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

ON WRITS OF CERTIORARI TO THE COURT OF APPEAL FIRST CIRCUIT, LOUISIANA BOARD OF ETHICS

VICTORY, J.

We granted writs in these two unrelated cases, consolidated for oral argument, to consider whether it was proper for the court of appeal to have reviewed advisory opinions issued by the Louisiana Board of Ethics (the "Board"). After reviewing the record and the applicable law, we hold that the provision of La. R.S. 42:1142 which provides that "[a]ny advisory opinion issued to any person or governmental entity by the board or panel . . . is subject to the supervisory jurisdiction of the appellate court . . ." is unconstitutional; therefore, the appellate courts are without jurisdiction to review such advisory opinions.

FACTS AND PROCEDURAL HISTORY

Duplantis v. Board of Ethics

On August 30, 1996, Christa Duplantis, through the Assistant Attorney for the Terrebonne Parish Consolidated Government, sought an advisory opinion from the

Louisiana Board of Ethics. The substance of that request was as follows:

> I have been requested by Council member, Christa Duplantis, to obtain an opinion from the Board of Ethics for Elected Officials regarding her potential employment with two local hospitals.
>
> Christa Duplantis was elected in 1995 to serve as a Terrebonne Parish Consolidated Government council member for a four year term which began in January 1996. Christa Duplantis is a Registered Nurse who desires to obtain employment with the Terrebonne General Medical Center ("TGMC") or the Leonard Chabert Medical Center ("LCMC"). TGMC is owned and operated by Hospital Service District No. 1 of the Parish of Terrebonne ("hospital district"). LCMC is a State owned and operated facility.

Particularly, Duplantis wanted the Board's opinion as to whether such employment would be prohibited by La. R. S. 42:1113(A). That statute provides, in pertinent part:

> No public servant . . . or member of such a public servant's immediate family, or legal entity in which he has a controlling interest shall bid on or enter into any contract, subcontract, or other transaction that is under the supervision or jurisdiction of the agency of such public servant.

La. R.S. 42:1113(A).

On October 7, 1996, the Board of Ethics responded with Advisory Opinion 96-147 which contained two principle conclusions. First, the Board concluded that La. R.S. 42:1113(A) would prohibit Duplantis from providing nursing services to Terrebonne General because it was part of the Terrebonne Parish Consolidated Government. Second, the Board found that the Code of Ethics would not prohibit Duplantis from seeking employment from Leonard Chabert because it was an agency of the state, not an agency of Terrebonne Parish Consolidated Government. On November 12, 1996, Duplantis applied for a writ of certiorari from the First Circuit Court of Appeal pursuant to La. R.S. 42:1142(A) as it read at that time.[1]

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[1]At the time Duplantis filed her writ application, La. R. S. 42:1142(A) provided:

> 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

In 1997, while the case was pending before the First Circuit, this court handed down its original opinion in ***Transit Management of S.E. La. v. Commission on Ethics for Pub. Emp.***, 96-1982, p. 2 (La. 12/2/97), 703 So. 2d 576, 577 [hereinafter ***TMSL***], which found that an advisory opinion was not a "preliminary, procedural, or intermediate action" within the meaning of La. R.S. 42:1142(A). Consequently, this court reasoned: "There is no constitutional or legislative authority for judicial review of an advisory opinion rendered by the [Board of Ethics]." ***Id***. Following that original opinion in ***TMSL***, the First Circuit dismissed Duplantis's writ on December 30, 1997. *See* ***Duplantis v. Board of Ethics for Elected Officials***, 96-2416, p. 1 (La. App. 1 Cir. 12/30/97) (per curiam) (unpublished opinion).

The original ***TMSL*** opinion had further reasoned that a "person who will be ultimately affected by a ruling of the [Board of Ethics], if and when a complaint is filed, can file an action for a declaratory judgment in the district court to determine the legal correctness of the [Board's] opinion on conduct or status." ***TMSL***, 96-1982 at 3, 703 So. 2d at 578. Based on this language, on February 3, 1998, Duplantis filed an action in the district court for a declaratory judgment that, if she were successful, would hold that the advisory opinion of the Board of Ethics barring her employment with Terrebonne General was incorrect.

