

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,	§	98TH JUDICIAL DISTRICT COURT
	§	
Defendant.	§	

Plaintiff Heather Kutumba’s Motion for Summary Judgment

Plaintiff Heather Kutumba files this Motion for Summary Judgment under TRCP 166a and asks the Court to hold as a matter of law that the Texas State Board of Veterinary Medical Examiners failed to comply with the clear requirements of the Texas Occupations Code. Ms. Kutumba asks the Court to order the Board to (1) resolve the Kutumba Complaint within 30 days or other time period the Court concludes satisfies the legislature’s mandate of timeliness, or (2) establish a complete schedule for conducting each phase of the complaint process.

I. Introduction

Under the Texas Occupations Code, the Texas State Board of Veterinary Medical Examiners (the “Board”) “*shall*: (1) dispose of each complaint in a timely manner, and (2) establish a schedule for conducting each phase of the complaint process that is under the control of the board not later than the 30th day after the date the board receives the complaint.” Tex. Occup. Code § 801.206(a) (emphasis added). More than two years ago, Ms. Kutumba filed a complaint with the Board against a veterinarian whose treatment of Ms. Kutumba’s horse caused the young filly’s physical condition to rapidly deteriorate (the “Kutumba Complaint”). In those more than two years, the Board has not minimally complied with the requirements of the Texas Occupations Code: The Board has allowed the Kutumba Complaint to languish at an early phase of

the complaint process; and not established a schedule for each of the phases of the complaint process under its control.

Because the Board has shown no effort to act on its own, Ms. Kutyba asks this Court to intervene and require the Board to act. Ms. Kutyba asks this Court to enter summary judgment in her favor, issue a writ of mandamus, and order the Board to comply with Tex. Occup. Code § 801.206(a)'s requirements either by (1) disposing of the Kutyba Complaint within 30 days or other time period the Court concludes satisfies the legislature's mandate of timeliness and/or (2) establishing a complete schedule for conducting each phase of the complaint process.

II. Summary Judgment Evidence

Exhibit	Description
1	4/11/18 Affidavit of Heather Kutyba
2	Ms. Kutyba's 2/17/16 complaint to the Board (attachments omitted)
3	2/24/16 letter from the Board to Ms. Kutyba enclosing schedule
4	4/5/16 letter from the Board to Ms. Kutyba
5	5/24/16 letter from the Board to Ms. Kutyba
6	7/12/16 letter from the Board to Ms. Kutyba
7	8/30/16 letter from the Board to Ms. Kutyba
8	10/18/16 letter from the Board to Ms. Kutyba
9	12/6/16 letter from the Board to Ms. Kutyba
10	1/25/17 letter from the Board to Ms. Kutyba
11	1/27/17 email from the Board's Director of Enforcement Matthew West to Ms. Kutyba
12	3/1/17 email from Board investigator Kandace Van Vlerah to Ms. Kutyba

Exhibit	Description
13	3/14/17 letter from the Board to Ms. Kutyba
14	5/23/17 letter from the Board to Ms. Kutyba
15	6/16/17 email from Board investigator Kandace Van Vlerah to Ms. Kutyba
16	6/20/17 emails between Ms. Kutyba and Sen. Watson’s office
17	7/11/17 letter from the Board to Ms. Kutyba
18	10/17/17 letter from the Board to Ms. Kutyba
19	2/6/18 letter from the Board to Ms. Kutyba
20	3/27/18 letter from the Board to Ms. Kutyba
21	Compact with Texans (as of Jan. 18, 2018)
22	Compact with Texans (as of Apr. 10, 2018)
23	FY 2017 Board enforcement statistics

III. Factual Background

1. Ms. Kutyba Files a Complaint, and the Board Enters an Incomplete Schedule

On February 17, 2016, Ms. Kutyba filed a complaint with the Board relating to a veterinarian licensed by the Board. X-2. On February 24, 2016, the Board initiated an investigation, assigned the Kutyba Complaint case number CP16-230, and issued a schedule for the Complaint. X-3. The schedule was incomplete. *See id.*

