

State of Louisiana
Board of Ethics

In Re: La. Facility Planning & Control, Applicant

Docket No. 2009- 378

Simoneaux dissents.*

I respectfully disagree with the majority opinion.

In this matter, the Office of Facility Planning & Control (OFPC), an office within the Louisiana Division of Administration, has applied for an advisory opinion on questions involving existing contractual relationships between OFPC, Washer-Hill Lipscomb-Cabaniss and Post Architects, (Washer Hill Post) and Milton L. Womack, Inc. The relevant facts are not complicated.

- On December 20, 2007, OFPC entered into architectural services contract with Washer Hill/Post (joint venture) regarding the then proposed LSU/Pennington New Clinical Research Facility. The facility will be owned and managed by LSU as a clinical research program on public health issues involving exercise testing, special procedures, metabolic chambers, and metabolic cart studies. Since execution of that contract, Washer Hill/Post have continuously provided architectural services to OFPC.
- On November 20, 2008, Milton J. Womack, Inc. (Womack) was declared low bidder on the LSU/Pennington New Clinical Research Facility. And on January 8, 2009, OFPC entered into a construction contract with Milton J. Womack, Inc. Since execution of that contract, Womack has continuously provided labor and materials for the LSU/Pennington project.
- Michael Hill of Washer Hill is the brother of Terry Hill, the President of Milton J. Womack, Inc. Terry Hill owns less than 25% of the stock in Womack.
- On March 20, 2009, the OFPC requested an advisory opinion as to whether Washer Hill was a "public employee", whether Womack could bid or enter into a contract with OFPC on a project for which Washer Hill is the design architect, and whether Washer Hill can perform the duties of an architect relative to Womack's obligations under its construction contract with OFPC.

In essence, the OFPC acts as the agent of the user entity in selecting an architect and awarding the construction contract to the low-bidder general contractor and then supervising through the architect the construction of the building in accordance with

the plans and specifications and state law governing the design and construction of state facilities.

Is the OFPC Request for an Advisory Opinion Based on Past Conduct?

At the time the OFPC requested an advisory opinion, about four months had elapsed since the Womack had been declared the low bidder on the project and about fifteen months since the Washer Hill contract had been executed. At the time the majority opinion was adopted by a majority of the Board, a year had elapsed since the Womack contract had been executed and over two years had elapsed since the Washer Hill contract had been executed. It is a well established policy of the Board to decline to issue an advisory opinion when past conduct is involved. When past conduct is involved, the requesting person may, if he believes that a Code violation has occurred, file a complaint which is followed by investigation and prosecution if warranted.¹ It is self evident that considerable past conduct is involved herein. Instead of declining to issue an advisory opinion, the majority of the Board adopted an advisory opinion that necessarily advises that the past conduct evidences a violation.

Is Washer-Hill a Public Employee Under the Code of Ethics?

The majority of the Board adopted the draft opinion of the Staff which concludes that Washer-Hill is a public employee by virtue of its architectural contract with the OFPC. In support of its conclusion, the opinion first cites Black's Law dictionary defining "governmental function" as being "conduct that is expressly or implied mandated or authorized by constitutional law or other law that is carried out for the benefit of the general public". As will be noted below, the opinion's reference to Black's Law Dictionary is not valid.

Presumably, no governmental contract is executed unless it is authorized by law and has some public benefit. But having some public benefit does not equate to a governmental function. Also, the opinion cites no supporting definition in the Code of Ethics,² no rule of the Board,³ no prior Board advisory opinion, and no judicial opinion that interprets the term "governmental function". Neither does it make any mention of

¹ The OFPC is not without a remedy to prevent potentially harmful conduct by its architects and contractors. The Architect Selection Board under the OFPC has the authority under R. S. 38:2311 to establish rules and regulations for the performance of the architect's obligations under a state contract. Additionally, the OFPC may promulgate any other rule deemed necessary or appropriate to any state contract and establish "qualifications and guidelines" in implementing the selection process. As to general contractors doing business with OFPC, that office has the authority to place in its specifications on any building project such terms and conditions as will protect the State against conflicts of interest by the contractor. The OFPC may also file a complaint alleging a Code of Ethics violation in this matter. Finally, architects, as all other contractors, are under Civil Code Article 1759 required to perform all of their obligations in good faith. That standard is judicially enforceable.

² There is no definition of "governmental function" in the Code of Ethics.

³ The Board has never promulgated a rule or regulation defining the meaning of the term "governmental function."

Advisory Opinion #2009-2008 - 1150, In Re Taylor Porter (the provision of legal services to a governmental agency is not the performance of a governmental function).

For the reasons assigned herein, I dissent.

