

NINETEENTH JUDICIAL DISTRICT COURT FOR THE PARISH OF EAST BATON
ROUGE

STATE OF LOUISIANA

NO. _____

SECTION ____

BRETT MALONE

VERSUS

LOUISIANA BOARD OF PARDONS

FILED: _____

DEPUTY CLERK

**PETITION FOR PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF AND
OTHER REMEDIES IN ENFORCEMENT OF OPEN MEETINGS LAW**

NOW INTO COURT, through undersigned counsel, comes Plaintiff Brett Malone, who, pursuant to La. R.S. §§ 42:24, 42:25(C), 42:26, and related provisions of the Louisiana Open Meetings Law, bring this summary proceeding against the Louisiana Board of Pardons (“the Board”) for (1) **declaratory judgment** that the Board violated the Open Meetings Law (a) when it acted on September 29, 2023, to convert the docketing of hearings on clemency applications to administrative reviews of those clemency applications and (b) when it acted on September 29, 2023, to enter into a Settlement Agreement purportedly reached between the Board, the Board’s individual members, the Louisiana Department of Public Safety and Corrections, Attorney General Jeff Landry (“the Attorney General”), East Baton Rouge Parish District Attorney Hillar Moore, Caddo Parish District Attorney James Stewart, Jefferson Parish District Attorney Paul Connick, Natchitoches Parish District Attorney Billy Joe Harrington, Rapides Parish District Attorney Phillip Terrell, and DeSoto Parish District Attorney Charles Adams (the six District Attorneys referred to hereafter as “the District Attorneys”) (“the Settlement Agreement”); (2) **enjoining** the Board from acting on September 29, 2023, to ignore the August 9, 2023 directive of Governor John Bel Edwards to conduct hearings on 55 capital clemency applications; and (3) **rendering void** the actions taken by the Board on September 29, 2023, to convert capital clemency hearings

to administrative reviews, to ignore the Governor’s August 9 directive to conduct hearings of 55 clemency applications, and to enter into the Settlement Agreement.

These remedies are required because the Board voted to enter into the Settlement Agreement, which purported to require the Board to convert clemency hearings to administrative reviews and to ignore the lawful directive of the Governor, in a decision reached in violation of the Open Meetings Law because the Board failed to solicit public comment prior to voting to take those actions and because the Board failed to disclose the actions it was voting on prior to that vote.

1.

Plaintiff Brett Malone is a citizen of the State of Louisiana who has publicly expressed his concerns for the proper administration of the State’s clemency procedures for capital inmates. As contained in the allegations below, Mr. Malone has reason to believe that the provisions of the Open Meetings Law have been violated by the Board in its September 29, 2023, meeting, with regard to actions taken by the Board to convert hearings on clemency applications into administrative reviews and to ignore the directive of the Governor to hear 55 clemency applications by capital inmates. The effect of the Board’s action was to deprive the Plaintiff of the opportunity to observe, listen, and comment on the Settlement Agreement. This is sufficient for standing under the Open Meetings Law at La. R.S. § 42:25(C).

2.

Defendant Louisiana Board of Pardons (“the Board”) is a “public body” as that term is defined at La. R.S. § 42:13(3), domiciled in East Baton Rouge Parish, which conducts all of its official business in East Baton Rouge Parish, and specifically held a meeting on September 29, 2023, that is the subject of this action, in East Baton Rouge Parish.

3.

Venue for this action is proper before this Court, because the demands herein arise from decisions made and actions taken by the Board during a meeting conducted in East Baton Rouge Parish on Friday, September 29, 2023. Enforcement of the Open Meetings Law in this Parish is therefore appropriate, and “shall be tried by preference and in a summary manner.” La. R.S. § 42:27.

4.

In June 2023, 56 of the 57 capital inmates on Louisiana’s death row filed applications for clemency (“the capital clemency applicants”), seeking to have their sentences of death commuted to sentences of life in prison. Subsequently, the conviction and sentence of one of the capital clemency applicants was vacated by the United States Fifth Circuit Court of Appeals, *see Neal v. Vannoy*, 78 F.4th 775 (5th Cir. Aug. 23, 2023), leaving 55 capital clemency applicants.

5.

Soon after the capital clemency applications were filed, in June 2023 the Attorney General announced his and his office’s official opposition to the substance of those applications: “‘I oppose clemency for all of these offenders who were given valid death sentences by juries of their peers,’ [Attorney General Jeff] Landry said in a statement. ‘My office will formally oppose their applications.’”¹

6.

