IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI ex rel. BRYAN TRAVIS ROBISON,	)	
Appellant,	)	
v.	)	**WD80793**
CHLORA LINDLEY-MYERS, DIRECTOR, DEPARTMENT OF INSURANCE, FINANCIAL INSTITUTIONS AND PROFESSIONAL REGISTRATION,	)	**OPINION FILED: August 29, 2017**
Respondent.	)	

Appeal from the Circuit Court of Cole County, Missouri
The Honorable Patricia S. Joyce, Judge

Before Division Two: Edward R. Ardini, Jr., Presiding Judge, and Karen King Mitchell and Anthony Rex Gabbert, Judges

Bryan Travis Robison appeals the circuit court's judgment quashing its preliminary writ in mandamus and denying Robison's request for a permanent writ. Robison sought a writ of mandamus against the director of the Department of Insurance, Financial Institutions, and Professional Registration to compel Director to approve his application for renewal of his license

as a General Bail Bond Agent. But because Robison failed to demonstrate he was entitled to mandamus relief, we affirm the judgment below.

Background[1]

Robison held a license as a General Bail Bond Agent that was set to expire on August 8, 2016. On July 14, 2016, Robison filed an application for renewal of his license with Director. On July 28, 2016, the Consumer Affairs Division of the Department filed a "Petition For Order Refusing To Renew General Bail Bond Agent License," asking Director to refuse Robison's requested renewal on the grounds that "Robison [wa]s disqualified for licensure as a general bail bond agent." Specifically, the petition alleged that Robison

> fail[ed] to meet the qualifications as a surety as set forth in Missouri Supreme Court Rule 33.17(f). Robison has $16,000.00 of unsatisfied judgments for four (4) bail bonds in two (2) separate circuit courts in Missouri. By his own admission in his April, May, June, and July General Bail Bond Affidavits, signed under oath and before notaries public, he has outstanding judgments in Case No. 11VE-CR00290-01 in Vernon County in the amount of $10,000.00 and Case Nos. 140006078, 140006079, and 140006080 in Jackson County in the total amount of $6,000.00.

The petition concluded, "Because Robison fails to meet the qualifications as a surety as set forth in Missouri Supreme Court Rule 33.17(f),[2] as required by § 374.715.1 RSMo,[3] the Director has no discretion and therefore must refuse to renew Robison's general bail bond agent license." On July 29, 2016, Director summarily refused Robison's application for renewal. Attached to the refusal order were various findings of fact and conclusions of law outlining Director's rationale. Also attached was a notice to Robison that stated:

> You may request a hearing in this matter. You may do so by filing a complaint with the Administrative Hearing Commission [AHC] of Missouri, P.O. Box 1557,

[1] Here, the court made no factual determinations in its judgment. Thus, we view all facts "as having been found in accordance with the result reached." Rule 73.01(c).

[2] All rule references are to the Missouri Supreme Court Rules (2016), unless otherwise noted.

[3] All statutory citations are to the Revised Statutes of Missouri, 2000, as updated through the 2015 Non-Cumulative Supplement.

> Jefferson City, Missouri, within 30 days after the mailing of this notice pursuant to Section 621.120, RSMo. Pursuant to 1 CSR 15-3.290, unless you send your complaint by registered or certified mail, it will not be considered filed until the Administrative Hearing Commission receives it.

Instead of requesting a hearing before the AHC, Robison filed a petition for a writ of mandamus with the circuit court, arguing that § 374.750 unconstitutionally denied him due process by allowing Director to summarily refuse to renew Robison's license without first giving him notice and an opportunity for a hearing. The circuit court issued a preliminary writ, ordering Director to respond to Robison's petition. Director responded, arguing that Robison was not entitled to a writ for the following reasons: (1) there is no clear entitlement to a renewed license; (2) the decision regarding unsatisfied bond forfeiture judgments is discretionary, involving application of facts to law; and (3) the decision regarding license renewal based on unsatisfied bond forfeiture judgments is mandatory. Director further argued that Robison "chose not to exercise his right to and failed to exhaust administrative remedies available to him in the AHC," and that Robison "present[ed] nothing showing that he has a protected property interest in the renewal of his license, or that the post-deprivation hearing procedures provided pursuant to § 621.120 RSMo (2000) violate due process in any way."

