IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

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ROBERT L. PITTS, and ROBB PITTS CAMPAIGN '01, Petitioners/Appellants, vs. STATE ETHICS COMMISSION, Respondent/Appellee.	)	CIVIL ACTION FILE NO. 2010CV181808 JUDGE KIMBERLY M. ESMOND ADAMS

FINAL ORDER AND JUDGMENT

Petitioners Robert L. Pitts and Robb Pitts Campaign '01 (collectively, "Pitts") filed a Petition for Judicial Review of Administrative Law Judge Malihi's December 8, 2009 Order denying their Motion for Summary Determination ("Order"). The Court held a hearing on the Petition on July 26, 2010. Having considered the complete record, the briefs, the arguments of counsel and the applicable law, the Court finds as follows:

BACKGROUND

In the administrative proceeding prompting Pitts' Petition, State Ethics Commission v. Pitts, OSAH-SEC-CAN-1007861-60-Malihi, the Georgia State Ethics Commission ("Commission") charged Pitts with committing various violations of the Georgia Ethics in Government Act ("EGA"), O.C.G.A. § 21-5-1 et. seq., in connection with his unsuccessful campaign for Mayor of the City of Atlanta in 2001. Specifically, the Commission alleged that Pitt's campaign chairperson issued a check which was returned for insufficient funds in the final days of the campaign. Pitts' campaign staff subsequently accepted loans from several individuals to cover that check which exceeded the maximum campaign contribution limits for those individuals. Pitts denies any personal knowledge of any of these transactions, having

delegated such responsibility to his campaign staff, and the Commission does not challenge his representation in that regard.

Pitts filed a Motion for Summary Determination, contending the Commission's administrative proceeding was barred by the one-year statute of limitations found in O.C.G.A. § 9-3-28. In 2005, the Georgia Legislature enacted a five-year statute of limitation for claims brought pursuant to the EGA. See O.C.G.A. § 21-5-13. However, that statute does not apply to any alleged violations which took place prior to January 9, 2006. Accordingly, the parties have stipulated that it does not apply to this proceeding. ALJ Malihi denied Pitts' Motion, concluding that Section 9-3-28 was inapplicable to the administrative proceeding because the Civil Practice Act ("CPA") does not apply to contested cases under the Administrative Procedures Act ("APA"). ALJ Malihi based his Order on the following undisputed material facts to which both Pitts and the Commission agreed:

1.

Pitts was an unsuccessful candidate for election to the office of Mayor of the City of Atlanta, Georgia on Tuesday, November 6, 2001.

2.

All of the alleged violations of the EGA except for one occurred in November 2001.

3.

The only alleged violation of the EGA occurring after November 2001 was the filing of a Campaign Contribution Disclosure Report by the Robb Pitts for Mayor Campaign ("Campaign") on January 8, 2002. The Campaign Treasurer, not Pitts, signed that report.

4.

The alleged facts prompting the allegations in the administrative proceeding were a matter of public record in Bickers v. Robb Pitts Campaign '01, Fulton State Court, Civil Action File No. 02VS038556B, which was filed on September 18, 2002.

5.

The alleged facts prompting the allegations in the administrative proceeding were published in an article in the Fulton County Daily Report on March 5, 2003.

6.

The Commission knew of the alleged facts prompting the allegations in the administrative proceeding no later than November 12, 2003.

7.

The Commission did not commence the administrative proceeding until on or about September 22, 2009.

After ALJ Malihi issued the Order denying Pitts' Motion, Pitts filed a Motion for Reconsideration, which included a renewed request to sever the issue of Section 9-3-28's applicability to the administrative proceeding. ALJ Malihi granted the request to sever pursuant to Rule 12 of the Administrative Rules of Procedure. See Ga. R. & Regs. 616-1-2-.12(2) (allowing severance whenever "the ALJ determines that it would be more conducive to an expeditious, full and fair hearing for any party or issue to be heard in separate proceedings"). Pitts then brought this Petition challenging ALJ Malihi's determination on the Section 9-3-28 issue pursuant to O.C.G.A. § 50-13-19(a), which entitles anyone "who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case . . . to judicial review." See O.C.G.A. § 50-13-19(a).