Nevertheless, one month later, when his office was approached by the Board seeking a non-advocacy-oriented Attorney General Opinion on a procedural question regarding whether the capital clemency applications could be scheduled for hearings when they were made more than one year after the denial of the applicants’ direct appeals, Attorney General Landry himself signed off on an Attorney General Opinion opining that the Board could not hear the applications that he had already announced he would substantively oppose. *See* A.G. Op. 23-0083 (July 18, 2023).

7.

In response to the Board’s decision to return the clemency applications to the applicants without any action taken on them in reliance on the Attorney General’s Opinion, on July 28, 2023 the capital clemency applicants invoked their right of recourse to the Governor on questions of the timeliness of applications under the Board’s Capital Cases regulations at LAC 22:V.213(B).

8.

¹ *See* James Finn, *Jeff Landry says he’ll fight Louisiana death row prisoners’ clemency pleas*, NOLA.COM, June 13, 2023 (last accessed 10/3/2023). The Attorney General has also publicly advocated for use of hanging and a firing squad to effect the executions of Louisiana death row inmates. *See* Bryn Stole, *AG Jeff Landry jumps back into federal suit over executions, though lethal drugs remain elusive*, NOLA.COM, Aug. 1, 2019 (last accessed 10/3/2023).

Approximately one week later, on August 9, 2023, the Governor issued a directive to the Board to place the then-56 capital clemency applications on its calendar for hearings. He did so thoughtfully and politely: “After thoughtful consideration, I am asking the Board to set these cases for hearing in a manner least disruptive to the non-capital cases currently pending before the Board.” But it was very clearly a directive that the Board hear the clemency applications: “[T]he Louisiana Constitution gives me as Governor and this Board the authority and the duty to consider these applications for individuals already sentenced to death. We should not shirk that obligation. ... I do not take the duties and obligations of the Board lightly. Nor do I take this request, of the effort required to timely and thoroughly hear the applications, lightly. However, given the importance of this issue, I ask the Board to set these cases for hearing in a manner that is least disruptive to the non-capital applications the Board is reviewing.”

9.

Under the Board’s own policies, this was not a request that could be denied by the Board: “The Board will consider recommending to the Governor a reprieve of execution of death sentence upon receipt of a written application in behalf of a condemned felon. Notwithstanding any provision to the contrary by Board policy, in any case in which the death sentence has been imposed, *the Governor may at any time place the case on the agenda and set a hearing for the next scheduled meeting or at a specially called meeting of the Board.*” Board Policy 02-207-POL. Such an application for reprieve specifically “include[s] a recommendation to commute the sentence to life imprisonment.” LAC 22:V.213.G.1; *see also* Board Policy 02-207-POL(B)(6)(a).

10.

Indeed, the Board understood the Governor’s directive for what it was, and took the ministerial act of complying with that directive on August 10, 2023, by setting twenty of the capital clemency applications for hearings on the merits of those applications on a series of hearing dates to commence on October 13, 2023. The Board sent required notices to victims’ family members, District Attorneys, and others required under the clemency laws on August 11, 2023, more than 60 days prior to the first scheduled hearing.

11.

The Board characterized these first 20 hearings as “group 1” of the hearings being set in compliance with the Governor’s August 9 directive, an acknowledgment that the remaining 35 would also be set. Indeed, the Board commenced the acquisition of required materials for the hearings of all 55 capital clemency applications from the Department of Public Safety and Corrections.

12.

Accordingly, in August 2023, the Board was complying with the Governor’s August 9 directive and had either set or was otherwise preparing to set and hold hearings on the 55 capital clemency applications.

13.

That all changed on September 29, 2023, in reaction to actions taken by the Attorney General and the District Attorneys, when the Board purported to make a decision to enter into the Settlement Agreement and to convert the hearings directed by the Governor on the 55 capital clemency applications into administrative reviews of 20 of the applications and the cancelation of any review or hearing for the other 35 applications.

14.

On or about September 12, 2023, East Baton Rouge Parish District Attorney Hillar Moore filed a petition for injunctive relief and other remedies, seeking to enjoin the Board from going forward with hearings of the capital clemency applications in compliance with the Governor’s August 9 directive.

15.

On or about September 20, 2023, the Attorney General and the other District Attorneys filed similar actions, seeking essentially the same relief as in the suit brought by District Attorney Moore. The Attorney General added as defendants the individual members of the Board, Sheryl Ranatza, Tony Marabella, Bonnie Jackson, Curtis Fremin, and Alvin Roché, Jr.; and the Rapides Parish District Attorney added the Louisiana Department of Public Safety and Corrections as a defendant.