The circuit court held a hearing, wherein it received arguments from counsel. After the hearing, the court issued a judgment and order, quashing the preliminary writ and denying Robison's petition for a writ of mandamus. Robison appeals.

Jurisdiction

"The general rule is that no appeal lies from the dismissal or the denial of a petition for writ of mandamus." *State ex rel. Am. Eagle Waste Indus. v. St. Louis Cty.*, 272 S.W.3d 336, 339 (Mo. App. E.D. 2008). "The remedy in such a case is a direct petition for writ of mandamus in a higher court." *Id.* But "[a]n appeal will lie from the denial of a writ petition when a lower court

has issued a preliminary order in mandamus but then denies a permanent writ" on the merits. *U.S. Dep't of Veterans Affairs v. Boresi*, 396 S.W.3d 356, 358 (Mo. banc 2013); *R.M.A. v. Blue Springs R-IV Sch. Dist.*, 477 S.W.3d 185, 189 (Mo. App. W.D. 2015).[4]

Analysis

Robison brings a single point on appeal; he argues that the circuit court erred in quashing its preliminary writ and denying his request for a permanent writ in mandamus because, as a general bail bond agent, Robison had a right to renew his license notwithstanding the provisions of § 374.750 insofar as professional licenses are property for constitutional purposes and, thus, the State must afford pre-deprivation notice and a hearing in order to comport with the requirements of due process.

A. Standard of Review

"An appellate court reviews the denial of a petition for a writ of mandamus for an abuse of discretion." *Boresi*, 396 S.W.3d at 359. "An abuse of discretion in denying a writ occurs when the circuit court misapplies the applicable statutes." *Id*.

B. Robison forfeited his right to seek mandamus by not seeking administrative review.

"The Missouri Administrative Procedure Act provides for two types of cases: contested cases and non-contested cases." *Furlong Cos., Inc. v. City of Kansas City*, 189 S.W.3d 157, 165 (Mo. banc 2006). "The distinction between these two types of cases is an often-litigated issue." *Id*. "A 'contested case' is defined in the MAPA as 'a proceeding before an agency in which

[4] "Following *Boresi*, there remains an open question about whether an appeal is available where a petition in mandamus is denied after the grant of a preliminary order in mandamus but on . . . grounds [other] than the merits of the petition." *R.M.A. v. Blue Springs R-IV Sch. Dist.*, 477 S.W.3d 185, 189 n.7 (Mo. App. W.D. 2015). "Although our research has not uncovered any Missouri Supreme Court cases addressing the issue, both this Court and the Eastern District have concluded that even when a preliminary order has issued, the final decision is still not reviewable by appeal if it does not reach the merits of the relator's petition." *Id*. (quoting *Powell v. Dep't of Corr.*, 463 S.W.3d 838, 841 n.3 (Mo. App. W.D. 2015)). Here, the court denied Robison's petition without any findings of fact or conclusions of law; thus, it is unclear whether the denial was on the merits or otherwise. Out of an abundance of caution and in the absence of further guidance from our Supreme Court, we will review Robison's claim on appeal.

legal rights, duties or privileges of specific parties are required by law to be determined after hearing.'" *Id*. (quoting § 536.010(4)). "The MAPA does not explicitly define a 'non-contested case,' but it has been defined by th[e Missouri Supreme] Court as a decision that is not required by law to be determined after a hearing." *Id.*

