

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2007 CA 1131

**JUDITH SANDIFER
FORMERLY KNOWN AS JUDITH HONAKER**

VERSUS

**THE LOUISIANA STATE BOARD OF PRACTICAL NURSE
EXAMINERS, FILMORE P. BORDELON,
RUBY R. CHANCELLOR, ROBERTA R. CONNELLEY,
GWENDOLYN M. DUNN, SHARON K. FORE,
BOBBY G. FULMER, PATRICIA S. JUNEAU,
ANN C. LAWS, REBECCA A. NELSON,
ROSEMARY S. PASSANTINO, EUGENE C. ST. MARTIN,
WILLIAM SONNIER, JR., IDOLPHUS C. TURNLEY, JR.,
AND CLAIRE D. GLAVIANO**

Judgment Rendered: MAR 26 2008

On Appeal from the 19th Judicial District Court
In and For the Parish of East Baton Rouge
Trial Court No. 508,244

Honorable Curtis A. Calloway, Judge Presiding

Francis B. Mulhall
Metairie, LA

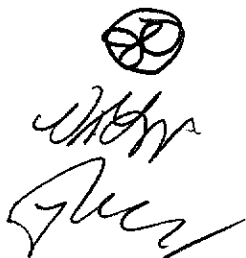
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Baton Rouge, LA

Counsel for Plaintiff/Appellee
Judith Sandifer f/k/a
Judith Honaker

Handwritten signature and initials in the left margin, including a circular stamp with a cross-like symbol.

BEFORE: WHIPPLE, GUIDRY, AND HUGHES, JJ.

HUGHES, J.

In this appeal the Louisiana State Board of Practical Nurse Examiners and its members (referred to collectively herein as the "Board") challenge a district court judgment finding the Board violated Louisiana's Open Meetings Law. For the reasons that follow, we affirm the judgment in part, vacate the judgment in part, and remand.

FACTS AND PROCEDURAL HISTORY

Judith Sandifer was employed as a licensed practical nurse in September of 2000 at the Good Samaritan Nursing Home in Franklinton, Louisiana, when she refused to submit to a drug screen during an investigation of missing narcotics. Ms. Sandifer later admitted her refusal was an "error of judgment" and that she refused because she had recently "accepted" marijuana while on vacation.

Proceedings were instituted before the Board culminating in a May 29, 2003 decision by the Board to place Ms. Sandifer's nursing license on probation for two years and to require Ms. Sandifer to meet certain conditions of probation.¹ On May 30, 2003 Ms. Sandifer filed the instant

¹An administrative hearing was conducted in this matter on April 22, 2003 with Board member, Ann Laws, a registered nurse, serving as hearing officer. At that hearing, Ms. Sandifer was present and represented by counsel, who participated in the examination of witnesses and introduction of evidence. Ms. Laws thereafter issued written findings of fact and recommendations to the Board that: Ms. Sandifer's license be suspended for a minimum of one year, she be fined \$500.00, she pay a \$500.00 hearing assessment fee, and she be required to submit proof of continued sobriety with her request for reinstatement of her license. Ms. Laws also recommended that "[u]pon receipt and favorable review of the evidence and records requested" Ms. Sandifer's license be placed on probation for one year with the following stipulations requiring Ms. Sandifer to: be placed on probation for at least twelve months to run concurrent with employment as a licensed practical nurse (license to be stamped "PROBATION"), with a minimum of ten days per month employment; notify the Board of any change in name, address, telephone number, or employment; provide patient care only under direct supervision of an R.N. or L.P.N.; request her employer to submit a "letter of hire" within five days of her hire date; request her employer to submit quarterly evaluative reports to the Board, or if unemployed she must send monthly letters to the Board so stating; refrain from working in a temporary or unsupervised employment setting; provide a copy of the Board's order to each employer; pay a probation fee of \$250.00; abstain at all times from the use of controlled or abuse-potential substances except as prescribed by a licensed practitioner for medical treatment, providing proof of prescription(s) to the Board; and submit to random drug screening at her expense. It was also recommended that Ms. Sandifer be informed that new verifiable reports of violations would result in immediate suspension for two years without further appearance before the Board, and that failure to comply with the Board's order may result in:

lawsuit essentially contending that the Board acted in violation of Louisiana's Open Meetings Law (LSA-R.S. 42:4.1 - 42:13) and Louisiana's Administrative Procedure Act (LSA-R.S. 49:950 et seq.). Included in Ms. Sandifer's petition before the district court was a request for injunctive relief, in response to which the district court issued a May 30, 2003 temporary restraining order enjoining the Board "from publishing any decision made at its May 29, 2003 meeting regarding the disciplinary matter involving [Ms. Sandifer] and from reporting to any agency, individual or entity its decision regarding the disciplinary matter involving [Ms. Sandifer]."

Following a trial in the district court, judgment was rendered finding that the actions of the Board violated Ms. Sandifer's "constitutional and statutory rights by denying [her] the right to observe and participate in the deliberations of the matters involving her license, more particularly violating the Open Meetings Law." The district court judgment "voided" the May 2003 action of the Board and granted Ms. Sandifer a permanent injunction prohibiting the Board from enforcing any penalty imposed on Ms. Sandifer at its May 28-29, 2003 meeting. The district court further awarded Ms Sandifer attorney's fees in the amount of \$42,616.25 and costs in the amount of \$6,144.45, with interest.²

From this judgment the Board appeals. We summarize the Board's contentions on appeal as follows: (1) the district court erred in failing to find that in Ms. Sandifer's case the Board's deliberations and discussions

indefinite suspension; ineligibility for renewal of license; additional fines, costs, and penalties up to \$500.00 per occurrence; increased probationary period; summary suspension; and/or revocation.

² We note that the record reflects prior proceedings before the Board on this alleged instance of drug use by Ms. Sandifer, which have not been alleged as having a preclusive res judicata effect on the current action. In connection with one prior proceeding, Ms. Sandifer brought suit in Orleans Parish challenging on due process grounds a decision of the Board, which resulted in a decision in favor of the Board that was subsequently upheld on appeal to the Fourth Circuit Court of Appeal.

during executive session were exempt from the open meetings requirement under LSA-R.S. 42:6.1(A)(9) (now LSA-R.S. 42:6.1(A)(10))³ of the Open Meetings Law and by LSA-R.S. 44:4(32) of the Public Records Act; (2) the district court erred in awarding injunctive relief and attorney's fees; and (3) the district court erred in denying the Board's request for sanctions and attorney's fees where the plaintiff/appellant "improperly and frivolously" requested attorney's fees amounting to \$54,219.94 for services related to alleged violations of the Administrative Procedure Act (notwithstanding her admission of marijuana use) and also encompassing unsuccessful prior litigation in Orleans Parish. Ms. Sandifer has filed an answer to this appeal contending the appeal is frivolous, seeking additional attorney's fees for defending this appeal, and requesting this court to overturn the trial court's denial of her motion for sanctions against the defendant/appellant.

DISCUSSION AND ANALYSIS

Open Meetings Law

Louisiana Constitution Article XII, § 3 provides that "[n]o person shall be denied the right to observe the deliberations of public bodies and examine public documents, except in cases established by law."

Louisiana's Open Meetings Law requires every meeting of any public body to be open to the public unless closed pursuant to LSA-R.S. 42:6 through 42:6.2.⁴ LSA-R.S. 42:5(A). See also **Organization of United Taxpayers and Civic Associations of Southeast Baton Rouge, Inc. v. Louisiana Housing Finance Agency**, 96-2406, p. 5 (La. App. 1 Cir.

