



State of New Jersey  
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Lt. Governor

SHEREEF M. ELNAHAL, MD, MBA  
Commissioner

February 19, 2019

Alan S. Naar, Esquire  
Greenbaum, Rowe, Smith & Davis LLP  
Metro Corporate Campus One  
P.O. Box 5600  
Woodbridge, New Jersey 07095

Re: Treatment Solutions of New Jersey's  
Request for a Stay of the Department of  
Health's Final Agency Decisions for  
Alternative Treatment Centers

Dear Mr. Naar:

I am in receipt of Treatment Solutions of New Jersey's February 6, 2019 request for a stay of the Department of Health's December 17, 2018 final agency decisions issued to six applicants selected to proceed with the alternative treatment center (ATC) permitting process. For the reasons set forth below, your request for a stay pending appeal is denied.

**THE RFA PROCESS**

The Department is charged with the responsibility of implementing the State's Medicinal Marijuana Program (MMP), including establishing a registry of qualifying patients and primary care givers 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. Since then, there has been a surge of new patients registering with the MMP. Between March 2018 and July 2018, 7,000 new patients were registered with the MMP, bringing the patient count to over 25,000. Due to this significant expansion of the patient population served by the MMP and because New Jersey has only six ATCs to serve all these patients, the Department determined that additional ATCs were necessary to meet the needs of 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. The Department issued a Request for Applications (RFA) on or about July 16, 2018, and applications were to be submitted by August 31, 2018. The ten-page RFA provided applicants with detailed review criteria and mandatory

organization information that was required with their submissions. The mandatory organization information included "the legal name of the corporation, a copy of the articles of incorporation and by-laws, evidence that the corporation is in good standing with the New Jersey Department of Treasury and a certificate certified under the seal of the New Jersey State Treasurer as to the legal status of the business entity." The request for this information was also reflected in the Department's application. Specifically, the application asked the applicant to provide the structure of its business entity and listed several options for it to choose, including limited liability company, corporation, limited partnership and sole proprietorship, among others.

As for the criteria measures, they included but were not limited to:

Criterion 1: Measure 1: Past experience in all three aspects of the medicinal marijuana supply chain: cultivation, manufacturing and dispensing.

Criterion 1: Measure 4: Estimate of time needed to produce first full crop of medicinal marijuana, including the projected size of that crop and the reasoning for the estimates.

Criterion 1: Measure 5: Record of past business taxes paid to federal, state and local governments

Criterion 2: Measure 3: Any certifications or designations proving the business is women-owned, minority-owned, or veteran-

owned.

[RFA at pages 6-10]

The RFA further advised that the Department would select up to six new vertically integrated ATCs with up to two in each of the three New Jersey regions, which are designated as the North, Central and South.

After issuing the RFA, the Department received a number of inquiries, which prompted the Department to issue "Frequently Asked Questions" to address the questions about the RFA. Relevant here, the Department was asked: "What form of entity is required for ATCs? Must the ATC entity be a corporation, or can it be a limited liability company (LLC)?" In response, the Department advised that the chosen business form of the proposed ATC was "at the discretion of the applicant."

In response to the RFA, the Department received 146 timely applications submitted by 103 applicants, with several applicants submitting applications to operate ATCs in multiple regions. Treatment Solutions of New Jersey, Inc. submitted applications in all three regions.

The Department then assembled a six-member review committee, which reviewed and scored all the applications, including Treatment Solutions'. The six-member committee was comprised of four employees from the Department of Health, one employee from the Department of Agriculture and one employee

from the Department of Treasury. The diversity in the committee provided MMP programmatic, plant science, diversity and financial expertise to the review process.

Prior to beginning the scoring process, the committee members attended a workshop, which trained them on diversity and implicit bias, gave them an overview of the MMP and its goals and mission, and provided them with guidance on scoring the applications. Thereafter, the members, each of whom signed a certification stating that he or she had no financial or personal interest in any of the applicants, independently scored and evaluated each application based on the criteria set forth in the RFA. Each member could award a maximum of 1000 points to each application. The composite scores generated by the review committee for each applicant ranged from the highest composite score of 958.1666 points to the lowest composite score of 223.6666 points.

