

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 CA 2467

BOURGET'S OF THE SOUTH, L.L.C.

VS.

LOUISIANA STATE RECREATIONAL AND USED MOTOR VEHICLE
COMMISSION

JUDGMENT RENDERED: NOV 21 2007

ON APPEAL FROM THE
NINETEENTH JUDICIAL DISTRICT COURT
DOCKET NUMBER 541,552, DIVISION O
PARISH OF EAST BATON ROUGE, STATE OF LOUISIANA

HONORABLE WILSON FIELDS, JUDGE

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ATTORNEYS FOR AMICUS CURIAE
LOUISIANA RECREATIONAL VEHICLE
ASSOCIATION, INC.

BEFORE: GAIDRY, McDONALD, AND McCLENDON, JJ.

McClelland, J. Concurs in part and agrees in part and assigns reasons.

McDONALD, J.

The Louisiana Recreational and Used Motor Vehicle Commission (Commission) appeals the judgment of the district court reversing the Commission's ruling and rendering judgment in favor of Bourget's of the South, L.L.C. (Bourget's). For the following reasons, we reverse the judgment of the district court and reinstate the ruling of the Commission.

BACKGROUND

Prior to 2005, Bourget's applied for and received a license from the Commission authorizing it to sell new motorcycles. The license, which was renewed for the 2005 calendar year on January 3, 2005, also authorized Bourget's to sell various used vehicles, including used motorcycles, motor homes, and trailers.

On September 9 and September 17, 2005, Bourget's entered into two contracts to provide the Federal Emergency Management Agency (FEMA) a total of 279 travel trailers, which were to be used to house people displaced by Hurricane Katrina. To fulfill that contract, Bourget's purchased numerous new travel trailers and other recreational vehicles from dealers in various states and Canada. Bourget's then sold the new trailers to FEMA.

On October 12, 2005, one of Bourget's business competitors filed a complaint with the Commission that Bourget's was selling new recreational vehicles without a license. Bourget's then applied to the Commission for a license to sell new motor homes and trailers on October 17, 2005, and the Commission issued the new license the next day. This license authorized Bourget's to sell new trailers, motor homes, and motorcycles, as well as various used motor vehicles. Although it was not issued until October 18, 2005, the license stated that its effective date was January 1, 2005.

Meanwhile, the Commission continued its investigation into the complaint that had been filed against Bourget's, ultimately determining that Bourget's had violated LSA-R.S. 32:774(A)(1) by selling 211 new travel trailers to FEMA over a period of 23 days without a license.¹ The Commission conducted an administrative hearing to address these alleged violations on January 17, 2006, after which the Commission ruled against Bourget's. The Commission voted to assess the maximum allowable fine of \$2,000.00 per day for each of the 23 days Bourget's had allegedly operated without a license, for a total fine of \$46,000.00. The Commission further ordered Bourget's to pay all hearing costs, including attorney fees, court reporter fees, and subpoena fees. A judgment in accordance with that ruling was signed by the Commission's hearing chairman on February 10, 2006.

Bourget's properly applied for judicial review of the Commission's ruling in accordance with LSA-R.S. 49:964. In addition to challenging the Commission's ruling, Bourget's requested that the Commission be assessed with all costs of the appeal and reasonable attorney fees. After a hearing, the district court reversed the Commission's ruling and rendered judgment in favor of Bourget's. In so ruling, the district court noted that the license issued to Bourget's on October 18, 2005, listed its effective date as January 1, 2005. Therefore, the district court concluded that "on its face," the license appeared to be retroactive, and Bourget's was not required to pay the fine or costs assessed by the Commission. The district court also denied Bourget's requests for costs and attorney fees. The Commission filed a motion for new trial, which was denied by the district court. This appeal by the Commission followed. Bourget's has answered the appeal, requesting costs and attorney fees in accordance with LSA-R.S. 49:965.1.

¹ The Commission contended that Bourget's had committed other violations as well; however, those additional charges were withdrawn prior to the hearing. Thus, the only violation addressed by the Commission was whether Bourget's was properly licensed at the relevant time.

