SUPREME COURT OF ARKANSAS

No. CV-21-599

	Opinion Delivered: June 2, 2022
ARKANSAS DEPARTMENT OF FINANCE AND ADMINISTRATION; ALCOHOLIC BEVERAGE CONTROL DIVISION; AND THE ARKANSAS MEDICAL MARIJUANA COMMISSION APPELLANTS	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT [NO. 60CV-20-3658] HONORABLE TIMOTHY DAVIS FOX, JUDGE
V. CARROLL COUNTY HOLDINGS, INC., D/B/A EUREKA GREEN APPELLEE	REVERSED AND DISMISSED.

BARBARA W. WEBB, Justice

This is an interlocutory appeal related to a medical marijuana dispensary license. Carroll County Holdings, Inc. ("Eureka Green"), sought temporary and permanent injunctive relief restraining and enjoining the State from issuing replacement dispensary-facility licenses. The State filed a motion to dismiss on the grounds of sovereign immunity. The motion was denied, and this appeal followed. We reverse the circuit court's ruling and dismiss the case below.

I. *Facts*

Eureka Green submitted a dispensary license for Zone 1. The Arkansas Medical Marijuana Commission (MMC) initially awarded four licenses to Zone 1. Eureka Green was the fifth-highest-scoring applicant. Pursuant to MMC Rules § V.9(g)–(h), the MMC holds unsuccessful applicants in reserve for twenty-four months from the issuance of the

initial licenses to offer the next highest scoring applicant a license if additional licenses are needed or allocated in the Zone. Unselected applicants, like Eureka Green, can remain in the applicant pool or withdraw their request and receive a one-half refund of the license fee. *Id.* Eureka Green withdrew its application and received the partial refund. On June 30, 2020, the MMC created a fifth dispensary in Zone 1. 006.28.1 Ark. Admin. Code § V.9(g)–(h) (WL current through Nov. 15, 2021). Even though Eureka Green had been the fifth-highest-scoring applicant, it was no longer in the running for consideration because it had withdrawn its application. The dispensary license went to a third party and stranger to this case, Natural Root Wellness.

Eureka Green filed suit in the circuit court on June 29, 2020, alleging that the MMC had violated its own rules, the constitution, and the Administrative Procedure Act (APA). There is nothing in the record that indicates Eureka Green appealed the decision of an administrative hearing or that any administrative hearing was ever held before the MMC on any of the issues raised by Eureka Green in the circuit court. The State moved to dismiss on the grounds of sovereign immunity, lack of subject-matter jurisdiction, mootness, and failure to plead facts indicating a cause of action related to equal protection. The circuit court denied the motion, and this appeal followed.

II. *Standard of Review*

Generally, in this type of interlocutory appeal, we only review issues that implicate sovereign immunity. *See Chaney v. Union Producing, LLC*, 2020 Ark. 388, 611 S.W.3d 482; *Ark. Dep't of Fin. & Admin. v. Carpenter Farms Med. Grp., LLC*, 2020 Ark. 213, at 11, 601 S.W.3d 111, 119. However, such a limitation does not apply to subject-matter jurisdiction.

Where the question is one of subject-matter jurisdiction, it does not matter how it arises. *Timmons v. McCauley*, 71 Ark. App. 97, 101, 27 S.W.3d 437, 440 (2000). Even though this case came to us on a denial of sovereign immunity, as a threshold issue, we must consider subject-matter jurisdiction.

Subject-matter jurisdiction is a court's authority to hear a particular type of case. *Ark. Dep't of Fin. & Admin. v. Naturalis Health, LLC*, 2018 Ark. 224, at 6, 549 S.W.3d 901, 906 (citing *Fatpipe, Inc. v. State*, 2012 Ark. 248, 410 S.W.3d 574). It cannot be waived, can be questioned for the first time on appeal, and we are required to raise it *sua sponte*. *Id.* (citing *Terry v. Lock*, 343 Ark. 452, 37 S.W.3d 202 (2001)). *See also Hoyle v. Faucher*, 334 Ark. 529, 533, 975 S.W.2d 843, 845 (1998) (citing *Priest v. Polk*, 322 Ark. 673, 912 S.W.2d 902 (1995)). Subject-matter jurisdiction is determined from the pleadings and not the proof. *Naturalis Health, LLC*, 2018 Ark. 224, at 6, 549 S.W.3d at 906. Where the issue of subject-matter jurisdiction requires interpretation of a statute or constitutional provision, our review is *de novo*. *Id.* (citing *Tripcony v. Ark. Sch. for the Deaf*, 2012 Ark. 188, 403 S.W.3d 559).

