

CAUSE NO. D-1-GN-18-000441

HEATHER KUTYBA,	§	IN THE DISTRICT COURT OF
	§	
Plaintiff,	§	
	§	
v.	§	TRAVIS COUNTY, TEXAS
	§	
TEXAS STATE BOARD OF	§	
VETERINARY MEDICAL EXAMINERS,	§	<u>98th</u> JUDICIAL DISTRICT COURT
	§	
Defendant.	§	

Plaintiff Heather Kutymba's Amended Writ of Mandamus
and Original Petition

1. Plaintiff Heather Kutymba files this Amended Writ of Mandamus and Original Petition and asks the Court to order the Texas State Board of Veterinary Medical Examiners (the "Board") to comply with the clear requirements of the Texas Administrative Code.

2. There have been gross irregularities in the handling of Ms. Kutymba's complaint to the Texas State Board of Veterinary Medical Examiners.

3. Among others, the Board has a duty to comply with requirements of the Texas Administrative Code: the "Board investigations of complaints alleging substandard care by a Specialist in his/her area of specialty *will include* consultations with one or more Specialists licensed by the Board practicing the same specialty on the species involved in the complaint." 22 Tex. Admin. Code § 573.23.

4. Ms. Kutymba has no other adequate remedy at law. Mandamus is proper.

5. Additionally or in the alternative, Ms. Kutumba seeks judicial review of the letter from the Board, dated September 21, 2018, wherein the Board stated that “[n]o additional investigation will be initiated” as to Ms. Kutumba’s complaint, and dismissed the administrative appeal.

6. The Board’s decision to dismiss her appeal was arbitrary and capricious. Under established law, when an agency does not follow the clear, unambiguous language of its own regulation, a court will reverse its action as arbitrary and capricious.

I. Discovery Control Plan

7. Ms. Kutumba intends to conduct Level 2 discovery under TRCP 190.3.

II. Parties

8. Plaintiff Heather Kutumba, an individual, lives in Harris County, Texas.

9. Defendant Texas State Board of Veterinary Medical Examiners is a governmental agency with its office in Austin, Texas and may be served with process by service of citation upon its Executive Director John M. Helenberg at 333 Guadalupe, Tower III, Suite 3-810 in Austin, Texas 78701-3942.

III. Jurisdiction and Venue

10. This Court has jurisdiction based on its power to hear a petition for writ of mandamus where a public board has failed to perform a ministerial duty.

11. Venue lies in Travis County, Texas because it is where all or a substantial part of the events or omissions giving rise to this Petition for Writ of Mandamus occurred and also where the principle office of the Board is located.

12. Ms. Kutyba asks this Court to issue a writ of mandamus and order the Board to comply with the aforementioned provision of the Tex. and Administrative Code.

13. Ms. Kutyba seeks non-monetary relief under TRCP 47 and demands all other relief to which she is entitled.

IV. Facts

14. On February 17, 2016, Ms. Kutyba filed a complaint with the Board relating to a veterinarian licensed by the Board, assigned case number CP16-230 (the “Kutyba Complaint”). The Kutyba Complaint involved an allegation of mistreatment and death of Ms. Kutyba’s horse, under the care of Dr. Ashlee Watts. For more than 700 days, the Kutyba Complaint languished.

15. On February 24, 2016, the Board issued a partial schedule for the Kutyba Complaint. The schedule lists five procedural “phases” that the Board “shall” comply with and includes blanks next to each step: the investigative process (phase 1); the review process (phase 2); informal conference (phase 3); final agreed order (phase 4); and a hearing set at the State Office of Administrative Hearings (phase 5). Of these, at a minimum, the first four phases were “under the control of the [B]oard.” Tex. Occup. Code § 801.206(a). For the Kutyba Complaint, the Board only established a date of February 24, 2016 for Phase 1 of the complaint process. The Board never listed any dates in the blank spaces associated with the remaining four phases.

