STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: July 1, 2013)

RHODE ISLAND PATIENT ADVOCACY COALITION, INC., RHODE ISLAND ACADEMY OF PHYSICIAN ASSISTANTS, INC., RHODE ISLAND MEDICAL SOCIETY, and PETER NUNES, SR., Plaintiffs	:	
v.	:	**C.A. No. PC-2012-5182[1]**
MICHAEL FINE, M.D., individually and in his capacity as DIRECTOR OF THE RHODE ISLAND DEPARTMENT OF HEALTH, and THE RHODE ISLAND DEPARTMENT OF HEALTH, Defendants	:	

DECISION

CARNES, J. Before this Court is an administrative appeal[2] of a decision of Defendant Rhode Island Department of Health (DOH) denying an application for a medical marijuana registry identification card submitted by Plaintiff Peter Nunes, Sr. (Plaintiff Nunes). DOH denied the Application because Plaintiff Nunes applied under the authorization of a licensed nurse practitioner, in contravention of the Edward O. Hawkins and Thomas C. Slater Medical Marijuana Act (MMA), G.L. 1956 § 21-28.6-1, et seq. Plaintiff Nunes appealed pursuant to the

[1] Per this Court's Order dated December 7, 2012, this case is consolidated with PC-2012-4724.

[2] Pursuant to the Briefing Schedule set by this Court in an Order dated April 4, 2013, this Decision concerns only Plaintiff Nunes' administrative appeal, as set forth in Counts I, II, and III. (Second Am. Compl., ¶¶ 2, 35-43.) In Counts IV, V, VI, and VII, Plaintiff Nunes and Plaintiffs Rhode Island Patient Advocacy Coalition, Inc., Rhode Island Academy of Physician Assistants, Inc., and Rhode Island Medical Society (Institutional Plaintiffs and, collectively, Plaintiffs) seek declaratory relief pursuant to § 42-35-7. (Second Am. Compl., ¶¶ 2, 44-55.)

Rhode Island Administrative Procedures Act (APA), § 42-35-15. This Court, however, lacks subject matter jurisdiction because Plaintiff Nunes' purported administrative appeal is not a "contested case" under the APA.

I

Facts and Travel

Enacted by the General Assembly in 2006, the MMA contains legislative findings declaring that "[s]tate law should make a distinction between the medical and nonmedical use of marijuana." Sec. 21–28.6–2(5). "[T]he purpose of [the MMA] is to protect patients with debilitating medical conditions, and their physicians and primary caregivers, from arrest and prosecution, criminal and other penalties, and property forfeiture if such patients engage in the medical use of marijuana." Id. Pursuant to the MMA, qualifying Rhode Island residents may possess certain amounts of usable marijuana and marijuana plants for medical use. Sec. 21–28.6–4. To qualify, one must be 1) certified as having a debilitating medical condition by "a person who is licensed with authority to prescribe drugs" per the Board of Medical Licensure and Discipline, § 5-37-1, et seq., and 2) issued a registry identification card (Registry Card) by the DOH. Secs. 21–28.6–3; 21–28.6–4(b). If the DOH fails to issue a valid Registry Card in response to a valid application within thirty-five days of its submission, then the Registry Card is deemed granted. Sec. 21-28.6-9. A Registry Card expires two years after the date of issuance. Sec. 21-28.6-6(e).

Although the DOH previously approved Registry Card applications certified by a nurse practitioner (NP) or physician's assistant (PA), the DOH determined that NP- and PA-certified applications were not "valid applications" under the MMA and that the MMA allowed only licensed physicians to certify Registry Card applications. (DOH APA R. for Plaintiff Nunes, Ex.

A, Aff. of Director Fine ¶¶ 6-19, Ex. C, NP Notice; Second Am. Compl., Ex. C, Letter to Chairwoman Matteson.) This determination was effective August 22, 2012 and applied to Registry Card applications received by the DOH after August 7, 2012. (DOH APA R. for Plaintiff Nunes, Ex. A, Aff. of Director Fine ¶ 19, Ex. C, NP Notice; Second Am. Compl., Ex. C, Letter to Chairwoman Matteson.)

