

**FIRST CIRCUIT  
COURT OF APPEAL  
STATE LOUISIANA**

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**DOCKET NO. 2014-CA-1166**

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**ROBERT BURNS**

**(PLAINTIFF / APPELLANT)**

**VERSUS**

**LOUISIANA AUCTIONEERS LICENSING BOARD, CHARLES “HAL”  
MCMILLIN, JAMES M. SIMS, DARLENE JACOBS-LEVY, GREGORY L.  
“GREG” BORDELON, CHARLES “CLAYTON” BRISTER**

**(DEFENDANT / APPELLEE)**

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**On appeal from the 19<sup>th</sup> Judicial District Court  
for the Parish of East Baton Rouge, State of Louisiana  
No. C-616916, Section 25  
Hon. Wilson Fields, Presiding  
(A Civil Proceeding)**

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**ORIGINAL BRIEF ON BEHALF OF APPELLEES,  
LOUISIANA AUCTIONEERS LICENSING BOARD, CHARLES  
MCMILLIN, JAMES M. SIMS, DARLENE JACOBS-LEVY, GREGORY L.  
BORDELON, CHARLES BRISTER**

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BORDELON, CHARLES BRISTER**

**I. JURISDICTIONAL STATEMENT**

Appellant has appealed a final decision of the 19<sup>th</sup> Judicial District Court rendered in open court on April 9, 2014 and executed on April 22, 2014. Such judgment is appealable under La. C.C.P. Art. 2083(A), and this honorable First Circuit Court of Appeal has jurisdiction as provided under Article V, Section 10 of the Louisiana Constitution of 1974.

**II. STATEMENT OF THE CASE**

This case arises from a dispute regarding Louisiana’s Open Meetings Laws. The Appellant, Robert Burns, was a licensee of the Louisiana Auctioneer’s Licensing Board, and the individually named appellees/defendants are members of the Louisiana Auctioneer’s Licensing Board (LALB). The LALB is an executive agency of the State of Louisiana.

On September 17, 2012, the LALB held an Administrative Hearing to discuss possible violations by Robert Burns of policies and procedures regulating

LALB licensees. At the conclusion of evidence and testimony of all witnesses, James Sims, LALB vice-chairman, moved for the Board to enter into Executive Session. Mr. Burns, who was represented by counsel, requested that any discussions regarding his character remain as part of the open session.

The Board had no intention of discussing Mr. Burns' character in the Executive Session, and the presiding Administrative Law Judge determined that the Board had a "right" to enter into Executive Session.

The Board sits as the jury for violations of the license holders. Ultimately, LALB decided to issue Mr. Burns a public reprimand for his violations.

Following the initial Administrative Hearing, it was alleged by Appellant that the Executive Session had been held in error. In response to such allegations, and in an abundance of caution, the proceeding was reset for January 8, 2013. On January 8, 2013, Mr. Burns was afforded additional opportunity to be heard in connection with the proceeding, and no Executive Sessions took place. Ultimately, LALB members, again, rendered a decision to publically reprimand Mr. Burns. Prior to the second hearing, Burns did not renew his license as an auctioneer. Burns did not appeal the public reprimand in accordance with the Administrative Procedures Act.

In connection with the aforementioned occurrences, Appellant filed this suit in the 19<sup>th</sup> JDC, claiming that LALB and its individual members knowingly violated the Open Meetings Law by allegedly discussing his character in an Executive Session. On April 9, 2014, a bench trial took place, and Judgment was rendered in favor of the Defendants/Appellees, LALB and the individual members. The trial court held that Defendants/Appellees had not violated the Open Meetings Laws, finding that Defendants/Appellees had not knowingly and willingly gone into an executive session knowing that it would be contrary to law, and finding that

the Defendants/Appellees had not entered into an executive session for the purpose of discussing Appellant's character.<sup>1</sup>

A Judgment was signed accordingly on April 22, 2014. The *pro se* Appellant did not agree to the proposed judgment and submitted an additional judgment to the Court. The additional Judgment, prepared by the Appellant, which included Appellant's proposed written reasons for judgment, was signed by the trial court on May 8, 2014.