"In either a contested or a non-contested case the private litigant is entitled to challenge the governmental agency's decision." *Id*. "The difference is simply that in a contested case the private litigant must try his or her case before the agency, and judicial review is on the record of that administrative trial, whereas in a non-contested case the private litigant tries his or her case to the court." *Id*. But in either kind of case, before a litigant may seek relief in the circuit court either by way of judicial review in a contested case or by way of instituting a suit for mandamus or other appropriate action in a non-contested case, the litigant must demonstrate either that he has exhausted his administrative remedies or that the decision he challenges is not subject to administrative review. §§ 536.100 (providing a right of judicial review in a contested case to "[a]ny person who has exhausted all administrative remedies provided by law"), 536.150.1 (providing a right to a judicial action in a non-contested case where the decision challenged "is not subject to administrative review").

Section 374.750 provides: "The department may refuse to issue or renew any license required pursuant to sections 374.700 to 374.775 for any one or any combination of causes stated in section 374.755." It further indicates that "[t]he department shall notify the applicant in writing of the reasons for the refusal and shall advise the applicant of his right to file a complaint with the administrative hearing commission as provided by chapter 621." *Id*.

Section 621.120 provides that, "[u]pon refusal by any agency listed in section 621.045[5] to . . . renew a license of an applicant . . . who possesses the qualifications for licensure without examination, such applicant may file . . . a complaint with the administrative hearing commission." The section allows for the applicant to obtain a hearing before the AHC and directs that the complaint "shall set forth that the applicant . . . is qualified . . . for . . . renewal without examination under the laws and administrative regulations relating to his profession and shall set out with particularity the qualifications of such applicant for same." *Id*. Then, "[i]f at the hearing the applicant shall show that under the law he is entitled to . . . renewal, the administrative hearing commission shall issue an appropriate order to accomplish such . . . renewal." *Id*.

But here, rather than seek the hearing before the AHC provided by § 621.120, Robison sought a writ of mandamus from the circuit court. We need not determine whether Director's refusal order of Robison's license renewal constitutes a contested or non-contested case, because in either circumstance, Robison improperly bypassed administrative review. Because § 374.750 provides administrative review, Robison was precluded by § 536.150.1 from seeking mandamus. He was also precluded from seeking mandamus by § 536.100 because he failed to exhaust all administrative remedies available under § 621.120.

"The purpose of exhaustion is to prevent premature interference with agency processes so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record that is adequate for judicial review." *St. Louis Metro. Towing v. Dir. of Revenue*, 450 S.W.3d 303, 307 (Mo. App. W.D. 2014) (quoting *Parker v. City of Saint Joseph*,

[5] Section 621.045 lists the Department of Insurance, Financial Institutions and Professional Registration among the entities covered.

167 S.W.3d 219, 221 (Mo. App. W.D. 2005)). "Exhaustion occurs when every step of the administrative procedure has been completed and the agency renders a final decision." *Id.* (quoting *Parker*, 167 S.W.3d at 221). "If the subject of [an] agency's actions . . . does not apply for review with the AHC, he forfeits the right to challenge the agency's initial decision in any manner, including through judicial review." *Impey v. Mo. Ethics Comm'n*, 442 S.W.3d 42, 48 (Mo. banc 2014).

By failing to avail himself of the opportunity for administrative review provided by §§ 374.750 and 621.120, Robison forfeited any right he had to seek mandamus in the circuit court. Accordingly, the circuit court's judgment quashing the preliminary writ and denying the permanent writ did not constitute an abuse of discretion.

Robison argues that, because he has raised a constitutional challenge to § 374.750, and "the [AHC] is not empowered to determine the constitutionality of statutes[,] . . . a party is not required to raise those issues at that level." In making this argument, he relies on *Duncan v. Missouri Board of Architects, Professional Engineers & Land Surveyors*, 744 S.W.2d 524, 531 (Mo. App. E.D. 1988).

