

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

(FILED: July 2, 2013)

WILLIAM ANDRADE, :
MEGHAN SULLIVAN, :
Medical Marijuana patients, :
Plaintiffs, :

v. :

C.A. No. PC-2012-4724¹

DR. MICHAEL FINE, in his capacity as :
Director of the Rhode Island Department :
of Health, RHODE ISLAND :
DEPARTMENT OF HEALTH, :
STATE OF RHODE ISLAND :
Defendants. :

DECISION

CARNES, J. Before this Court are appeals of decisions of the Rhode Island Department of Health (DOH) denying applications for medical marijuana registry identification cards submitted by Plaintiff William Andrade (Plaintiff Andrade) and Plaintiff Meghan Sullivan (Plaintiff Sullivan and, collectively, Plaintiffs). DOH denied the applications because Plaintiffs applied under the authorization of a licensed nurse practitioner or licensed physician’s assistant, in contravention of the Edward O. Hawkins and Thomas C. Slater Medical Marijuana Act (MMA), G.L. 1956 § 21-28.6-1, et seq. Plaintiffs appealed pursuant to the Rhode Island Administrative Procedures Act (APA), § 42-35-7, and the Uniform Declaratory Judgment Act (UDJA), § 9-30-1, et seq.² For the reasons set forth below, this Court denies DOH’s motion to affirm the agency

¹ Per this Court’s Order dated December 7, 2012, this case is consolidated with PC-2012-5182.

² This Court set a Briefing Schedule in an Order dated April 4, 2013, pursuant to which administrative appeals would be considered before declaratory judgment counts. The companion case sets forth an administrative appeal.

action because Plaintiffs do not present a claim under § 42-35-15 for which this Court would lack subject matter jurisdiction.

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 Sullivan, Ex. A, Aff. of Director Fine ¶¶ 6-19, Ex. C, NP Notice.) 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 Sullivan, Ex. A, Aff. of Director Fine ¶ 19, Ex. C, NP Notice.)

Plaintiff Sullivan applied for a Registry Card on June 28, 2012, and an NP certified her application. (Fourth Am. Compl., ¶¶ 14-15; DOH APA R. for Plaintiff Sullivan, Ex. D, DOH File.) She was arrested for possession of marijuana and driving in possession of a controlled substance on August 13, 2012, and on September 5, 2012, DOH denied her application because NPs no longer were allowed to certify Registry Card applications.³ (Fourth Am. Compl., ¶¶ 14-15, 18, 30-32; DOH APA R. for Plaintiff Sullivan, Ex. D, DOH File.) On September 24, 2012, Plaintiff Sullivan reapplied for a Registry Card; a physician certified her application. (DOH APA R. for Plaintiff Sullivan, Ex. D, DOH File.) On October 2, 2012, DOH approved Plaintiff Sullivan's application. Id.

The record contains discrepancies with respect to Plaintiff Andrade's application for a Registry Card. According to Plaintiffs' Fourth Amended Complaint, Plaintiff Andrade applied for a Registry Card on August 6, 2012, and a PA certified his application. (Fourth Am. Compl., ¶¶ 8-9, 45.) According to the DOH File, however, Plaintiff Andrade applied for a Registry Card on August 29, 2012, and an NP certified his application. (DOH APA R. for Plaintiff Andrade, Ex. D, DOH File.) These discrepancies are immaterial here. Plaintiff Andrade was arrested for possession of marijuana on or about August 17, 2012, and on August 30, 2012, DOH denied his application because NPs and PAs no longer were allowed to certify Registry Card applications. (Fourth Am. Compl., ¶¶ 10-11; Pl. Mem. at 2.) He reapplied for a Registry Card on November 15, 2012, and a physician certified his application. (DOH APA R. for Plaintiff Andrade, Ex. D, DOH File.) On November 28, 2012, DOH approved Plaintiff Andrade's application. Id.

³ Plaintiff Sullivan avers that she received the denial notice on October 2, 2012. (Pl. Mem. at 2.)