### **III. TRAVERSING ASSIGNMENT OF ERROR**

The District Court properly held that Defendants/Appellees did not violate Louisiana's Open Meetings Laws, L.A. R.S. 42:11, *et. seq.*

### **IV. ISSUE PRESENTED FOR REVIEW BY APPELLANT**

1. Whether a public body is subject to the Open Meetings Law under LA. R. S. 42:11, *et seq.*, when discussing a complaint of one of its licensees.
2. Whether the actions of the individual board members of a public body to go into an allegedly illegally held Executive Session are knowing and willful.

### **V. STATEMENT OF FACTS**

The Appellant, Robert Burns, was a licensee of the Louisiana Auctioneer's Licensing Board, and the individually named defendants/appellees are members of the Louisiana Auctioneer's Licensing Board (LALB). The LALB is an executive agency of the State of Louisiana. Its mission is to contribute to the safety, health, and management of the property of the people of Louisiana in the transfer of property by auction.<sup>2</sup>

The present suit appeal arises out of a claim by Robert Burns that LALB and its individual members violated the Open Meetings Law by allegedly discussing

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<sup>1</sup> R. 347-348.

<sup>2</sup> La. R.S. 37:3101.

his character in an Executive Session. LALB and its members named in the suit dispute that Appellant's character was in issue or discussed during the subject Executive Session. The named defendants contend that the purpose of the Executive Session was to discuss whether Robert Burns had violated any LALB rules, regulations, or statutes, and what, if any, penalties should be imposed.<sup>3</sup>

The LALB members sit as a jury to determine whether any licensee has violated its laws, rules, or regulations.<sup>4</sup> On September 17, 2012, LALB held an administrative hearing to deliberate on complaints that Robert Burns had violated certain rules, regulations, and laws related to his status as a license holder.<sup>5</sup> The administrative hearing was presided over by an administrative hearing officer of the Louisiana Attorney General's office. The administrative officer who presided over the hearing held on September 17, 2012 was Michael J. Vallen. Upon the advice of the hearing officer, the LALB members decided to go into Executive Session to discuss the alleged violations and the imposition of any penalties.<sup>6</sup> It was not until after a vote had already taken place, confirming the Board's decision to deliberate in private that the Appellant requested such deliberation take place in an open session. However, it was the advice of the hearing office that the board members sat as jurors and therefore were entitled to discuss the allegations in private. Ultimately, the board deliberated in private and voted to publically reprimand Robert Burns for violations as a license holder.

Due to the claims by Burns of a violation of the Open Meetings Law, the Board agreed to reset the hearing for open deliberation of the matter on January 8, 2013. Appellees deny any violation of the Open Meetings Law, but in an abundance of caution and to clarify that any action previously taken was "voidable", the Board reset the hearing for public deliberations. Previous actions

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<sup>3</sup> R. 322, 325.

<sup>4</sup> La. R.S. 49:950, *et seq*

<sup>5</sup> R. 348.

<sup>6</sup> R. 347.

taken by LALB may be ratified by subsequent action taken in conformity with the Open Meetings requirements.<sup>7</sup>

At the January 8, 2013 hearing, the LALB discussed the claims pending against Robert Burns entirely in Open Session. The members again found it appropriate to issue Robert Burns a public reprimand.<sup>8</sup> Therefore, even if there was a violation of the Open Meetings Law on September 17, 2012, which is at all times denied, the subsequent administrative hearing ratified the previous decision to issue Robert Burns a public reprimand, and Burns suffered no prejudice.