³ On appeal, Ms. Sandifer relies on LSA-R.S. 42:6.1, authorizing an executive session on "any other matters now provided for or as may be provided for by the legislature," which at the time her suit was filed was designated as LSA-R.S. 42:6.1(A)(9). Subsequent legislation resulted in the re-numbering of this paragraph to LSA-R.S. 42:6.1(A)(10). See 2003 La. Acts, No. 336, § 1, and 2006 La. Acts 2006, No. 90, § 1.

⁴ A "public body" is defined by LSA-R.S. 42:4.2(A)(2) as including any "state, parish, municipal, or special district boards." It is not disputed in this case that the Board is a public body.

11/7/97), 703 So.2d 107, 110, writ denied, 97-3007 (La. 2/6/98), 709 So.2d 745. The purpose of Louisiana's Open Meetings Law is to allow the public to observe and evaluate public officials, public conduct, and public institutions. It is meant to protect citizens from secret decisions made without any opportunity for public input. **Organization of United Taxpayers and Civic Associations of Southeast Baton Rouge, Inc. v. Louisiana Housing Finance Agency**, 96-2406 at p. 5, 703 So.2d at 110, citing **Daigre v. Terrebonne Association for Retarded Citizens**, 543 So.2d 1108, 1109 (La. App. 1 Cir.), writ denied, 548 So.2d 333 (La. 1989). This policy is reflected in LSA-R.S. 42:4.1(A), which states:

It is essential to the maintenance of a democratic society that public business be performed in an open and public manner and that the citizens be advised of and aware of the performance of public officials and the deliberations and decisions that go into the making of public policy. Toward this end, the provisions of [LSA-]R.S. 42:4.1 through 10 shall be construed liberally.

All votes made by members of a public body shall be *viva voce* and shall be recorded in the minutes, journal, or other official, written proceedings of the body, which shall be a public document. LSA-R.S. 42:5(C).⁵

Further, LSA-R.S. 42:6 provides:

A public body may hold executive sessions upon an affirmative vote, taken at an open meeting for which notice has been given pursuant to R.S. 42:7, of two-thirds of its constituent members present. An executive session shall be limited to

⁵ We note that in the instant case, a "draft" of the Board minutes for May 28-29, 2003 appears in the record, referencing Ms. Sandifer by her license number and stating in pertinent part: "Dr. Fulmer moved that, in the case of license number 951234, the respondent's license be placed on probation for a minimum period of 2 years from the date of the board order with the usual stipulations as attached." No notation was made in these written minutes concerning the Board members' vote on the motion. We are informed in brief to this court that no final copy of these minutes was created, in compliance with the district court order in the instant suit enjoining the Board from further action. However, the record on appeal also contains an audio tape of the meeting, which recorded the vote taken during the open session of the Board. The tape reflects that a motion was made that "in the case of license number 951234 ... that respondent be placed on probation for a minimum period of two years with the usual stipulations." All Board members in favor of the motion were asked to say "Aye." The voices of numerous Board members were then heard to say "Aye" collectively. The Board chairman then stated that the motion had carried.

matters allowed to be exempted from discussion at open meetings by R.S. 42:6.1; however, no final or binding action shall be taken during an executive session. The vote of each member on the question of holding such an executive session and the reason for holding such an executive session shall be recorded and entered into the minutes of the meeting. Nothing in this Section or R.S. 42:6.1 shall be construed to require that any meeting be closed to the public, nor shall any executive session be used as a subterfuge to defeat the purposes of R.S. 42:4.1 through R.S. 42:8.

Louisiana Revised Statute 42:6.1(A) specifies under what circumstances a public body may hold a meeting that is closed to the public:

A public body may hold an executive session pursuant to R.S. 42:6 for one or more of the following reasons:

(1) **Discussion of the character, professional competence, or physical or mental health of a person,** provided that such person is notified in writing at least twenty-four hours before the meeting and that such person may require that such discussion be held at an open meeting, and provided that nothing in this Subsection shall permit an executive session for discussion of the appointment of a person to a public body. In cases of extraordinary emergency, written notice to such person shall not be required; however, the public body shall give such notice as it deems appropriate and circumstances permit.