On April 4, 1998, in response to the rehearing application by the Board of Ethics in ***TMSL***, this Court otherwise denied the rehearing but withdrew the reference in the ***TMSL*** opinion to the availability of declaratory relief for a person in Duplantis's position, reciting that the statement was dicta. *See* ***TMSL***, 96-1982, p. 1 (La. 4/4/98),

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> within thirty days after the decision of the board becomes final. Any preliminary, procedural, or intermediate action or ruling by the board or panel is subject to the supervisory jurisdiction of the appellate court as provided by Article V, Section 10 of the Constitution of Louisiana. The Court of Appeal, First Circuit, shall promulgate rules of procedure to be followed in taking and lodging such appeals.

710 So. 2d 792, 792 (on rehearing). Instead, we stated that: "Issues as to other possible 'remedies' for persons affected by advisory opinions were not before us, and problems with specific remedies are properly addressed when such issues are squarely presented." ***Id.*** On June 22, 1998, the district court in this matter sustained an exception of lack of subject matter jurisdiction filed by the Board of Ethics and dismissed Duplantis's case. She appealed to the court of appeal.

While Duplantis's case was before the court of appeal, the Legislature, by Acts 1999, No. 252, § 1, effective June 11, 1999, amended La. R.S. 42:1142(A) to provide that:

> 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. Any advisory opinion issued to any person or governmental entity by the board or panel or any preliminary, procedural, or intermediate action or ruling by the board or panel is subject to the supervisory jurisdiction of the appellate court as provided by Article V, Section 10 of the Constitution of Louisiana. The Court of Appeal, First Circuit, shall promulgate rules of procedure to be followed in taking and lodging such appeals. (Emphasis added.)

La. R.S. 42:1142(A). Following the statute's revision, the court of appeal, believing the Legislature had changed the law in ***TMSL***, converted Duplantis's appeal to a supervisory writ and secured the record from the previous case (the 1996 dismissed matter) so that Duplantis could "have her day in court." ***Duplantis v. Louisiana Board of Ethics***, 98-2056, pp. 6-8 (La. App. 1 Cir. 12/28/99) (unpublished opinion). Thereafter, on May 18, 2000, the First Circuit granted the writ with an order favorable to Duplantis reversing the Board's opinion. ***Duplantis v. Louisiana Board of Ethics***, 00-0293 (La. App. 1 Cir. 5/18/00). We granted the writ sought by the

Board of Ethics. ***Duplantis v. Louisiana Board of Ethics***, 00-1750 (La. 9/15/00), 767 So. 2d 699.

Breazeale, Sachse, & Wilson, L.L.P. v.Louisiana Board of Ethics

On March 14, 2000, Breazeale, Sachse, & Wilson, L.L.P. ("Breazeale, Sachse") sought an advisory opinion from the Louisiana Board of Ethics. The substance of that request was as follows:

> Breazeale, Sachse, & Wilson, L.L.P. ("BS&W") represents the Louisiana Community and Technical College System ("LCTCS") on a number of legal matters pursuant to employment by the Louisiana Attorney General's office. We request an Advisory Opinion as to whether Murphy J. Foster, III ("Foster") would be in violation of Section 1113A of the Code of Governmental Ethics if Foster, as a partner of BS&W, received any financial benefit in the form of compensation that might be derived from BS&W's representation of LCTCS.

Breazeale, Sachse further acknowledged to the Board that Foster was a member of the Governor's immediate family within the meaning of La. R.S. 42:1113(A)[2] and that his ownership interest in the firm was less than 25%.

