

IN THE FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

CASE No.

MEDPURE, LLC, a Florida limited liability company,

Petitioner,

v.

STATE OF FLORIDA, DEPARTMENT OF HEALTH,
OFFICE OF MEDICAL MARIJUANA USE,

Respondent.

**PETITIONER MEDPURE, LLC'S
PETITION FOR WRIT OF MANDAMUS**

Barry Richard
Florida Bar No. 105599
Lorence J. Bielby
Florida Bar No. 393517
Greenberg Traurig, P.A.
101 E College Ave
Tallahassee, FL 32301
richardb@gtlaw.com
bielbyl@gtlaw.com

Avi Benayoun
Florida Bar No. 0151696
Greenberg Traurig, P.A.
401 East Las Olas Boulevard
Suite 2000
Fort Lauderdale, Florida 33301
benayouna@gtlaw.com
yeargina@gtlaw.com
flservice@gtlaw.com

Brigid F. Cech Samole
Florida Bar No. 730440
Greenberg Traurig, P.A.
333 S.E. 2nd Avenue
Suite 4400
Miami, Florida 33131
cechsamoleb@gtlaw.com
miamiappellateservice@gtlaw.com

Counsel for Petitioner MedPure, LLC

RECEIVED, 06/27/2019 04:39:34 PM, Clerk, First District Court of Appeal

PETITION FOR WRIT OF MANDAMUS

Petitioner, MedPure, LLC (MedPure), petitions this Court for a writ of mandamus, directing Respondent, State of Florida, Department of Health, Office of Medical Marijuana Use (OMMU), forthwith to conduct a hearing to address the merits of the pending Petition for Formal Administrative Proceedings (the Petition) by MedPure, filed on May 29, 2019. The Petition challenges the OMMU's untimely decision to reject MedPure's registration application for licensure to operate a Medical Marijuana Treatment Center (MMTC). MedPure seeks the writ of mandamus to obtain a final disposition of the Petition without continuing unreasonable delay.

JURISDICTION

This Court has jurisdiction to issue writs of mandamus under Article V, Section 4(b)(3) of the Florida Constitution. Mandamus is the proper remedy to enforce an established legal right by compelling an official to perform a ministerial duty required by law. "To be entitled to mandamus relief, 'the petitioner must have a clear legal right to the requested relief, the respondent must have an indisputable legal duty to perform the requested action, and the petitioner must have no other adequate remedy available.'" *Pleus v. Crist*, 14 So. 3d 941, 945 (Fla. 2009). Specifically, here, mandamus is the proper remedy to compel an administrative hearing pursuant to Chapter 120, Florida Statutes. *Community Health Charities of*

Florida v. State, Dept. of Management Servs., 961 So. 2d 372 (Fla. 1st DCA 2007) (mandamus granted where state agency had a clear duty to comply with the provisions of Section 120.569, Florida Statutes).

NATURE OF RELIEF SOUGHT

MedPure seeks a writ of mandamus to compel the OMMU to conduct formal administrative proceedings with respect to MedPure’s challenge of the agency’s untimely rejection of MedPure’s registration application for licensure as a MMTC.

STATEMENT OF FACTS

MedPure submitted its registration application for licensure as a MMTC to OMMU on October 19, 2018, pursuant to Article X, Section 29(b)(5) of the Florida Constitution and applicable Florida law. (A:3-5). MedPure’s registration application was submitted after the trial court in *Florigrown, LLC, et al. v. Florida Dept. of Health*, Case No. 2017 CA 2549 (the *Florigrown* Lawsuit), on October 5, 2018, issued an Order Granting Motion for Temporary Injunction dated October 5, 2018 (Temporary Injunction), in which OMMU was ordered “**by 5:00 PM, Friday, October 19, 2018**, to commence registering MMTCs in accordance with the plain language of the Medical Marijuana Amendment [Article X, Section 29, of the Florida Constitution].” (A:10 (*emphasis in original*)).

Section 120.60(1), Florida Statutes, provides that “[u]pon receipt of a license application, an agency shall examine the application and, within 30 days after such

receipt, notify the applicant of any apparent errors or omissions” and that “[a]n application for a license must be approved or denied within 90 days after receipt of a completed application.” Any application for a license which is not approved or denied within the 90 days is considered approved. *Id.*

Notwithstanding the fixed deadlines, MedPure was never advised that its application was incomplete and did not receive any response from OMMU to its application for licensure until its receipt of a letter dated March 26, 2019, from OMMU, 158 days after MedPure submitted its application. (A:12). OMMU did not grant MedPure’s application for licensure, advising that it was “not accepting applications for Medical Marijuana Treatment Center registration.” (A:12). No basis or explanation was given.

Thereafter, MedPure filed its Petition for Formal Administrative Proceedings with the OMMU on May 29, 2019, challenging the agency’s untimely decision to reject MedPure’s registration application to operate a MMTC. (A:16-22). MedPure has not received any response from OMMU to its Petition; no hearing has been granted, nor has it been licensed as a MMTC.

To date, OMMU has not taken any action with respect to MedPure’s Petition. MedPure has not received notice from OMMU providing time, place and nature of the hearing, or such other information as OMMU may be required to provide under Florida law.

SUMMARY OF ARGUMENT

MedPure is entitled to writ of mandamus to compel OMMU to act on its petition for formal administrative proceedings. Under Section 120.569, Florida Statutes (2018), in all proceedings in which the “substantial interests of a party are determined by an agency,” such party is to be afforded an opportunity for a hearing. Moreover, Section 120.569(2)(a) requires that “[a] request for a hearing shall be granted or denied within 15 days after receipt.” Here, by virtue of the untimely rejection of its application for licensure, MedPure’s substantial interests – specifically, its right to licensure as an MMTC under Florida law – have been determined by OMMU’s actions or, more appropriately, its failure to act. Notwithstanding that MedPure’s substantial interests are at issue, OMMU has failed to act on MedPure’s request for a hearing as required by Section 120.569(2)(a). This Court should issue a writ of mandamus to compel OMMU to act on MedPure’s hearing request.

