

3/23/01

SUPREME COURT OF LOUISIANA

NO. 00-CC-1750

CHRISTA DUPLANTIS

VERSUS

LOUISIANA BOARD OF ETHICS

c/w

No. 00-CC-1956

BREAZEALE, SACHSE & WILSON, L.L.P.

VERSUS

LOUISIANA BOARD OF ETHICS

Knoll, Justice, dissenting

The issue in these consolidated cases is whether an advisory opinion is a decision within the context of Article X Section 21 of the Louisiana Constitution. The majority contrasts an advisory opinion with a full blown investigation of a formal complaint and holds an advisory opinion is not a decision under LA. CONST. art. X, § 21. In his extensive dissent, Chief Justice Calogero delves into the legislative intent behind “decisions” by examining the debates of the delegates at the 1973 Constitutional Convention and finds an advisory opinion is a decision. I agree with Chief Justice Calogero’s excellent dissent; however, I believe the word “decisions” encompasses advisory opinions under LA. CONST. art. X, § 21 for additional reasons and dissent separately to explain my view.

“The words of a law must be given their general prevailing meaning.” LA. CIV. CODE ANN. art. 11. Words must be read in context and must be construed “according to the common and approved usage of the language.” LA. REV. STAT. ANN. § 1:3. The majority fails to apply the general prevailing meaning of the word

“decisions.” A decision is “[a] determination arrived at after consideration of facts, and, in legal context, law. A popular rather than technical or legal word; *a comprehensive term having no fixed, legal meaning*. It may be employed as referring to ministerial acts as well as to those that are judicial or of a judicial character.” BLACKS LAW DICTIONARY 407 (6th ed. 1990) (emphasis added).

It is not a casual matter to request an advisory opinion. There is a formal procedure with which the affected person must comply. To receive an advisory opinion from the Louisiana Board of Ethics, an affected person must request an advisory opinion in writing. RULES FOR THE BOARD OF ETHICS, Chapter 6 § 601. The request must, inter alia, disclose the requesting person’s interest in the question presented, state the governmental agency and/or the individual involved, and state sufficient facts to enable the Board to respond. Id. Under this procedure, the Board considers facts presented by a person affected by the opinion and makes a determination. Although the majority correctly stated that the facts are not developed in an adversarial context, the majority fails to contrast a “decision” with a “final decision.” A “final decision” is “[o]ne which leaves nothing open to further dispute and which sets at rest [a] cause of action between parties. One which settles rights of parties respecting the subject-matter of the suit and which concludes them until it is reversed or set aside.” BLACKS LAW DICTIONARY 629 (6th ed. 1990). A “final decision” is one that contemplates an adversarial process between two parties, not a “decision.” The drafters of the constitution purposefully used the word “decisions” as opposed to “final decisions.” Compare LA. CONST. art. X, § 12 (using both “decision” and “final decision” in the context of removal and disciplinary cases before the State Civil Service Commission) with LA. CONST. art. X § 20 (using only “decisions”).

The Administrative Procedure Act (“APA”) provides a definition of a decision in that context as “the whole or any part of a final disposition ... of any agency, in any matter other than rulemaking, required by constitution or statute to be determined on the record after an opportunity for an agency hearing....” LA. REV. STAT. ANN. § 49:951(3). This narrow definition of decision is appropriate to the APA; however, it is not tailored to fit the special needs of governmental ethics where a broader definition of decision is required.

The Board’s ethics opinions are called advisory opinions; however, this does not mean that the opinions are merely advice and not decisions. Rather, if we disregard the form which these decisions take and examine the “substantial operation” of the opinion, see United States v. Thompson, 251 U.S. 407, 412 (1919) (holding that the question of whether a quashing of an indictment was a “decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy” is a question “to be determined not by form but by substance.”), we see that an advisory opinion impacts people in a concrete and significant manner. We should adopt this view in which substance triumphs over form.

I stated in my dissent in Transit Management of Southeast Louisiana, Inc. v. Commission on Ethics for Public Employees, No. 96-1982 p. 2 (La. 1997), 703 So. 2d 576, 578-79, that advisory opinions in the context of government ethics can aggrieve people. An advisory opinion can have costly compliance requirements and can have a “chilling effect” on the actions of people affected by the opinion who are concerned that a request for an advisory opinion may result in a full blown investigation and formal charges.

Because ethical considerations are not always clear, the Board issues

advisory opinions to help people make ethical decisions. What happens when a petitioner disagrees with the Board's advisory opinion on an unclear and close issue? The majority forces petitioners to challenge the Board's opinions with conduct and face the peril of formal charges even though the propriety of the underlying ethical issue is close and unclear. This approach to governmental ethics suggests that one may be better off not asking for an advisory opinion and taking his or her chances that the conduct they think has unclear ethical considerations will go unnoticed rather than draw attention to the conduct by petitioning for an advisory opinion. This approach is illogical and unconscionable. One would be better off not even asking for an advisory opinion under these circumstances. The substantive effect of advisory opinions demonstrates that advisory opinions from the Board are more akin to judgments than to advice.

Simply stated, the majority's narrow interpretation of "decisions," in essence, means only "violations" are appealable. If LA. CONST. art. X, § 21 meant only "violations" are the decisions of the Board that are appealable, the word "violations" would have been used rather than the more encompassing term, "decisions." It is an inherent function of the Board to give advisory opinions upon proper request. These advisory opinions, which concretely and significantly impact an affected person's life and are part of the decision making authority of the Board, are encompassed in the broad term "decisions," but are left unchecked by judicial review under the majority's narrow interpretation. "Decisions" must be read in the context of the function of the Board of Ethics. The majority reads it too narrowly by restricting it to formal complaints and thereby diminishes the valuable and necessary service provided by the Board to those who seek its counsel. Thus, I find that "decisions" includes advisory opinions in the context of LA. CONST. art.

X, § 21. Any other reading conflicts with the general prevailing definition of “decisions” and with the practical consequences involved when a public official is forced to dispute an advisory opinion by challenging it through conduct. For these reasons, I respectfully dissent.