

SUPREME COURT OF LOUISIANA

No. 96-CC-1982

TRANSIT MANAGEMENT OF SOUTHEAST LOUISIANA, INC.

VERSUS

COMMISSION ON ETHICS FOR PUBLIC EMPLOYEES

KNOLL, J., Dissenting.

I dissent from the majority holding that the First Circuit Court of Appeal does not have jurisdiction to review advisory opinions issued by the Commission on Ethics for Public Employees. The appellate jurisdiction over the Commission's actions is clearly provided by the legislature and affirmed by longstanding jurisprudential authority.

La.R.S. 42:1134(E) authorizes the Commission to render advisory opinions with respect to the Code of Governmental Ethics. LA.CONST. Art. X, § 21, authorizing the Code of Ethics, provides that “[d]ecisions of a board shall be appealable, and the legislature shall provide the method of appeal.” In La.R.S. 42:1142(A), the legislature provides for appeal of the board's decisions:

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 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.)

A plain reading of La.R.S. 42:1142(A) reveals two distinct situations that give rise to appellate jurisdiction over the Commission's actions, namely, "whenever action is taken against any public servant or person," *or* "whenever any public servant or person is aggrieved by any action taken by the board or panel." By holding that appellate jurisdiction attaches only when "there is some proceeding before the Commission which could result in the Commission imposing a penalty," the majority disregards the second basis for appellate jurisdiction provided by La.R.S. 42:1142(A). Clearly, La.R.S. 42:1142(A) does not require the institution of an action against a public official or person before a decision of the Commission may be appealed.

Although an advisory opinion issued by the Commission may not impose a sanction on an individual, it is easy to see that a public official or person can be aggrieved by such an opinion. An advisory opinion may have expensive compliance requirements for both public and private persons. The opinion may have a "chilling effect" on the actions of affected individuals, justifiably concerned about an impending formal action against them if they challenge the Commission's opinion by their conduct. Rather than place the expense and burden of humiliation of an ethics investigation on the individual, it is better to encourage the challenge of advisory opinions in the courts.

This reading of La.R.S. 42:1142 is supported by the longstanding jurisprudence of both this Court and the First Circuit Court of Appeal. The First Circuit has consistently held that it has jurisdiction to review advisory opinions of the Commission. In *Fulda v. State of Louisiana*, 95-1740 (La.App. 1 Cir. 2/23/96), 668 So.2d 1381, *reversed on other grounds*, 96-0647 (La.5/10/96), 673 So.2d 201, the appellate court noted:

La.R.S. 42:1142 expressly vests this court with supervisory jurisdiction over preliminary, procedural or intermediate actions or rulings of the Ethics Commission. The law is settled that an advisory opinion rendered by the Commission is a preliminary or intermediate action or ruling by the ethics body within the meaning of La.R.S. 42:1142, and as such, it is subject to this court's supervisory jurisdiction. *Louisiana Insurance Guaranty Association v. Commission on Ethics for Public Employees*, 95-0021 (La.App. 1st Cir. 5/5/95); 656 So.2d 670, writ denied, 95-1833 (La. 11/13/95); 662 So.2d 467; *City of Baton Rouge v. Commission on Ethics for Public Employees*, 94-2480 (La.App. 1st Cir. 5/5/95); 655 So.2d 457, 459, writ denied, 95-1423 (La. 9/22/95); 660 So.2d 473; *Board of Trustees of Employees' Retirement System of City of Baton Rouge v. Commission on Ethics for Public Employees*, 95-0062 (La.App. 1st Cir. 5/5/95); 655 So.2d 1355, 1356, writ denied, 95-1417 (La. 9/22/95); 660 So.2d 472.

Fulda, supra at 1383.

In *Midboe v. Commission on Ethics for Public Employees*, 94-2270 (La.11/30/94), this Court noted:

[A]n advisory opinion by the Commission is a preliminary or intermediate action or ruling by an ethics body within the meaning of La.R.S. 42:1142. *Board of Com'rs v. Commission on Ethics*, 484 So.2d 845, 849 (La.App. 1 Cir.), writ denied, 487 So.2d 440 (La.1986).

* * *

Had *Midboe's* petition sought a determination of the ethics code's application or interpretation, the constitutional and statutory scheme outlined above provides for an initial determination utilizing the Commission's expertise and review by the court of appeal.

Midboe, supra at 355.

I agree with the prior decisions of the First Circuit Court of Appeal and with the prior opinion of this court in *Midboe* that advisory opinions issued by the Commission on Ethics for Public Employees are subject to the supervisory jurisdiction of the appellate courts. For the foregoing reasons, I respectfully dissent.