16. Nevertheless, the schedule includes estimates for how long each phase will take. For example, the Board estimates phase 1 will take 3-5 months; phase 2, 1-3 months; phase 3, 1-5 months; phase 4, 1-5 months; and phase 5, 1-18 months.

17. Using the February 24, 2016 date set by the Board for Phase 1 and then applying the longest estimate for each phase, from start to finish, the investigative process associated with the Kutyba Complaint (phase 1) “shall” have been complete by July 24, 2016; the review process (phase 2) by October 24, 2016; the informal conference (phase 3) by March 24, 2017; and the final agreed order (phrase 4) by August 24, 2017. Any challenge to the final agreed order before the State Office of Administrative Hearings (phase 5) would be well underway.

18. Instead, the Board repeatedly communicated with Ms. Kutyba that the case was not moving forward at an appropriate pace. For instance, on February 24, 2016, the Board advised: “An investigation will proceed in an effort to establish the facts related to your complaint.”

19. On April 5, 2016, the Board advised the Kutyba Complaint “is still open and being processed.” This happened again on May 24, 2016, on July 12, 2016, on August 30, 2016, on October 18, 2016, and on January 25, 2017.

20. On March 1, 2017, a Board investigator informed Ms. Kutyba by email: “Your case is currently being reviewed by our medical reviewers. I hope that we will have a decision in the next day or two.... I’m sorry that this process has taken longer than expected.” The Board did not reach a decision in the “next day or two,”

and on March 14, 2017, the Board once again advised the Kutyba Complaint “is still open and being processed.”

21. On March 28, 2017, Ms. Kutyba testified during citizen comments at the public Board meeting and implored the Board to act on the Kutyba Complaint.

22. On April 6, 2017, Ms. Kutyba testified before the Texas Senate Committee on Agriculture, Water, & Rural Affairs’ public hearing on Senate Bill 319, relating to the continuation and functions of the Board. The Board’s then-Executive Director was present. Ms. Kutyba testified about the delay in resolving the Kutyba Complaint, which by then had been languishing for more than 390 days.

23. On May 23, 2017, the Board advised the Kutyba Complaint “is still open and being processed.”

24. On June 20, 2017, Ms. Kutyba emailed Senator Kirk Watson, a member of the Texas Sunset Commission Advisory Panel during the Board’s review cycle, about the delays in resolving the Kutyba Complaint. His staff followed up with Ms. Kutyba by email and phone.

25. On July 11, 2017, the Board again advised the Kutyba Complaint “is still open and being processed.” On July 21, 2017, Ms. Kutyba met with her Texas state representative, Dr. Tom Oliverson, regarding the delays in resolving the Kutyba Complaint. On July 27, 2017, Blake Roach from the Texas Governor’s office called Ms. Kutyba to discuss the delays in resolving the Kutyba Complaint. On August, 3, 2017, after Ms. Kutyba inquired with the Board about the status of the Kutyba Complaint and expressed concern about the Board’s delay, the Board’s

General Counsel called Ms. Kutyba. The Board, through its General Counsel, gave no reason for the delay and refused to establish any timeline by which the Kutyba Complaint would proceed. During this discussion, the General Counsel acknowledged that Rep. Oliverson had contacted the agency on Ms. Kutyba's behalf. The Kutyba Complaint continued to languish.

26. On October 10, 2017, Ms. Kutyba testified at the public Board meeting and again implored the Board to act on the Kutyba Complaint. Ms. Kutyba's testimony and the presence of these state representatives apparently had no impact because on October 17, 2017, the Board once again advised the Kutyba Complaint "is still open and being processed." Under the Board's "Compact With Texans" available on its website, the Board states as its objective, "The average resolution time for resolving complaints against veterinarians will be 140 days or less." In practice, according to its enforcement statistics, the Board resolves complaints within 225 days.

27. On January 25, 2018, Ms. Kutyba sought mandamus relief for the languishing complaint. Then in April 2018, the Board dismissed the Kutyba Complaint.

