In the Missouri Court of Appeals
Western District

STATE OF MISSOURI ex rel. MISSOURI DEPARTMENT OF HEALTH and SENIOR SERVICES,	)	**WD84247**
Appellant,	)	
v.	)	
	)	**FILED: May 18, 2021**
RENEE T. SLUSHER, Commissioner, Administrative Hearing Commission,	)	
Respondent.	)	

APPEAL FROM THE CIRCUIT COURT OF COLE COUNTY
THE HONORABLE JOHN E. BEETEM, JUDGE

BEFORE DIVISION FOUR: CYNTHIA L. MARTIN, CHIEF JUDGE, PRESIDING, LISA WHITE HARDWICK AND W. DOUGLAS THOMSON, JUDGES

The Missouri Department of Health and Senior Services ("the Department") appeals the circuit's court's judgment quashing its preliminary writ of prohibition and denying the Department's petition for a permanent writ of prohibition. The Department contends that it cannot be compelled to disclose data submitted by medical marijuana license applicants because the Missouri Constitution requires it to keep that information confidential. For reasons explained herein, we affirm.

FACTUAL AND PROCEDURAL HISTORY

In November 2018, Missourians, through initiative, enacted Article XIV of the Missouri Constitution. Article XIV authorizes and regulates medical marijuana. The article directs the Department to administer the state's medical marijuana program, including granting or denying "state licenses . . . for the cultivation, manufacture, dispensing, sale, testing, tracking, and transportation of marijuana for medical use as provided by law." Art. XIV, § 1.3(1)(a). The article provides for the Department to make available to the public license application forms to operate medical marijuana cultivation facilities, medical marijuana testing facilities, medical marijuana dispensary facilities, and medical marijuana-infused products manufacturing facilities. Art. XIV, §1.3(6).[1] The article allows the Department to restrict the aggregate number of licenses granted in each category of medical marijuana cultivation, medical marijuana-infused products manufacturing, and medical marijuana dispensary facilities. Art. XIV, § 1.3(15), (16), (17).

To evaluate license applicants, 19 CSR 30-95.025(4) directs the Department to determine whether applicants meet minimum standards described in the regulation. When more qualified applicants apply than there are available licenses in a facility category, both the regulation and article provide for the Department to "use a system of numerically scoring ten (10) additional evaluation criteria to rank the applications in each such license . . . category against each

[1] The article also directs the Department to make available to the public application forms for qualifying patient identification cards, qualifying patient cultivation identification cards, and primary caregiver identification cards. Art. XIV, § 1.3(7).

other." 19 CSR 30-95.025(4); Art. XIV, § 1.3(1)(h). In further discussing how the numerical scoring of evaluation criteria is to be conducted, the regulation reiterates that "[e]ach type of facility . . . application will be scored and ranked against the other applications of the same type." 19 CSR 30-95.025(4)(C)2.A. The article and regulation provide that an applicant may appeal the denial of a license to the Administrative Hearing Commission ("AHC"). Art. XIV, § 1.3(23); 19 CSR 30-95.025(6). After the exhaustion of administrative review, the denial is subject to judicial review. *Id.*

Kings Garden Midwest, LLC ("Kings Garden") applied for two medical marijuana cultivation facility licenses. The Department denied both applications. Kings Garden appealed the denials to the AHC. One of the allegations in Kings Garden's appeal was that its applications were subjected to an arbitrary and capricious scoring process in which other applicants received different scores for answers that were the same or substantially the same as the answers that Kings Garden submitted. To prove this claim, Kings Garden requested in discovery that the Department provide complete and unredacted copies of successful cultivation license applications.

The Department objected to the request, claiming that disclosure of this information would violate its constitutional mandate to maintain the confidentiality of information submitted by applicants and licensees. Kings Garden filed a motion to compel and agreed to limit its request to only those questions on the successful applications for which Kings Garden did not receive

the full 10-point score. AHC Commissioner Renee T. Slusher granted the motion to compel and ordered the Department to produce substantially all of the documents that Kings Garden requested. Commissioner Slusher gave the Department the option to redact applicants' identifying information. She also entered a protective order covering the produced documents.

