

CITY OF BATON ROUGE,
PARISH OF EAST BATON
ROUGE, AND THE DEPARTMENT
OF PUBLIC WORKS

STATE OF LOUISIANA

COURT OF APPEAL

VERSUS

FIRST CIRCUIT

ANTHONY DOUGLAS AND THE
PERSONNEL BOARD OF THE
CITY OF BATON ROUGE, PARISH
OF EAST BATON ROUGE

NO. 2004 CA 1448

KUHN, J., dissenting.

JAN 13 2006

J.E.K. by jmm Although I believe that the City of Baton Rouge, Parish of East Baton Rouge (City/Parish) has "by its own charter limited its recourse as a juridical entity from adverse decisions of its own Personnel Board," *see City of Baton Rouge v. Bernard*, 2001-2468, p. 5 (La. App. 1st Cir. 1/22/03), 840 So.2d 4, 7, *writ denied*, 2003-1005 (La. 6/27/03), 847 So.2d 1278, I disagree with the issuance of the writ of mandamus to affect a retroactive application to the holding of the *Bernard* decision in this case.

The trial court was presented with a petition seeking a writ of mandamus. A writ of mandamus may be directed to a public officer to compel the performance of a ministerial duty required by law. La. C.C.P. art. 3863. But a mandamus may not issue to compel performance of an act which contains any element of discretion, however slight. *Wiginton v. Tangipahoa Parish Council*, 2000-1319, p.3 (La. App. 1st Cir. 6/29/01), 790 So.2d 160, 163, *writ denied*, 2001-2541 (La. 12/7/01), 803 So.2d 971. Mandamus is an extraordinary remedy which is used sparingly by the courts to compel something that is clearly provided by law, and only where it is the sole available remedy or where the delay occasioned by the use of any other remedy would cause an injustice. *Id.*, 2000-1319 at p. 3, 790 So.2d at 162-63.

Because the district court did not have subject matter jurisdiction to entertain the City's appeal of the Board's decision in favor of Douglas, the subsequently-rendered judgment, which this court reviewed in *City of Baton Rouge v. Douglas*, 2000-1736 (La. App. 1st Cir. 9/28/01) (an unpublished opinion), was null and void. Although a null and void judgment may be collaterally attacked in any proceeding at any time, *see Miles v. OLOL Regional Medical Center*, 2001-2272 (La. App. 1st Cir. 10/2/02), 836 So.2d 136, I believe the trial court erred in issuing the mandamus because the act that Douglas seeks to perform -- an application of the holding of *Bernard* to his judgment for which all appeals had been expended -- contains an element of discretion. Specifically, the trial court was required to utilize a discretionary analysis to determine whether the *Bernard* decision warranted a retroactive application in Douglas's case. Thus, the compulsion that Douglas seeks by his mandamus lawsuit is not a "ministerial duty required by law."

In *Willis-Knighton Medical Center v. Caddo Shreveport Sales and Use Tax Com'n*, 2004-0473 (La. 4/1/05), 903 So.2d 1071, 1107 (per curiam), the Louisiana Supreme Court set forth the following criteria for determining whether a judicial decision should be accorded prospective effect only: (1) the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed; (2) the merits and demerits must be weighed in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective application will further or retard its operation; and (3) the inequity imposed by retroactive application must be weighed.

Under this analysis, it is evident that application of a retroactive effect to the final judgment rendered in *Bernard* is not warranted. As the City/Parish notes in its brief, it has relied on the clear past precedent that it could appeal decisions from the Personnel Board and, indeed, has done so. The City/Parish also points out the inequitable effect (reinstatement of employees) retroactive application will have on the City Civil Service.

A mandamus is clearly not the only remedy available to Douglas to assert his entitlement to the relief he seeks. Nothing precluded Douglas from filing a declaratory suit, wherein the trial court could consider whether the *Bernard* decision should be given retroactive application.

For these reasons, I dissent.