CONCLUSIONS OF LAW

The Court has authority to reverse or modify an administrative decision where a party's "substantial rights . . . have been prejudiced because the administrative findings, inferences, conclusions, or decisions" violate a statutory provision. See O.C.G.A. § 50-13-19(h)(1). The Court also can reverse an administrative decision where it is "[a]ffected by other error of law" or is "[c]learly erroneous in view of the reliable, probative, and substantial evidence on the whole record." See O.C.G.A. § 50-13-19(h)(4) and (5). For the reasons explained below, this Court finds that O.C.G.A. § 9-3-28 applies to this administrative proceeding. The Court further finds that the proceeding is barred by the one-year statute of limitations codified at O.C.G.A. § 9-3-28 and, accordingly, must be dismissed.

I. Severance Under Georgia Rule of Administrative Procedure 12 Was Proper.

As a preliminary matter, the Court addresses the Commission's procedural argument that ALJ Malihi erroneously severed the issue of Section 9-3-28's applicability to the administrative proceeding pursuant to Rule 12 of the Administrative Rules of Procedure. See Ga. R. & Regs. 616-1-2-.12(2). An ALJ can sever an issue under Rule 12 if severance would lead to a more expeditious resolution of that issue. The Rule does not require that an issue be severed at the start of an administrative action; it simply states that an issue can be severed into a "separate proceeding." Thus, an ALJ can sever an issue after an initial round of briefing — or even after a preliminary decision on a motion for summary determination — if it "would be more conducive to an expeditious, full and fair hearing" than would keeping the issue with the rest of the action.

Rule 12 seeks to promote a quick and fair resolution of issues. See Ga. R. & Regs. 616-1-2-.12(2). Severing a decision about the applicability of a statute of limitations, which exists to prevent parties from having to defend untimely lawsuits based on outdated potential liability

serves Rule 12's goal. It allows this Court to evaluate an ALJ's determination right away so that no party will have to defend a proceeding that is time-barred simply because the ALJ has erroneously concluded that a statute of limitations does not apply. The fact that ALJ Malihi's Order severing the statute of limitations issue came after the Order deciding that issue is of no legal consequence.

Nonetheless, the Commission asserts that Pitts has not yet exhausted his administrative remedies and, therefore, should not be permitted to seek judicial review of ALJ Malihi's statute of limitations ruling. The Commission relies on Flint River Mills v. Henry, et. al., 234 Ga. 385 (1975). In that case, the agency representative did not decide the issue at all, as the appellant filed a lawsuit in the trial court before the agency had a chance to rule. See id. at 387. It is not surprising, then, that the Supreme Court concluded that the administrative process had not been exhausted in Flint: no administrative decision had ever been made. Here, ALJ Malihi did make a decision, and the Commission, through its silence, affirmed that decision. See O.C.G.A. § 50-13-41(e)(1). Thus, Flint is inapplicable to the present case.

The Court does not agree that Pitts has failed to exhaust his administrative remedies. ALJ Malihi decided the parties' briefs adequately addressed the Section 9-3-28 issue and ruled on the issue, without a hearing, on December 8, 2009. According to O.C.G.A. § 50-13-41(e)(1), the Commission had thirty (30) days from the date of that Order "to reject or modify" it. See O.C.G.A. § 50-13-41(e)(1). The Commission did neither. As a result, that Order became the opinion of the Commission on January 6, 2010, by operation of law. Id. Pitts timely filed his Petition, as authorized by O.C.G.A. § 50-13-19, and a consent Order extending the time for filing on February 22, 2010. Final orders are appealable.

However, even if ALJ Malihi's December 8, 2009 Order had not been affirmed by the Commission's failure to modify it, O.C.G.A. § 50-13-19(a) would still have authorized Pitts to apply for judicial review. As that section provides, "[a] preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy." See O.C.G.A. § 50-13-19(a). Forcing Pitts to wait until the Commission issued a final agency decision before he could obtain judicial review from this Court would have essentially mooted his challenge to the statute of limitations issue. Thus, review of the final agency decision would not have provided an adequate remedy. For those two reasons, then, the Court finds that ALJ Malihi was authorized to sever the issue of Section 9-3-28's applicability to this proceeding under Rule 12 and that Pitts was authorized to seek judicial review of that issue.

II. O.C.G.A. § 9-3-28 Applies To This Proceeding.

The Court now turns to the substance of the matter. The first inquiry is whether the statute of limitations found in O.C.G.A. § 9-3-28 applies to this proceeding. The Court finds that it does.

Section 9-3-28 provides: "All actions by informers to recover any fine, forfeiture, or penalty shall be commenced within one year from the time the defendant's liability thereto is discovered or by reasonable diligence could have been discovered." See O.C.G.A. § 9-3-28. Pursuant to well-established precedent, the Commission is considered an "informer" for purposes of the one-year limitation of actions period codified in O.C.G.A. § 9-3-28. That conclusion is mandated by Western Union Tel. Co. v. Nunnally, 86 Ga. 503 (1891).