On April 17, 2000, the Board responded with Advisory Opinion 2000-216 containing three principle conclusions. First, the Board concluded that nothing in La. R.S. 42:1113(A) would prevent Breazeale, Sachse from "providing legal services to or otherwise representing the interests of LCTCS, provided the provision of such services is by partners and members of Breazeale, Sachse other than Mr. Murphy J. Foster, III." Second, the Board found that the Code of Ethics would not prohibit Foster from receiving his normal distribution of the profits from Breazeale, Sachse,

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[2]La. R.S. 42:1113(A) provides:

> No public servant, excluding any legislator and any appointed member of any board or commission and any member of a governing authority of a parish with a population of ten thousand or less, or member of such a public servant's immediate family, or legal entity in which he has a controlling interest shall bid on or enter into any contract, subcontract, or other transaction that is under the supervision or jurisdiction of the agency of such public servant.

even when some of those profits would be derived from the firm's representation of LCTCS. Finally, the Board concluded that La. R.S. 42:1113(A) prohibited Foster from personally rendering legal services to LCTCS because such services would constitute a prohibited "transaction."

On May 30, 2000, Breazeale, Sachse applied for a supervisory writ to the First Circuit Court of Appeal. On June 16, 2000, the First Circuit denied the writ reasoning that:

> Murphy Foster, III, is an individual and as an individual he is prohibited by law from entering into a transaction with executive branch agencies because he is an immediate family member of the Governor. It is of no moment that he may be acting in his capacity as an agent of his law firm pursuant to a contract between his law firm and those agencies. He, as an individual, is an immediate family member of the governor and therefore, cannot perform the work.

Breazeale, Sachse, & Wilson, L.L.P. v. Louisiana Board of Ethics, 00-1179 (La. App. 1 Cir. 6/16/00) (denying the writ). We granted the writ of Breazeale, Sachse. ***Breazeale, Sachse, & Wilson, L.L.P. v. Louisiana Board of Ethics***, 00-1956 (La. 9/15/00), 767 So. 2d 699.

DISCUSSION

The Louisiana Board of Ethics is established by Title 42, Section 1132 of the Louisiana Revised Statutes and is charged with enforcing the Louisiana Code of Ethics. *See* La. R.S. 42:1132. The purpose of the Code of Ethics is to further the public interest by insuring that the law protects against conflicts of interest on the part of Louisiana's public officials and state employees by establishing ethical standards to regulate the conduct of those persons. *See* La. R.S. 42:1101. To this end, the eleven-member Board is given the authority to investigate and pursue formal charges through either public or private hearings against an individual or entity for alleged violations of the Code of Ethics. *See* La. R.S. 42:1134. Upon finding a violation of

the Code, the Board has the authority to impose various penalties on the responsible party. *See* La. R.S. 1151-57.3. Further, the Board is specifically authorized to render advisory opinions regarding interpretations of the Code of Ethics. *See* La. R.S. 42:1134(E). It is pursuant to this authority that the Board issued the two advisory opinions at issue in these cases.

Before La. R.S. 42:1142(A) was revised in 1999 to add that "[a]ny advisory opinion issued to any person or governmental entity by the board or panel" is subject to the supervisory jurisdiction of the appellate court, we held in ***TMSL*** that "[t]here is no constitutional or legislative authority for judicial review of an advisory opinion rendered by the Commission." 703 So. 2d at 577. We held that under La. R.S. 42:1142(A), "an advisory opinion by the Commission is not a 'preliminary, procedural or intermediate action or ruling."[3] ***Id.*** Further, we explained that "[t]he preliminary or procedural actions or ruling referred to in Section 1142(A) are those rulings which the Commission makes after a proceeding before the Ethics Commission has been commenced, such as by filing of a complaint." ***Id.***

Shortly thereafter, the legislature revised La. R.S. 42:1142(A) to give the First Circuit Court of Appeal supervisory jurisdiction over "any advisory opinion issued to any person or governmental entity by the board or panel," as well as "any preliminary, procedural, or intermediate action or ruling by the board or panel." 1999 La. Acts 252, § 1(amending La. R.S. 42:1142(A)). It is clear that the legislature intended to change the law set out in ***TMSL*** and provide legislative authority for the First Circuit to review advisory opinions of the Board of Ethics. Accordingly, the issue presented

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[3]In ***TMSL***, we retracted a statement we made earlier in dicta in ***Midboe v. Commission on Ethics for Public Employees***, 94-2270 (La. 11/304), 646 So. 2d 351, that an advisory opinion by the Commission was reviewable by an appellate court as "a preliminary or intermediate action or ruling by an ethics body" and overruled the jurisprudence holding that advisory opinions by the Commission are reviewable as preliminary or intermediate actions or rulings. ***TMSL***, *supra* at 578, n.3.

is whether the legislature has the authority under our Constitution to grant that power to our courts.