The Department filed a petition for writ of prohibition asking the circuit court to bar enforcement of Commissioner Slusher's order compelling it to produce the information. The circuit court entered a preliminary order in prohibition ordering Commissioner Slusher to "refrain from all action in the premises until further order." After briefing and argument, the court quashed the preliminary writ and denied the Department's petition for a permanent writ. The court stayed the judgment for the later of 40 days or the final resolution of a timely appeal. The Department appeals.

STANDARD OF REVIEW

When the circuit court issues a preliminary order but later denies a permanent writ of prohibition, "the proper remedy is an appeal." *State ex rel. Ashby Road Partners, LLC v. State Tax Comm'n*, 297 S.W.3d 80, 83 (Mo. banc 2009). "Prohibition is an original remedial writ brought to confine a lower court to the proper exercise of its jurisdiction." *Id*. (citation omitted). A writ of prohibition is appropriate to prevent "an abuse of judicial discretion, to avoid irreparable harm to a party, or to prevent an abuse of extra-jurisdictional power." *Id*. (citation

omitted). "A writ of prohibition is discretionary, however, and there is no right to have the writ issued." *Id*. (internal quotation marks and citations omitted).

ANALYSIS

In its sole point on appeal, the Department contends that the circuit court erred in quashing the preliminary writ and denying its petition for a permanent writ of prohibition because it claims that Commissioner Slusher acted outside of her authority by compelling the disclosure of the requested applicant data to Kings Garden. The Department argues that it cannot be compelled to disclose data submitted by medical marijuana license applicants because the Missouri Constitution requires it to maintain the confidentiality of that information.

The interpretation of a constitutional provision is a question of law, which we review *de novo*. *Gerken v. Sherman*, 276 S.W.3d 844, 848 (Mo. App. 2009). "Constitutional provisions are subject to the same rules of construction as statutes except that consideration should be given to the broader purposes and scope of constitutional provisions." *Brown v. Morris*, 290 S.W.2d 160, 167 (Mo. banc 1956). In ascertaining the meaning of a constitutional provision, "the court must first undertake to ascribe to the words the meaning which the people understood them to have when the provision was adopted." *Mo. Prosecuting Attorneys v. Barton Cty.*, 311 S.W.3d 737, 741 (Mo. banc 2016) (citation omitted). We interpret the words in the constitutional provision "to give effect to their plain, ordinary, and natural meaning." *Wright-Jones v. Nasheed*, 368 S.W.3d 157, 159 (Mo. banc 2012). "[D]ue regard is given to the primary objectives of the provision in issue as

viewed in harmony with all related provisions, considered as a whole." *Mo. Prosecuting Attorneys,* 311 S.W.3d at 742 (citation omitted). We "must assume that every word contained in a constitutional provision has effect, meaning, and is not mere surplusage." *State v. Honeycutt*, 421 S.W.3d 410, 415 (Mo. banc 2013).

The constitutional provision at issue is Article XIV, Section 1.3(5), which provides:

> The department shall maintain the confidentiality of reports or other information obtained from an applicant or licensee containing any individualized data, information, or records related to the licensee or its operation, including sales information, financial records, tax returns, credit reports, cultivation information, testing results, and security information and plans, or revealing any patient information, or any other records that are exempt from public inspection pursuant to state or federal law. Such reports or other information may be used only for a purpose authorized by this section. Any information released related to patients may be used only for a purpose authorized by federal law and this section, including verifying that a person who presented a patient identification card to a state or local law enforcement official is lawfully in possession of such card.

The Department argues that the intent of the voters in enacting this provision was to mandate that it keep all information filed in medical marijuana license applications strictly confidential and immune from disclosure under any circumstances, including, as in this case, in response to a discovery request in the appeal of a license denial.

To support its argument, the Department relies on *State ex rel. Department of Social Services, Division of Children Services v. Tucker*, 413 S.W.3d 646 (Mo. banc 2013), a case in which the Supreme Court examined whether the Children's

Division could be compelled to produce in discovery information concerning hotline reports that Section 210.150, RSMo Supp. 2012, mandated be kept confidential. The Court began its analysis in *Tucker* by looking at whether any of the statute's stated exceptions to its general rule of confidentiality applied. *Id*. at 647-48. After determining that no exception applied to allow disclosure of the information, the Court then stated that the statutorily mandated confidentiality "is not overcome by demonstrating relevance or the absence of a traditional evidentiary privilege." *Id*. at 648. The Court explained that, while "the confidentiality mandated by section 210.150 does not establish a legal privilege," it does mandate that the Children's Division "keep confidential an entire body of information." *Id*. at 649. Thus, the Court ruled that the information was not discoverable, and the circuit court abused its discretion in ordering its disclosure. *Id*.