In Nunnally, the Georgia Supreme Court reversed the trial court's denial of a defendant's motion to dismiss, in which the defendant argued that a claim was time-barred by Georgia Code

§ 2925, the predecessor to O.C.G.A. § 9-3-28. Georgia Code § 2925 contained the exact language now found in O.C.G.A. § 9-3-28. Nunnally was an action brought to recover a penalty imposed by statute upon Western Union for its failure to deliver a telegraph message with due diligence. The Georgia Supreme Court had previously determined that the penalties imposed by the legislation involved in that case were penalties for the breach of a public duty. See 86 Ga. at 503 (citing W. Union Tel. Co. v. Taylor, 84 Ga. 408 (1890); Goodridge v. Union Pac. Ry. Co., 35 F. 35 (1888)). The Court held that an action to recover a statutory fine for the breach of a public duty was "clearly within the spirit and meaning, if not within the very letter, of [O.C.G.A. § 9-3-28]. The action is to recover a penalty, and it is brought by one who, if not literally an informer, is designated by statute to take the fruits of an action brought for the violation of a public penal law." Id.

The Court then reviewed the legislative history of the predecessor to O.C.G.A. § 9-3-28 and concluded there was "no doubt" the Georgia legislature intended actions seeking penalties for violations of public duties to be subject to the one-year statute of limitation. Id. The Court reasoned:

> If this construction is not sustainable, then the Code prescribed no limitation whatever for such an action as the one now under consideration, unless it falls within [the predecessor to O.C.G.A. § 9-3-22], which has these words: "All suits for the enforcement of rights accruing to individuals under statutes, acts or incorporation, or by operation of law, shall be brought within twenty years after the right of action accrues." We think it incredible that actions for penalties should have been limited to 1 year when brought by an informer, and to 20 years when brought by others not falling within the strict literal description of informers . . . . To leave [the defendant] exposed to suit . . . for 20 years would be simply absurd.

See id.

To bolster its determination that a one-year limitation period applies to actions seeking penalties arising from violations of public duties, the Court quoted United States Supreme Court Chief Justice John Marshall:

> In expounding this case, it deserves some consideration that, if it does not limit actions of debt for penalties, these actions might, in many cases, be brought at any distance of time. This would be utterly repugnant to the genius of our laws. In a country, where not even treason can be prosecuted after a lapse of three years, it can scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture.

Id. (quoting Adams v. Woods, 6 U.S. (2 Cranch) 336, 342 (1805)). The Court concluded with this clear and definitive holding: "If all actions by informers for penalties are to be commenced within one year, it is much more reasonable to treat all persons empowered to sue for penalties as informers, than to hold that the right of action remains open for 20 years for a class of penalties which ought to be sued for speedily, if any ought." Id. Despite being more than 100 years old, Nunnally is still good law.

Just like the informer in Nunnally, the Commission has been empowered to sue for penalties arising from the alleged violation of a public duty. The EGA was enacted to impose upon candidates for elected office certain duties that serve the public interest. As outlined in the Declaration of Policy of the EGA, "it is the policy of this state that the state's public affairs will be best served by disclosures of significant private interests of public officers and officials which may influence the discharge of their public duties and responsibilities." See O.C.G.A. § 21-5-2. It is the Commission's job to ensure that the EGA policy is faithfully followed, and the Commission was doing just that when it brought the administrative proceeding underlying Pitts' Petition.

In the proceeding before ALJ Malihi, the Commission sought a determination that Pitts violated the EGA. If the Commission had brought its claim to an ALJ within the one-year period to which it was statutorily limited by O.C.G.A. § 9-3-28 and had obtained a final ruling in its favor, the Commission would have been authorized to issue an Order compelling Pitts to "pay a civil penalty not to exceed $1,000 for each violation contained in any report . . . or for each failure to comply with any other provision of [the EGA]." See O.C.G.A. § 21-5-6(b)(14)(C)(i). Such an Order could be enforced through a civil proceeding. See O.C.G.A. § 21-5-6(b)(14)(C)(ii). Any penalties ultimately recovered by the Commission from Pitts in connection with this proceeding would have to be deposited in the state treasury. Id.