In *Duncan*, the Court addressed the issue of whether the appellant's constitutional challenge to a licensing statute had been properly preserved for review. *Id.* After noting the preservation requirement that a constitutional issue must be raised at the earliest opportunity, the Court noted that "[t]he reason for the rule . . . is to permit a ruling on the constitutional issue by the body before whom the matter is pending." *Id.* The Court noted that, because "[a]dministrative agencies lack the jurisdiction to determine the constitutionality of statutory enactments[,] . . . [r]aising the constitutionality of a statute before such a body is to present to it an issue it has no authority to decide." *Id.* And because "[t]he law does not require the doing of

a useless and futile act," the Court saw "no logical reason to require that a constitutional challenge to the validity of a statute be raised before an administrative body in order to preserve the issue for appellate review." *Id.*

But nothing in *Duncan* suggests that a party may seek an end-run around statutorily provided means of administrative review in order to pursue a constitutional challenge directly in the circuit court. Rather, it merely holds that the failure to raise the constitutional challenge before the administrative body *during the administrative review* does not affect preservation of that issue for appellate review. Contrary to Robison's argument, it does not mean that a party may simply bypass administrative review altogether.

Sections 374.750, 621.120, 536.100, and 536.150.1 all require that a person wishing to challenge the refusal of a requested license renewal must do so before the AHC before he accrues any right to seek relief in the circuit court. As noted in *St. Louis Metropolitan Towing*, 450 S.W.3d at 305 n.3, regardless of arguments to the contrary, "[w]e are not . . . permitted to ignore the law." "[W]here [a] statute provides a remedy and a procedure to be followed it must be complied with." *Springfield Park C. Hosp. v. Dir. of Revenue*, 643 S.W.2d 599, 600-01 (Mo. 1983). And "[w]hen a statute provides a special type of review[,] it is exclusive so as to preclude the use of any other or nonstatutory method." *Gothard v. Spradling*, 586 S.W.2d 443, 445 (Mo. App. S.D. 1979).

Because §§ 374.750 and 621.120 provide for a special type of review of Director's refusal to renew a general bail bond agent license, that is the procedure that must be followed. Robison is not permitted to bypass that procedure in favor of directly seeking a writ of mandamus.

A similar argument was raised and rejected in *Shelton v. Farr*, 996 S.W.2d 541 (Mo. App. W.D. 1999). In *Shelton*, a fireworks wholesaler sought a declaratory judgment and writ of mandamus against the state fire marshal, asking the circuit court to declare that the refusal to grant a new fireworks permit was unlawful and to require the fire marshal to issue a fireworks permit. *Id.* at 542. The application had been denied because the wholesaler's permit had previously been suspended on the ground that he possessed illegal fireworks. *Id.* According to 11 C.S.R. § 40-3.010(2)(A), any person "engaged in the manufacture, transportation, wholesale or retail sales of consumer fireworks . . . shall have an applicable license or permit issued by the state fire marshal." The same regulation, in subsection (2)(K), provided: "The state fire marshal may refuse to issue a license or permit to any applicant when the permit or license of the individual, corporation or partner is under suspension or revocation." On appeal from the dismissal of the wholesaler's petition for declaratory judgment and writ of mandamus, this court determined that the wholesaler failed to exhaust his administrative remedies by proceeding directly to the circuit court, rather than seeking review with the AHC. *Shelton*, 996 S.W.2d at 542-43.

Like Robison, the wholesaler argued that, "because the issues presented by his petition [we]re solely questions of law and because no adequate remedy exist[ed] through the administrative process, he [wa]s not required to exhaust his administrative remedies." *Id.* at 543. We disagreed. *Id.* We noted that "the AHC has 'full authority to reach a decision on the law as it finds it, subject, of course, to judicial review.'" *Id.* (quoting *Bridge Data Co. v. Dir. of Revenue*, 794 S.W.2d 204, 207 (Mo. banc 1990), *abrogated on other grounds*, *Int'l Bus. Machs. Corp. v. Dir. of Revenue*, 958 S.W.2d 554 (Mo. banc 1997)). "Thus, even in matters of interpretations of questions of law, the AHC should be given the first opportunity to make such

interpretations before subjecting those interpretations to judicial review." *Id.* Finding that the wholesaler "had an adequate remedy at law," this court held that "the circuit court did not err in dismissing [his] petition." *Id.*

Here, because Robison failed to pursue the statutorily provided administrative review of Director's refusal order, he was not permitted to seek mandamus in the circuit court. Therefore, the circuit court did not abuse its discretion in quashing the preliminary writ and denying a permanent one.