III. *Subject-Matter Jurisdiction*

Ultimately, no matter how Eureka Green phrases its case in the circuit court, the causes of action it brings, and how the State treats those pleadings, this is an administrative appeal of an "arbitrary and capricious disqualification of Eureka Green's application for a medical marijuana dispensary facility license" by the MMC and a challenge of the applicability of the MMC's rules to Eureka Green. As such, we consider two issues to determine if there is subject-matter jurisdiction: Whether there is an appeal of an agency's

administrative adjudication or if this case is seeking a declaratory judgment on the validity or applicability of the MMC's rules. *See* Ark. Code Ann. §§ 25-15-207, -212 (Repl. 2014 & Supp. 2021).

A. Administrative Adjudication

Section 212 of the APA permits judicial review of agency adjudications. *Carpenter Farms Med. Grp., LLC*, 2020 Ark. 213, at 8, 601 S.W.3d at 118 (citing Ark. Code Ann. § 25-15-212(a)). However, such an adjudication takes place only following "the final disposition . . . in which the agency is required by law to make its determination after notice and hearing." *Id.* (quoting Ark. Code Ann. § 25-15-202(1), (6) (Supp. 2019)). This means that only "quasi-judicial" agency functions support further judicial review. *Id.* (citing *Tripcony*, *supra*). Quasi-judicial functions generally include hearing testimony, making findings of fact, rendering legal conclusions, and recording the proceedings. *Id.* (citing *Sikes v. Gen. Publ'g Co.*, 264 Ark. 1, 7, 568 S.W.2d 33, 36 (1978)).

The APA subjects only some, *not all*, agency decisions to circuit court review. *Id.* (citing *Tripcony*, *supra*) (emphasis added). Courts do not generally have jurisdiction to examine administrative decisions of state agencies. *Id.* at 6–7, 549 S.W.3d at 906. This limitation on judicial review of executive agency decisions is necessary because our constitution divides State government into three branches and requires that no branch "shall exercise any power belonging to either of the others." Ark. Const. art. 4, § 2. This is foundational to our government. *Naturalis Health, LLC*, 2018 Ark. 224, at 6, 549 S.W.3d at 906. The judicial branch will not abdicate this constitutional provision by reviewing the

day-to-day actions of the executive branch. *Id.* (citing *Ark. Livestock & Poultry Comm'n v. House*, 276 Ark. 326, 634 S.W.2d 388 (1982)).

Turning to the record on appeal, it is readily apparent that there is no quasi-judicial action of an agency on appeal. There was no hearing held by the MMC on Eureka Green's license or any of the challenges it raised to the circuit court. The MMC did not issue a notice of hearing. There was no testimony taken. There are no findings of fact or final orders from the MMC which resulted from a hearing. The record of the proceedings before the MMC are not included in the appeal to the circuit court or this court. All, or at least a substantial number of these items, are necessary to invoke the judiciary's ability to review an executive branch agency action. If there is no agency adjudication, then there is no action for a court to review. *Id.* at 7, 549 S.W.3d at 906. Subject-matter jurisdiction will not lie under this method of review of the MMC's actions regarding Eureka Green's license.

B. Validity or Applicability of the MMC's Rules

The next challenge which would invoke our subject-matter jurisdiction is a declaratory judgment on the validity or applicability of the MMC's rules. Declaratory judgments serve a much different purpose than review of an agency's adjudication. *Id.* The validity or applicability of a rule may be determined in an action for declaratory judgment if it is alleged that the rule, or its threatened application, injures or threatens to injure the plaintiff in his or her person, business, or property. *Id.* (citing Ark. Code Ann. § 25-15-207).

Examining a rule's "applicability" is not the same as examining its "application." *Naturalis Health, LLC*, 2018 Ark. 224, at 9, 549 S.W.3d at 907. Section 207 is limited to

declarations concerning the rule—that the rule is either null and void, in the case of a validity challenge, or whether the rule should be applied to a particular person or situation, in the case of an applicability challenge. *Id.* Eureka Green's challenges in the case at bar are that the MMC violated its own rule and failed to follow the APA's model-rules requirement. *See* Ark. Code Ann. § 25-15-215. Neither challenge, as pled, goes to whether the rule was null and void nor if it was applicable to Eureka Green.

Like the appellees' complaints in *Naturalis Health, LLC*, Eureka Green's complaint neither challenges the "applicability" of any rule as contemplated by section 207 nor does it seek a declaration whether other rules should have been applied. 2018 Ark. 224, at 9, 549 S.W.3d at 907. As such, the circuit court did not have subject-matter jurisdiction over the Eureka Green's complaint under either section 207 or 212 and neither does this court. We reverse the circuit court's order and dismiss the complaint.

Reversed and dismissed.

BAKER, J., concurs.

WOMACK, J., concurs without opinion.

HUDSON AND WYNNE, JJ., dissent.