The Department also crafted a selection methodology to guide its selection determinations from among the scored applications. The Department first concluded that choosing the same applicant in multiple regions would lead to an overly concentrated market and, given the size and strength of the applicant pool, was unnecessary for this RFA. Additionally, the Department determined that having a more diverse set of ATCs across the State would benefit MMP patients because it would

lead to a greater variety of products, thereby leading to greater access and choice. A more diverse set of ATCs would also mitigate negative impacts if one were to fail; such failure would impact only one facility. Therefore, pursuant to this RFA, the Department determined that no one applicant should operate more than one ATC.

The Department also used a supply and demand factor in its selection method to ensure that the selections yielded an adequate supply of medical marijuana for MMP patients, which is a significant component of the purpose and intent of the Act. The Department used existing medical marijuana supply and demand to determine the regional order in which the Department would make its selections. Specifically, the Department utilized existing medical marijuana supply and demand to determine the regional order in which the Department would make its selections. In calculating supply and demand, the Department first established a medical marijuana demand factor for each region. The demand factor for each region was comprised of the following calculations: total population of the region divided by total statewide population (2017 American Community Survey 5-year estimates) and, utilizing the MMP's Patient Registry, the current medical marijuana patient population in the region divided by total statewide medical marijuana patient population. The two calculations were averaged to determine the demand

factor.

The Department calculated a medical marijuana supply factor using data extracted from the inventory management systems of the current ATCs. The supply factor was the total current medical marijuana supply of the region in ounces divided by total statewide supply in ounces. These factors were then divided to determine the ratio of supply and demand in each region, with lower numbers meaning demand was higher than supply and higher numbers meaning supply was keeping pace with demand. Based on this analysis, the following ranking was determined among the regions:

Region	Total population (ACS 5 Year)	Patient Population	Supply (Ounces)
Statewide	8,960,161	37,988	68,544
North	3,678,145	10,605	12,112
South	1,837,763	13,625	22,288
Central	3,444,253	13,758	34,144

Region	Demand Factor	Supply Factor	Supply/Demand	Rank
North	0.344833492	0.176704015	0.512432867	1
South	0.281884843	0.325163399	1.153532751	2
Central	0.373281665	0.498132586	1.334468401	3

Based upon the Department's selection methodology, the committee's review of the applications, and the composite scores generated by the review process, the Department selected those applicants who would proceed with the ATC permitting process.

Beginning with the Northern region, the Department selected

NETA NJ, LLC (scoring 932.1667) and GTI New Jersey, LLC (scoring 927.3333) as they were the highest scoring applicants in the region. Next, the Department considered applicants for the Southern region. In making its selection for this region, the Department found that MPX New Jersey (scoring 958.1667) and NETA NJ, LLC (scoring 932.1667) had received the highest scores. However, because NETA's application was selected for the Northern region, it was disqualified from selection in the Southern region under the Department's selection methodology. As such, the Department selected the next highest scoring applicant for the Southern region, Columbia Care New Jersey, LLC (scoring 929.0000). Thus, Columbia Care New Jersey, LLC and MPX New Jersey were the selected applicants for the Southern region.

In selecting the applicants for the Central Region, the top four scoring applicants for this region - MPX (scoring 958.1667), NETA (scoring 932.1667), Columbia Care New Jersey, LLC (scoring 929.000), and GTI (scoring 927.3333)- were already selected for other regions in the State. Consequently, the Department disqualified MPX, Columbia Care, GTI and NETA from consideration for the Central region. The Department then proceeded to select the next two highest ranking applications in this region, which were Verano NJ, LLC (scoring 920.6667) and JG New Jersey, LLC (scoring 913.3333). Therefore, NETA NJ, LLC; GTI New Jersey, LLC; MPX New Jersey; Columbia Care New Jersey, LLC;



Verano NJ, LLC; and JG New Jersey, LLC were selected to proceed with the ATC permitting process for their respective regions.