(2) Strategy sessions or negotiations with respect to collective bargaining, prospective litigation after formal written demand, or litigation when an open meeting would have a detrimental effect on the bargaining or litigating position of the public body.

(3) Discussion regarding the report, development, or course of action regarding security personnel, plans, or devices.

(4) **Investigative proceedings regarding allegations of misconduct.**

(5) Cases of extraordinary emergency, which shall be limited to natural disaster, threat of epidemic, civil disturbances, suppression of insurrections, the repelling of invasions, or other matters of similar magnitude.

(6) Any meeting of the State Mineral Board at which records or matters entitled to confidential status by existing law are required to be considered or discussed by the board with its staff or with any employee or other individual, firm, or corporation to whom such records or matters are confidential in their nature, and are disclosed to and accepted by the board subject to such privilege, for the exclusive use in evaluating lease bids or development covering state-owned lands and water bottoms, which exception is provided pursuant to and consistently with the Public Records Act, being Chapter I of Title 44 of the Louisiana Revised Statutes of 1950, as amended, and other such statutes to which the board is subject.

(7) Discussions between a city or parish school board and individual students or the parents or tutors of such students, or both, who are within the jurisdiction of the respective school system, regarding problems of such students or their parents or tutors; provided however that any such parent, tutor, or student may require that such discussions be held in an open meeting.

(8) Presentations and discussions at meetings of civil service boards of test questions, answers, and papers produced and exhibited by the office of the state examiner, municipal fire and police civil service, pursuant to R.S. 33:2492 or 2552.

(9) The portion of any meeting of the Second Injury Board during which records or matters regarding the settlement of a workers' compensation claim are required to be considered or discussed by the board with its staff in order to grant prior written approval as required by R.S. 23:1378(A)(8).

(10) *Or any other matters now provided for or as may be provided for by the legislature.*

(Emphasis added.)

Because the exemptions contained in LSA-R.S. 42:6.1(A) are in derogation of the broad public policy of openness, these enumerated reasons for an executive session are exclusive. **Brown v. East Baton Rouge Parish School Board**, 405 So.2d 1148, 1154 (La. App. 1 Cir. 1981).

Any action taken in violation of LSA-R.S. 42:4.1 through LSA-R.S. 42:8 shall be voidable by a court of competent jurisdiction. A suit to void any action must be commenced within sixty days of the action. LSA-R.S. 42:9. Any person who has been denied any right conferred by the provisions of LSA-R.S. 42:4.1 through LSA-R.S. 42:8 or who has reason to believe that the provisions of LSA-R.S. 42:4.1 through LSA-R.S. 42:8 have been violated may institute enforcement proceedings. LSA-R.S. 42:10(C).

Of the instances enumerated in LSA-R.S. 42:6.1(A) in which an executive session may be held by a public body, only Paragraphs (1), (4), and (10) have any arguable relevance to the instant case.

Firstly, we note that with respect to Paragraph (1) of LSA-R.S. 42:6.1(A), allowing an executive session for discussion of professional competence, the Board's administrative rules specifically include as a ground

for disciplinary proceedings: being guilty of unprofessional conduct, which includes "using or being under the influence of illegal drugs whether on or off duty." See 46 La. Admin. Code, Part 47, § 306(T)(8)(q). Hence the Board's examination of this case concerned the professional competence of Ms. Sandifer, and the Board would, without more, be entitled to hold their discussions in executive session. However, it is undisputed that Ms. Sandifer requested in accordance with Paragraph (1) that the matter be reviewed in an open meeting, and that the Board denied this request.⁶ Because Paragraph (1) clearly and unambiguously "require[s] that such discussion be held at an open meeting" if so desired by the person at issue, the Board was in plain violation of the Open Meetings Law unless some other provision of the law authorized an executive session in this case. Since LSA-R.S. 42:6.1(A) permits the Board to hold an executive session "for one or more of the following reasons," we examine whether another provision in the statute may supply the Board with an alternative basis for holding an executive session.