ARGUMENT

Section 120.569, which is part of Florida’s Administrative Procedure Act (APA) and applies to “all proceedings in which the substantial interests of a party are determined by an agency,” requires OMMU, as an administrative agency, to provide a hearing to MedPure. Here, MedPure’s substantial interests were determined by OMMU, which is part of the Department of Health and is tasked with

the responsibility for issuing licenses to applicants seeking registration as MMTCs under Section 381.986(8), Florida Statutes (2018). OMMU's obligation was confirmed further by the then-pending Temporary Injunction in the *Florigrown* Lawsuit, directing the agency to commence registering MMTCs. (A:6-11).

OMMU did not perform its obligations in accordance with Florida law. Pursuant to applicable law and the Temporary Injunction, MedPure applied for license as an MMTC. OMMU did not advise that the application was incomplete within 30 days, nor did it approve or deny the application within 90 days. §120.60(1), Fla. Stat. Nearly a month after it was supposed to act on MedPure's application for licensure, OMMU belatedly advised that the application was rejected. (A:12). OMMU's denial was untimely as a matter of law.

On May 29, 2019, MedPure filed its petition for formal administrative hearing with respect to OMMU's untimely rejection of its application. Section 120.59(2)(a) requires OMMU to act on MedPure's request for hearing within 15 days of its request, but as of the date of this petition, OMMU has taken no action. Mandamus is an appropriate remedy where an agency has failed to provide an administrative hearing in accordance with the APA. *See Community Health Charities*, 961 So. 2d at 372; *Teacher's Educators Association, Inc. v. Duval County School District*, 763 So. 2d 1265 (Fla. 1st DCA 2000) (granting mandamus petition where agency failed to grant formal administrative hearing following its refusal to grant applicant a

license to provide training to school district employees); *see also Perry v. Dept. of Children and Families*, 220 So. 3d 546, 549-50 (Fla. 3d DCA 2017) (“pursuant to the APA, when actions undertaken by a Florida administrative agency affect one’s ‘substantial interests,’ the affected person is entitled to an administrative hearing”).

MedPure is twice prejudiced by OMMU’s delay. First, it has been prejudiced by OMMU’s failure to act within 90 days on its application for MMTC license. Second, after OMMU acted belatedly to reject its application, MedPure now is being prejudiced by OMMU’s refusal to grant a formal hearing on its entitlement to license by default. Accordingly, MedPure is entitled to issuance of mandamus directing OMMU to act on MedPure’s request for a formal administrative hearing within 15 days.

Because it is entitled to a writ of mandamus directing OMMU to act on its petition, MedPure further is entitled to an award of attorneys’ fees. *Salam v. Bd. of Prof. Engineers*, 946 So. 2d 48, 49 (Fla. 1st DCA 2006), is directly on point:

The agency’s action in failing to rule on his petition for formal hearing within 15 days as required by section 120.569(2)(a) constituted a gross abuse justifying an award of attorney’s fees to petitioner pursuant to section 120.595(5). In the administrative process, it is fundamental that an aggrieved person receive a formal administrative hearing upon request. Here, that request was timely made and the agency randomly put it on hold; by so doing, the agency exercised its discretion arbitrarily and capriciously in violation of fundamental requirements. . . . A citizen’s rights under the Florida Statutes must be taken seriously by the State’s agencies and handled expeditiously.

CONCLUSION

Based on the foregoing, MedPure respectfully requests the Court for mandamus relief, to command OMMU to act on MedPure's request for a formal administrative hearing within 15 days.

Respectfully submitted,

Barry Richard
Florida Bar No. 105599
Lorence J. Bielby
Florida Bar No. 393517
Greenberg Traurig, P.A.
101 E College Ave
Tallahassee, FL 32301
Telephone: 850.222.6891
Facsimile: 850.681.0207
richardb@gtlaw.com
bielbyl@gtlaw.com

Avi Benayoun
Florida Bar No. 0151696
Greenberg Traurig, P.A.
401 East Las Olas Boulevard
Suite 2000
Fort Lauderdale, Florida 33301
Telephone: 954.765.0550
Facsimile: 954.765.1477
benayouna@gtlaw.com
yeargina@gtlaw.com
flservice@gtlaw.com

Brigid F. Cech Samole
Florida Bar No. 730440
Greenberg Traurig, P.A.
333 S.E. 2nd Avenue
Suite 4400
Miami, Florida 33131
Telephone: 305.579.0500
Facsimile: 305.579.0717
cechsamoleb@gtlaw.com
miamiappellateservice@gtlaw.com

Counsel for Petitioner MedPure, LLC

By: /s/ Avi Benayoun
Avi Benayoun

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to State of Florida, Department of Health, Office of Medical Marijuana Use, 4052 Bald Cypress Way, Bin M-01, Tallahassee, Florida 32399, and Agency Clerk, Office of General Counsel, Florida Department of Health, 2585 Merchants Row Boulevard, Suite 110, Tallahassee, Florida 32399, with a copy delivered by email to Courtney Coppola, Director, Florida Office of Medical Marijuana Use, Courtney.Coppola@flhealth.gov, this 27th day of June 2019.

By: /s/ Avi Benayoun
Avi Benayoun

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing document is in compliance with the font requirements of Florida Rule of Appellate Procedure 9.100(1). This document is submitted in Times New Roman 14-point font.

By: /s/ Avi Benayoun
Avi Benayoun