## **VI. SUMMARY OF ARGUMENT**

The trial court correctly held that Appellees did not violate Louisiana's Open Meetings Laws. In order for the individual board members to be held personally liable for a violation of Louisiana's Open Meetings Laws, the members must knowingly and willfully violate a provision of the Open Meetings Laws.<sup>9</sup> In this case, the trial court correctly concluded that the individual LALB members entered into an Executive Session with the advice of the Administrative Law Judge, and the LALB members did not enter into an Executive Session with the knowledge and willful intent that such action would be contrary to law.<sup>10</sup> The trial court further concluded that the LALB did not violate a provision of the Open Meetings Laws by deliberating in private, as the closed deliberation was not conducted for the purpose of discussing Appellant's character, professional competency or physical or mental health.<sup>11</sup>

## **ARGUMENT**

### **A. Standard of Review**

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<sup>7</sup> *Marien v. Rapides Parish Police Jury*, 98-0077 (La. App. 3d Cir. 7/8/98) 717 So.2d 1187;

<sup>7</sup> *Delta Development Co., Inc. v. Plaquemines Parish Com'n Council*, 451 So.2d 134 (La. App. 4th Cir. 1984).

<sup>8</sup> R. 269-270.

<sup>9</sup> La. R.S. 42:28.

<sup>10</sup> R. 347.

<sup>11</sup> R. 348.

The standard of review in this case is manifest error. The trial court's judgment was based on factual determinations concerning the LALB's reason for entering into an Executive Session and the knowledge and intent of the individual board members. Under the manifest error standard of review, a factual finding cannot be set aside unless the appellate court finds that it is manifestly erroneous or clearly wrong.<sup>12</sup> In order to reverse a fact finder's determination of fact, an appellate court must review the record in its entirety and (1) find that a reasonable factual basis does not exist for the finding, **and** 2) further determine that the record establishes that the fact finder is clearly wrong.<sup>13</sup> Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly wrong.<sup>14</sup> Similarly, where there is conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed on review.<sup>15</sup> Thus, if the trial court's findings are reasonable in light of the record reviewed in its entirety, this court may not reverse, even if convinced that had it been sitting as trier of fact, it would have weighed the evidence differently.<sup>16</sup>

In this case, quite simply, the record does not establish that a reasonable factual basis does not exist for the trial court's finding. Additionally, the record does not establish that the trial court is clearly wrong.

**B. The Trial Court correctly held that the LALB did not violate Louisiana's Open Meetings Laws, La. R.S. 42:11, et seq.**

After hearing all evidence and testimony, the Trial Court properly held that the LALB's actions on September 17, 2012 did not violate any provision of Louisiana's Open Meetings Laws. Specifically, the Court held that the Board did not enter into an executive session or even conduct a meeting for the discussion of

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<sup>12</sup> Rosell v. ESCO, 549 So.2d 840, 844 (La.1989).

<sup>13</sup> Bonin v. Ferrellgas, Inc., 2003–3024, pp. 6–7 (La.7/2/04), 877 So.2d 89, 94–95, emphasis added.

<sup>14</sup> Bonin, 2003–3024 at p. 12, 877 So.2d at 98, emphasis added.

<sup>15</sup> Bonin, 2003–3024 at p. 12, 877 So.2d at 98.

<sup>16</sup> Stobart v. State through Dept. of Transp. and Development, 617 So.2d 880, 882 (La.1993).

character, professional competency or physical or mental health.<sup>17</sup> The Court further concluded that there was a complaint filed against Mr. Burns, and the LALB conducted a hearing concerning the complaint on September 17, 2012.<sup>18</sup> “For that purpose, [the Board] went into executive session to discuss their recourse as it relates to what they should.”<sup>19</sup>