With respect to Paragraph (4) of LSA-R.S. 42:6.1(A), allowing closed sessions for investigative proceedings regarding allegations of misconduct, we conclude this paragraph is inapplicable to the executive session at issue in this case. The administrative rules of the Board, as set forth in 46 La. Admin. Code, Part 47, § 101 et seq., clearly provide distinct phases for the

⁶ On May 19, 2003 a written notice was forwarded by the Board to Ms. Sandifer giving the date and time of the Board's May 28-29, 2003 meeting, and also stating: "The review of disciplinary cases is held in Executive Session pursuant to R.S. 42:1 through R.S. 42:12. ... The open meeting will resume following the conclusion of the Executive Session, at which time a vote will be taken on disciplinary recommendation[s]. This is done by license number only. No open discussion will be allowed at that time on the decisions." Ms. Sandifer also received a copy of the meeting agenda showing a beginning time of 2:00 p.m. on May 28th. On May 27, 2003 at 11:56 a.m., counsel for Ms. Sandifer faxed a letter to the Board stating: "In accordance with La. R.S. 42:6.1(A)(1), I hereby request that the discussion concerning the disciplinary action pending against [Ms. Sandifer] be held at an open meeting." The Board responded with a letter dated May 28, 2003 denying the request for an open meeting and stating, "The statute [LSA-R.S. 42:6.1] clearly allows the Board to meet in Executive Session when discussing investigative proceedings and more particularly during deliberations."

processing of a disciplinary complaint: investigation, optional informal disposition, and formal proceedings. 46 La. Admin. Code, Part 47, § 306(D), (E), and (F). The record in this case shows that an investigation was first conducted; plaintiff admitted the allegations against her; a formal complaint was filed; a formal hearing was held; a recommendation was made to the Board by the hearing officer; and the Board considered whether to accept the hearing officer's recommendation at its May 28-29, 2003 meeting.⁷ Clearly, the Board was making a final disposition in a formal disciplinary proceeding on the date in question, rather than conducting an investigative proceeding, so that LSA-R.S. 42:6.1(A)(4) is inapplicable in this case.

It is the Board's contention that Ms. Sandifer's disciplinary proceeding fell within the purview of Paragraph (10) (then Paragraph (9)) of LSA-R.S. 42:6.1(A), allowing the Board to enter into an executive session to discuss "any other matters now provided for or as may be provided for by the legislature." Specifically, the Board cites LSA-R.S. 44:4(32) as a LSA-R.S.

⁷ The allegation(s) shall be investigated by the executive director, his/her designee, and/or staff. 46 La. Admin. Code, Part 47, § 306(D). Unless precluded by law, informal disposition may be made of any case of adjudication by stipulation, agreed settlement, consent order, or default. 46 La. Admin. Code, Part 47, § 306(E). Proceedings that require an opportunity for hearing shall commence with the filing of a formal complaint by the Board. 46 La. Admin. Code, Part 47, § 306(G). If the respondent denies the allegations of the formal complaint, an administrative hearing is scheduled unless waived by the respondent. 46 La. Admin. Code, Part 47, § 306(I). Prior to hearing, the respondent is entitled to conduct discovery and request the issuance of subpoenas in furtherance of discovery and/or to compel the attendance of witnesses. 46 La. Admin. Code, Part 47, § 306(M). During the formal hearing, all parties are to be afforded the opportunity to present documentary, visual, physical, or illustrative evidence and to cross-examine witnesses as well as call witnesses to give oral testimony. All testimony given during a formal hearing must be under oath and may be before a certified stenographer. 46 La. Admin. Code, Part 47, § 306(K) and (N). See also LSA-R.S. 49:955. The Board may name a hearing officer to preside over the administrative hearing. See LSA-R.S. 37:969; LSA-R.S. 49:956; and 46 La. Admin. Code, Part 47, § 306(A). After the administrative hearing is concluded, the hearing officer must issue a report containing his/her findings of fact, conclusions of law, and recommendations, which is presented to the Board. 46 La. Admin. Code, Part 47, § 306(P). See also LSA-R.S. 49:957-958. The Board then must make a decision based on the entire record, including the hearing officer's report and determine what sanctions, if any, should be imposed and issue an appropriate order with respect thereto. A copy of this order of the Board must be sent to the respondent by certified mail. 46 La. Admin. Code, Part 47, § 306(Q). Disciplinary action(s) imposed by the Board may include reprimand, probation, suspension, revocation, as well as penalties provided under R.S. 37:961 et seq., as amended and/or the rules and regulations of the Louisiana State Board of Practical Nurse Examiners and/or any combination thereof. 46 La. Admin. Code, Part 47, § 306(R).

