

D-1-GN-18-000441  
No. \_\_\_\_\_

HEATHER KUTYBA,	§	IN THE DISTRICT COURT OF
	§	
Plaintiff,	§	
	§	
v.	§	TRAVIS COUNTY, TEXAS
	§	
TEXAS STATE BOARD OF	§	8TH
VETERINARY MEDICAL EXAMINERS,	§	_____ JUDICIAL DISTRICT COURT
	§	
Defendant.	§	

Plaintiff Heather Kutumba’s Petition for Writ of Mandamus

1. Plaintiff Heather Kutumba files this Petition for Writ of Mandamus 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 Occupations Code.

2. The Board has a ministerial duty to comply with the Texas Occupations Code’s requirements that 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).

3. Ms. Kutumba asked the Board to comply with these requirements by filing a complaint (the “Kutumba Complaint”) relating to a veterinarian licensed by the Board. More than 700 days later, the Board has refused to comply with these duties and/or otherwise have clearly abused their discretion because the Board has (1) allowed the Kutumba Complaint to languish at an early phase of the complaint

process; and (2) not established a schedule for each of the phases of the complaint process under its control. Ms. Kutymba has no other adequate remedy at law.

4. Mandamus is proper. Ms. Kutymba alleges in support:

**I. Discovery Control Plan**

5. Ms. Kutymba intends to conduct Level 2 discovery under TRCP 190.3.

**II. Parties**

6. Plaintiff Heather Kutymba, an individual, lives in Harris County, Texas.

7. 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**

8. 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.

9. 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.

10. Ms. Kutymba asks this Court to issue a writ of mandamus and order the Board to comply with Tex. Occup. Code § 801.206(a)'s requirements by (1) disposing of the Kutymba 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.

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

#### **IV. Facts**

12. On February 17, 2016, Ms. Kutyba filed a complaint with the Board relating to a veterinarian licensed by the Board.

13. On February 24, 2016, the Board initiated an investigation and assigned the Kutyba Complaint case number CP16-230.

14. On February 24, 2016, the Board issued a 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 require action by the Board and are “under the control of the [B]oard.” Tex. Occup. Code § 801.206(a).

15. For the Kutyba Complaint, the Board only established a date of February 24, 2016 for Phase 1 of the complaint process. The Board did not list 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.

19. On February 24, 2016, the Board advised: “An investigation will proceed in an effort to establish the facts related to your complaint.”

20. On April 5, 2016, the Board advised the Kutyba Complaint “is still open and being processed.”

21. On May 24, 2016, the Board again advised the Kutyba Complaint “is still open and being processed.”

22. On July 12, 2016, the Board again advised the Kutyba Complaint “is still open and being processed.”

23. On August 30, 2016, the Board again advised the Kutyba Complaint “is still open and being processed.”

24. On October 18, 2016, the Board again advised the Kutyba Complaint “is still open and being processed.”

25. On December 6, 2016, the Board once again advised the Kutyba Complaint “is still open and being processed.”

26. On January 25, 2017, the Board once more advised the Kutyba Complaint “is still open and being processed.”

27. 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.”

28. 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.”

29. 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.”

30. 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.

31. 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.

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

33. On June 16, 2017, a Board investigator informed Ms. Kutumba by email that the Board was “in the process of finding another reviewer.”

34. On June 20, 2017, Ms. Kutumba 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 Kutumba Complaint. His staff followed up with Ms. Kutumba by email and phone.

35. On July 11, 2017, the Board again advised the Kutumba Complaint “is still open and being processed.”

36. On July 21, 2017, Ms. Kutumba met with her Texas state representative, Dr. Tom Oliverson, regarding the delays in resolving the Kutumba Complaint.

37. On July 27, 2017, Blake Roach from the Texas Governor’s office called Ms. Kutumba to discuss the delays in resolving the Kutumba Complaint.

38. On August, 3, 2017, after Ms. Kutumba inquired with the Board about the status of the Kutumba Complaint and expressed concern about the Board’s delay, the Board’s General Counsel called Ms. Kutumba. The Board, through its General Counsel, gave no reason for the delay and refused to establish any timeline by which the Kutumba Complaint would proceed. During this discussion, the General Counsel acknowledged that Rep. Oliverson had contacted the agency on Ms. Kutumba’s behalf. The Kutumba Complaint continued to languish.