As noted in Appellant’s brief, the LALB held an Administrative Hearing entailed the matter of *LALB v. Robert Burns* on September 17, 2012.<sup>20</sup> However, the Appellant incorrectly tries to fit said administrative hearing into the confines of Louisiana’s Open Meeting statutes. Unequivocal testimony during the trial of this matter demonstrated that the Board conducted its regular bimonthly meeting prior to the subject administrative hearing.<sup>21</sup> The regular board meeting adjourned.<sup>22</sup> Following such adjournment, the administrative hearing began under the guidance of an administrative law judge from the Attorney General’s office.<sup>23</sup> Testimony from the board members as well as the executive assistant for the LALB confirmed that the Board has always acted like a jury and deliberated in private at the conclusion of an administrative hearing, and such action was never questioned by the administrative law judge.<sup>24</sup>

The Administrative Procedure Act authorizes agencies to conduct adjudications and requires an adjudication to be conducted according to procedures similar to those applied in court proceedings.<sup>25</sup> Courts have described the nature of these proceedings as “quasi-judicial.” Traditionally, those who exercise judicial authority (judges, juries) deliberate in private. The Legislature was certainly aware of this tradition when it bestowed quasi-judicial authority on agencies through the

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<sup>17</sup> R. 348.

<sup>18</sup> R. 348.

<sup>19</sup> R. 348.

<sup>20</sup> Appellant’s brief, page 13.

<sup>21</sup> R. 328

<sup>22</sup> R. 328

<sup>23</sup> R. 328.

<sup>24</sup> R. 268, 290, 321.

<sup>25</sup> La. R.S. 49:950, *et seq.*

APA, and surely intended that agencies deliberate in private when exercising their quasi-judicial authority.

Further, the Trial Court held that the Board did not enter into an executive session pursuant to La. R.S. 42:16<sup>26</sup>; however, even if this court disagrees with the Trial Court's findings, the Board may enter into an executive session for the purpose of an investigative proceedings regarding allegations of misconduct.<sup>27</sup>

While Appellant attempts to argue that LALB's closed deliberation was an executive session, under La. R.S. 42:16, for the purpose of discussing his character, professional competence or physical or mental health, there is simply no evidence to support such contention. There was not a single witness that testified that Appellant's character, professional competence or physical or mental health was discussed during the private deliberations. To the contrary, the record indicates that the only matter discussed outside of the presence of the Appellant was the gravity of the charges against the Appellant and the associated penalties.<sup>28</sup>

Additionally, without any evidence in the record to establish that the Trial Court was clearly wrong in determining that the Appellant's character, professional competence or physical or mental health was not discussed by the LALB in an executive session, Appellant's reliance on *Sandifer v. Louisiana State Board of Practical Nurse Examiners*<sup>29</sup> is inappropriate herein. Not only is the Sandifer case an unpublished opinion which fails to carry legal precedence, it is factually distinguishable from the present matter. In *Sandifer*, the Plaintiff was a licensed practical nurse who refused to take a drug test because she had recently "accepted" marijuana.<sup>30</sup> The plaintiff admitted that her refusal was an "error of judgment."<sup>31</sup>

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<sup>26</sup> R. 248.

<sup>27</sup> La. Rev. Stat. Ann. § 42:17; See Op. Atty. Gen., No. 03-0124, April 25, 2003, in which the Attorney General opined that LSU may conduct investigations of alleged fraudulent conduct in an executive session.

<sup>28</sup> R. 322, 325.

<sup>29</sup> *Sandifer v. Louisiana State Board of Practical Nurse Examiners*, 2008 La. App. 1<sup>st</sup> Cir., Unpub. LEXIS 98.

<sup>30</sup> *Id.*

The court found that the matter concerned the professional competence of the plaintiff and since the Plaintiff had properly requested that the Board hold discussions regarding her professional competence in an open meeting, the Board violated Louisiana's Open Meetings Law by discussing her professional competence in an executive session.<sup>32</sup>

Contrary to *Sandifer*, in the present case, the Trial Court properly found that the LALB did not enter into an executive session to discuss the Appellant's character, professional competence or physical or mental health. The records fails to provide any evidence to (1) find that a reasonable factual basis does not exist for the finding, **and** 2) further determine that the record establishes that the fact finder is clearly wrong.