C. Robison failed to demonstrate a clearly established right compelling mandamus.

Even if *Duncan* could be read as Robison suggests, the circuit court did not abuse its discretion because Robison failed to demonstrate a clearly established right compelling mandamus.

"The purpose of the extraordinary writ of mandamus is to compel the performance of a ministerial duty that one charged with the duty has refused to perform." *Furlong Cos.*, 189 S.W.3d at 165. "The writ can only be issued to compel a party to act when it was his duty to act without it." *Id.* at 166. "It confers upon the party against whom it may be issued no new authority, and from its very nature can confer none." *Id.* "A litigant asking relief by mandamus must allege and prove that he has a clear, unequivocal, specific right to a thing claimed." *Id.* "He must show himself possessed of a clear and legal right to the remedy." *Id.* "Mandamus does not issue except in cases where the ministerial duty sought to be coerced is definite, arising under conditions admitted or proved and imposed by law." *Id.*

"Whether a petitioner's right to mandamus is clearly established and presently existing is determined by examining the statute or ordinance under which petitioner claims the right." *Manz v. Prairie Twp. Fire Prot. Bd.*, 463 S.W.3d 831, 835 (Mo. App. W.D. 2015) (quoting *State*

ex rel. Lee v. City of Grain Valley, 293 S.W.3d 104, 107 (Mo. App. W.D. 2009)). "Mandamus may . . . be used [only] where the ministerial duty sought to be performed is definite and arises under conditions imposed by law." *Id.*

Robison argues that he had a right to license renewal, citing §§ 374.730 and 374.750. Section 374.730 provides that "[a]ll licenses issued to . . . general bail bond agents under the provisions of sections 374.700 to 374.775 *shall* be renewed biennially, which renewal shall be in the form and manner prescribed by the department and shall be accompanied by the renewal fee set by the department." (Emphasis added.) As noted above, § 374.750 provides that "[t]he department *may* refuse to issue or renew any license required pursuant to sections 374.700 to 374.775 for any one or any combination of causes stated in section 374.755." (Emphasis added.)

Robison argues that, despite the permissive term "may" in § 374.750 regarding refusal, § 374.730 uses the mandatory term "shall" regarding renewal. Thus, he claims that he has a clear and unequivocal right to renewal. We disagree.

"To determine the meaning of the statute, we start with the plain language of the statute itself." *State ex rel. Kansas City Symphony v. State*, 311 S.W.3d 272, 277 (Mo. App. W.D. 2010). "It is the general rule that in statutes the word 'may' is permissive only, and the word 'shall' is mandatory." *Silvey v. Bechthold*, 499 S.W.3d 760, 763 (Mo. App. W.D. 2016) (quoting *Wolf v. Midwest Nephrology Consultants, P.C.*, 487 S.W.3d 78, 83 (Mo. App. W.D. 2016)). Though "use of the word 'shall' generally connotes a mandatory duty[, w]hether the use of the word 'shall' in a statute is considered mandatory or directory . . . is primarily a function of context and legislative intent." *Kansas City Symphony*, 311 S.W.3d at 277. "In ascertaining legislative intent, the statute should be read *in pari materia* with related sections, and the

[licensing] statutes should be construed in context with each other." *Street v. Dir. of Revenue*, 361 S.W.3d 355, 358 (Mo. banc 2012).

