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Acting Commissioner

December 10, 2019

Joshua S. Bauchner, Esquire
Ansell, Grimm & Aaron
365 Rifle Camp Road
Woodland Park, New Jersey 07424

Re: Tetra Grow's Request for the
Department of Health to Stay
Consideration of Alternative Treatment
Center Applications

Dear Mr. Bauchner:

On November 27, 2019, I received Tetra Grow's request for the Department of Health to stay its consideration of all alternative treatment center (ATC) applications submitted in response to the Department's July 1, 2019 Request for Applications (RFA). Tetra Grow also requests that the Department allow any disqualified applicant who experienced technical difficulties with its electronic ATC application to resubmit its application for consideration. For the reasons set forth below, Tetra Grow's requests are denied.

THE RFA PROCESS

Under the Compassionate Use of Medical Marijuana Act (Act), N.J.S.A. 24:6I-1 to -16,¹ the Department is charged with implementing the State's Medicinal Marijuana Program (MMP), including establishing a registry of qualifying patients and primary caregivers and processing applications for permits to operate ATCs. To qualify as an MMP patient, an individual must suffer from one of the debilitating medical conditions listed in the Act or from any condition the Department establishes as debilitating. N.J.S.A. 24:6I-3.

In March 2018, the Department added five new medical conditions to the list of debilitating medical conditions that qualify for treatment with medical marijuana: (1) chronic pain related to musculoskeletal disorders; (2) chronic pain conditions of a visceral origin; (3) Tourette Syndrome; (4) migraine; and (5) anxiety. Then, in January 2019, the Department added one additional condition, Opioid Use Disorder (as an adjunct to Medication-Assisted Treatment), to the MMP. Since then, there has been a surge of new patients registering with the MMP. Between March 2018 and July 2019, 30,000 new patients registered with the

¹ Jake Honig's Law, signed by the Governor on July 2, 2019, amends the Act, effective immediately. However, the statutes in effect at the time the RFA was published govern this appeal. Thus, references to the statutes herein are to the version in effect on the date the RFA was published.

MMP, bringing the patient count to over 49,000. Due to the expansion of the patient population served by the MMP, the Department determined that additional ATCs were needed to meet the needs of the MMP patients. As such, the Department began the permitting process for new ATCs under its rules, N.J.A.C. 8:64-1.1 to -13.11.

As set forth in N.J.A.C. 8:64-6.1, the Department's selection of ATCs is accomplished through a competitive application process. Accordingly, the Department crafted an RFA for the submission of applications, which was issued on or about July 1, 2019. The RFA advised that the Department would select up to 24 new ATCs. Of the 24, the Department was seeking up to two cultivation endorsements, five dispensary endorsements and one vertically integrated permit² for each of the Northern and Central regions and up to one cultivation endorsement, five dispensary endorsements and one vertically integrated permit for the Southern region. The RFA further provided that one at-large vertically integrated permit applicant would be selected and regionally sited at the time of the award. Applications for dispensary endorsements were to be submitted by 3:00 p.m. on August 21, 2019, and applications for cultivation endorsements and vertically

² Vertically Integrated ATC permits consist of one dispensing, one cultivation and one manufacturing endorsement.

integrated permits were to be submitted by 3:00 p.m. on August 22, 2019.

The RFA also outlined the components of the ATC application and explained how an applicant could submit an application. Specifically, the application consisted of three main components: Permit Application Part A; Personal History Disclosure Form; and Permit Application Part B. For part A, there were fourteen mandatory submissions, including evidence that all principals, directors, board members, owners and employees of the ATC would cooperate with a criminal background check. The RFA also warned prospective applicants that an applicant's failure to submit the mandatory information would result in its disqualification from consideration under the ATC permitting process. As for Part B, it provided the criteria measures that would be scored by the Department if the application passed its completeness review as well as the maximum points that could be awarded for each measure.

For submission, applicants were given two options: electronic or paper. When submitting electronically, the RFA explained that Part A and the Personal History Disclosure form were fillable PDF forms and Part B had to be completed by the applicant and submitted as a single PDF. The RFA further advised the applicants that they must "download the free program, 'Adobe Acrobat Reader,' to properly fill out the Part A form and attach the necessary documents. The program can be downloaded via Adobe's

website at <https://get.adobe.com/reader/>."

As for paper submissions, the RFA stated that applicants could print out the application and complete it manually. When filing in paper form, the RFA instructed the applicants to submit one complete paper application to the Department.