As Exhibit 3 shows, 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). *See X-3.* For phase 1, the

Board established a date of February 24, 2016. X-3. The Board did not list any dates in the blank spaces associated with the remaining four phases. *Id.*

Nevertheless, the schedule includes estimates for how long each phase will take. *Id.* 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. *Id.* 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. Based on the Board’s estimates, any challenge to the final agreed order before the State Office of Administrative Hearings (phase 5) would be well underway.

2. The Board Allows the Kutyba Complaint to Languish

The Board repeatedly communicated with Ms. Kutyba that no progress was being made on her complaint. On February 24, 2016, the Board advised: “An investigation will proceed in an effort to establish the facts related to your complaint.” X-3. On April 5, May 24, July 12, August 30, October 18, and December 6, 2016, the Board repetitively advised the Kutyba Complaint “is still open and being processed,” but still did not set a schedule. X-4 to X-9. On January 25, 2017, the Board once more advised the Kutyba Complaint “is still open and being processed.” X-10. On January 27, 2017, the Board’s Director of Enforcement informed Ms. Kutyba that her Complaint was “currently awaiting medical review.... Once the case goes through medical review, a determination will be made if there was any violation of the Act or Rules. At that point, you will be notified of your case status.” X-11.

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.” X-12. But the Board did not reach a decision in the “next day or two,” *id.*, and on March 14, 2017, the Board once again advised the Kutyba Complaint “is still open and being processed.” X-13. Still, no schedule was set.

3. Ms. Kutyba Speaks Out to the Board, Legislature, and Public Officials, But the Board Still Takes No Action

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. X-1 at ¶ 7. 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. *Id.* at ¶ 8. The Board’s then-Executive Director was present. *Id.* Ms. Kutyba testified about the delay in resolving the Kutyba Complaint, which by then had been languishing for more than 390 days. *Id.*

Despite these efforts, on May 23, 2017, the Board advised the Kutyba Complaint “is still open and being processed” and still did not establish a schedule. X-14. On June 16, 2017, a Board investigator informed Ms. Kutyba by email that the Board was “in the process of finding another reviewer.” X-15.

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. X-16. His staff followed up with Ms. Kutyba by email and phone. *Id.*; X-1 at ¶ 9. On July 11, 2017, the Board again advised the Kutyba Complaint “is still open and being processed,” but did not set a schedule. X-17.

On July 21, 2017, Ms. Kutyba met with her Texas state representative, Dr. Tom Oliverson, regarding the delays in resolving the Kutyba Complaint. X-1 at ¶ 10. On July 27, 2017, Blake Roach from the Texas Governor’s office called Ms. Kutyba to discuss the delays in

resolving the Kutyba Complaint. *Id.* 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. *Id.* at ¶ 11. 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. *Id.* During this discussion, the General Counsel acknowledged that Rep. Oliverson had contacted the agency on Ms. Kutyba's behalf. *Id.*

When the Kutyba Complaint continued to languish, on October 10, 2017, Ms. Kutyba testified at the public Board meeting and again implored the Board to act on the Kutyba Complaint. *Id.* at ¶ 7. Representatives from Governor Abbott's and Senator Watson's office were in attendance. *Id.* 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" and still did not set a schedule. X-18. After Ms. Kutyba filed this lawsuit, the Board continued to advise her that her complaint "is still being open and being processed by this Board." X-19, X-20.

4. After More than 700 Days Without a Decision, Ms. Kutyba Files a Lawsuit to Seek Mandamus Relief

Under the Board's "Compact With Texans" available on its website before Ms. Kutyba filed suit, the Board stated as its objective, "The average resolution time for resolving complaints against veterinarians will be 140 days or less." X-21. After Ms. Kutyba filed this mandamus suit, the Board back-pedaled and changed the statement to read, "The **average** resolution time for resolving complaints against veterinarians and sending the final action to the board for approval will be 180 days." X-22 (emphasis in original). In practice, according to its 2017 enforcement statistics, the Board resolves complaints within 225 days. X-23.