In State Ethics Commissioner v. Moore, the Georgia Court of Appeals recognized that the potential fines authorized by the EGA are "quasi-criminal penalties." See 214 Ga. App. 236 at 238. Pursuant to O.C.G.A. § 21-5-9, "any person who knowingly fails to comply with or who knowingly violates [the EGA] shall be guilty of a misdemeanor." It necessarily follows, then, that the Commission's administrative proceeding sought to collect a quasi-criminal penalty from Pitts for alleged statutory violations of a public duty. Nunnally requires that O.C.G.A. § 9-3-28 be applied to exactly this type of proceeding.

Although the Commission argues that it is not an informer because it is not authorized to keep the penalties it recovers for itself, see O.C.G.A. § 21-5-6(b)(14)(C)(ii) ("All moneys recovered pursuant to this Code section shall be deposited in the state treasury."), nothing in Nunnally limits "informers" to those who receive some or all of the money. See generally Nunnally 86 Ga. 503. Indeed, the Supreme Court, in a case predating Nunnally, implicitly recognized that a party does not have to keep any of the penalty to be an informer. See Bank of St. Mary's v. State, 12 Ga. 475 (1853). In Bank of St. Mary's, the Supreme Court concluded that

penalties authorized by a repealed statute are generally no longer recoverable after repeal, and it noted "that it makes no difference whether the penalty, when recovered, **goes entirely to the public or to the informer**, or whether, as in this case, it is divided between them." Id. (emphasis added); see also Busbee v. Gillis, 241 Ga. 353 (1978) (using the precursor to O.C.G.A. § 9-3-28 to bar a statutorily created state agency from collecting penalties that, if recovered, would have gone back to the agency's fund for statutorily defined uses).

Busbee further supports the conclusion that O.C.G.A. § 9-3-28 applies here. In Busbee, the Georgia Supreme Court concluded that an action by the Board of Commissioners of the Peace Officers' Annuity & Benefit Fund to collect a statutory penalty from the Board of Commissioners of Treutlen County and the county clerk was barred by the one-year statute of limitation set forth in the predecessor to O.C.G.A. § 9-3-28. Id. at 354. The statutory penalty in Busbee arose from the Treutlen County Board's failure to pay amounts due to the Fund from fines and forfeitures collected by the State Court of Treutlen County. Id. Relying upon the same analysis it did in Nunnally, the Court rejected the plaintiff's contention that the 20-year limitation period found in the predecessor to O.C.G.A. § 9-3-22 should apply to the claim. Id. (citing Nunnally, 86 Ga. at 505).

The Georgia Supreme Court reached a similar conclusion in Atlanta & West Point Railroad Co. v. Coleman, 142 Ga. 94 (1914). In Coleman, the Court determined that an action seeking a statutory penalty against a railroad for its failure to comply with certain ticket-pricing requirements set by statute was subject to the one-year limitation period found in the predecessor to O.C.G.A. § 9-3-28. Id. at 95. The Court recognized that "[i]t has been held that an action for a penalty authorized by a statute is to be classified with actions by informers, relatively to the statute of limitations, so as to be barred in one year from the time the defendant's liability thereto

is discovered, or by reasonable diligence, could be discovered." Id. (citing Nunnally, 86 Ga. at 503, 12 S.E. 578); accord Greene v. Lam Amusement Co., 145 F. Supp. 346 (N.D. Ga. 1956) (recognizing that Georgia law provides that "all persons empowered to sue for penalties are treated as informers" and such actions are governed by the one-year statute of limitation found in the predecessor to O.C.G.A. § 9-3-28); City Express Serv., Inc. v. Rich's, Inc., 148 Ga. App. 123 (1978) (When an action is for a statutory penalty that is penal in nature, "no penalty is payable unless suit is brought within one year from the time [defendant's] liability was discovered or by reasonable diligence could have been discovered."); S. Ry. Co. v. Inman, Akers & Inman, 11 Ga. App. 564 (1912) (noting that an action to recover a statutory penalty which is penal in nature for violation of a public duty is barred by one-year statute of limitation); Cent. of Ga. Ry. Co. v. Huson Bros., 5 Ga. App. 529 (1909) (noting that an action to recover statutory penalty designated as such is barred by one-year statute of limitation).

The Coleman Court further noted that "[t]he primary purpose of legislation imposing penalties and authorizing suits by informers is, in general, not compensation, but correction or pecuniary forfeiture for doing the prohibited act. The Code expressly calls the suit here authorized one for a penalty." See Coleman, 142 Ga. at 95. Similarly, in this case, the Commission seeks a ruling that will permit it to collect penalties that are expressly denominated as such in the EGA and that are not intended to provide compensation to any injured party. Instead, the fines authorized by the EGA are punitive in nature and are required to be deposited into the state treasury. See O.C.G.A. § 21-5-6(b)(14)(c)(i) and (ii).