Plaintiff Nunes applied for a Registry Card on June 21, 2012, and DOH received his application on July 2, 2012; an NP certified his application. (Second Am. Compl., ¶¶ 20-23, Ex. B, Denial Letter; DOH APA R. for Plaintiff Nunes, Ex. D, DOH File.) On September 5, 2012, DOH denied his application because NPs no longer were allowed to certify Registry Card applications. (Second Am. Compl., ¶¶ 5, 23-25, Ex. B, Denial Letter; DOH APA R. for Plaintiff Nunes, Ex. D, DOH File.) On February 15, 2013, Plaintiff Nunes reapplied for a Registry Card; a physician certified this application. (DOH APA R. for Plaintiff Nunes, Ex. D, DOH File.) On March 11, 2013, DOH approved Plaintiff Nunes' application. Id.

Plaintiffs brought suit on October 5, 2012, and eventually filed a Second Amended Complaint, which is the operative pleading here. Super. R. Civ. P. 15(a). Plaintiff Nunes presents an administrative appeal pursuant to the APA, § 42-35-15(g) (Counts I, II, and III), and Plaintiff Nunes and the Institutional Plaintiffs seek declaratory relief pursuant to the APA, § 42-35-7 (Counts IV, V, VI, and VII). (Second Am. Compl., ¶¶ 2, 33-55.) With respect to the administrative appeal at issue here, Plaintiff Nunes seeks reversal of the DOH decision and contends that it was "arbitrary, capricious, contrary to applicable law, not supported by substantial evidence, and not supported by the record before the agency at the time of the denial." (Second Am. Compl., ¶ 36; Pl. Mem. at 18-23.) Plaintiff Nunes further argues that his application was deemed granted by the MMA because it was not acted upon within thirty-five

days of submission and DOH acted "contrary to statute, procedure and due process of law." (Second Am. Compl., ¶¶ 38-43; Pl. Mem. at 18-23.)

DOH moves this Court to affirm the denial of Plaintiff Nunes' Registry Card application because, inter alia, the appeal is not a contested case under § 42-35-15. (DOH Answer ¶ 2; DOH Mem. at 20-21; DOH Reply Mem. at 4-10.) Plaintiff Nunes counters that this Court has jurisdiction because his appeal meets all requirements for a contested case. (Pl. Mem. at 8-13.)

II

Jurisdiction

"A challenge to subject-matter jurisdiction questions the very power of the court to hear the case. It is an axiomatic rule of civil procedure that such a claim may not be waived by any party and may be raised at any time in the proceedings." Bradford Associates v. Rhode Island Div. of Purchases, 772 A.2d 485, 488 (R.I. 2001) (quoting Pine v. Clark, 636 A.2d 1319, 1321 (R.I. 1994)) (internal quotations omitted); Super. R. Civ. P. 12. The APA provides for "judicial review of contested cases" such that "[a]ny person [. . .] who has exhausted all administrative remedies available to him or her within the agency, and who is aggrieved by a final order in a contested case is entitled to judicial review[.]" Sec. 42-35-15(a). "'Contested case' means a proceeding, including but not restricted to ratemaking, price fixing, and licensing, in which the legal rights, duties, or privileges of a specific party are required by law to be determined by an agency after an opportunity for hearing[.]" Sec. 42-35-1(3). This Court may reverse or modify the decision of an agency if an appellant's substantial rights 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 or law;

> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Sec. 42-35-15(g).

The MMA, by its terms, does not contemplate hearings to appeal denials of Registry Card applications; instead, "[r]ejection of an application or renewal is considered a final department action, subject to judicial review. Jurisdiction and venue for judicial review are vested in the superior court." Sec. 21-28.6-6(c); see also § 21.28.6-5(a) (same, with respect to denial of public petitions to amend debilitating medical conditions included in MMA).