La. R. S. 42:1102 (18) sets forth four categories of persons who are "public employees" and therefore subject of the Code of Governmental Ethics. There is no requirement that they be compensated by a governmental agency. The four categories of public employees are discussed below:

(i) "An administrative officer or official of a governmental entity who is not filling an elective office." They include those persons who are selected by a non-elected "appointing authority" as authorized by law. Typically, they would be deputy assistant secretaries, chiefs of divisions, sections, bureaus, and other similar sub-governmental agencies. They occupy classified Civil Service slots or positions. They receive compensation directly from their governmental agency, plus medical and retirement benefits, are provided a place to work, the necessary equipment to carry on their work, and are subject to "working hours" and supervision as to how to accomplish their assigned work.

(ii) "Appointed by any elected official when acting in an official capacity, and the appointment is to a post or position wherein the appointee is to serve the governmental entity or an agency thereof, either as a member of an agency, or as an employee thereof." They include all lawfully authorized appointees of an elected official. They are typically in the Unclassified Civil Service. They receive compensation directly from their governmental agency plus medical and retirement benefits, are provided a place to work, the necessary equipment to carry on their work, and are subject to "working hours" and supervision as to how to accomplish their assigned work.

(iv) "Under the supervision or authority of an elected official or another employee of the governmental entity." This category consists of those persons, although not appointed, are employed in a governmental office or agency, are supervised by or subject to the authority of an elected official or another public employee with supervisory authority. They may be in the Classified or Unclassified Civil Service. They receive compensation directly from their governmental agency plus medical and retirement benefits, are provided a place to work, the necessary equipment to carry on their work, and are subject to "working hours" and supervision as to how to accomplish their assigned work.

(iii) "Engaged in the performance of a governmental function." Considering the foregoing categories, these persons are not appointed or employed by an elected official, an administrative officer or official of a governmental agency and the governmental agency receiving the services does not pay their compensation or provide their medical or retirement benefits. However, they are nonetheless deemed by law to be public employees by virtue of the fact that they "perform a governmental function". Apparently, these persons will be officers or employees of a private company performing a "governmental function".⁴

One may fairly conclude that Washer-Hill is not an administrative officer or official of a governmental agency, was not appointed by an elected official, and is not under the supervision or authority of an elected official or other employee of a governmental entity.⁵ By process of elimination, this leaves open the possibility of Washer-Hill being "engaged in the performance of a governmental function".

The concept of performance of a "governmental function" appears altogether different from the traditional notion of an employee as a person who is subject to the supervision and control of a superior who instructs the employee when, how and where to accomplish his assigned tasks. However, the term "governmental function" has been defined as a "term of art that has a specific, precise meaning in a given specialty, apart from its general meaning in ordinary contexts." Black's Law Dictionary, (8th ed. 2004). (Emphasis added). Black's Law Dictionary also provides examples of "governmental functions":

When a jurisdiction engages in a governmental function, such as operating a police department, conducting safety inspections, suing to enforce public policy as manifested by city ordinances, or generally is not acting in a proprietary manner, it is immune from tort liability for its actions (citations omitted & emphasis added).

⁴ All of the foregoing categories apply to comparable officials and employees in local governmental agencies.

⁵ The opinion also relies on Section 1102 (18) (a) (iii) which recites that the term "public employee" includes those persons who are under the supervision or authority of an elected official or another employee of the governmental entity". Architects have been judicially declared to be independent contractors who in the performance of their services are not supervised by the owner of the project. While it is recognized that the owner of a project has the final approval of the design and the construction of a project, the owner traditionally does not have supervision or authority over how, where and when the architect performs his services. Instead, the services of the architects are performed in their respective offices together with periodical review of the progress and quality of construction in the field. While they meet occasionally with the owner in person for coordination, they will not routinely use office space or office equipment in the owner's premises to perform work. Also, they will not render architectural services on an indefinite basis for the OFPC. Instead their services will terminate upon completion of the subject building. Therefore, Section 1102 (18) (a) (iii) is not applicable.

In *Commission On Ethics for Public Employees v. IT Corporation* 423 So.2d 695 (1st Cir. 1982), that corporation had entered into a contract with the La. Department of Natural Resources (DNR) to perform services leading to the siting and operation of a regional hazardous waste disposal facility. The court first emphasized that the work "was well within the function of the state to protect and preserve the public health and welfare". And the court also emphasized that in Act 334 of 1978 (now La. R. S. 30:2172 et seq) the legislature had concluded that: "it is in the public interest and within the police powers of the state, to establish a framework for the regulation, monitoring, and control of the generators, transportation, treatment, storage and disposal of such hazardous waste...". Thus, the court emphasized that the work being performed was integral to the protection of the public health and welfare. Thus, one must conclude that the protection of public health and welfare is a necessary prerequisite to a finding that a "governmental function" is present.

