

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CA 0210

IN RE DOUGLAS D. MCGINITY

Judgment Rendered: October 29, 2010

On Appeal from the Louisiana Board of Ethics
Docket No. 2007-452

Frank Simoneaux, Chairman
Scott E. Frazier, Co-Chairman
Dr. Robert Bareikis, Reverend Gail Bowman, James Boyer,
Gary G. Hymel, Jean Ingrassia, Dr. Cedric Lowrey, M. Blake Monroe,
Scott Schneider, and Grove Stafford, Board Members

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BEFORE: PARRO, GUIDRY, AND HUGHES, JJ.

HUGHES, J.

This is an appeal from the denial of an unsuccessful judicial candidate's application for rehearing of a decision by the Louisiana Board of Ethics (the "Board") imposing civil penalties for the late filing by the candidate of an election day expenditures campaign finance report. For the reasons that follow, we dismiss the appeal.

Attorney Douglas D. McGinity was a 2007 candidate for judge of the district court in Orleans Parish who failed to prevail in the March 31, 2007 primary election. Mr. McGinity was required to file an election day expenditures campaign finance report with the Board not later than ten days after the primary election; this report was due on April 10, 2007. See LSA-R.S. 18:1532.¹ Mr. McGinity filed his election day expenditures

¹ Louisiana Revised Statute 18:1532 provides, in pertinent part:

A. In addition to all other reports required by this Chapter, not later than ten days after a primary election and not later than ten days after a general election, each candidate, each political committee, and each person required to file reports pursuant to this Chapter shall file a report with the supervisory committee, on such form as the committee shall provide, which shall include:

(1) The total amount of expenditures the candidate, committee, or person required to report has made for each category of expenditures listed below for services performed or advertising broadcast or published on election day:

(a) Television advertising.

(b) Radio advertising.

(c) Newspaper advertising.

(d) Services by election day workers paid by the candidate, committee, or other person required to report.

(e) Contributions or expenditures to organizations for election day activities or services in support of a candidate or candidates or in opposition to a candidate or candidates.

(2) The name and address of each individual to whom a monetary expenditure was made by the candidate, committee, or person required to file, for services performed on election day.

(3) The name and address of each individual to whom a monetary expenditure was made by an organization, to whom the candidate, committee, or person has made a contribution or expenditure for purposes of the support of the organization, for services performed on election day and the name and address of the organization. Such information shall be provided to the candidate, committee, or person required to report under this Section by the organization to whom the candidate, committee, or person made a contribution or expenditure for purposes of the support of the organization.

(4) The name and address of any person, as defined in R.S. 18:1483, to whom the candidate, committee, or person required to report made an expenditure directly or indirectly for services performed or advertising broadcast or published on election day, except as reported pursuant to Paragraphs (2) and (3).

(5) The amount paid to each individual listed pursuant to Paragraphs (2), (3), and (4) and the purpose of the payment.

report on August 18, 2009.

As authorized by LSA-R.S. 18:1505.4,² the Board notified Mr. McGinity that it had imposed \$100-per-day penalties up to the maximum amount of \$2,500.00, with an additional civil penalty of \$2,500 if the report were not filed by November 12, 2007, for the late filing of his election day expenditures report. A notice was mailed to Mr. McGinity on August 2, 2007 to the address he gave in his pre-election campaign finance report, 5500 Prytania Street.³ A return receipt showing delivery of the August 2007 notice was obtained, showing the return receipt was signed by "Z. Lombard." Despite being notified of an October 11, 2007 public hearing date before the Board by the August 2007 notice, Mr. McGinity failed to appear at the October 11, 2007 hearing, during which the civil penalties were confirmed.

² Louisiana Revised Statute 18:1505.4 provides, in pertinent part:

A. (1) Any candidate, the treasurer or chairman of a political committee, or any other person required to file any reports under this Chapter, who knowingly fails to file or who knowingly fails to timely file any such reports as are required by this Chapter may be assessed a civil penalty as provided in R.S. 42:1157 for each day until such report is filed.

(2)(a) The amount of such penalty may be:

(i) One hundred dollars per day, not to exceed two thousand five hundred dollars, for each candidate for major office and any treasurer or chairman of any political committee designated as a principal campaign committee or subsidiary committee of such a candidate.