The parties' arguments concern whether this Court lacks jurisdiction under § 45-25-15 because the MMA does not require a hearing. Plaintiff Nunes asserts that § 42-35-15 provides this Court with jurisdiction over his administrative appeal and that he may obtain relief under § 42-35-15(g) because his appeal is a contested case, notwithstanding the absence of a hearing requirement in the MMA. (Second Am. Compl., ¶¶ 2, 35-43; Pl. Mem. at 8-13.) He accordingly claims that the decision denying his Registry Card application should be reversed or remanded for further proceedings pursuant to all but one subsection of § 42-35-15(g). (Second Am. Compl., ¶¶ 2, 35-43; Pl. Mem. at 18-23.) DOH responds that Plaintiff Nunes' appeal pursuant to § 45-35-15 is not a contested case because the MMA does not require a hearing and because the MMA and APA explicitly provide Superior Court jurisdiction apart from the APA's procedure for contested cases. (DOH Answer ¶ 2; DOH Mem. at 20-21; DOH Reply Mem. at 4-10.) Thus, the DOH contends that because there is no subject matter jurisdiction, this Court must refuse to address Plaintiff Nunes' claims under § 45-25-15(g). Id.

The APA's authorization "to review agency decisions is more narrow" than its authorization to review rulemaking issues. Bradford, 772 A.2d at 489 (citing §§ 42–35–15, 42–35–18); §§ 42-35-3, 42-35-7. The APA confines Superior Court review of agency decisions to

contested cases; to determine whether a case is contested, it is necessary to review the applicable statutory law "for the presence of a hearing requirement." Bradford, 772 A.2d at 489. Our Supreme Court has plainly stated that "[a] hearing must be required by law in order for an administrative matter to constitute a contested case." Prop. Advisory Grp., Inc. v. Rylant, 636 A.2d 317, 318 (R.I. 1994) (per curiam). The Court later reiterated that "a failure to expressly provide for a hearing by statute renders a case 'uncontested' for purposes of the APA." Mosby v. Devine, 851 A.2d 1031, 1049-50 (R.I. 2004) (citing Bradford, 772 A.2d at 489.) The MMA is devoid of any hearing requirement or reference to the APA, § 45-35-15, and the MMA explicitly vests the Superior Court with jurisdiction over appeals of decisions denying Registry Card applications.[3] Sec. 21-28.6-6(c); cf., § 42-28.6-12 (Law Enforcement Officers' Bill of Rights requiring a hearing and delineating jurisdiction of appeals through explicit reference to § 45-35-15).

In response to these cases and the DOH's emphasis thereon, Def. Mem. at 20-21, Def. Reply Mem. at 4-10, Plaintiff Nunes cites Colonial Hilton Inns of New England, Inc. v. Rego, 109 R.I. 259, 284 A.2d 69 (1971) for the proposition that even where a statute does not expressly provide for a hearing, one may be implicitly required and, thus, jurisdiction lies in the Superior Court pursuant to § 42-35-15. (Pl. Mem. at 10-13.) In Rego, our Supreme Court considered whether a hearing was required to review an application filed under § 46-6-2 to fill submerged

[3] In addition, § 42-35-15.1 defines, in pertinent part, the manner of taking appeals from administrative agencies:

> "(a) Appeals from decisions by administrative agencies of the state or officers thereof shall be taken to the superior court or to the district court as provided by the General Laws in respect to each agency, provided, however, the time limits for the taking of steps necessary to perfect the appeal to the superior court or the district court shall be governed by the provisions of § 42-35-15, any provisions in the General Laws to the contrary notwithstanding."

lands. 109 R.I. at 261-63, 284 A.2d at 70-71. Although § 46-6-2 did not expressly provide for a hearing, the Department of Natural Resources held a hearing upon the petitioner's request, then denied the petitioner's application; the petitioner appealed directly to the Supreme Court, bypassing the Superior Court. Id. The Supreme Court held that it lacked jurisdiction and that the petitioner should have appealed to the Superior Court pursuant to § 42-35-15 because the matter was a contested case, as defined by § 42-35-1(3), in which the petitioner's "rights, duties or privileges [were] to be determined." Rego, 109 R.I. at 263, 284 A.2d at 71. The Court subsequently explained that "[i]mpairment of a riparian owner's rights authorized by the General Assembly is a deprivation of a state-created interest" and, therefore, "procedural due process would call for a hearing." Mosby, 851 A.2d at 1049-50 (citing Rego, 109 R.I. at 216-63, 284 A.2d at 70-71).