On January 25, 2018, after her Complaint had been pending for more than 700 days, Ms. Kutymba filed a lawsuit with this Court to seek mandamus relief. *See* X-3. As of the date of this motion, her complaint has been pending for 785 days.

IV. Summary Judgment Standard

The Court may grant a traditional summary judgment if the movant shows there are no genuine issues of material fact to be decided and it is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *Lear Siegler, Inc. v. Perez*, 819 S.W.2d 470, 471 (Tex. 1991).

This case presents a straightforward application of the law to facts that cannot be disputed: Whether the Board has failed to comply with non-discretionary duties under the Texas Occupations Code requiring it to resolve a complaint in a timely fashion and enter a schedule within 30 days of a complaint being filed. The Board has failed to comply with these clear non-discretionary duties by (1) allowing the Kutymba Complaint to languish at an early phase of the complaint process; and (2) not establishing a schedule for each of the phases of the complaint process under its control. The Court should grant summary judgment for Ms. Kutymba and order the Board to comply.

V. Argument

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 (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).

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. 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). The public body’s refusal need not be express. *See O’Connor v. First Court of Appeals*, 837 S.W.2d 94, 95 (Tex. 1992). Refusal to act, sufficient to support mandamus, will be implied when the public body fails to act in a reasonable time or other circumstances show the body’s intention not to perform. *See id.*

Mandamus will not lie when the petitioner has another clear and effective remedy, adequate to obtain the relief to which she may be entitled. *See Cont’l Cas. Co. v. Rivera*, 124 S.W.3d 705, 713 (Tex. App.—Austin 2003, pet. denied). An adequate remedy, however, is not one that requires an individual to do that which he has already done. *See McCraw v. Gomez*, No. 01-13-00573-CV, 2014 WL 7473805, at *5 (Tex. App. Dec. 30, 2014).

1. The Board Has Shirked its Ministerial Duties

a. By Letting the Kutyba Complaint Languish for Close to 800 Days, the Board Has Not Resolved Ms. Kutyba’s Complaint “in a Timely Manner”

Under Texas law, the Board “shall... dispose of each complaint in a timely manner.” Tex. Occup. Code § 801.206(a). The Board has flouted this duty by not acting on the Kutyba Complaint for close to 800 days.

By filing her complaint on February 17, 2016, *see* X-2, Ms. Kutyba demanded the Board comply with its duty under Tex. Occup. Code § 801.206(a) to resolve the Kutyba Complaint within a “timely” manner. The Board refused to perform within a “timely” manner by letting the Kutyba Complaint languish for more than 700 days before Ms. Kutyba filed suit.

By the Board's own numbers, this delay is not acceptable or remotely "timely." Before she filed this lawsuit, the Board publicly stated its objective was to resolve complaints within 140 days; after this lawsuit, the Board increased the number to an average of 180 days. *Compare* X-21 to X-22. On average, by its own estimates, the Board resolves complaints within 225 days. X-23. Even accepting any of these numbers as "timely," the Kutyba Complaint should have been resolved between July 6, 2016 and September 29, 2016—at least 550 days ago.

Using the more generous timelines listed within the schedule for each phase of the complaint process, *see* X-3, the Board already should have completed each of the phases within its control: The Board should have completed the investigative process associated with the Kutyba Complaint (phase 1) 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 (phase 4) by August 24, 2017. *See id.* Under this schedule, the Kutyba Complaint would have been resolved 227 days ago.