16.

The actions filed by the Attorney General and the District Attorneys were docketed in the 19th Judicial District Court as Civil Docket Nos. 737912, 738241, 738255, 738262, 738280, 738281, and 738283, and they were subsequently ordered by Chief Judge Don Johnson of Section 24 of the 19th Judicial District Court to be consolidated before him. They are referred to herein as “the consolidated injunction actions.”

17.

After the District Attorneys and Attorney General brought the consolidated injunction actions, the Board purported to engage J. Arthur Smith, III, to represent it in defense to those actions. With the Board’s approval, on September 26, 2023, Mr. Smith presented to this Court and prepared for filing, among other things, a Motion to Recuse Attorney General, asserting conflicts of interest in the Attorney General’s various capacities with regard to the capital clemency applications and the Board’s setting of hearings for those applications.

18.

That same day, citing to Mr. Smith’s allegations of the Attorney General’s conflict, the Attorney General sent a letter to Mr. Smith informing him that the Attorney General would not authorize Mr. Smith to serve as counsel for the Board—the entity that the Attorney General was suing. Accordingly, due to the control being exercised by the Attorney General over the Board’s defense of the suit that he had brought against it, the Board was unable to pursue its defense of that suit with its initially chosen counsel, including a motion to recuse the Attorney General.

19.

In the place of the Board’s initially chosen counsel, the Attorney General approved as counsel for the Board the law firm of Sher Garner Cahill Richter Klein & Hilbert, L.L.C. (“Sher Garner”), a firm that itself often (indeed, concurrently) represents the Attorney General. *See, e.g., June Med. Servs., LLC v. Landry*, 2022-1042 (La. App. 1 Cir. 8/16/2023), --- So. 3d ---, 2023 WL 5315446 (noting as counsel for the Attorney General James M. Garner and others from the Sher Garner firm, along with Assistant Attorneys General enrolled in the consolidated injunction actions, Emily Andrews, Angelique Freel, and Alexander Reinboth).

20.

Meanwhile, on or about September 26, 2023, nine of the capital clemency applicants filed petitions for intervention into the injunction actions that would subsequently be consolidated.

21.

At a hearing set by Chief Judge Johnson on September 28, 2023, the Attorney General-approved counsel for the Board indicated they would request more time to prepare for a hearing on the merits of the consolidated injunction actions, due to their late entry into the case. Additionally, various District Attorneys and the Assistant Attorneys General indicated they would object to the consolidation that Chief Judge Johnson had indicated he would order. Accordingly, Chief Judge Johnson set for hearing the question of consolidation and the merits of the injunction actions for Tuesday, October 3, 2023.

22.

Just hours after that September 28 hearing, in the afternoon on Thursday, September 28, 2023, the Board purportedly announced a special meeting to take place at 4:00 p.m. on Friday, September 29, 2023, to discuss in executive session six of the seven pending actions. The action brought by District Attorney Moore was omitted from the September 28, 2023 notice.

23.

The September 29 meeting is memorialized on the Board's YouTube channel at <https://www.youtube.com/watch?v=Q4z2F4qWJSQ> (hereafter, "Meeting Livestream"). The below factual allegations regarding the September 29 meeting will include reference to the time-stamp on the Meeting Livestream for various actions taken during that meeting.

24.

At the September 29 meeting, Board member Tony Marabella moved to add the action brought by District Attorney Moore to the list of litigations to be discussed in executive session during the meeting, citing La. R.S. § 42:19(A)(1)(b)(ii)(cc). *See Meeting Livestream*, beginning at 4:48. That motion passed.

25.

Prior to voting on the motion to add the action brought by District Attorney Moore to the list of litigations to be discussed in executive session, the Board Chair asked for public comment.

The capital clemency applicants' counsel, Michael Arata, commenced asking questions regarding the confection of the meeting notice and the addition of the Moore action, but was informed by the Board Chair (at the direction of the Board's counsel from Sher Garner) that Mr. Arata could only make a comment and could not ask the Board questions. Mr. Arata then thanked the Board for its work and its efforts and expressly reserved the right to provide public comment as to any decisions the Board proposed after its executive session.

26.

The Board's agenda and Notice of Intent to Move Into Executive Session for the September 29, 2023, meeting did not list all parties to the pending litigation that the Board agenda noticed would be discussed in executive session, specifically omitting the Board members in their individual capacities, the Department of Public Safety and Corrections, and the nine capital clemency applicants who had intervened into each of the litigations.

27.