Rego is distinguishable from the instant case. First, the petitioner in Rego requested and was granted a hearing by the agency, and the agency opposed the petitioner's appeal to the Supreme Court on grounds that he failed to exhaust all administrative remedies. 109 R.I. at 261-63, 284 A.2d at 70-71. Here, Plaintiff Nunes neither requested a hearing upon denial of his Registry Card application nor requests one now;[4] the DOH denies that a hearing is authorized by the MMA or APA.

Next, dispositive in Rego was the following "state-created interest" under § 46-6-2: "nothing herein contained shall be construed to impair the rights of any riparian proprietors to erect wharves authorized to be erected under any of the laws establishing harbor lines within the state or otherwise by the [G]eneral [A]ssembly." Mosby, 851 A.2d at 1049. The MMA contains

[4] Plaintiff Nunes only asserts that "[n]o hearing was offered to" him by the DOH, Pl. Mem. at 9, and otherwise fails to address the prospect that, were he to prevail in demonstrating that his appeal is a contested case, he failed to exhaust his administrative remedies pursuant to § 42-35-15(a).

no comparable language preserving a right, and our Supreme Court has declined to extend Rego to subsequent cases. See Mosby, 851 A.2d at 1049-50 (in contrast to § 46-6-2, statute governing application to carry concealed weapon "contains no analogous limitation" and "does not impose an express limitation on the [Department of the Attorney General's] decision-making authority"); Rylant, 636 A.2d at 318 (holding that the Rhode Island Housing and Mortgage Finance Corporation's review of an application for financing was not a contested case and Rego was "not applicable"); Bradford, 772 A.2d at 488-89 (holding, without mention of Rego, that the suspension of a government contractor was not a contested case because the regulations were silent as to a hearing and otherwise provided a remedy in § 37-2-52).

In addition, the Court in Rego considered a statute that predated the APA and "had no requirement for notice and hearing[.]" 109 R.I. at 263, 284 A.2d at 71. The Court emphasized that the "underlying theory" of the APA was:

> "'to relieve the confusion that inhered in the administrative practice in this state by providing a uniform system of procedures and standards to regulate action within the agency affected and at the same time to uniformly regulate the scope of judicial review of agency action. It is our conclusion then that, in enacting § 42-35-15(a), the legislature intended to provide a single and exclusive method of obtaining judicial review of agency decisions.'" Rego, 109 R.I. at 263, 284 A.2d at 71 (quoting New England Telephone & Telegraph Co. v. Fascio, 105 R.I. 711, 716-17, 254 A.2d 758, 761 (1969)).

The MMA was enacted in 2006 and allays such policy concerns because the statute explicitly vests the Superior Court with jurisdiction over appeals of Registry Card application denials. Sec. 21-28.6-6(c). Moreover, the APA, § 42-35-7, provides that the "validity or applicability of any [agency] rule may be determined in an action for declaratory judgment in the superior court of Providence County." Indeed, Plaintiff Nunes and the Institutional Plaintiffs raised similar claims under this declaratory provision. (Second Am. Compl., ¶¶ 2, 44-55.) Plaintiff Nunes, therefore,

cannot proceed on his appeal pursuant to § 42-35-15 because a hearing generally must be required by law in order for an administrative matter to constitute a contested case and because Rego is inapplicable.

III

Conclusion

In light of the foregoing, this Court concludes that § 42-35-15, the provision for judicial review of contested cases, does not apply to the DOH decision denying Plaintiff Nunes' Registry Card application. Because Plaintiff Nunes does not present a contested case, this Court is without subject matter jurisdiction to entertain Counts I, II, and III of Plaintiffs' Second Amended Complaint. Counsel shall confer and prepare an appropriate order for entry.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Rhode Island Patient Advocacy Coalition, Inc., et al. v. Michael Fine, M.D., et al.**
CASE NO:	**PC-2012-5182**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**July 1, 2013**
JUSTICE/MAGISTRATE:	**Carnes, J.**
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