The fact that this proceeding originated in an administrative court instead of in a trial court is no obstacle to applying O.C.G.A. § 9-3-28. Indeed, pursuant to O.C.G.A. § 9-3-3, "[u]nless otherwise provided by law, limitation statutes shall apply equally to all courts." See

Trust Co. Bank v. Union Circulation Co., 241 Ga. 343 (1978) (noting that statutes of limitation are intended to embrace all causes of action not specially excepted and should not be construed to defeat that goal); Harrison v. Holsenback, 208 Ga. 410 (1951) (noting that statutes of limitation should not be evaded, as they are considered beneficial and resting in principles of sound public policy).

Administrative tribunals are courts for deciding administrative proceedings just as much as trial courts are courts for deciding civil complaints and criminal charges. The General Assembly confirmed this conclusion when it gave ALJs the powers of a court. See O.C.G.A. § 50-13-13(a)(6) (listing the authority of a "hearing officer," which includes the power to issue subpoenas and to regulate the course of the hearing); O.C.G.A. § 50-13-41(a)-(c) (listing the authority of an ALJ, which includes the power to reach factual and legal conclusions, to recommend a disposition for the case and to issue subpoenas).

Section 9-3-28 is not contained within the Civil Practice Act, see O.C.G.A. §§ 9-11-1 to 9-11-133, but it does apply equally to all courts, see O.C.G.A. §9-3-3. ALJ Malihi's tribunal is a court. ALJ Malihi's conclusion that O.C.G.A. § 9-3-28 does not apply to this proceeding is an incorrect application of Georgia law. Section 9-3-28 is not, as ALJ Malihi concluded, contained within the CPA. As the Court of Appeals has recognized, the CPA is codified at Chapter 11 of Title 9. See, e.g., Hart v. Redmond Reg'l Med. Ctr., 300 Ga. App. 641, 642 n.5 (2009) (citing to O.C.G.A. § 9-15-14(b), which refers to "Chapter 11 of this title, the 'Georgia Civil Practice Act'"). By contrast, O.C.G.A. § 9-3-28 is codified in Chapter 3 of Title 9, which contains both general guidance on when and how actions should be limited and the various statutes of limitation provisions applicable to specific types of cases. The placement of O.C.G.A. § 9-3-28 in Chapter 3 with the other statutes of limitation instead of in Chapter 9 with the provisions of

the CPA confirms that it is not a part of the CPA. Thus, while the CPA may not apply to APA cases like this one, O.C.G.A. § 9-3-28 — which is not a part of the CPA — does apply here. Thus, as the case law discussed above makes clear, this proceeding must be subject to the one-year statute of limitation in O.C.G.A. § 9-3-28.

III. O.C.G.A. § 9-3-28 Bars This Proceeding.

The second substantive inquiry is whether O.C.G.A. § 9-3-28 bars this proceeding because it was filed outside of the limitations period. Section 9-3-28 required the Commission to initiate proceedings against Pitts within one year of the date it discovered the alleged violation of the EGA. The undisputed record shows that the Commission had knowledge of the facts prompting this administrative proceeding no later than November 12, 2003. Thus, under O.C.G.A. § 9-3-28, the Commission had until November 11, 2004 to bring its claims against Pitts. Instead, the Commission waited until September 2009. Thus, O.C.G.A. § 9-3-28 bars this proceeding.

CONCLUSION

Pitts' Motion for Summary Determination should have been granted as a matter of law because O.C.G.A. § 9-3-28 bars this proceeding. As a result, the proceeding should have been dismissed. Thus, the Court finds that ALJ Malihi's Order denying Pitts' Motion must be reversed because it violates a statutory provision, is affected by error of law, and is clearly erroneous in view of the whole record. See O.C.G.A. § 50-13-19(h)(1), (4), (5). The Court further finds that this proceeding must be remanded to ALJ Malihi with instructions to dismiss this proceeding as barred by O.C.G.A. § 9-3-28.

Accordingly, the December 8, 2009 Order denying Pitts' Motion for Summary Determination is **REVERSED**, and this matter is **REMANDED** to ALJ Malihi with instructions

to dismiss the Commission's proceeding against Pitts as **BARRED** by the statute of limitations found in O.C.G.A. § 9-3-28.

SO ORDERED this 19th day of October, 2010.

KIMBERLY M. ESMOND ADAMS, Judge
Fulton County Superior Court
Atlanta Judicial Circuit

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