The Board voted to go into executive session to discuss the consolidated injunction actions. *See Meeting Livestream*, beginning at 10:17. Neither the Agenda nor the Board during or prior to that vote indicated that the Board would be discussing potential settlement of those actions.

28.

When the Board came out of executive session at the September 29 meeting, Board member Curtis Fremin moved for the Board to approve enabling Board Chair Sheryl Ranatza to enter into a Settlement Agreement that would settle the consolidated injunction actions against the Board and against the individual Board members. *See Meeting Livestream*, beginning at 1:33:22.

29.

No member of the Board disclosed any of the Board actions or decisions that would be required by the Settlement Agreement, or any other terms of the Settlement Agreement, and the Settlement Agreement was not otherwise made available to the public for review or comment prior to the vote.

30.

The Board then voted to approve the Settlement Agreement pursuant to Mr. Fremin's motion, *without* calling for public comment on the motion prior to voting on the motion. *See*

Meeting Livestream, beginning at 1:33:50. Board Chair Sheryl Ranatza announced the results of the vote and said, “We will sign that agreement.” Meeting Livestream, at 1:34:22.

31.

Only after voting to approve Mr. Fremin’s motion to approve the Settlement Agreement did Board Chair Sheryl Ranatza ask for public comment on the action the Board has already taken. *See* Meeting Livestream, at 1:34:23. Only at that point was Mr. Arata allowed to comment on behalf of the capital clemency applicants as to the purported settlement of the claims in the consolidated injunction actions against the Board and the Board’s members—and he was forced to do so without any knowledge of what Board actions that Settlement Agreement purported to require. *See* Meeting Livestream, beginning at 1:34:23.

32.

The terms of the Settlement Agreement were not disclosed at any time at the September 29 meeting.

33.

Three days later, on October 2, 2023, counsel for the Board, at Sher Garner, emailed a copy of the Settlement Agreement to Mr. Arata.

a.

The Settlement Agreement included as defined “Parties” the Attorney General, all of the District Attorneys, the Board, all five of the Board’s members, and the Department of Public Safety and Corrections.

b.

The Settlement Agreement, by its own terms at ¶ 10.0 of that Agreement, would not become effective until the date of execution of the Agreement by these defined “Parties.”

c.

The “executed” Settlement Agreement produced by the Board’s counsel on October 2, 2023, was not executed by Board member Bonnie Jackson or by the Department of Public Safety and Corrections.

d.

Nevertheless, the Settlement Agreement provided that the Attorney General and the District Attorneys would dismiss with prejudice the consolidated injunction actions.

e.

The Settlement Agreement also provided that the Board “will conduct administrative reviews of the [20] clemency applications [scheduled for October 13, November 8, November 13, and November 27, 2023] to determine whether or not to approve the applications for clemency hearings *and will not hold clemency hearings on the applications.*” The Board agreed to not set any clemency hearings until at least 60 days after the corresponding administrative review hearing, meaning that only those capital clemency applications whose October 13 hearings had been converted to administrative reviews would have the possibility of being heard prior to the end of Governor John Bel Edwards’ term.

f.

The Settlement Agreement also provided that the Board would not schedule even an administrative review of any of the other 35 capital clemency applications before December 31, 2023, meaning that none of these 35 capital clemency applications would even receive an administrative review prior to the end of Governor John Bel Edwards’ term.

g.

The Settlement Agreement effectively ended the ability of 50 of the 55 capital clemency applicants to have their clemency applications heard—hearings that Governor John Bel Edwards directed the Board to conduct—before the end of that Governor’s term, a Governor who had publicly announced his intention to clear death row and place capital inmates instead into sentences of life without possibility of parole and to advocate for abolition of the death penalty in Louisiana. All parties understood this to be a unique window for commutation of death sentences to sentences of life in prison, and that the Board’s decision to acquiesce to the demands of the Attorney General and the District Attorneys would effectively halt the Governor’s exercise of his constitutional prerogative to pursue that result.

h.

The Board's decision to enter into the Settlement Agreement was a decision to (1) convert the hearings on the 55 capital clemency applications into administrative reviews of 20 of the applications, and (2) ignore the Governor's directive to conduct hearings on the 55 capital clemency applications.

34.

The Board's vote to approve the Settlement Agreement violated the Open Meetings Law for the following reasons:

a.

The notice of the September 29, 2023, special meeting was ineffective under La. R.S. § 42:19(A)(1)(b)(iii)(aa), as the notice failed to identify all of parties "relative to any pending litigation to be considered at the meeting," as the Board's members as individual defendants, the Department of Public Safety and Corrections, and the nine capital clemency applicants who had intervened into the cases were not included in the notice, even though the motion to approve the settlement agreement expressly included approval of a settlement of the claims against the individual members as well as the claims against the Board itself.

b.