Treatment Solutions submitted applications for all three regions. However, it received scores of only 873.6667 for its Northern and Central applications and a score of only 877.5000 for its Southern application. Consequently, Treatment Solutions was not selected for any region. The Department issued final agency decisions to the selected applicants on December 17, 2018. The Department also issued final agency decisions to Treatment Solutions on December 17, 2018, advising that its applications were denied. On January 31, 2019, the Department issued a notice of correction of the final agency decisions, which corrected two minor typographical errors.

#### THE STAY APPLICATION

On January 30, 2019, Treatment Solutions appealed the denial of its application to the Superior Court of New Jersey, Appellate Division. Treatment Solutions requests that I stay the Department's final agency decisions issued to the six applicants selected to proceed with the ATC permitting process under the RFA. After reviewing Treatment Solution's application, I find that it fails to meet the requirements for injunctive relief.

To succeed in its application for a stay, Treatment Solutions 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 Treatment Solutions to demonstrate entitlement to the relief requested by satisfying each of the applicable criteria. I find that Treatment Solutions did not establish any of these criteria.

First, I find that Treatment Solutions has not shown that it is reasonably likely to succeed on the merits of its appeal. To be successful in its appeal, Treatment Solutions must demonstrate that the final agency decisions were 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, the Department undertook a painstaking evaluation of the applications under the governing statutes and regulations.

The Compassionate Use of Medical Marijuana Act, and the regulations promulgated thereunder, afford the Department broad discretion to evaluate ATC permit applications and select those entities to receive permits to operate ATCs. 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, et seq.

The process at issue here began with a comprehensive RFA. The RFA contained three criteria, each with subsections setting forth specific measures, addressing all aspects of establishing and operating an ATC. The RFA also included a scoring system which assigned a certain number of points for each criterion and measure outlined in the RFA. The Department designed each criterion and measure, as well as the scoring system itself, to further the purpose and intent of the Act -- to ensure that an adequate supply of medical marijuana is made available to qualifying individuals and that the entities producing and dispensing the medical marijuana are financially viable, law-abiding, well-organized and physically secure.

The Department assembled a six-member review committee to consider and evaluate the applications submitted in response to the RFA. The committee members were carefully chosen to infuse the review process with expertise in the areas of the MMP, plant science, finance, and diversity. The members also attended a training workshop on diversity, implicit bias, scoring guidelines and MMP background to equip them with the necessary tools to perform an effective evaluation of each application. The chosen members were also vetted to ensure that they had no financial or personal stake in any of the applicants. This process resulted in a committee staffed with qualified, unbiased

reviewers.

The committee members then reviewed the applications against the criteria set forth in the RFA and allocated scores based on the points assigned to each of the criteria and measures referenced in the RFA. The review process yielded composite scores for each applicant.

The Department then developed a selection methodology for the selection of six applicants for ATC permits. The selection method provided that no one applicant should operate more than one ATC and used existing medical marijuana supply and demand to determine the regional order in which the selections would be made.

The Department first selected two applicants for the Northern region as this was the region with the greatest need for medical marijuana, as demonstrated by the supply and demand calculations. The Department then selected two applicants for the Southern region. Finally, the Department selected two applicants for the Central region. While Treatment Solutions submitted applications for all three regions, its composite score for each region were lower than the selected applicants. Thus, Treatment Solutions was not selected for any region. This process provided a fair, reasonable and unbiased review of what each applicant, including Treatment Solutions, had to offer.

