

Litigation Cropping Up as Losing Applicants Scrap for Handful of Medical Marijuana Cultivator Licenses in Ohio

By Brian Laliberte and Chad M. Eggspuehler

Losing medical marijuana cultivator applicants have ferociously litigated the constitutionality of Ohio's new program, the validity of the application process, and alleged fraud and abuse in selecting winning cultivator provisional licensees. The scarcity of provisional licenses (and corresponding certificates of operation), combined with the lucrative opportunity to be one of Ohio's first legal marijuana cultivators and distributors, fueled the litigation. Though the litigation has thus far failed to derail the entire program, specific plaintiffs have achieved a measure of success, ranging from a prompt administrative hearing to an isolated scoring error that resulted in the award of an additional license.

By statutory design, Ohio's Medical Marijuana Control Program (MMCP) permits only 24 licensed cultivators at the start of the Program. Once a provisional licensee passes state inspection, it then receives one of 24 coveted certificates of operation. Of the 24 certificates of operation, 12 authorize cultivation of up to 25,000 square feet of medical marijuana (Level I Cultivators), and an additional twelve authorize no more than 3,000 square feet of cultivation (Level II Cultivators).

The Ohio Department of Commerce oversees the licensing component of the MMCP. It used anonymous teams to score and rank the Level I and Level II applications using a number of published criteria. The applicants with the 10 highest consensus scores for each Level received provisional licenses, with the 2 remaining provisional licenses for each Level reserved by statute for the 2 highest scoring "economically disadvantaged groups," or "EDGs." The statute defined EDGs as applicants consisting of a certain percentage of "Blacks or African Americans, American Indians, Hispanics or Latinos, and Asians."

The first case filed in December 2017, *Pharmacann Ohio, LLC v. Ohio Department of Commerce*, challenged the constitutionality of the MMCP, targeting its statutory set-aside for EDGs. Because neither EDG receiving a Level I application scored in the top twelve, they effectively displaced two non-EDG applicants who were ranked 11 and 12 respectively. The two EDGs that received provisional licenses were joined as parties, and they in turn joined all other Level I Cultivators as third-party defendants. Motion practice ensued.

On May 31, 2018, the court in deciding multiple motions to dismiss held as follows: (1) the EDG set-aside was severable from the remainder of the MMCP statutory scheme, eliminating the need for the third-party defendants to participate in the case; (2) the EDG provision of the MMCP was subject to strict scrutiny because it imposed race-based selection criteria; (3) Pharmacann properly asserted a federal equal protection claim by alleging that it was deprived of a property right secured by the U.S. Constitution; and, (4) Pharmacann was not required to exhaust its administrative remedies before pursuing a facial challenge to the EDG provision.

The court did not, however, decide the merits of the plaintiff's constitutional claim.

Surprisingly, before the court issued its decision, the Department of Commerce admitted that it incorrectly scored Pharmacann's application. Pharmacann should have been ranked in the top ten, the Department conceded, and it should have received a Level I Cultivator provisional license. The court permitted the twelfth ranked non-EDG applicant to intervene and effectively replace Pharmacann as the plaintiff. The case remains pending without a decision on the merits of the constitutionality set-aside.

Another losing applicant, Cannascend Ohio LLC, filed suit against the Ohio Department of Commerce and each of the Level I Cultivators that received a provisional license. It challenged the validity of the application scoring process, alleging conflicts of interest on the part of outside reviewers and fraud and/or misrepresentation by certain applicants that should have invalidated their applications. It also asserted violations of the Ohio Public Records Act. Cannascend sought a preliminary injunction that would have halted *the entire* MMCP. Specifically, it asked the court to revoke all Level I provisional licenses and to prohibit the Department of Commerce from converting the licenses to certificates of operation.

On May 17, 2018, the court declined to exercise jurisdiction over Cannascend's claims that challenged the scoring process, holding that it failed to exhaust its administrative remedies. In dismissing the licensing-related claims, the court denied Cannascend's broad request for a preliminary injunction shutting down MMCP licensing. It did not, however, dismiss the public records claims, which remain pending solely against the Ohio Department of Commerce.

Finally, in *Ohio Releaf, LLC v. Jaqueline T. Williams, Director, Ohio Department of Commerce, et al.*, a losing Level I applicant sought to compel the Department of Commerce to afford it a prompt administrative hearing. Ohio's administrative code requires that state departments and their agencies hold such hearings within 15-days of receiving a notice of appeal, and this administrative review process applies to losing MMCP applicants. Upon receiving Ohio Releaf's notice of appeal, the Department initially scheduled the hearing, but then unilaterally continued it indefinitely. The Department's counsel then informed Ohio Releaf that the first available hearing date likely would be in early 2019, some 14 months after the Department denied its application.

Ohio Releaf filed a motion for preliminary injunction asking the Court (1) to compel Commerce to hold a prompt hearing, and (2) to stop Commerce from converting provisional licenses to certificates of operation until it received that hearing. Like Cannascend, it also sought to compel the production of public records. Ohio Releaf amended its complaint to join the Level I provisional licensees as defendants, and the matter proceeded to a preliminary injunction hearing.

During the preliminary injunction hearing, Ohio Releaf attempted to demonstrate that it would suffer an irreparable competitive disadvantage and nearly insurmountable barriers to entering Ohio's medical marijuana marketplace if the MMCP was not enjoined and administrative review of its application resulted in it receiving an additional license. It also attempted to

demonstrate the merits of its application in the hopes that the court would conclude that it had a viable application. Witnesses from the Department of Commerce testified concerning their first-come, first-serve policy for scheduling hearings based on the time that notices of appeal were filed. The delay in Ohio Releaf's hearing, they explained, reflected its slow filing, which occurred after the filing of 50 other appeals. They also testified that a substantial point-gap separated Ohio Releaf from the top scoring Level I provisional licensees, making it unlikely that it would receive a license after an administrative hearing. Hence, there was no urgency in scheduling Ohio Releaf's hearing ahead of any other losing applicant.

The court also heard evidence from a patient advocate who described the anticipated effect medical marijuana treatment would have on her epileptic daughter. She explained that her family had exhausted all other pharmaceutical options—medical marijuana was the last option for mitigating her daughter's seizures. The court opined from the bench that the Ohio legislature identified the public's interest in making medical marijuana available to certain patients, including epileptics.

Finally, the chief operating officer of one of the Level I licensees testified about the substantial harm a broad injunction of the MMCP would have on his company. He stated that more than \$14 million of an anticipated \$16 million budget had been spent to obtain the company's license, construct a state-of-the-art facility, hire qualified personnel from around the country, and prepare for inspection and the first crop of medical marijuana. He further testified that his company's facility alone created approximately 300 new construction jobs and dozens of permanent operations jobs. Other Level I licensees submitted affidavits that contained similar information. All in, Level I licensees have more than \$150 million invested in Ohio's MMCP.

On May 18, 2018, the court granted a limited injunction that denied Ohio Releaf's broad request for an order shutting down the MMCP. Though the court rejected the same jurisdictional arguments that won the day in *Cannascend*, it granted only limited relief by ordering the Department to hold an administrative hearing within two weeks of the order. The court also dismissed Ohio Releaf's public records act claims, holding that Commerce acted, and continued to act, in good faith in responding to records requests. Ohio Releaf received its administrative hearing, which concluded in July 2018. Aspects of the case remain pending before the common pleas court.

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All of the information presented in the article is from public sources, including court transcripts and written judicial decisions.