28. The April 2018 letter says that "[t]wo board members, who are both veterinarians, reviewed and evaluated your complaint, Dr. Watt's response to it, and other documentation obtained during the investigation.... Since the reviewers failed to identify any violation of the Veterinary Licensing Act or the Rules of

Professional Conduct by Dr. Ashlee Watts, this case will be closed and no further inquires will be conducted.”

29. The two veterinarians that reviewed the Kutya Complaint about Dr. Ashlee Watts were not specialists licensed in the same specialty on the same species, as required by the rule. Ms. Kutya knows this to be true because the letter stated that the reviewers were board members, and no board member at the time was an appropriate specialist.

30. The Kutya Complaint failed to complete the other phases of the process—because the complaint was dismissed, she never had an informal conference, and never had a hearing before SOAH.

31. Ms. Kutya sought to understand the procedures and review process used by Board, but to no avail. The process has been secretive and lacked transparency.

32. Ms. Kutya appealed the April 2018 dismissal of her complaint pursuant to Rule 575.281.

33. Ms. Kutya raised several issues in her appeal, such as the failure by Dr. Watts to maintain adequate medical records; Dr. Watt’s performance of unnecessary treatment; and Dr. Watt’s holding herself out to be an orthopedic specialist but providing an inaccurate diagnosis of the horse.

34. The appeal was dismissed on September 21, 2018, and Ms. Kutya has exhausted her administrative remedies and her case is ripe for judicial review.

V. Causes of Action

Count 1: Writ of Mandamus

35. Texas law authorizes a trial court to grant mandamus relief to compel a public body to either perform a ministerial duty or to correct a clear abuse of discretion. *See Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992). To qualify for mandamus relief, a party must establish that (1) a public body failed to perform a ministerial duty or committed a clear abuse of discretion; and (2) there is no adequate remedy at law. *See Republican Party v. Dietz*, 940 S.W.2d 86, 88 (Tex. 1997) (orig. proceeding).

36. An act is ministerial, or nondiscretionary, when “the law clearly spells out the duty to be performed with sufficient certainty that nothing is left to the exercise of discretion.” *See Anderson*, 806 S.W.2d at 793.

37. When the public body has a legal duty to perform a nondiscretionary act, a demand for performance of that act has been made, and the official or body refused to perform, a party is entitled to mandamus relief against the official or body. *See id.*; *Sheppard v. Thomas*, 101 S.W.3d 577, 581 (Tex. App.—Houston [1st Dist.] 2003, pet. denied).

38. Under Texas law, the “Board investigations of complaints alleging substandard care by a Specialist in his/her area of specialty *will include* consultations with one or more Specialists licensed by the Board practicing the same specialty on the species involved in the complaint.” 22 Tex. Admin. Code § 573.23.

39. The Board has violated this duty. The Board failed to have Ms. Kutumba's complaint reviewed by the appropriate specialist.

40. Here mandamus is proper because Ms. Kutumba has no other remedy at law to ensure that her Complaint achieves the proper review.

41. Ms. Kutumba asks the Court to issue a writ of mandamus that requires the Board to "consult[] with one or more Specialists licensed by the Board practicing the same specialty on the species involved in the complaint."

Count 2: Judicial Review of Arbitrary and Capricious Agency Action

42. In the alternative, Ms. Kutumba has exhausted her administrative remedies and appeals from the board's denial of her administrative appeal. She appeals the administrative agency decision, Tex. Government Code Sec. 2001.176.

43. Specifically, the Board abused its discretion in not consulting with a specialist in the review of Ms. Kutumba's complaint. Because this is in violation of the agency's own rules, it is arbitrary and capricious.

44. This Court should remand the case back to the Board to undertake review of the Complaint consistent with proper procedures.

VII. Relief Requested

Ms. Kutumba respectfully asks this Court to (1) enter a writ of mandamus ordering the Board to follow the required procedures under 22 Tex. Admin. Code § 573.23; and/or (2) to remand the case back to the agency to comply with its own procedures under that provision; or (3) to the extent allowed by the law, to award

pre-judgment and post-judgment interest, costs, attorney's fees, and all other appropriate relief.

Date: October 19, 2018

Respectfully submitted,

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