And, regardless of the chosen method of submission, the RFA instructed each applicant to submit to the Department the required application fees and a paper application cover sheet that included an original signature of an individual authorized to make legally binding commitments on behalf of the applicant along with a "statement attesting to the accuracy, veracity, and completeness of all statements, figures, amounts and other information contained in the materials submitted."

After issuing the RFA, the Department received several inquiries about the RFA, which prompted it to issue a "Frequently Asked Questions" guidance document. When asked about electronic submissions, the Department advised that "[a]pplicants assume sole responsibility for the complete effort involved in the application submission. Allow plenty of time for the application submission process as applications received after the application period closes will not be considered."

The Department also posted a pre-application webinar to its website on August 2, 2019, where the Department reviewed the RFA process and the most commonly submitted questions. In the webinar,

the Department reiterated the above guidance to prospective ATC applicants. The webinar remained on the Department's website as a resource for applicants.

In response to the RFA, the Department received 196 timely applications, with 46 of the applicants seeking vertically integrated ATC permits. Tetra Grow submitted an electronic application for a vertically integrated ATC permit in the Southern region.

After the RFA closed, the Department conducted a completeness review of the applications to determine whether each applicant had completed and submitted all mandatory information requested in the RFA. During the completeness review, Tetra Grow's application was deemed incomplete. Specifically, the Department was unable to access the following mandatory requirement in Tetra Grow's application due to file corruption:

- Evidence that all principals, directors, board members, owners and employees will cooperate with a criminal history record background check, pursuant to N.J.A.C. 8:64-7.2.

Because Tetra Grow failed to submit mandatory documents set forth in the RFA, the Department issued a final agency decision on November 18, 2019 advising Tetra Grow that its application was disqualified from consideration under the RFA.

The RFA Electronic Application Submission System

To allow for online submissions under the RFA, the Department

created an electronic application submission system. The system was substantially the same as the electronic application submission system used by the Department for its 2018 ATC RFA and was crafted in a manner that ensured it was simple and easy to use. Prior to releasing the RFA, the Department extensively tested the online forms, the PDF forms, and the PDF upload functionality of the online application and found no issues.

After the RFA was issued, a prospective applicant advised the Department about an issue with the "add a page" function of the fillable portion of the Part A form. The Department immediately investigated and discovered that the "add a page" function had been inadvertently disabled when it was uploaded into the system. The Department quickly corrected this. After thoroughly testing the corrected form, which included testing the "add a page" function multiple times, uploading multiple large attachments to the form to ensure that it would accept voluminous attachments, and finding no issues, the Department posted the updated form to its website on the morning of August 2, 2019. That same morning, the Department also prominently posted a notice about the updated form on the RFA webpage, which prospective applicants were required to use in order to access and view the Department's pre-application webinar being held that afternoon.

On August 21 and 22, 2019 - the dates applications were due - the Department continuously monitored the online submission

system to make certain that it was functioning properly and that applicants were not encountering any issues with their submissions. The Department did not find any problems with the system, and the system did not experience any outages. Additionally, no applicants, including Tetra Grow, contacted the Department to report any technical issues with electronically submitting their applications.

During the completeness review of the applications, the Department found that fifteen³ applicants had uploaded some documents with their applications that were inaccessible to the Department due to file corruption. For Tetra Grow, the Department could not open some of its mandatory submitted documents because they were corrupted. Upon discovering this, the Department again reviewed the application submission system and found no errors or issues with its functionality. Because the Department's system was functioning properly, the vast majority of applicants did not upload corrupted files, and the applicants who did encounter file corruption only experienced the issue with some, but not all, of their uploaded documents, the Department determined that the corruption was not caused by the Department's system. As a result, applicants who submitted corrupted, mandatory files, like Tetra

³ Of those 15 applicants, six had submitted applications both electronically and in paper, so the file corruption did not affect the Department's review.

Grow, were disqualified from proceeding with the ATC permitting process because the required documents were inaccessible to the Department. The disqualifications were memorialized in final agency decisions issued to each applicant who submitted corrupted, mandatory documents.

THE STAY APPLICATION

On November 26, 2019, Tetra Grow appealed the denial of its application to the Superior Court of New Jersey, Appellate Division. Tetra Grow now requests that I stay consideration of all alternative treatment center (ATC) applications submitted in response to the Department's July 1, 2019 RFA. After reviewing Tetra Grow's application, I find that it fails to meet the requirements for injunctive relief.