In making this determination, we are cognizant of the basic rules of statutory construction, specifically that a statute is presumed constitutional, and the burden of clearly establishing unconstitutionality rests upon the party who attacks the statute, in this case, the Board of Ethics. ***State v. Muschkat***, 96-2922 (La. 3/4/98), 706 So. 2d 429, 432; ***State v. Newton***, 328 So. 2d 110, 117 (La. 1975). Further, a statute must be upheld whenever possible. ***State v. Muschkat***, *supra*; ***State v. Griffin***, 495 So. 2d 1306, 1308 (La. 1986).

Article X, Section 21 of the Louisiana Constitution mandates that the legislature enact a code of ethics and create a board to administer the code, and provides the jurisdictional authority for judicial review of the Board's actions. Art. X, § 21 provides that "[d]ecisions of a board shall be appealable, and the legislature shall provide the method of appeal." Thus, we must determine whether advisory opinions are "decisions" of the Board under our Constitution.

We held in ***TMSL***, before the revision of La. R.S. 42:1142 to include advisory opinions, that "[t]here is no constitutional or legislative authority for judicial review of an advisory opinion rendered by the Commission." The revision of La. R.S. 42:1142 does not change that result; there is still no constitutional authority for judicial review of advisory opinions.

To understand what constitutes "decisions" of the Board under Art. X, § 21, it is important to understand the difference between an advisory opinion issued pursuant to La. R.S. 42:1134(E) and a finding of a violation by the Board issued pursuant to the procedures outlined in La. R.S. 42:1141. An advisory opinion is usually sought by correspondence to the Board by an applicant. In the request, the

applicant presents a set of facts upon which the Board bases its opinion, which is usually researched and prepared by the Board's staff. There is no investigation by the Board, nor is there an adversary hearing. The applicant is placed in no different position after he receives the advisory opinion as he was before the issuance of advice. In fact, the resulting advice might have been much different had a full investigation and adversary hearing been held.

By contrast, the procedures for instituting a complaint with the Board of Ethics are set out in La. R.S. 42:1141. Upon receiving a sworn complaint from a complainant, or voting to consider a matter which the Board believes may be a violation of any provision within its jurisdiction, the matter is assigned to a panel of the Board which then conducts a private investigation to elicit evidence in order to determine whether to recommend that the Board conduct a public hearing or to indicate that no violation has occurred. La. R.S. 42:1141(B)(1), (C). The "defendant" and the "complainant" are given notice of the investigation, and the results of the investigation. La. R.S. 42:1141(C)(1), (2). During the investigation or hearing, the Board may administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any records. La. R.S. 42:1141(E)(2). The defendant has the right to be represented by counsel, to cross-examine witnesses, call witnesses, and present evidence in his own behalf. La. R.S. 42:1141(E)(6). Any witness may be accompanied and advised by an attorney and may submit questions to be asked at the hearing. La. R.S. 42:1141(E)(8). No disciplinary action may be taken unless a majority of the Board or a panel of the Board consisting of more than three members, or a unanimous three-member panel, has found a violation has occurred.[4] La. R.S. 42:1141(E)(5). A wide range of penalties may be