MOTIONS

We first address two motions filed in this court by Bourget's. The first motion seeks to supplement the record with the transcript of a meeting of the Commission that took place after the district court had ruled in this matter. In this meeting, the Commission apparently heard comments from the public and then voted to appeal the judgment of the district court to this court. The second motion seeks to dismiss the Commission's appeal based upon the participation of one of the members of the Commission in the discussion at that meeting. Specifically, Bourget's contends that Commissioner Courville participated in that meeting despite having recused himself from participating in the earlier administrative hearing in which the charges against Bourget's had been addressed. According to Bourget's, Commissioner Courville's participation in the meeting and the subsequent vote to appeal renders the appeal defective and an absolute nullity.

As a preliminary matter, we note that the transcript with which Bourget's seeks to supplement the record is incomplete, as it contains only the odd-numbered pages of the transcript. More importantly, however, Bourget's has not cited any authority, nor is this court aware of any, that would require a member who had recused himself from participation in an administrative hearing to remain recused from participation in all subsequent proceedings that might involve the same matter, particularly when, as here, such proceedings are merely administrative in nature. Furthermore, if Bourget's wished to prevent Commissioner Courville from participating in the vote on the issue of the appeal, it could have requested that he recuse himself again. Accordingly, the motions to supplement the record and dismiss the appeal are denied.²

² In addition, we note that Bourget's has not cited any authority that requires the Commission to conduct a vote on the issue of whether to appeal an unfavorable judicial decision. Moreover, even if such authority were to exist, we note that it is undisputed that Commissioner Courville did not cast the deciding vote; indeed, the parties acknowledge that the vote to appeal was unanimous.

DISCUSSION

When reviewing an administrative final decision in an adjudication proceeding, the district court functions as an appellate court. **Maraist v. Alton Ochsner Medical Foundation**, 2002-2677 (La. App. 1 Cir. 5/26/04), 879 So.2d 815, 817. Once a final judgment is rendered by the district court, an aggrieved party may seek review of the judgment by appeal to the appropriate court of appeal. LSA-R.S. 49:965. On review of the district court's judgment, no deference is owed by the court of appeal to the factual findings or legal conclusions of the district court, just as no deference is owed by the Louisiana Supreme Court to factual findings or legal conclusions of the court of appeal. **Maraist**, 879 So.2d at 817.

Louisiana Revised Statute 49:964(G) provides:

The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
- (6) Not supported and sustainable by a preponderance of evidence as determined by the reviewing court. In the application of this rule, the court shall make its own determination and conclusions of fact by a preponderance of evidence based upon its own evaluation of the record reviewed in its entirety upon judicial review. In the application of this rule, where the agency has the opportunity to judge the credibility of witnesses by first-hand observation of demeanor on the witness stand and the reviewing court does not, due regard shall be given to the agency's determination of credibility issues.

A state agency is charged with interpreting its own rules and regulations, and great deference must be given to the agency's interpretation. **Oakville Community Action Group v. Louisiana Department of Environmental Quality**, 2005-1365, 2005-1366 (La. App. 1 Cir. 5/5/06), 935 So.2d 175, 186. A conclusion of a public body is "capricious" when the conclusion has no substantial evidence to support it or the conclusion is contrary to the substantiated competent evidence. The word "arbitrary" implies a disregard of evidence or of the proper weight thereof. **Bailey v. Department of Public Safety and Corrections**, 2005-2474 (La. App. 1 Cir. 12/6/06), 951 So.2d 234, 243.

On appeal, the Commission contends that the district court failed to give the proper deference to the Commission's interpretation of its own rules. At the administrative hearing, Jack Torrance, the Executive Director of the Commission, testified that the effective date of any license was the date on which it was issued. Thus, he opined that the license issued to Bourget's on October 18, 2005, was effective on that date, despite the fact that the license itself stated that it was effective on January 1, 2005. At least partially in reliance upon this testimony, the Commission ruled against Bourget's.

Although the Commission's interpretation of its licensing rules is entitled to great deference, we believe that this interpretation is contrary to the explicit terms of the license, which had been drafted by the Commission. By its terms, the license was effective on January 1, 2005, despite having been issued on October 18, 2005, and the Commission has failed to cite any rule or regulation supporting its position that a license may not be effective retroactively. Thus, we cannot agree with the Commission's interpretation of the effective date of the license, because such an interpretation would render meaningless the explicit terms of the license.