The crucial distinction between *Tucker* and this case is that, while none of the exceptions to confidentiality set forth in Section 210.150 applied to allow disclosure of the statutorily mandated confidential information in that case, Article XIV, Section 1.3(5) expressly allows the constitutionally mandated confidential information in this case to be "used" for a purpose authorized by the section. The second sentence of Article XIV, Section 1.3(5) states, "Such reports or other information may be used only for a purpose authorized by this section." In that sentence, "this section" refers to Section 1.3. Subsection (23) of Section 1.3 gives denied license applicants the right to appeal the Department's denial to the AHC

and, following the exhaustion of administrative remedies, the right to seek judicial review. Because an appeal to the AHC and the courts is authorized by Section 1.3, the plain language of Section 1.3(5) allows the confidential information to be used for the purpose of an appeal of a license denial. Furthermore, because Section 1.3(5) does not limit the use of the information in an appeal of a license denial, the information is subject to discovery as provided in 1 CSR 15-3.420, the regulation governing discovery in contested cases before the AHC.

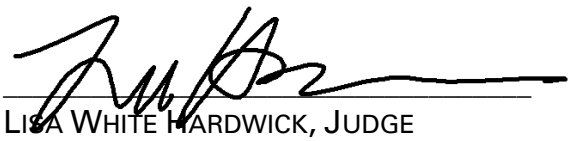
In its appeal to the AHC, Kings Garden is seeking to discover information from successful applications to prove that its applications were subjected to an arbitrary and capricious scoring process in which successful applicants received different scores for answers that were the same or substantially the same as the answers that Kings Garden submitted. Article XIV, Section 1.3(1)(h) and the Department's regulations expressly direct the Department to score and rank qualified applications *against each other* to decide which licenses to grant or deny. Because applications are not judged solely on their own merits but are ranked competitively against other applications, the only way to determine whether the Department denied Kings Garden's applications in an arbitrary or capricious manner is to compare its applications against information from those of successful applicants. To interpret Section 1.3(5) as not allowing the discovery of information from the successful applications in the appeals process would lead to the unreasonable and absurd result that unsuccessful applicants pursuing an appeal – and, in turn, the AHC and the courts – would be denied access to

information that was an integral part of the Department's decision to deny their applications. Without all of the information that formed the basis of the Department's decision, no meaningful review of that decision can occur. "Courts should avoid constructions of the Missouri Constitution that are unreasonable or would lead to absurd results." *Mo. Chamber of Commerce & Indus. v. Mo. Ethics Comm'n*, 581 S.W.3d 89, 92 (Mo. App. 2019). [2]

Because the plain language of Section 1.3(5) allows the confidential information to be used for purposes of an appeal of the Department's decision to deny a license, Commissioner Slusher did not err in granting Kings Garden's motion to compel and ordering the production of certain confidential information pursuant to a protective order.[3] Consequently, the circuit court did not err in denying the Department's petition for a writ of prohibition. Point denied.

CONCLUSION

The judgment is affirmed.



LISA WHITE HARDWICK, JUDGE

[2] The Department contends that allowing denied license applicants to discover information from successful applications in the appeals process will open the door to the disclosure of medical marijuana patients' confidential information in domestic, personal injury, tort, worker's compensation, and other cases. We disagree. The use of any of this confidential information in the types of cases cited by the Department would not be for a purpose authorized by Section 1.3, as those cases are not an appeal of the denial of a license, license renewal, or identification card pursuant to Section 1.3(23). Moreover, Section 1.3(5) provides extra protection for the disclosure of patient information, as it expressly states that "[a]ny information released related to patients may be used only for a purpose *authorized by federal law and this section*." (Emphasis added.)

[3] The Department does not challenge the scope of the order on the motion to compel or the scope of the protective order.

ALL CONCUR.