39. On October 10, 2017, Ms. Kutumba testified at the public Board meeting and again implored the Board to act on the Kutumba Complaint.

40. 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."

41. As of December 2017, the Board listed the status of the Kutyba Complaint as open and approved for medical review.

42. From the Board's various communications, it appears that the Kutyba Complaint has stalled out at phase 2.

43. 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.

44. The Kutyba Complaint has been pending at an early phase more than 700 days as of the date of this lawsuit.

## **V. Petition for Writ of Mandamus**

45. 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).

46. 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.

47. 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).

48. The refusal need not be express and 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 O’Connor v. First Court of Appeals*, 837 S.W.2d 94, 95 (Tex. 1992).

49. 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. *McCraw v. Gomez*, No. 01-13-00573-CV, 2014 WL 7473805, at \*5 (Tex. App. Dec. 30, 2014).

50. Under Texas law, the Board “shall... dispose of each complaint in a timely manner.” Tex. Occup. Code § 801.206(a).

51. Under Texas law, the Board also “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).

52. The Board has violated both duties.

53. First, the Board not resolved the Kutyba Complaint in a “timely” manner under Tex. Occup. Code § 801.206(a).

54. Ms. Kutyba filed her complaint on February 17, 2016 and therefore demanded the Board comply with its duty under Tex. Occup. Code § 801.206(a) to resolve the Kutyba Complaint within a “timely” manner.

55. Further, the Board refused to perform within a “timely” manner by letting the Kutyba Complaint languish for more than 700 days.

56. The Board publicly states its objective is to resolve complaints within 140 days. Based on this number, the Kutyba Complaint should have been resolved by July 6, 2016—more than 560 days ago.

57. On average, by its own estimates, the Board resolves complaints within 225 days. Based on this average number, the Kutyba Complaint should have been resolved by September 29, 2016—nearly 500 days ago.

58. Using the more generous timelines listed within the schedule for each phase of the complaint process, 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.

59. The Kutyba Complaint has not met its stated objective, average, or estimates and therefore is not “timely.” Instead, the Kutyba Complaint has languished at phase 2, and the Board has not resolved the Kutyba Complaint more than 700 days after it was filed.

60. Based on these allegations and other facts that may be identified through discovery, the Board has failed to comply with the nondiscretionary duty to resolve the Kutyba Complaint in a timely fashion and/or otherwise clearly has abused its discretion. Tex. Occup. Code § 801.206(a).

61. Second, the Board also has failed to “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).

62. After Ms. Kutyba filed the Kutyba Complaint on February 17, 2016, 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). By filing the complaint, Ms. Kutyba demanded the Board’s performance with these requirements.

63. Phases 1, 2, 3, and 4 of the complaint process are “under the control of the [B]oard.” Tex. Occup. Code § 801.206(a).

64. 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 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). Even when asked to set a schedule over a year into the process, the Board continued to refuse.

65. 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).

66. Ms. Kutyba 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). Her 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).

67. Here mandamus is proper because the Board has failed to perform a ministerial duty or otherwise clearly abused its discretion by failing to (1) dispose of the Kutyba Complaint in a timely manner and (2) establish a schedule for conducting each phase of the Kutyba Complaint.

68. Ms. Kutyba therefore asks the Court to issue a writ of mandamus that requires the Board to (1) dispose of 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), and/or (2) establish a schedule for conducting each phase of the complaint process.

#### **VI. Request for Disclosure**

69. Ms. Kutyba asks the Board to disclose the information or material described in TRCP 194.2 within 50 days of service of this Petition.

#### **VII. Relief Requested**

Ms. Kutyba respectfully asks this Court to issue citations for the Board to appear and answer; to enter a writ of mandamus ordering the Board to comply with Tex. Occup. Code § 801.206(a) by (1) resolving the Kutyba Complaint within 30 days, or other time period as the Court deems appropriate to comply with, and/or (2) issuing a revised schedule that lists deadlines for each phase under the Board's control; and 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: January 25, 2018

Respectfully submitted,

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