* * *

(4)(a) For reports required by this Chapter which are required to be filed between the time a candidate qualifies and election day, in addition to any penalties which may be imposed under this Section or any other law, the supervisory committee may impose on any person required to file such a report who has not filed such report by the sixth day after the report is due, after a hearing by the supervisory committee pursuant to the provisions of R.S. 18:1511.4(C), with notice to the party who is the subject of the hearing, an additional civil penalty not to exceed ten thousand dollars.

(b) For all other reports required by this Chapter, in addition to any penalties which may be imposed by this Section or any other law, the supervisory committee may impose on any person required to file such a report who has not filed such report by the eleventh day after the report is due, after a hearing by the supervisory committee pursuant to the provisions of R.S. 18:1511.4(C), with notice to the party who is the subject of the hearing, an additional civil penalty not to exceed ten thousand dollars.

³ Although the Board directed other correspondence to Mr. McGinity, we find reference to this correspondence unnecessary to a resolution of this appeal.

Mr. McGinity claims he did not receive the Board's 2007 notice and was unaware of the October 11, 2007 public hearing. He contends that it was only after he was served with the Board's Nineteenth Judicial District Court suit, seeking to enforce its order imposing penalties, that he became aware of the administrative proceeding.⁴ Mr. McGinity then contacted the Board and an agreement was reached to hold the district court suit in abeyance while Mr. McGinity applied to the Board for rehearing.

Mr. McGinity filed his motion for rehearing with the Board on August 18, 2009. A hearing on the motion was held before the Board on September 30, 2009. At the close of the hearing, a motion was made by Board member J. Blake Monroe to deny the motion as untimely and without good cause. The motion was adopted by the Board, and the motion for rehearing was denied. Mr. McGinity was present when the oral ruling was made. Thereafter, on October 1, 2009, written notice of the Board's decision was mailed to Mr. McGinity.

Mr. McGinity has appealed the Board's ruling to this court and urges the following assignments of error:⁵

ERROR NO. 1: The Board of Ethics erred in failing to give due notice to appellant and, without any evidence of due notice, by conducting show cause hearings, *ex parte*, on September 13, 2007, October 11, 2007 and March 13, 2008, at which hearings the Board issued orders assessing late fees and penalties in the sum of \$7,700.00.

ERROR NO. 2: The Board of Ethics erred in dismissing appellant's Motion For Rehearing as being untimely filed and ignoring the fact that appellant had no notice of the show cause

⁴ The record indicates that Mr. McGinity was served with the district court suit on April 1, 2009.

⁵ We note that in addition to the Board's order appealed herein, two other orders of the Board have been appealed. These orders imposed penalties in connection with other delinquent campaign finance reports required to be filed by Mr. McGinity. Mr. McGinity's motions to consolidate these appeals, filed in each respective appeal, were denied by this court by orders dated April 26, 2010. Decisions in the other appeals are also rendered this date. See **In Re McGinity**, 2010-0209 (La. App. 1 Cir. 10/29/10) (unpublished); **In Re McGinity**, 2010-0211 (La. App. 1 Cir. 10/29/10) (unpublished). Further, we note that attachments to Mr. McGinity's appellate brief not in conformity with Uniform Rules – Courts of Appeal, Rule 2-12.4, have been stricken in accordance with an August 24, 1995 *en banc* order of this court (allowing other attachments only with leave of court).

hearings and therefore was prohibited from filing a “timely” motion for rehearing.

ERROR NO. 3: The Board of Ethics erred in failing to make any reasonable effort to determine appellant’s correct addresses, either his residence or his law office, both on file with the Louisiana Supreme Court, the Louisiana Bar Association and the various telephone directories and considering the fact that appellant’s valid telephone number was on file with the Board of Ethics.

ERROR NO. 4: The Board of Ethics erred in failing to consider that the late reports were in fact filed with the Board long prior to the show cause notices and the show cause hearings, as the Board is required to consider by law.

ERROR NO. 5: The Board of Ethics erred in failing to consider the fact that the information that was untimely disclosed, was not significant information withheld from the voting public.

ERROR NO. 6: Alternatively, all adjudications involving the assessment of late fees by the Board of Ethics, acting in its capacity as the Supervisory Committee on Campaign Finance Disclosure, should be referred to the administrative law judges.

In response to Mr. McGinity’s assertions on appeal, the Board has asserted, along with other contentions, that the instant appeal was not timely filed. We agree and therefore find it unnecessary to address other issues presented in this appeal.