In its moving papers, Treatment Solutions contends that it

is likely to succeed on the merits of its appeal because N.J.A.C. 8:64-7.1(b)(1) requires an ATC applicant to be a corporation, yet the Department allowed business entities other than corporations, such as limited liability companies, to apply for and receive approval to proceed with the ATC permitting process. In support of this argument, Treatment Solutions claims that the Department improperly applied its unpromulgated proposed rule amendment for N.J.A.C. 8:64-7.1(b)(1), which removes the corporation limitation for ATC applicants, to the RFA process. Based upon this assertion, Treatment Solutions contends that the Department's final agency decisions are unreasonable because it changed its interpretation of its rules for the RFA without first engaging in rulemaking as required by Metromedia, Inc. v. Director, Division of Taxation, 97 N.J. 313 (2001). I find this argument unavailing.

"Administrative agencies have wide discretion in selecting the means to fulfill the duties that the Legislature has delegated to them. Agencies may act informally, or formally through rulemaking or adjudication in administrative hearings." Texter v. Dept. of Human Servs., 88 N.J. 376, 383-84 (1982) (citations omitted). "Administrative agencies possess the ability to be flexible and responsive to changing conditions. This flexibility includes the ability to select those procedures most appropriate to enable the agency to implement legislative

policy.” Id. at 385 (citations omitted). Informal agency action has been defined as “any determination that is taken without a trial-type hearing, including investigating, publicizing, negotiating, settling, advising, planning, and supervising a regulated industry.” Northwest Covenant Medical Center v. Fishman, 167 N.J. 123, 136-37 (2001). “[I]nformal action constitutes the bulk of the activity of most administrative agencies.” In re Request for Solid Waste Util. Customer Lists, 106 N.J. 508, 518 (1987).

In January 2018, Governor Murphy issued Executive Order 6, which called upon the Department to “undertake a review of all aspects of New Jersey’s medical marijuana program, with a focus on ways to expand access to marijuana for medical purposes,” including “[a]n evaluation of the current rules regulating the operations and siting of dispensaries and cultivation facilities.” In response, the Department began reviewing its rules. This rule review revealed an inconsistency in N.J.A.C. 8:64-7.1(b)(1), which states that an applicant for an ATC permit is required to submit to the Department, in addition to its application, “[t]he legal name of the corporation, a copy of the articles of incorporation and by-laws, evidence that the corporation is in good standing with the New Jersey Secretary of State and a certificate certified under the seal of the New Jersey State Treasurer as to the legal status of the business

entity." As written, the rule first appears to limit ATC's to the corporation business structure, but then provides the applicant with the opportunity to advise the Department of the "legal status of the business entity," signaling that other business entity forms were permitted for ATCs.

Due to the potential confusion that could result from the inconsistency in the rule and to clarify that the Department never intended for this rule to limit ATC permit applications to corporations, the Department included a section in the RFA application that prompted the applicant to select its business entity type from a list of several different options, including limited liability company. This was done to eliminate any confusion on the part of the applicant and place the applicant on notice that it was not restricted to the corporation business structure.

Although the application listed several different business entity structures, the Department received inquiries from potential applicants seeking clarification on whether N.J.A.C. 8:64-7.1(b)(1) only permitted corporations to apply under the RFA or whether other business entities, such as limited liability companies, could submit applications. In response, the Department advised in its frequently asked questions for the RFA that the business structure of a proposed ATC was at the applicant's discretion. Thus, the Department provided additional

notice to all potential applicants that the rule and the RFA did not restrict ATC applicants to the corporate business structure.

Additionally, the current RFA is the first time the Department relied upon its rules for the competitive ATC permitting process as the rules were not yet promulgated when the currently permitted ATCs were selected. Therefore, the Department has never applied or relied upon an interpretation of the rule that differs from the one used for the current RFA.

Based upon the above, the Department has consistently interpreted N.J.A.C. 8:64-7.1(b)(1) to mean that all business entity forms were eligible to apply for an ATC permit. While the Department included a clarification of this rule in its June 2018 rule proposal to amended N.J.A.C. 8:64, which has not yet been adopted, this does not establish that the Department applied a new or different interpretation of N.J.A.C. 8:64-7.1(b)(1) in advance of rulemaking. Accordingly, I find that Treatment Solutions has not demonstrated that the Department changed its interpretation of N.J.A.C. 8:64-7.1(b)(1) or applied a new interpretation to the RFA process in advance of rulemaking.