[4]La. R.S. 42:1141(A) provides the procedures whereby the board members sit *en banc*, or in panels of not less than three members. La. R.S. 42:1142(E)(5) provides that no disciplinary action may

imposed by the Board for a violation, such as: (1) administrative enforcement by the public employee or former public employee's agency head or authority figure under La. R.S. 42:1151; (2) recission of any contract of, permit, or license issued by the governmental entity under La. R.S. 42:1152; (3) censure, removal, reduction in pay, demotion or fine of the public employee under La. R.S. 42:1153; (4) monetary fines of no more than $10,000 for any illegal payments under La. R.S. 42:1154; and, (5) recovery of the amount of any economic advantage gained in violation of any law within the jurisdiction of the Board and additional penalties not to exceed one-half of the amount of the economic advantage, plus forfeiture of any gifts or payments made in violation of this Chapter. La. R.S. 42:1155. It is undisputed that decisions resulting from the above procedures and findings under La. R.S. 42:1141 are appealable under Art. X, § 21.

On the other hand, we now hold that advisory opinions issued pursuant to La. R.S. 1134(E) are not decisions under Art. X, § 21, and therefore are not reviewable.[5]

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be taken by the board or panel unless a majority of the board or panel finds that a violation has occurred. However, when a panel consists of only 3 members, the vote must be unanimous.

[5]The dissent argues that the delegates to the Constitutional Convention of 1973, in drafting La. Const. Art. X, § 21, intended for "decisions" to include purely advisory opinions. The dissent bases this argument on the comments of Harmon Drew, the delegate who introduced the amendment which added the sentence "The decisions of the board shall be appealable and the legislature shall provide the method of appeal." Before this amendment, Art. X, § 21 contained no mention of judicial review. Another delegate was concerned that the amendment could possibly give the prior existing Louisiana Commission on Governmental Ethics and Louisiana Board of Ethics for State Elected Officials powers they did not possess, that is, the power to impose sanctions. Drew's comment was that "any action taken by the Board of Ethics that would be critical of a person should be subject to review" and the dissent interprets his comment as indicative of his understanding that "all actions of the Board should be subject to review, whether adjudicatory or advisory." As the dissent points out, in adopting Mr. Drew's amendment, the delegates to the convention were addressing the concern that, without a specific grant of authority for judicial review in the proposed article, the Legislature would be unable to provide a method of appeal for decisions of these boards. At that time, although the boards did not have the power to impose sanctions, they did have the power to investigate alleged misconduct, conduct hearings on the alleged violations, and issue determinations of whether a violation of the Code of Ethics had occurred. *See* La. R.S. 42:1119, 1121 and 1144 (vacated by 1979 La. Acts 443, § 1). These determinations were decisions that were meant to be appealable under Art. X, § 21, just as they were under the Constitution of 1921 and the former statutory provisions. There is no indication that the delegates intended that purely advisory opinions, which the two boards were also authorized to issue under La. R.S. 42:1119(D)(9) and 42:1144(E)(7), would also be appealable under Art. X, § 21.

The reasons for our interpretation that advisory opinions are not "decisions" under La. Const. art. X, § 21 are many. First, this Court has frequently noted that the grant of judicial power implicitly restricts our courts to review only matters which are justiciable, i.e., actual and substantial disputes with adverse parties, not hypothetical, moot, or abstract questions of law. *See* ***Cat's Meow v. City of New Orleans***, 98-0601 (La. 10/20/98), 720 So. 2d 1186, 1193; ***Perschall v. State***, 96-1322 (La. 7/1/97), 697 So. 2d 240, 251; ***Louisiana Associated Gen. Contractors, Inc. v. State***, 95-2105 (La. 3/8/96), 669 So. 2d 1185, 1193. We have defined a "justiciable controversy" as "an existing actual and substantial dispute, as distinguished from one that is merely hypothetical or abstract, and a dispute which involves the legal relations of the parties who have real adverse interests, and upon which the judgment of the court may effectively operate through a decree of conclusive character." ***Abbott v. Parker***, 249 So. 2d 908, 918 (La. 1971). This court has clearly held that "The Constitution does not vest [Louisiana Courts] with jurisdiction to render advisory opinions." ***Belsome v. Southern Stevedoring, Inc.***, 118 So. 2d 458, 461 (La. 1960). In ruling that advisory opinions of the Board of Ethics are not reviewable, in ***TMSL*** we held:

> until there is some proceeding before the Commission which could result in the Commission's imposing a penalty, there is no preliminary or procedural action or ruling by the Commission that is appropriate for judicial review, either by appeal or by supervisory writs. Indeed, there is no justiciable controversy for the courts to decide.