42:6.1(A), Paragraph (10) matter intended by the legislature to be subject to executive session. This statute provides that the Public Records Act "shall not apply" to:

[A]ny records, writings, accounts, recordings, letters, exhibits, data, pictures, drawings, charts, photographs, or copies of memoranda thereof, and any report concerning the fitness of any person to receive or continue to hold a license to practice as a practical nurse in the custody or control of the Louisiana State Board of Practical Nurse Examiners; however, any final determination made by the board, and any legal grounds upon which such action is based, relative to the fitness of any person to receive or continue to hold a license to practice as a practical nurse shall be a public record.

The Board avers that because any discussion of Ms. Sandifer's disciplinary action would necessarily involve a discussion of the public records prohibited by LSA-R.S. 44:4(32) from disclosure, any conflict between LSA-R.S. 44:4(32) and LSA-R.S. 42:6.1(A)(1) must be resolved in favor of the Board's decision to hold an executive session.

The Public Records Act must be construed liberally in favor of access and any doubt must be resolved in favor of the right of access. Any exemption to the Public Records Act is in derogation of the public's right to be reasonably informed and must be narrowly interpreted. The exception to the Public Records Act at issue herein has its basis in the right to privacy guaranteed by Louisiana Constitution Article I, § 5, and has been described as the right to be let alone and to be free from unnecessary public scrutiny. Among the interests protected is the individual's right to be free from unreasonable intrusion into his seclusion or solitude, or into his private affairs. However, the right to privacy, like other personal rights, may be lost in many ways, such as by express or implied waiver or consent, or by a course of conduct which prevents its assertion. **East Bank Consolidated Special Service Fire Protection District v. Crossen**, 2004-838, pp. 5-6 (La.

App. 5 Cir. 12/28/04), 892 So.2d 666, 669-70, writ denied, 2005-0212 (La. 4/1/05), 897 So.2d 608.

After carefully considering the argument presented by the parties and the doctrines at issue, we conclude that implied within Ms. Sandifer's request for an open meeting of the Board to discuss the disciplinary proceeding filed against her was her consent to waive any right to privacy interests she may have had in the matters addressed during the course of the disciplinary action through that date. It is obvious that Ms. Sandifer would not have requested that the Board discuss these matters in public had she desired to retain privacy in the details of this action. Had there been any doubt as to this fact, the Board could have requested an express waiver of any rights Ms. Sandifer had under LSA-R.S. 44:4(32) of the Public Records Act.

Thus, we find no merit in the Board's assertion that LSA-R.S. 42:6.1(A) authorized an executive session despite Ms. Sandifer's request for an open meeting as to her case. The Board cites no other provision of law that would validate its executive session on Ms. Sandifer's disciplinary action.