Nevertheless, in applying the standard of review provided by LSA-R.S. 49:964, we are constrained to find that the Commission's ruling against Bourget's

was not arbitrary, capricious, or characterized by an abuse of discretion. At the time relevant to this matter, LSA-R.S. 32:774(A)(1)³ provided:

It shall be unlawful and shall constitute a misdemeanor for any person, firm, association, corporation, limited liability company, or trust to engage in business as, or serve in the capacity of, or act as a used motor vehicle dealer or used motor vehicle salesman, or as an all-terrain vehicle dealer, trailer, motor home, used bus, recreational vehicle, travel trailer, used fire truck, used wrecker, used conversion vehicle, used hearse, used ambulance, or marine dealer in this state without first obtaining a license therefore as provided in this Section. (emphasis added)

It is undisputed in this matter that, regardless of the stated effective date on the license Bourget's received, Bourget's did not apply for or obtain a license authorizing it to sell new recreational vehicles until after it had already begun selling the vehicles to FEMA. Clearly, Bourget's could not have obtained a license within the meaning of the statute before it ever applied for one. Therefore, the Commission properly found Bourget's to be in violation of LSA-R.S. 32:774 for acting as a recreational vehicle dealer without first obtaining a license. Moreover, LSA-R.S. 32:780⁴ authorized the Commission to impose a civil penalty against Bourget's for its violation of the above provision, not to exceed \$2,000.00 for each of the 23 days the violation continued, for a total fine of \$46,000.00. Accordingly, we find no error in the ruling of the Commission and conclude that the district court erred in reversing that ruling.⁵

In its brief to this court, Bourget's argues that it was not in violation of the licensing requirements because the Commission had suspended those requirements

³ In 2006, LSA-R.S. 32:774 was repealed and reenacted as LSA-R.S. 32:811.

⁴ In 2006, LSA-R.S. 32:780 was repealed and reenacted as LSA-R.S. 32:788.

⁵ Although we find that Bourget's acted improperly under the specific facts of this case, we note that the Commission has in the past issued licenses with effective dates that pre-date the date of issuance. Indeed, Bourget's original license, for which it had applied in November 2004, was issued on January 3, 2005, with an effective date of January 1, 2005. Although Bourget's did apply for that license prior to its stated issue and effective dates, the Commission's practice of issuing its licenses with retroactive effective dates could be in violation of LSA-R.S. 32:811 (former LSA-R.S. 32:774), and we urge the Commission to address the issue. However, as Bourget's had not even applied for a license to sell new recreational vehicles prior to actually acting as dealer of such vehicles, we do not address the broader issue at this time.

in the wake of Hurricanes Katrina and Rita. Specifically, Bourget's relies on a memorandum issued by the Commission, which stated:

Due to the urgent need to locate temporary housing for displaced victims of Hurricanes Katrina and Rita and in following with the Governor's Executive Orders with regard for the relief of these victims, the Commission will temporarily suspend the licensing requirements of LSA R.S. 32:774(J)(1). For recreational vehicle dealers who are attempting to meet the needs of those displaced victims by providing recreational vehicles to FEMA, any licensed recreational vehicle dealer who is attempting to provide recreational vehicles to FEMA will not be required to furnish a franchise agreement as a condition to its license to sell a particular line of existing manufacturers. This suspension will be lifted once the need for temporary housing has been met, and notice will be forwarded to dealers to insure that proper franchise agreements are on file as a condition of doing business with a manufacturer. For other sales, such as sales to the general public, the recreational vehicle dealer must have the appropriate manufacturer's franchise agreements.

Bourget's reliance on this memorandum is misplaced.