To succeed in its application for a stay, Tetra Grow must establish (1) that irreparable injury will result if the relief sought is withheld; (2) a reasonable likelihood of success on the merits of the underlying claim; (3) that the legal right underlying the request for relief is well settled; and (4) that the relative hardship of the parties is balanced in its favor. Crowe v. DeGioia, 90 N.J. 126, 132-34 (1982). The burden is on Tetra Grow to demonstrate entitlement to the relief requested by satisfying each of the applicable criteria. I find that Tetra Grow did not establish any of these criteria.

First, I find that Tetra Grow has not shown that it is

reasonably likely to succeed on the merits of its claim. To be successful in its claim, Tetra Grow must demonstrate that the Department's submission process for ATC applications was arbitrary, capricious, unreasonable or inconsistent with the governing law. Matter of Musick, 143 N.J. 206, 216 (1996); Henry v. Rahway State Prison, 81 N.J. 571, 579-80 (1980). As explained above, nothing about the Department's submission process was unreasonable.

Under the Act, the Department is responsible for implementing the MMP, which includes the permitting and oversight of ATCs. The Legislature afforded the Department broad discretion to accept and evaluate ATC permit applications and select entities to receive permits to operate ATCs so that it could "ensure the availability of a sufficient number of alternative treatment centers throughout the State, pursuant to need." N.J.S.A. 24:6I-7(a). Through the exercise of its discretion, the Department developed a comprehensive process for accepting, reviewing and selecting entities to receive ATC permits. See N.J.A.C. 8:64-6.1 to -6.5. Specifically, the Department's selection of ATCs is accomplished through a competitive application process. See N.J.A.C. 8:64-6.1.

Finding a shortage of ATCs in the State due to the expanding MMP patient population, the Department issued an RFA for ATC applications in July 2019. To attract as many qualified applicants as possible, the Department provided applicants with two simple

avenues for submitting applications: paper and electronic. For paper submissions, the applicant was required to print out the application, manually complete it and submit one copy, along with the required fees and cover sheet, to the Department before the deadline. The paper submission process was uncomplicated and straightforward.

The electronic submission process was equally undemanding. Part A of the application and the Personal History Disclosure form were fillable PDF forms, and Part B of the application was to be completed by the applicant and submitted as a single PDF. To complete Part A and the Personal History Disclosure form and upload the necessary documents, all the applicant needed was Adobe Acrobat Reader, a free program, to create its PDFs.

To ensure that the online submission process was functional and user friendly, the Department rigorously tested it prior to release. When a minor issue arose with Part A of the application during the open submission period (which was unrelated to Tetra Grow's PDF uploading issue), the Department took immediate steps to correct it. The Department also continuously monitored the online application system on the final days of the submission period to ensure that applicants were not experiencing issues with the system and no system outages were preventing the submission of applications. There were none. In fact, the Department received no reports of problems of any kind in these final days. In short,

the Department's application process was reasonable.

In its moving papers, Tetra Grow claims that the Department's disqualification of its application from the ATC selection process was arbitrary, capricious and unreasonable because 1) the Department's online submission application system was flawed as it corrupted some of its mandatory documents upon submission; and 2) the Department failed to develop a record for the Appellate Division by not affording it an administrative hearing on its denied application. I reject Tetra Grow's claims.

As to the first claim, the Department's online application submission system was extensively tested and continuously monitored. Throughout its oversight, the Department found no issues with attaching or uploading documents in the system. When a minor issue was found with Part A of the application during the open submission period, which was unrelated to Tetra Grow's PDF uploading issue, the Department corrected it immediately. Additionally, the vast majority of applicants uploaded documents with no issues. The few applicants who experienced file corruption only experienced it with some, but not all, of their uploads. Because the Department's system was functioning properly, the overwhelming majority of applicants did not upload corrupted files, and only some of Tetra Grow's uploaded files were corrupted, the corruption was not caused by the Department's system. Rather, the files were corrupted by Tetra Grow.

Moreover, Tetra Grow chose not to exercise the option of submitting its application in paper format. Instead, it assumed the risk of relying solely on an electronic submission. As the Department cautioned in its Frequently Asked Questions and during its pre-application webinar, "[a]pplicants assume sole responsibility for the complete effort involved in application submission." Tetra Grow's failure to heed this warning does not render the Department's application submission process arbitrary, capricious or unreasonable. Accordingly, I reject Tetra Grow's claim of error.

Tetra Grow's second claim is also unfounded because, under N.J.S.A. 24:6I-7, the denial of an application to operate an ATC "shall be considered a final agency decision, subject to review by the Appellate Division of the Superior Court." Consistent with this statutory directive, the Department informed Tetra Grow that it could appeal the denial of its application to operate an ATC to the Appellate Division of the Superior Court, rather than affording it an administrative hearing.