With the Kutyba Complaint, the Board has not met its stated objective, average, or estimates for resolving complaints. *See* X-3, X-21, X-22, X-23. By any of these measures, the Board has not acted in a "timely" fashion by letting the Kutyba Complaint languish for 785 days (and counting).

Based on these facts and supporting evidence, the Court should rule that the Board has failed to comply with the non-discretionary duty to resolve the Kutyba Complaint in a timely fashion and/or otherwise clearly has abused its discretion. Tex. Occup. Code § 801.206(a). The Court should grant Ms. Kutyba's motion for summary judgment and require the Board to act on the Kutyba Complaint within 30 days, or other time period the Court concludes may satisfy the legislature's mandate of timeliness under Tex. Occup. Code § 801.206(a).

b. The Board Never Established a Schedule for “Each Phase of the Complaint Process,” Let Alone by “the 30th Day” After Receiving the Kutyba Complaint

Under Texas law, the Board “shall... establish a schedule for conducting each phase of the complaint process that is under the control of the board not later than the 30th day after the date the board receives the complaint.” Tex. Occup. Code § 801.206(a). The Board failed to carry out this duty.

After Ms. Kutyba filed the Kutyba Complaint on February 17, 2016, *see* X-2, the Board had a non-discretionary duty to establish a schedule for conducting each phase of the complaint process under its control within 30 days (i.e., by March 18, 2016). Tex. Occup. Code § 801.206(a). Phases 1, 2, 3, and 4 of the complaint process are “under the control of the [B]oard.” Tex. Occup. Code § 801.206(a). By filing the complaint, Ms. Kutyba demanded the Board’s performance with each of these requirements.

But the Board refused to comply with its duty under Tex. Occup. Code § 801.206(a) because it issued a schedule that sets a schedule for only one phase of the four phases within its control, *see* X-3, and therefore did not “establish a schedule for conducting each phase of the complaint process” for the Kutyba Complaint. Tex. Occup. Code § 801.206(a).

By refusing to establish a schedule for conducting Phases 2, 3, and 4 within 30 days of the Kutyba Complaint (i.e., by March 18, 2016), the Board has failed to comply with a nondiscretionary duty and/or clearly abused its discretion. *See* Tex. Occup. Code § 801.206(a).

2. The Board Has Refused to Act, and Ms. Kutyba Has No Adequate Remedy at Law

Ms. Kutyba has met the other requirements for mandamus. First, the Board has refused to act as a matter of law because it has not resolved the Kutyba Complaint or set a schedule for nearly 800 days. The public body’s refusal need not be express. *See O’Connor*, 837 S.W.2d at

95. Refusal to act, sufficient to support mandamus, will be implied when the public body fails to act in a reasonable time or other circumstances show the body's intention not to perform. *See id.*

Further, Ms. Kutymba has no adequate remedy at law because she has taken all actions within the scope of the complaint process that she is empowered to take. She should not be required to do that which he has already done. *See McCraw v. Gomez*, No. 01-13-00573-CV, 2014 WL 7473805, at *5 (Tex. App. Dec. 30, 2014). Ms. Kutymba's extensive advocacy efforts before the Board and legislature offer further evidence that her attempts to use the processes available to her have not yielded the result required by Tex. Occup. Code § 801.206(a). *See X-1* at ¶¶ 6-11.

3. Mandamus is Proper

Because the Board has failed to perform a ministerial duty or otherwise clearly abused its discretion and because the other prerequisites for mandamus have been met, Ms. Kutymba asks the Court to issue a writ of mandamus that requires the Board either to (1) dispose of the Kutymba Complaint within 30 days, or other time period the Court concludes may satisfy the legislature's mandate of timeliness under Tex. Occup. Code § 801.206(a), and/or (2) establish a schedule, within 14 days, for conducting each phase of the complaint process.

Date: April 11, 2018

Respectfully submitted,

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Certificate of Service

I certify that consistent with the TRCP, a true and correct copy of the above document was sent to the following counsel of record on April 11, 2018:

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