**C. The Trial Court correctly held that the individual board members did not knowingly and willfully participate in a meeting in violation of Louisiana's Open Meeting Laws.**

In accordance with La. R.S. 42:28, in order to assess civil penalties against the individual LALB members, the board members must not only violate the open meetings laws, but they must commit such violation knowingly and willfully. Such was not the case in this matter. LALB members were operating in good faith and neither intentionally nor knowingly violated Open Meetings Laws by conducting their deliberations in private. In an administrative hearing concerning a violation of the Louisiana Auctioneers laws, the LALB members participate as the jury. An administrative law judge presides over the proceeding to provide LALB members with legal guidance. In the present case, at the conclusion of the evidence, the LALB members requested the opportunity to deliberate in a closed meeting. The administrative law judge presiding over the hearing approved such request. Based on aforementioned reasoning and the advice of the presiding administrative law

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

judge, the LALB members made a reasonable calculation that the closed deliberation was permissible.

At the trial of this matter, the board members, as well as the executive assistant for the LALB testified that the Board has always acted like a jury and deliberated in private at the conclusion of an administrative hearing, and such action has never been questioned by a licensee or the administrative law judge.<sup>33</sup> Accordingly, the Trial Court held that the board members had not knowingly and willfully entered into an executive session contrary to law.<sup>34</sup> The Trial Court noted that the Board had been advised by their attorney that it was appropriate for them to deliberate in private.<sup>35</sup>

**D. The Appellant has not been damaged.**

Appellant attempts to argue that he has been damaged by the holdings of the Trial Court; however, such claims lack merit. Appellees specifically deny any violation of the Louisiana Open Meetings Laws; however, in an abundance of caution, the LALB's action was ratified by the subsequent open deliberation held on January 8, 2013.

In *Delta Development Co., v. Plaquemines Parish Com'n Council*, the court held that even where an Open Meeting Law violation occurred, the plaintiff's claim was moot where the action was ratified.<sup>36</sup> In *Delta Development Co.*, mineral rights holders moved for a preliminary injunction against members of the parish commission council.<sup>37</sup> The mineral rights holders sought to enjoin the parish council from continuing in a suit against the holders to recover mineral rights.<sup>38</sup> The mineral rights holders, Delta Development Company, argued that the parish

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<sup>33</sup> R. 268, 290, 321.

<sup>34</sup> R. 347.

<sup>35</sup> R. 347.

<sup>36</sup> *Delta Development Co., Inc. v. Plaquemines Parish Com'n Council*, 451 So.2d 134 (La. App. 4th Cir. 1984).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

council violated the Open Meeting Law when it adopted a resolution authorizing the suit against it.<sup>39</sup> Namely, Delta Development contended that the resolution passed by the parish council was not among the listed exceptions necessary for an executive session.<sup>40</sup> The court took note of the plaintiff's argument and agreed that the actions of the parish council amounted to a violation of the Open Meeting Law. However, the court reasoned that under La. R.S. 42:9 the product of a violation of the Open Meeting Law was relatively null rather than absolutely null.<sup>41</sup> Therefore, the parish council's actions could be ratified. Because the parish council held a subsequent meeting that comported with the Open Meeting Law to pass the resolution, the court found that the action had been ratified. As a result, the plaintiff's claims were found moot and a decision was rendered in favor of the defendants.<sup>42</sup>

In an additional case, *Marien v. Rapides Police Jury*, the court also found that actions held in a subsequent meeting, which complied with Open Meetings Law requirements, ratified the violations of a previous meeting.<sup>43</sup> In *Marien*, the plaintiffs challenged a resolution passed by the local police jury.<sup>44</sup> In their complaint, the plaintiffs' alleged that the vote for the resolution was held without proper notice.<sup>45</sup> The police jury provided notice of the hearing, but did not observe the proper time delay.<sup>46</sup> The court recognized that this error violated the Open Meetings Law.<sup>47</sup> The court found, however, that the police jury ratified its action by holding a meeting with proper notice at a subsequent meeting ten days later.<sup>48</sup>

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<sup>39</sup> Id.