Plaintiffs brought suit on September 11, 2012,⁴ and eventually filed a Fourth Amended Complaint, which is the operative pleading here. Super. R. Civ. P. 15(a). Plaintiffs present two claims for declaratory judgment: an “agency appeal” pursuant to the APA, § 42-35-7 (Count I), as well as a request for declaratory judgment pursuant to the UDJA, § 9-30-1, et seq. (Fourth Am. Compl., ¶¶ 5, 44-63; Pl. Mem. at 1-4; Pl. Reply Mem. at 1-2.) Plaintiffs contend that, pursuant to § 42-35-7, “the DOH’s departure from the prior interpretation allowing the NP to certify [medical marijuana] patients without providing a reasoned analysis is arbitrary and capricious and the change in rule should be vacated.” (Fourth Am. Compl., ¶¶ 5, 33-35, 45-52.) Plaintiffs seek several related declarations that their Registry Card applications were valid, vested, and wrongfully denied by the DOH because, inter alia, the DOH “failed to follow the APA in promulgating the rule change that disqualified nurse practitioners from signing certifications” and impermissibly retroactively applied the rule change. (Fourth Am. Compl., ¶¶ 44-63, Prayer for Relief, ¶¶ 1-11.)

The DOH moves this Court to affirm the denial of Plaintiffs’ Registry Card applications on the basis of § 42-35-15. (DOH Answer ¶ 5; DOH Mem. at 13, 16-24; DOH Reply Mem. at 4-10.) Specifically, the DOH contends that pursuant to § 42-35-15, Plaintiffs’ appeal is moot because they are not aggrieved parties, improper because it is not a contested case, and time-barred because it was not filed within thirty days of the DOH decision. Id. DOH also cites § 42-35-15(g) for the applicable standard of review. (DOH Mem. at 13-14.)

The record is devoid of support for DOH’s characterization of Plaintiffs’ claims, however, as Plaintiffs’ filings in this matter reveal only that Plaintiffs seek declaratory relief

⁴ This is the filing date indicated on the docket. DOH contends, however, that Plaintiffs actually commenced the suit on October 11, 2012, because Plaintiffs’ initial filing did not constitute a complaint; this Court held a hearing on this issue on September 20, 2012. (DOH Mem. at 11, Ex. 1; DOH Reply Mem., Ex. 1.)

under both the APA, § 42-35-7 and UDJA, § 9-30-1, et seq. (Fourth Am. Compl., ¶¶ 5, 44-63, Prayer for Relief, ¶¶ 1-11, Pl. Mem. at 1-4, 11; Pl. Reply Mem. at 1-2, 10.) The DOH's briefs are identical for the two consolidated cases, but the cases are not identical in facts and claims. In the instant matter, Plaintiffs present two claims for declaratory relief, whereas in the companion case, PC-2012-5182, the Consolidated Plaintiffs present claims premised on §§ 42-35-15 and 42-35-7. Although, pursuant to this Court's Briefing Schedule, the DOH was not yet required to brief the Plaintiffs' requests for declaratory judgment, the DOH failed to acknowledge that Plaintiffs offered nothing but claims for declaratory judgment.

To be sure, § 42-35-7 is not confined to contested cases, and Plaintiffs do not argue that they present a contested case. Section 42-35-7 of the APA vests this Court with jurisdiction over claims for "[d]eclaratory judgment on validity or applicability of rules" when it is alleged that an agency's "rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff." Further, § 42-35-15(a) expressly provides that "[t]his section does not limit utilization of or the scope of judicial review available under other means of review, redress, relief, or trial de novo provided by law." Because Plaintiffs plainly seek declaratory relief and do not argue that § 45-32-15 supplies jurisdiction over their appeal, the DOH's arguments with respect to § 45-32-15 are without merit. This Court reserves judgment on Plaintiffs' claims for declaratory judgment.

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 Plaintiffs' appeals of the DOH decisions denying their Registry Card applications. This Court, therefore, denies DOH's motion to affirm agency action insofar as it relates to § 42-35-15.



RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE: William Andrade, et al. v. Dr. Michael Fine, et al.

CASE NO: PC-2012-4724

COURT: Providence County Superior Court

DATE DECISION FILED: July 2, 2013

JUSTICE/MAGISTRATE: Carnes, J.

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