TMSL, *supra* at 578. Our interpretation today, and in ***TMSL***, comports with our long-standing principle that our courts are without jurisdiction to issue or review advisory opinions and may only review matters that are justiciable.[6]

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[6]In ***Midboe,*** *supra*, an attorney filed a Petition for Declaratory Judgment and Injunction in the district court seeking an order declaring a provision of the Code of Ethics and an unfavorable advisory opinion issued by the Ethics Board unconstitutional. The Board argued that the district court did not have subject matter jurisdiction to rule on Midboe's petition under La. R.S. 42:1142. In ruling on this initial jurisdictional question, this Court held:

Secondly, in seeking an advisory opinion, the applicant is not adverse to the Board, nor is the Board adverse to the Board. La. R.S. 42:1134(E) authorizes the Board to issue advisory opinions and provides that "[t]he Board may render advisory opinions with respect to the provisions of this Chapter and any other law within its jurisdiction and rules and regulations issued by the board." La. R.S. 42:1134(E). An advisory opinion is simply advice as to the status or conduct of that person or some other person under the Code of Ethics. "It is not a ruling or action by the Commission that will affect the person whose conduct or status is questioned, and it cannot be enforced by any person." ***TMSL***, *supra* at 577; *see* 2 Kenneth C. Davis & Richard J. Pierce, Jr., Administrative Law § 15.15 (1994). The Board is a disinterested party merely giving advice to a party who has sought its advice pursuant to the

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> Had Midboe's petition sought a determination of the ethics code's application or interpretation, the constitutional and statutory scheme outlined above [La. R.S. 42:1142] provides for an initial determination utilizing the Commission's expertise and review by the court of appeal. However, Midboe's petition clearly sought a determination of the constitutionality of the statutory provisions of the ethics code. The determination whether a statute is unconstitutional is a purely judicial function. The judicial power of the state is constitutionally vested in the courts. La. Const. Art. 5, § 1. The Commission is not a court but is an administrative agency in the executive branch of state government. An administrative agency does not have the authority to determine the constitutionality of statutes. Thus, the district court, and not the Commission, had jurisdiction to rule on the constitutionality of statutes.

646 So. 2d at 354. After finding that the Court had jurisdiction because Midboe raised a constitutional challenge, this Court went on to find that Midboe's challenge presented a justiciable controversy as follows:

> Midboe, as a former state agency head within two years following termination of his public service, is faced with an immediate and genuine situation, the applicability of ethics code's rules to his present attorney employment opportunities. Midboe has a real interest in obtaining a declaratory judgment to clarify his employment options. If he proceeded without such a declaration, he might subject himself and his future employer to the Commission's administrative sanctions. The Commission has a statutorily mandated duty to administer and enforce the ethics code. Thus, there is a genuine controversy between the parties. "To require private individuals to do business under the act at their peril in order to acquire standing is to defeat a major purpose of the declaratory judgment act."

Id. (Cites omitted.) To the extent that ***Midboe*** held that a justiciable controversy is always presented by a challenge to an advisory opinion, that holding was overruled by six justices of this Court, including the Chief Justice, in ***TMSL*** and we reaffirm that result today.

Board's authority under 42:1134(E).[7] This is in stark contrast to the posture of the parties upon the filing of a sworn complaint by a "complainant" against a "defendant" or the consideration of a matter that the Board has reason to believe may be a violation, and in which a private investigation is undertaken, a public hearing is held at which parties are represented by counsel, parties testify under oath and present evidence and cross-examine witnesses, and then the Board votes as to whether a violation has occurred and, if so, imposes a penalty on the former or present governmental employee.

Third, the review of an advisory opinion would depend solely on facts as represented by the requesting party, not on sworn testimony presented by opposing parties, without any investigation by the Board or adversarial hearing. Consequently, there is no record of the proceedings below for an appellate court to review as there was no hearing, no evidence, and no testimony.