Based upon the above, I find that Tetra Grow has not established a reasonable likelihood of success on the merits of its appeal. For the same reasons, I find that Tetra Grow has not established that the legal right underlying the request for relief is well settled.

I also find that Tetra Grow has not shown it will suffer

irreparable injury. Harm is generally considered "irreparable" if it cannot adequately be addressed by the payment of monetary damages. Thus, it has been defined as "substantial injury to a material degree coupled with the inadequacy of monetary damages." Judice's Sunshine Pontiac, Inc. v. General Motors Corp., 418 F. Supp. 1212, 1218 (D.N.J. 1976). In addition, the movant must establish "that the harm to him if the injunction is denied will be greater than the harm to the opposing party if the injunction is granted." Ispahani v. Allied Domecq Retailing USA, 320 N.J. Super. 494, 498 (App. Div. 1999).

Tetra Grow claims that it will experience "irreparable harm" because the Department's disqualification of applicants who submitted corrupted, mandatory files with their applications could result in the most-qualified applicants being excluded from consideration. Tetra Grow speculates this will result in the entire permitting process being jeopardized. This claim of harm to the ATC selection process does not articulate how Tetra Grow itself will experience harm, let alone irreparable harm.

Tetra Grow further asserts that those applicants selected to proceed with the ATC permitting process will be irreparably harmed if the selection process is not stayed because they will experience a significant economic loss if the Appellate Division finds the Department's electronic submission system unreasonable and invalidates the selection process. However, the only impact that

selected applicants will experience if the selection process is not stayed and the court later invalidates the selection process is purely economic. Financial loss is not irreparable harm.

In contrast, I find that staying the review of the ATC applications will harm MMP patients. As outlined above, the Department's recent addition of six new medical conditions to the MMP resulted in a drastic increase in the number of patients on the registry. When the RFA was issued in July 2019, the MMP had approximately 49,000 patients registered. Today, the MMP has over 62,000 registered patients and is averaging 3500 new patients per month. Because the MMP patient population is expanding rapidly, so too is the demand for medical marijuana. As such, I cannot halt the ATC permitting process, as the patients the Department is charged with serving would be harmed. Therefore, I find that Tetra Grow has not established that it will suffer irreparable harm if a stay is not entered.

Finally, the relative hardships of the parties do not weigh in Tetra Grow's favor. The public's interest in ensuring a sufficient number of ATCs in the State to provide qualifying patients with medical marijuana outweighs Tetra Grow's self-motivated interests in becoming an ATC in New Jersey.

For these reasons, I find that Tetra Grow has not satisfied any of the requirements for a stay, and its request for injunctive relief is denied.

REQUEST TO RESUBMIT CORRUPTED FILES

Tetra Grow also requests that the Department permit it and other disqualified applicants who experienced technical difficulties with their electronic submissions to resubmit their mandatory files that were corrupted so their applications can proceed through the selection process. I reject this request for several reasons.

First, allowing applicants to resubmit corrupted files is unwarranted because the technical errors they experienced were not caused by the Department. As explained above, any technical errors that resulted in corrupted files fall at the creating entity's feet; the Department's online submission system did not corrupt the files. In essence, Tetra Grow requests that disqualified applicants receive special treatment to correct their own errors. This is not a reasonable basis to allow Tetra Grow and others similarly situated to resubmit their documents.

Second, allowing the resubmission of corrupted files would provide Tetra Grow and all other applicants who failed to file timely, error-free applications an unfair advantage over those applicants who did. Again, only a few applicants submitted corrupted files. And, because the errors Tetra Grow complains of are not the Department's fault, providing such relief to the disadvantage of other applicants would be unfair.

Third, the RFA offered applicants the opportunity to submit

their applications in paper format. The fact that Tetra Grow and other similarly situated entities did not exercise this option is not a reason to allow applicants to resubmit their documents well after the submission deadline has passed.

Lastly, to allow the resubmission of documents would unduly delay the permitting process for additional ATCs. Because additional ATCs are necessary to meet the growing needs of the MMP patients, I cannot temporarily suspend the permitting process to allow Tetra Grow and other entities to correct self-created technical errors.

For these reasons, Tetra Grow's request to allow disqualified applicants to resubmit their corrupted files so their applications may proceed with the selection process is denied.

Pursuant to Court Rule 2:9-7, Tetra Grow may seek relief from this decision in the Superior Court of New Jersey, Appellate Division.

Sincerely,



Judith M. Persichilli, RN, BSN, MA
Acting Commissioner