Treatment Solutions also asserts that there were scoring irregularities with the applications, which makes the final agency decisions arbitrary. It claims that for certain criterion measures applicants received high scores from some of



the selection committee members while receiving lower scores from other members for the same criterion measure. Treatment Solutions also asserts that the Department failed to ensure that the members applied the same standards of evaluation to all the applications in the scoring process. Thus, Treatment Solutions claims that the entire review process was arbitrary and capricious. I disagree.

As explained above, the Department populated the selection review committee with six individuals from three agencies who brought to the review process knowledge and expertise in the areas of the MMP, plant science, finance, and diversity. The members also attended a training workshop on diversity, implicit bias, scoring guidelines and MMP background. This workshop was provided so that each member had the same general baseline of information necessary to conduct an effective and fair review of the applications. Therefore, each member was armed not only with general scoring guidelines, but also with his or her own set of skills and expertise for the review process. Because of the diverse background of each member coupled with the standard scoring information provided to the members, it was not only anticipated but expected that the scores given to an applicant by each member would vary and not be identical. 'Indeed, the fact that some applicants received different scores from each committee member for the same criteria measure demonstrates that

each member applied his or her unique expertise to the scoring process, thereby ensuring that the applications were vetted and viewed from all reasonable and relevant vantage points. Accordingly, I find that the applications were properly reviewed by the members and reject Treatment Solution's claim of error.

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

I also find that Treatment Solutions 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).

In its moving papers, Treatment Solutions claims that "irreparable harm" will befall it in that it will experience a

significant economic loss if the stay is not granted. It asserts that if the stay is not granted, the selected applicants can continue to build-out their ATC businesses while Treatment Solutions cannot do so without a great economic risk. In short, Treatment Solutions' claim of irreparable harm is purely economic. Financial loss is not irreparable harm.

In contrast, if the final agency decisions were stayed, the MMP patients would suffer irreparable harm. As outlined above, the Department's recent addition of five new debilitating medical conditions to the MMP resulted in a drastic increase in the number of patients on the registry. In February 2018, the MMP had approximately 18,000 patients registered. Today, the MMP has over 40,000 registered patients and is averaging 2800 new patients per month. With this amount of growth, the Department expects that the number of registered patients will reach between 60,000 and 70,000 by January of 2020. Because the MMP patient population is expanding rapidly, the demand for medical marijuana is growing as fast. With only six ATCs in the State, the cultivation and dispensing of medical marijuana simply cannot keep pace with the growing demand. As such, I cannot halt the ATC permitting process necessary to increase production of medical marijuana, as harm will come to the very patients the Department is charged with serving. Therefore, I find that Treatment Solutions has not established that it will

suffer irreparable harm if a stay of the final agency decisions is not entered.

Finally, the relative hardships of the parties do not balance in Treatment Solutions' favor. The public's interest in ensuring that there are a sufficient number of ATCs in the State to provide individuals suffering from debilitating medical conditions with medical marijuana to alleviate their suffering outweighs Treatment Solutions' self-motivated interests in becoming an ATC in New Jersey.

For these reasons, I find that Treatment Solutions has not satisfied any of the requirements for a stay, and its request for a stay pending appeal is denied.

Pursuant to Court Rule 2:9-7, Treatment Solutions may appeal this decision to the Superior Court of New Jersey, Appellate Division.

Sincerely,

A handwritten signature in blue ink, appearing to read "Shereef M. Elnahal", is written over a light blue rectangular background.

Shereef M. Elnahal, MD, MBA  
Commissioner

cc: Arnon Vered, NETA NJ, LLC  
Devra Karlebach, GTI New Jersey, LLC  
Dana Klein, Verano New Jersey, LLC  
Jamil Taylor, JG New Jersey, LLC  
Elizabeth Stavola, MPX New Jersey  
Nicholas K. Vita, Columbia Care New Jersey, LLC