Pursuant to LSA-R.S. 42:1142, any person aggrieved by a decision of the Board may file an appeal within thirty days after the decision of the Board becomes “final.”⁶ A decision of the Board is deemed “final” pursuant to La. Admin. Code 52:I.1017(C): (1) on the date of mailing of notice to the respondent of the board's decision if the board renders its decision orally; or (2) on the tenth day following the publication of its opinion, if the board chooses to issue a written opinion.

⁶ Louisiana Revised Statute 42:1142(A) provides, in pertinent part:

Whenever action is taken against any public servant or person by the board or panel or by an agency head by order of the board or panel, or whenever any public servant or person is aggrieved by any action taken by the board or panel, he may appeal therefrom to the Court of Appeal, First Circuit, if application to the board is made within thirty days after the decision of the board becomes final.

In this case, the Board issued a written decision dated October 11, 2007, and mailed notice of the decision to Mr. McGinity on October 15, 2007. Therefore, the Board's decision became final and res judicata in 2007, when no motion for rehearing or motion for appeal was filed.

Nevertheless, upon receipt of Mr. McGinity's August 18, 2009 motion for rehearing, the Board scheduled a September 30, 2009 hearing on the motion for rehearing, and at the conclusion of the hearing, rendered an oral decision to deny the motion, as untimely and without good cause. We find it unnecessary to decide whether the Board's action in entertaining Mr. McGinity's motion for rehearing constituted a waiver of the rehearing delay, since Mr. McGinity's motion for appeal to this court was untimely even if the delay for appeal were calculated from the time the motion for rehearing was denied. Notice of the September 30, 2009 denial of the motion for rehearing was mailed on October 1, 2009; therefore, an appeal, if calculated from that denial, was required to be filed by November 2, 2009. Mr. McGinity's motion for appeal was fax-filed to the Board on November 10, 2009, after the time for appealing had expired.

Louisiana Code of Civil Procedure Article 2121 provides that an appeal is taken by obtaining an order "within the delay allowed."⁷ This necessarily requires that the motion or petition for appeal be filed within that delay. **Hospital Corporation of America v. Robinson**, 506 So.2d 938, 939 (La. App. 1 Cir. 1987).

An application for an appeal to a court from an administrative decision must be timely for a court to have appellate jurisdiction. When the time fixed for appealing has elapsed, the administrative ruling in question

⁷ "An appeal is taken by obtaining an order therefor, within the delay allowed, from the court which rendered the judgment . . ." LSA-C.C.P. art. 2121.

becomes res judicata. **Save Our Wetlands, Inc. v. Department of Environmental Quality**, 2000-2809, p. 5 (La. App. 1 Cir. 2/15/02), 812 So.2d 746, 749, writ denied, 2002-1230 (La. 8/30/02), 823 So.2d 953. The timely filing of a motion for an appeal is a condition precedent for an appellate court to properly obtain jurisdiction over an action. **Shahla v. City of Port Allen**, 601 So.2d 746, 751 (La. App. 1 Cir. 1992). Absent the timely filing of an appeal or petition for judicial review of an administrative ruling, the courts of this state lack jurisdiction to review that ruling. **Robinson v. City of Baton Rouge**, 566 So.2d 415, 418 (La. App. 1 Cir. 1990). An appellate court can dismiss an appeal at any time for lack of jurisdiction if it is untimely. LSA-C.C.P. art. 2162;⁸ **Shahla v. City of Port Allen**, 601 So.2d at 751; **Schenker v. Watkins**, 521 So.2d 686, 687 (La. App. 1 Cir. 1988).

In this case, Mr. McGinity failed to file his motion for appeal within the thirty-day time period allotted by LSA-R.S. 42:1142. Therefore, his appeal was not timely filed and must be dismissed.⁹

CONCLUSION

For the reasons stated herein, this appeal is dismissed. All costs of this appeal are to be borne by Douglas D. McGinity.

APPEAL DISMISSED.

⁸ Louisiana Code of Civil Procedure Article 2162 provides, in pertinent part: "An appeal can be dismissed at any time . . . for lack of jurisdiction of the appellate court . . ."

⁹ We note that even if it were appropriate to reach the merits of imposition of penalties in this case, Mr. McGinity, who was given an opportunity to state his reasons for noncompliance before the Board, failed to articulate good cause for his failure to comply with campaign finance reporting laws, stating as his reason for failing to file the requisite reports in a timely manner the following:

I just couldn't get to it. I had to go back to earning a living I was overwhelmed [a]nd I filed the report[s] late, and I apologize for doing so.