<sup>40</sup> Id., at 137.

<sup>41</sup> Id., at 138.

<sup>42</sup> Id.

<sup>43</sup> *Marien v. Rapides Parish Police Jury*, 98-0077 (La. App. 3d Cir. 7/8/98) 717 So.2d 1187.

<sup>44</sup> Id.

<sup>45</sup> Id.

<sup>46</sup> Id., at 1192.

<sup>47</sup> Id.

<sup>48</sup> *Marien v. Rapides Parish Police Jury*, 98-0077 (La. App. 3d Cir. 7/8/98) 717 So.2d 1187, 1192.

“The ratification action...cured that problem.”<sup>49</sup> Again, the court found in favor of the defendants.

In the present case, due to the Appellant’s complaints and out of an abundance of caution, the board members decided to reset the subject hearing for January 8, 2013.<sup>50</sup> Appellant was provided with sufficient notice of such hearing. Following the conclusion of the presentation of evidence, the LALB members openly deliberated regarding the complaints against the Appellant.<sup>51</sup> By his own admission, the plaintiff was able to fully participate in the reset hearing, thereby, curing any defects in the prior deliberations. At the conclusion of the hearing, the LALB members rendered an identical decision and issued a public reprimand against the Appellant, thereby affirming its decision of September 17, 2012.<sup>52</sup> Thus, the Appellant has suffered no damage.

### **CONCLUSION**

In this case, the Trial Court properly held that the LALB did not violate any provision of Louisiana’s Open Meetings Laws and that the individual members did not act knowingly and willfully in contradiction of Louisiana’s Open Meeting Laws. Appellees did not enter into an executive session for the purpose of discussing Appellant’s character, professional competency or physical or mental health, and the record clearly reflects a reasonable factual basis for the Trial Court’s findings and fails to establish that the Trial Court is clearly wrong.

The Trial Court’s findings are reasonable in light of the record reviewed in its entirety, and the Appellant has failed to satisfy the burden of proof under the manifest error standard of review in order to set aside the Trial Court’s findings. Accordingly, the Trial Court’s findings should be affirmed.

Respectfully submitted,

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<sup>49</sup> Id.

<sup>50</sup> R. 269.

<sup>51</sup> R. 269.

<sup>52</sup> R. 269-270.

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**CERTIFICATE & AFFIDAVIT OF VERIFICATION**

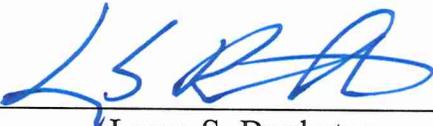
STATE OF LOUISIANA

PARISH OF EAST BATON ROUGE

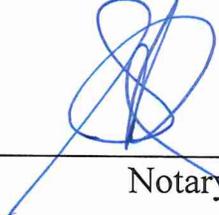
BEFORE ME, the undersigned authority, personally came and appeared, Larry S. Bankston, who, being first duly sworn, did depose and say:

That he is the attorney for Appellees, Louisiana Auctioneers Licensing Board, et al, in the above and foregoing Original Brief on behalf of Appellees, that he has prepared and read said Brief and that all of the allegations contained therein are true and correct to the best of his knowledge, information and belief; that a copy of the Original Brief on behalf of the Appellee was duly served upon the following counsel of record by electronic mail and by mailing same on the 9<sup>th</sup> day of October, 2014 by United States mail, properly addressed, and first class, postage prepaid to:

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*Counsel for Appellant, Robert Burns*

  
\_\_\_\_\_  
Larry S. Bankston

SWORN TO AND SUBSCRIBED before me, this 9<sup>th</sup> day of October, 2014.

  
\_\_\_\_\_  
Notary Public

**G. Steven Duplechain**  
Notary Public  
La. Bar Roll 5200  
My commission expires at death