This court has previously held in **Daigre v. Terrebonne Association for Retarded Citizens**, 543 So.2d at 1109, that LSA-R.S. 42:10 allows enforcement proceedings to be brought by any person who has been denied any right conferred by the Open Meetings Law, or who has reason to believe that the Open Meetings Law has been violated, and that LSA-R.S. 42:9 mandates voiding any action taken in violation of LSA-R.S. 42:4.1, et seq. Therefore, we find no error in the district court judgment voiding the Board's proposed disciplinary action as to Ms. Sandifer and enjoining any further

action by the Board enforcing the penalties imposed at its May 28-29, 2003 meeting.⁸

Sanctions

In the district court, both the Board and Ms. Sandifer filed motions seeking sanctions against each other for the continued litigation of allegedly meritless claims. The district court denied these motions. On appeal, the parties assert the incorrectness of the trial court rulings as to their respective motions. Because we find that each party raised plausible legal questions on appeal, we find no error in the lower court's decision to deny the motions for sanctions.

Attorney's Fees

Attorney's fees in this case were awarded under LSA-R.S. 42:11(C), which provides:

If a person who brings an enforcement proceeding prevails, he shall be awarded reasonable attorney fees and other costs of litigation. If such person prevails in part, the court may award him reasonable attorney fees or an appropriate portion thereof. If the court finds that the proceeding was of a frivolous nature and was brought with no substantial justification, it may award reasonable attorney fees to the prevailing party.

The amount of attorney's fees awarded under this statute is a reasonable amount. In determining a reasonable fee, some factors the court should consider are: (1) the ultimate result obtained; (2) the responsibility incurred; (3) the importance of the litigation; (4) the amount of money involved; (5) the extent and character of the work performed; (6) the legal knowledge, attainment, and skill of the attorneys; (7) the number of court appearances; (8) the intricacies of the facts involved; (9) the diligence and skill of counsel;

⁸ We note that Ms. Sandifer did not appeal the merits of the action proposed by the Board, in the context of the rights provided to her under the Administrative Procedure Act, LSA-R.S. 49:964-965, and we express no opinion herein as to the continued viability of any further action by the Board arising out of the underlying factual circumstances that gave rise to its action against Ms. Sandifer.

and (10) the court's own knowledge. **Hymel v. HMO of Louisiana, Inc.**, 2006-0042, p. 29 n.23 (La. App. 1 Cir. 11/15/06), 951 So.2d 187, 207 n.23, writ denied, 2006-2938 (La. 2/16/07), 949 So.2d 425. See also Louisiana Rules of Professional Conduct, Rule 1.5(a). The trial court has much discretion in fixing an award of attorney fees and that award will not be modified on appeal absent a showing of an abuse of that discretion. **Hymel v. HMO of Louisiana, Inc.**, 2006-0042 at p. 29, 951 So.2d at 207.

An analysis of the factors pertinent to a determination of reasonableness is extremely fact intensive. At issue ultimately is the reasonable value of the services rendered and value received by the client. **Regions Bank v. Automax USA, L.L.C.**, 2002-1755, p. 5 (La. App. 1 Cir. 6/27/03), 858 So.2d 593, 596, writ denied, 2003-2131 (La. 11/7/03), 857 So.2d 503.

On September 19, 2006 the issue of attorney's fees was presented to the trial court and attorney's fees in the amount of \$42,616.25 were awarded. The trial court gave the following oral reasons for ruling in Ms. Sandifer's favor:

I believe that Mr. Shows' bill is reasonably high, but this is his bill. I don't believe that I have heard anything that causes me to believe that this isn't his bill and that it's an unreasonable bill. This matter has been here since May 30th of '03, and considering the number of times that I've seen these parties in here, I don't know that this is an unreasonable bill.

The record reflects that during the course of the instant enforcement proceeding, counsel for Ms. Sandifer made approximately seven court appearances over the course of the three-year time period the matter was pending before the district court. Counsel for Ms. Sandifer also engaged in extensive discovery that included the taking of some thirteen depositions of Board members and staff.

