the member’s] public employment or office.” Thus, Ms. Burgess’s interest in that position or office is plainly not a “substantial economic interest” within the meaning of La. R.S. 42:1102(21)(a), and certainly cannot be considered “personal,” in the sense of arising outside of her public office. Thus, any participation by Ms. Burgess in a vote to elect the President Pro Temp while a

⁵ An emolument is defined as “[a]ny advantage, profit, or gain received as a result of one’s employment or one’s holding of office.” Black’s Law Dictionary 563 (8th ed. 2004). Any additional salary received by the Metropolitan Council member serving as President Pro Tempore is clearly an additional emolument of office, and thus exempt from the prohibitions of La. R.S. 42:1111 against payments from nonpublic sources and payments for nonpublic services.

⁶ We note that the definition was amended by Acts 2006, No. 408, § 1, effective June 22, 2006, adding subsection b, which provides an additional exception: The interest that an elected official who is elected to a house, body, or authority has in a position or office of such house, body, or authority which is required to be filled by a member of such house, body, or authority by law, legislative rule, or home rule charter. (The amendment made prior subsection b the current subsection c.)

candidate for that position would not constitute a violation of La. R.S. 42:1112, nor, by extension, a violation of La. R.S. 42:1120.⁷

Therefore, the Louisiana Board of Ethics erred in finding Ms. Burgess violated the Code of Ethics by her conduct of voting in elections for Mayor Pro Tem in which she was nominated, since she did not have a “substantial economic interest” in that election as contemplated by the Code.

Accordingly, the judgment of the Louisiana Board of Ethics is hereby reversed. Costs of this appeal, in the amount of \$422.00, are assessed to the Louisiana Board of Ethics.

REVERSED.

⁷ We note the aforementioned amendment adding another exception to “substantial economic interest” was enacted after this matter was adjudicated by the Board and appears to clarify the intended result, and strengthens the result reached in this opinion today.