Reading §§ 374.730 and 374.750 together, it is clear that, though renewal must be *sought* biennially, Director has the discretion to refuse renewal if Director finds the presence of any of the factors identified in § 374.755. Among the factors identified in § 374.755 is "[v]iolation of any provision of . . . the laws of this state." § 374.755.1(6). Before a person may be licensed as a general bail bond agent, that person must, by law, "meet[] the qualifications for surety on bail bonds as provided by supreme court rule." § 374.715. Rule 33.17(f) provides that "[a] person shall not be accepted as a surety on any bail bond unless the person . . . [h]as no outstanding forfeiture or unsatisfied judgment thereon entered upon any bail bond in any court of this state." The use of the word "shall" in Rule 33.17 indicates that Director lacks any discretion to either issue or renew a general bail bond agent license if the applicant has outstanding forfeitures or unsatisfied judgments thereon, as doing so would mean that the person lacked the necessary qualifications to be a general bail bond agent; consequently, it would be a violation of a provision of a law of this state for that person to hold a general bail bond license. In other words, if an applicant for a general bail bond agent license renewal has outstanding forfeitures or judgments thereon, Director must refuse the renewal request.

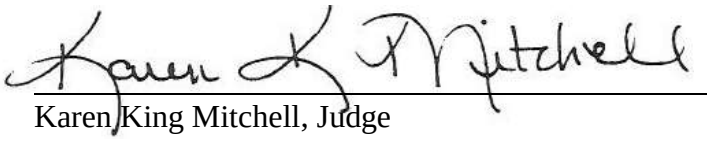
Here, Robison admitted having outstanding forfeitures and judgments thereon. Accordingly, he had no right to license renewal. And his request for mandamus to compel Director to issue a renewal was quite simply a request for the court to compel Director to engage in a direct violation of Missouri law. A court "may not coerce the performance of an unlawful act." *State ex rel. Sayad v. Zych*, 642 S.W.2d 907, 911 (Mo. banc 1982).

In short, the circuit court did not abuse its discretion because Robison was not entitled to seek a writ insofar as he neither pursued administrative remedies nor established a clear and unequivocal right to license renewal.[6]

Point denied.

Conclusion

The circuit court did not abuse its discretion in either quashing the preliminary writ or denying Robison's request for a permanent one. Its judgment is affirmed.



Karen King Mitchell, Judge

Edward R. Ardini, Jr., Presiding Judge, and
Anthony Rex Gabbert, Judge, concur.

[6] Because Robison did not establish a clear and unequivocal right to license renewal, his due process claim also fails. "To have a constitutionally cognizable property interest in a right or a benefit, a person must have 'a legitimate claim of entitlement to it.'" *Austell v. Sprenger*, 690 F.3d 929, 935 (8th Cir. 2012) (quoting *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)). "The Due Process Clause does not create any property interest; it merely protects property rights arising 'from an independent source such as state law.'" *Id.* (quoting *Bd. of Regents*, 408 U.S. at 577). "A property interest arises when state law creates 'expectations that are "justifiable."'" *Id.* (quoting *O'Bannon v. Town Ct. Nursing Ctr.*, 447 U.S. 773, 796 (1980)). Though Missouri law recognizes that "a licensed entity may have a property interest in an existing valid license, . . . Missouri law is less clear when it comes to license *renewal* proceedings." *Id.* And, as discussed, *supra*, Robison had no right to license renewal, as his outstanding forfeitures and judgments thereon disqualified him from holding a general bail bond agent license at all.

In any event, "a statutory scheme which permits an initial summary decision . . . without a hearing based on objective statutory criteria . . . does not violate due process provided a full, post-deprivation, hearing is available to challenge the [decision]." *Jarvis v. Dir. of Revenue*, 804 S.W.2d 22, 24 (Mo. banc 1991). As provided in § 621.120, a full hearing before the AHC was available to Robison if he wished to challenge Director's refusal order. But he chose not to avail himself of this procedural protection. "[O]pportunity not taken when given is not opportunity denied." *State Bd. of Registration for Healing Arts v. Masters*, 512 S.W.2d 150, 166 (Mo. App. 1974).