Fourth, we find that the purpose of the third sentence of La. Const. art. X, § 21 was to allow a direct appeal to the court of appeal of a decision by the Board on the merits of the charged violation. In the absence of this provision, jurisdiction for judicial review would be vested in the district court.[8]

For all these reasons, we find the provision of La. R.S. 42:1142(A) which provides that "[a]ny advisory opinion issued to any person or governmental entity by the board . . . is subject to the supervisory jurisdiction of the appellate court as provided by Article V, Section 10 of the Constitution of Louisiana" is unconstitutional as it is contrary to Article 10, § 21 of the Louisiana Constitution which provides that

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[7]Advisory opinions of the Board are similar in this respect to opinions issued by the Attorney General pursuant to La. R.S. 49:251, which are likewise not reviewable by a court.

[8]This constitutional provision is similar to the additional appellate jurisdiction provided to the courts of appeal by La. Const. art. X, § 12(A), which authorizes a direct appeal to the court of appeal for a "final decision" of the State Civil Service Commission.

"[d]ecisions of a board shall be appealable, ..." An advisory opinion issued by the Board pursuant to La. R.S. 1134(E) is not a "decision" of the Board that is appealable.

However, we find that this provision, which was added by the legislature by Acts 1999, No. 252, § 1 is severable from the remainder of La. R.S. 1142. The test for severability is whether the unconstitutional portions of the law are "so interrelated and connected with the constitutional parts that they cannot be separated without destroying the intention manifested" by the enacting body. ***Radiophone, Inc. v. City of New Orleans***, 616 So. 2d 1243, 1249 (La. 1993) (citing ***State v. Azar***, 539 So. 2d 1222 (La. 1989)). If the remaining portion is separable from the offending portion, this Court may strike only the offending portion and leave the remainder intact. ***Id.*** The legislature added the offending portion of the statute, i.e. "[a]ny advisory opinion issued to any person or governmental entity by the board or panel or" to the second sentence of La. R.S. 42:1142(A) in 1999. Prior to that time, the statute constitutionally provided that "Any preliminary, procedural, or intermediate action or ruling by the board or panel is subject to the supervisory jurisdiction of the appellate court as provided by Article V, Section 10 of the Constitution of Louisiana." This provision remains intact and enforceable and is unaffected by the severance of the offending portion of the statute.

Finally, in ***Duplantis,*** we must address the issue of whether the district court has subject matter jurisdiction over a declaratory judgment action seeking a determination of the application or interpretation of the Ethics Code. In ***Duplantis***, following the First Circuit's dismissal of her writ application seeking review of the advisory opinion issued by the Board in ***Duplantis v. Board of Ethics,*** 96-2416 (La. App. 1 Cir. 12/30/97), Duplantis filed an action in the district court seeking a

declaratory judgment that the advisory opinion issued by the Board of Ethics was incorrect. This declaratory judgment action was dismissed by the district court for lack of subject matter jurisdiction, and Duplantis appealed to the court of appeal. While the appeal was pending, the legislature amended La. R.S. 42:1142(A) to provide that advisory opinions were subject to the supervisory jurisdiction of the appellate court. In ruling on this appeal, the First Circuit converted the appeal to a supervisory writ and ordered the supplementation of the record with the record in ***Duplantis v. Board of Ethics***, 96-2416. In so doing, the court noted:

> Even if this court were to apply the amendments to La. R.S. 42:1142A retroactively, we would be precluded from rendering an opinion on the merits for the reason that the record before us does not contain a copy of the advisory opinion or other relevant evidence of the parties introduced before the Ethics Board at its hearing. This evidence was presented to this court in ***Christa Duplantis v. Board of Ethics for Elected Officials***, 96CE2416 (La. App. 1 Cir. 12/30/97). As we noted previously, this matter was assigned to a five-member panel of this court and was subsequently dismissed in response to the Louisiana Supreme Court's ruling in ***Transit***.
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> We know of no internal procedural device whereby, as members of the instant panel, we can direct that the previous five-member panel reinstate and decide Ms. Duplantis' previous writ application.