Nevertheless, we agree with the Board that during the hearing on the matter of attorney's fees, counsel for Ms. Sandifer failed to establish that all of the hours billed in connection with this lawsuit were reasonably necessary for the court to decide the issues before it. The issues in this case were exclusively legal issues; i.e., whether LSA-R.S. 42:6.1(A) of the Open Meetings Law required the Board to hold an open meeting in the disciplinary action against Ms. Sandifer upon her request, and if so whether LSA-R.S. 44:4(32) of the Public Records Act constituted an independent basis for the Board's consideration of the matter in executive session.

Counsel for Ms. Sandifer made allegations in the lower court and submitted evidence in support of contentions that the Board committed procedural errors in the way the executive session was conducted (such as what Board personnel were properly allowed in the executive session and what evidence the Board should have considered) in addition to and other than the failure to hold an open meeting as to Ms. Sandifer's license. However, these other alleged procedural errors were the type that would ordinarily be raised in a final appeal of the administrative action under LSA-R.S. 49:964 of the Administrative Procedure Act. Because no final decision of the Board was actually rendered, no appeal of the merits of the Board's proposed action was or could have been taken.⁹ Moreover, the trial court

⁹ It is only a "final decision or order" as set forth in LSA-R.S. 49:951(3) and 49:964(A)(1) that can be appealed. **Republic Fire and Casualty Insurance Company v. State of Louisiana Division of Administration, Office of State Purchasing**, 2005-2001, p. 10 (La. App. 1 Cir. 12/28/06), 952 So.2d 89, 96, citing **Metro Riverboat Associates, Inc. v. Louisiana Gaming Control Board**, 2001-0185, p. 9 n. 7 (La. 10/16/01), 797 So.2d 656, 662 n. 7. "Decision" or "order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency, in any matter other than rulemaking, required by constitution or statute to be determined on the record after notice and opportunity for an agency hearing, and including non-revenue licensing, when the grant, denial, or renewal of a license is required by constitution or statute to be preceded by notice and opportunity for hearing. LSA-R.S. 49:951(3). "[A] person who is aggrieved by a final decision or order in an adjudication proceeding is entitled to judicial review..." LSA-R.S. 49:964(A)(1).

ruled in favor of Ms. Sandifer on the failure of the Board to hold an open meeting without reaching any other issue.

Consequently, we conclude the trial court abused its discretion in awarding an excessive amount of attorney's fees for protracted litigation unnecessary to the resolution of the Open Meetings Law issues. However we are unable to determine on the record before the court what portion of the attorney's fees charged by counsel was attributable only to litigation related to the failure of the Board to hold an open meeting. Accordingly, we vacate the award of attorney's fees and remand the case to the trial court for assessment of attorney's fees in a reasonable amount, limited to litigation of the open meeting issue.

Damages for Frivolous Appeal

In her answer to this appeal, Ms. Sandifer has requested an additional amount in attorney's fees occasioned by the necessity of responding to the Board's appeal, contending the appeal is frivolous. Louisiana Code of Civil Procedure Article 2164 authorizes an appellate court to award damages for frivolous appeal. Damages for a frivolous appeal may be awarded when there is no serious legal question, when the appeal is taken solely for the purpose of delay, or when it is evident that the appellant's counsel does not seriously believe in the position he advocates. The courts have been very reluctant to grant damages under this article, as it is penal in nature and must be strictly construed. Rather, appeals are favored and damages for frivolous appeal are granted only when clearly due. **Bracken v. Payne and Keller Co.**, 2006-0865, p. 12 (La. App. 1 Cir. 9/5/07), 970 So.2d 582, 591-92. Having found partial merit in the assignments of error before the court, we conclude the appeal raised valid legal issues and is not frivolous. Therefore, damages for frivolous appeal are not warranted.

CONCLUSION

For the reasons assigned, we affirm the trial court judgment in part, vacate the award of attorney's fees, and remand for reassessment of the attorney's fees award consistent with the foregoing. Each party is to bear his own costs of this appeal.

AFFIRMED IN PART; VACATED IN PART; AND REMANDED.