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Nuleaf CLV Dispensary, LLC v. State, Dep't of Health and Human Serv's, 134 Nev. Adv. Op. 17 (Mar. 29, 2018)

Margaret Higgins
University of Nevada, Las Vegas -- William S. Boyd School of Law

Nuleaf CLV Dispensary, LLC v. State, Dep't of Health and Human Serv's, 134 Nev. Adv. Op. 17 (Mar. 29, 2018)[1]

STATUTORY INTERPRETATION: MEDICAL MARIJUANA

Summary

The Court determined that under NRS Chapter 453: (1) a medical marijuana establishment applicant does not have to satisfy NRS 453A.322(3)(a)(5)'s requirements for the Department of Health and Human Services to issue the applicant a provisional registration certificate; and (2) the registration certificate shall be deemed provisional until the applicant receives proper approval to commence operations from the applicable local government to commence operation.

Background

Every year, the Department of Health and Human Services accepts applications for those seeking to operate medical marijuana establishments. The relevant statutory and regulatory framework is summarized as follows:

The Department first evaluates the applicants according to criteria set forth in NRS Chapter 453A and NAC 453A, ranks the applicants, and then issues registration certificates to qualifying applicants within 90 days of receiving the applications. Under NRS 453A.322(3)(a)(5) an applicant must submit proof of licensure or a letter of compliance from the applicable local governmental authority certifying that the establishment is in compliance with local zoning restrictions and building requirements before commencing operation.[2] The City is responsible for notifying the Department when a proposed location has been deemed compliant.[3] The Department can only issue 12 certificates each year to dispensaries located in the City.

In 2014, the Department accepted applications in August and had a 90-day deadline to issue rankings and corresponding registration certificates. The City issued a letter to the Department, listing the compliant applicants, on November 3, 2014, one business day before the conclusion of the 90-day review period. The Department issued its 2014 rankings without considering the letter of compliance, thereby ranking some non-compliant applicants higher than compliant applicants.

This appeal concerns the City's rankings of, and subsequent denials of registration certificates for, three medical marijuana establishments. Appellant Nuleaf CLV Dispensary, LLC (Nuleaf), a non-compliant establishment, ranked third. Respondent/cross-appellant GB Sciences, LLC (GB), a compliant establishment, ranked thirteenth. Respondent/cross-respondent

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[1] By Molly Higgins

[2] NEV. REV. STAT. 453A.322(3)(a)(5) (2013).

[3] LAS VEGAS, NEV., MUN. CODE 6.95.080 (2017).

Acres Medical, LLC (Acres), a compliant establishment, ranked in the thirties. Acres filed suit against the Department seeking writ of mandamus to compel it to recalculate its score because it failed to account for certain criteria while calculating Acres original score, which the district court granted. After recalculation Acres moved up to thirteenth place, and GB moved down to fourteenth.

GB filed suit and moved for summary judgment against the Department and Nuleaf, alleging that the Department should have disqualified Nuleaf for its failure to obtain approval from the City under NRS 453A.322(3)(a)(5) and that the Department should reissue the certificate to GB. Nuleaf filed a counter-motion for summary judgment seeking declaratory relief that the Department correctly interpreted NRS Chapter 453 to allow for a provisional certificate even where compliance requirements are not yet met. Acres intervened, arguing that Nuleaf should be disqualified and that the certificate should be reissued to Acres because it held a higher position than GB.

The district court concluded that: (1) the compliance letter under NRS 453A.322(3)(a)(5) was an absolute prerequisite for receiving a provisional registration certificate, (2) Nuleaf should be disqualified for failing to provide the compliance letter, and (3) Nuleaf's certificate should be revoked and reissued to Acres.

Discussion

Ordinarily under NRS Chapter 453A a "disappointed applicant for medical marijuana establishment registration" does not have the right to judicial review because the application process does not constitute a contested case.[4] However, GB could properly seek declaratory relief because the issue here involved the construction and validity of a statute.[5]

A.

The Court considered three interrelated statutes—NRS 453A.322, NRS 453.326, and NRS 453A.328— and concluded that NRS 453A.322 is ambiguous as to whether the Department can issue a certificate for an applicant who fails to satisfy its requirements. While, NRS 453A.322(3)(a) states the Department "shall" register a medical marijuana establishment when it satisfies that subsection's requirements, NRS 453A.326(3) states that the issuance of a certificate "*shall be deemed to be provisional* until such time as: (a) the establishment is in compliance with all applicable local governmental ordinances or rules; and (b) the local government has issued a business license for the operation of the establishment."[6] Additionally, the Court noted that NRS

[4] *State, Dep't of Health and Human Servs. v. Samantha Inc.*, 133 Nev., Adv. Op. 100, 407 P.3d 327, 328, 332 (2017).
[5] NEV. REV. STAT. 30.040 (2009) ("Any person . . . whose rights status or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status, or other legal relations thereunder.")
[6] NEV. REV. STAT. 453A.322(3)(a) (2013); NEV. REV. STAT. 453A.326(3) (2013) (emphasis added).

453A.328 provides that the criteria of merit is to be considered "in addition to the *factors* set forth in [NRS 453A.322]."[7] Thus, the Court concluded that NRS 453A.322 is ambiguous.

B.

The Court concluded that NRS 453A.322's legislative history provides little guidance and turned to statutory construction principles explained in *Leven v. Frey*.[8] The Court concluded that, because NRS 453A.322 imposes a 90-day deadline on the Department but LVMC 6.95.080 does not impose any corresponding time requirement on the City, construing the statute as requiring the Department to wait for the City's notification would produce unreasonable results and render the 90-day limit meaningless.

The Court also concluded that allowing applicants to receive a provisional certificate does not disrupt the crucial interplay between the Department and local authorities in overseeing the medical marijuana registration process. It noted that the provisional certificates under NAC 453A.316 will not grant approval to begin operations until the establishment complies with all local ordinances and rules and receives a business license or approval from the local government to commence operations. Provisional certificate recipients must obtain such approval within 18 months of receiving the certificate or it may be revoked. Thus, the Departments ability to issue provisional licenses does not supercede the local government's function.

Finally, the Court, following *Meridian Gold Co. v. State ex rel. Dep't of Taxation*, deferred to the Department's interpretation of the statute because it is the administrative body tasked with enforcing the statute, its interpretation was within the language of the statute, and did not conflict with the legislative intent.[9]

Conclusion

The Court reversed the district court's order that NRS 453.322(3)(a)(5) must be satisfied before an applicant can obtain a provisional license and remanded for further proceedings. Under NRS 453A.322, the Department of Health and Human Safety has the authority to issue provisional certificates of registration to medical marijuana establishments regardless of whether the applicant has satisfied the requirements set forth in NRS 453A.322(3)(a)(5). To hold otherwise would produce unreasonable results and render the Department's 90-day review period meaningless.

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[7] NEV. REV. STAT. 453A.328 (2013) (emphasis added).
[8] *Leven v. Frey*, 123 Nev. 399, 404, 168 P.3d 712, 716 (2007).
[9] *Meridian Gold Co. v. State ex rel. Dep't of Taxation*, 119 Nev. 630, 635, 81 P.3d 516, 519 (2003).