The Board's vote to approve the Settlement Agreement took place without the opportunity for public comment prior to that vote taking place, violating La. R.S. § 42:14(D), which provides, "Except school boards, ... each public body conducting a meeting which is subject to the requirements of R.S. 42:19(A) shall allow a public comment period at any point in the meeting *prior to action on an agenda item upon which a vote is to be taken.*" (Emphasis added).

c.

The Board's vote to approve the Settlement Agreement could not have taken place with effective public comment because the Board did not disclose the provisions of the Settlement Agreement prior to the vote, or at any time during the September 29, 2023,

meeting. Indeed, the Board's counsel did not provide a copy of the settlement agreement to counsel for the applicants until three days later.

d.

The Board's actions to convert the hearing on the 55 capital clemency applications to administrative reviews for 20 of the applications, and to ignore the directive of the Governor to conduct hearings of the 55 capital clemency applications, violated the requirement for public comment prior to the Board's action because it did not disclose that those were the actions it was voting to take prior to the vote.

35.

Pursuant to La. R.S. § 42:26(A)(3), Mr. Malone is entitled to declaratory relief, declaring that the Board violated the Open Meetings Law by (1) acting to enter into the Settlement Agreement, (2) acting to convert the hearings on the 55 capital clemency applications to administrative reviews on 20 of the applications, and (3) acting to ignore the Governor's directive to conduct hearings on the 55 capital clemency applications, all without an opportunity for public comment prior to voting to take those actions, where public comment was not solicited until after the vote had been taken and where those actions were not disclosed before the vote was taken.

36.

Pursuant to La. R.S. § 42:26(A)(2), Mr. Malone is entitled to preliminary and permanent injunctive relief enjoining the Board from converting the hearings on the 55 capital clemency applications to administrative reviews, enjoining the Board from ignoring the directive of the Governor to conduct hearings on the 55 capital clemency applications, and enjoining the Board from taking any actions purportedly required by the Settlement Agreement; *i.e.*, enjoining the Board from taking the actions it took in violation of the Open Meetings Law on September 29, 2023.

37.

Pursuant to La. R.S. § 42:26(A)(4), Mr. Malone is entitled to a judgment rendering the actions taken at the September 29, 2023, meeting—to enter into the Settlement Agreement, to convert the hearings on the 55 capital clemency applications to administrative reviews of 20 of the

hearings, and to ignore the Governor's directive to hear the 55 capital clemency applications—void, as provided in La. R.S. § 42:24.

WHEREFORE, Plaintiff respectfully prays that summary proceedings be conducted by this Court in accordance with the time and other requirements of the Louisiana Code of Civil Procedure applicable to summary proceedings, including the entry of a preliminary injunction at a hearing **set between two and ten days after service**, as follows:

1. This Court hear this request for relief in a summary manner under La. R.S. § 42:27, as it seeks relief under the Open Meetings Law;
2. This Court render declaratory judgment under La. R.S. § 42:26(A)(3) that the Board violated the Open Meetings Law by (1) entering into the Settlement Agreement, (2) converting the hearings on the 55 capital clemency applications to administrative reviews on 20 of the applications, and (3) deciding to ignore the Governor's directive to conduct hearings on the 55 capital clemency applications, all without an opportunity for public comment prior to voting to take those actions, where public comment was not solicited until after the vote had been taken and where the contents of those decisions were not disclosed before the vote was taken;
3. This Court issue preliminary and permanent injunctive relief under La. R.S. § 42:26(A)(2) enjoining the Board from converting the hearings on the 55 capital clemency applications to administrative reviews, enjoining the Board from ignoring the directive of the Governor to conduct hearings on the 55 capital clemency applications, and enjoining the Board from taking any actions purportedly required by the Settlement Agreement; *i.e.*, enjoining the Board from taking the actions it took in violation of the Open Meetings Law on September 29, 2023;
4. This Court enter judgment under La. R.S. § 42:26(A)(4) rendering the actions taken at the Board's September 29, 2023, meeting—to enter into the Settlement Agreement, to convert the hearings on the 55 capital clemency applications to administrative reviews of 20 of the hearings, and to ignore the Governor's directive to hear the 55 capital clemency applications—void, as provided in La. R.S. § 42:24; and

5. Plaintiff be awarded attorneys' fees and costs as provided under La. R.S. § 42:26(C), along with all other relief provided by law.

Respectfully submitted,

Promise of Justice Initiative



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