The only other case concerning "governmental function" is *In Re George Dyer and Fire Apparatus Specialist, Inc.*, 667 So.2d. 1075 (La App. 1 Cir. 1982). Dyer was the Assistant Fire Chief of TDVFD, a volunteer group of firemen that had a contract with the Third Fire District, a governmental body, to be the sole provider of fire protection to the fire district. At the same time, Dyer owned a controlling interest in Fire Apparatus Specialties, Inc. ("FAS"), a private corporation. FAS regularly sold new fire trucks and equipment to and repaired old fire trucks and equipment for the TDVFD.

The court noted that "the central issue (was) whether the TDVFD is engaged in the performance of a governmental function so as to subject its members to the Code." 667 So.2d. 1075, p. 5. With little discussion, the appellate court affirmed the ruling of the Commission on Ethics for Public Employees that Dyer, as a member of TDVFD, was engaged in the performance of a "governmental function" because he provided fire protection to the public. Protection of public health and welfare certainly includes fire protection.

In Advisory Opinion # 83-148 dated December 7, 1983, the Commission on Ethics for Public Employees considered a letter from the Department of Natural Resources (DNR) concerning a number of hypothetical situations. Most importantly, the letter dealt only with hypothetical services rendered to the various offices and divisions of DNR whose functions related to the protection of the public from the harmful effects of contamination of land, water and air by chemical pollution. The resulting hypothetical opinion followed the IT decision by approximately one year. Not surprisingly, the Commission's response correctly concluded that in each of the hypothetical scenarios, the contractual services protected the public health and welfare and therefore assumed those services were a governmental function. The opinion does not extend the reach of "governmental function" beyond the scope of the IT decision.

In summary, in each of the three precedents, the term "governmental function" is applied only to instances in which the contractual service provides protection to the public health and welfare. There is no precedent for applying the term beyond that limit. The Opinion in the instant matter ignores the lack of a precedent and extends without supporting precedent or rationale the term "governmental function" to the mere design and construction of a building. Furthermore, the Opinion opens the door for a conclusion that any contractual services rendered for a governmental agency is ipso facto a "governmental function". This renders the other three categories of public employees meaningless because "governmental function" now means without limitation any service to fulfill any statutory duty or responsibility of a governmental agency.⁶ And that certainly includes the three other categories of "public employee".

To hold that all private contractors with a governmental agency, their officers and employees are public employees is beyond the intent of the Legislature in adopting Sec. 1102 (18) (a) (iii).⁷ If the Legislature had intended that result, it would simply have stated that any private party who provides a service under any contract with a governmental agency is deemed to be a "public employee." The Legislature has not adopted such a law.

The instant opinion errs in failing to note that the mere design and construction of a building does not equate to the protection of the public health and welfare. Instead, those activities are a proprietary function of state government; that is, a service relating to the property of the state. On the other hand, the health clinical treatment and health research activities that will take place later in the completed building will be for the protection of the public health and welfare; i.e., a governmental function.⁸

The appellate courts have cautioned the Board (and its predecessors) against "expansive" interpretations of Code provisions. See for example, *In Re Regions Bank*

⁶ There are probably thousands of contracts between private entities and state and local governmental agencies. The object of these contracts varies greatly. Some examples are: legal, accounting, architecture, engineering, landscape architect, medical, computer tech, human resources, janitorial, etc; personal or consulting services; social services, employment and management assistance, insurance advice and policies, materials, equipment, consumables, janitorial services; construction, renovation, or repairs of building, roads, or equipment, etc. The list is virtually endless.

⁷ The majority opinion recites that Washer-Hill is a public employee for the limited purposes of the scope of its contract. This is an apparent reliance on Commission of Ethics for Public Employees Advisory Opinion # 83-148, dated December 7, 1983 which opines, inter alia, that the governmental contractor's agency is defined by the scope of its contract. However, that opinion provides no legal authority for this limited "agency" concept. In fact, Sec. 18 (a) is not equivocal in stating that those who are engaged in the performance of a governmental function are in law deemed a "public employee" for purposes of the Code of Ethics. As there is no statutory limitation on the applicability of the Code to such a public employee, this limited agency theory may provide little comfort to governmental contractors.

⁸ The majority opinion does not consider the clear and convincing standard of proof. There is valid question herein as to whether the facts herein prove by clear and convincing evidence that Washer Hill is performing a "governmental function". R. S. 42:1141C (4) (d).

and C. C. Dabadie, 665 So.2d 824, 95 0061 (La. App. 1 Cir. 12/15/96) (" This expansive interpretation of the Ethics Code by the creation of a presumption of assistance goes far beyond the literal language of the Ethics Code and reads out the intent requirement of La.R.S.42:1102(4)".)

For the foregoing reasons, I would opine that Washer Hill is not performing a "governmental function".

*Frazier, Boyer and Hymel concur in the dissent.