Duplantis v. Board of Ethics, 98-2056, p. 6 (La. 12/28/99). Under its supervisory jurisdiction over cases within its circuit under La. Const. Art. V, § 10, the First Circuit converted the appeal of the dismissal of the declaratory judgment action to a supervisory writ and ordered the record supplemented with the record in 96-2416. ***Id.*** at 7-8. No party filed a writ application to this Court based on this ruling. Subsequently, the First Circuit granted the writ and reversed the advisory opinion issued by the Board of Ethics. ***Duplantis v. Board of Ethics***, 00-0293 (La. App. 5/18/00). The opinion we are issuing today vacates this decision based on our finding that the appellate court lacks jurisdiction to review advisory opinions of the Board.

However, because of the unusual procedure used by the First Circuit in converting Duplantis's appeal of the dismissal of her declaratory judgment action into a supervisory writ, the status of Duplantis's declaratory judgment action is unclear, but will inevitably present itself again. Therefore, we address the issue of whether a declaratory judgment action is available to review the advisory opinions of the Board.[9] Based on our prior holdings in ***Jones v. Board of Ethics for Elected Officials,*** 96-2005 (La. 5/9/97), 694 So. 2d 171, *modified on rehearing*, 696 So. 2d 549 (La. 6/20/97) and ***Midboe***, *supra*, regardless of whether a case or controversy is presented, a district court lacks subject matter jurisdiction as an initial matter to review the interpretation and application of provisions of the Ethics Code, absent a constitutional challenge to a provision of the Ethics Code. "The grant of exclusive jurisdiction of certain subject matter to [the Board] results in the subtraction of those matters from the district court's jurisdiction." ***Jones***, *supra*, 694 So. 2d at 172. Thus, the district court lacks subject matter jurisdiction over a declaratory judgment action seeking a determination of the Ethics Code's application or interpretation.

CONCLUSION

An advisory opinion issued by the Board pursuant to La. R.S. 42:1134(E) is not a "decision" of the Board under La. Const. art. X, § 21. Consequently, the provision of La. R.S. 42:1142(A) which provides that "[a]ny advisory opinion issued to any person or governmental entity by the board or panel" is subject to the supervisory jurisdiction of the appellate court is in derogation of La. Const. art. X, § 21 and is

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[9]As discussed, *infra*, on pages 3-4, we stated in our original ***TMSL*** opinion that a "person who will be ultimately affected by a ruling of the [Board of Ethics], if and when a complaint is filed, can file an action for a declaratory judgment in the district court to determine the legal correctness of the [Board's] opinion on conduct or status." ***TMSL***, *supra*, 703 So.2d at 578. On rehearing, we withdrew that statement, stating that "[i]ssues as to other possible 'remedies' for persons affected by advisory opinions were not before us, and problems with specific remedies are properly addressed when such issues are squarely presented." ***TMSL***, *supra*, 710 So. 2d at 792 (on rehearing).

unconstitutional. Thus, we find that the First Circuit Court of Appeal has no jurisdiction to review advisory opinions of the Board. Further, we find that a district court lacks subject matter jurisdiction over a declaratory judgment action seeking a determination of the Ethics Code's application or interpretation.

DECREE

For the reasons stated above, in ***Duplantis v. Louisiana Board of Ethics***, we vacate the ruling of the First Circuit in 00-0293 (La. App. 1 Cir. 5/18/00) which reversed the Board's advisory opinion. In ***Breazeale, Sachse, & Wilson, L.L.P. v. Louisiana Board of Ethics***, we affirm the judgment of the First Circuit denying the writ, but on different grounds. The writ should have been denied because the First Circuit lacked jurisdiction to review advisory opinions of the Board.

Duplantis v. Louisiana Board of Ethics, 00-1750---**VACATED;**

Breazeale, Sachse, & Wilson, 00-1956---**AFFIRMED.**