The memorandum suspended only the requirements of LSA-R.S. 32:774(J)(1), which provided, in pertinent part:

Applications for license as a marine dealer, new motorcycle, trailer, motor home, recreational vehicle, travel trailer, or all-terrain vehicle dealer must, in addition to the foregoing, also be accompanied by the filing with the commission of any bona fide contract or franchise in effect between the applicant and a manufacturer or distributor of the marine products, new and unused motorcycles, trailer, motor homes, recreational vehicles, travel trailers, or all-terrain vehicle, or vehicles proposed to be dealt in

Thus, the memorandum only suspended the requirement that an applicant must submit a contract or franchise agreement as a prerequisite for the issuance of a license. It did not, however, suspend the requirement of actually applying for the license or any of the other requirements enumerated in the statute. Accordingly, we find no merit in this argument.

Bourget's further contends that the Governor's Executive Orders issued in the wake of Hurricanes Katrina and Rita, as well as the Louisiana Legislature's subsequent ratification of those orders with the passage of LSA-R.S. 9:5821, *et seq.* (collectively, the emergency declarations), operated to suspend the

Commission's licensing requirements. A review of these emergency declarations demonstrates that they specifically refer to the suspension and extension of prescriptive and preemptive periods and other legal deadlines. Nothing in the declarations serves to suspend or otherwise alter the Commission's licensing requirements. This argument is without merit.

Bourget's next contends that the Commission erred in not following the recommendation and opinion of its own legal expert who concluded that Bourget's had not violated the licensing requirements. At the start of the investigation, the Commission requested an opinion concerning the licensing issues from Herschel Adcock, an attorney who had previously performed some work for the Commission. Mr. Adcock researched the issues and sent a letter to the Commission concluding that he did not believe that Bourget's was in violation of the law by selling the vehicles to FEMA.

In reaching this conclusion, Mr. Adcock cited LSA-R.S. 32:774(J)(4), which provided:

No person, firm, association, corporation, limited liability company, or trust can sell, offer or attempt to negotiate a sale, or make deliveries of five or more new and unused motorcycles, trailers, motor homes, recreational vehicles, travel trailers, or all-terrain vehicles in, or into, this state, other than by common or contract carrier, unless licensed by this commission.

Mr. Adcock opined that the statutory scheme was designed to prohibit the sale of the listed vehicles at retail to the general public. Thus, he concluded that, because the sale to FEMA was not a sale at retail to the general public and delivery of the units was made by "common or contract carrier," the transaction between Bourget's and FEMA did not violate the statute.

As a preliminary matter, we note that Mr. Adcock did not testify at the hearing before the Commission and was never admitted as a "legal expert" in these proceedings. Secondly, even if Mr. Adcock had so testified, the Commission was

not required to credit his opinion to the preclusion of its own judgment. More importantly, however, we cannot agree with Mr. Adcock's interpretation of the statute.

The starting point for the interpretation of any statute is the language of the statute itself. **Burnette v. Stalder**, 2000-2167 (La. 6/29/01), 789 So.2d 573, 577. A simple reading of the statute demonstrates that the language of the provision is not limited to sales at retail or sales to the general public. Rather, it is a general prohibition of the sale or delivery of certain vehicles without a license. Accordingly, we find no merit in this argument.

Finally, Bourget's has answered the Commission's appeal, seeking an award of attorney fees and costs in accordance with LSA-R.S. 49:965.1, which authorizes such an award to a small business that has prevailed in its petition for judicial review of a final decision in an adjudication proceeding. Because we have reinstated the ruling of the Commission, Bourget's is not entitled to an award pursuant to LSA-R.S. 49:965.1.

CONCLUSION

For the foregoing reasons, we reverse the judgment of the district court and reinstate the ruling of the Louisiana Recreational and Used Motor Vehicle Commission. All costs of this appeal are assessed to Bourget's of the South, L.L.C.

MOTIONS TO SUPPLEMENT RECORD AND TO DISMISS APPEAL DENIED; JUDGMENT REVERSED AND RULING OF COMMISSION REINSTATED.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 CA 2467

BOURGET'S OF THE SOUTH, L.L.C.

VERSUS

**LOUISIANA STATE RECREATIONAL AND USED MOTOR
VEHICLE COMMISSION**

McCLENDON, J., agrees in part, concurs in part and assigns reasons.

I concur with the result reached by the majority regarding the denial of Bourget's motion to supplement the record. In all other respects, I agree with the opinion.