DECLARATORY RULING 2019-01:
The State Contractor Status of Medical Marijuana Industry Licensees

On October 25, 2018, the State Elections Enforcement Commission (the "Commission") received a request for a Declaratory Ruling by Attorney Andrew C. Glassman of Pullman & Comley LLC concerning whether medical marijuana industry licenses would be considered state contracts. At its regular meeting on November 14, 2018, the Commission voted to initiate a declaratory ruling proceeding responsive to this petition.

In September 2018, Mr. Glassman verbally inquired of staff whether a company that has a license issued by the State of Connecticut to produce medical marijuana in the state is considered a state contractor. Given that the monetary thresholds in this licensing arrangement appear to have been met since the payment for the license exceeded $50,000 per year and the definition of "state contract" includes an "agreement" for "a licensing arrangement," staff advised that such licenses would likely be covered.

Mr. Glassman now seeks a formal ruling from the Commission, arguing that "licensing arrangement" is not meant to include "[licensees] operating a trade or business within the state" because such a license is not a bilateral agreement between two parties and the state contractor restrictions are only meant to cover contracts in which the State is paying the party for services rather than the party paying the State. He further contends that such an interpretation would lead to the absurd result that occupational licenses such as those for barbers, doctors, and lawyers, would be covered by the state contractor ban.

Executive Summary

The plain language of General Statutes § 9-612 (f) (1) (C) clearly indicates that the medical marijuana industry licenses would be considered state contracts. Even if the language of the statute itself was not clear, the legislative history of the 2007 changes to the definition of state contract favors this reading: "[O]ne of the things that this bill does is it expands the application of the prohibitions on contributions and solicitations by principals of state contractors to cover virtually any agreement, contract, or arrangement with the state for which the value is at least $50,000 in a calendar year, which includes fees, compensation, or remuneration of any kind." S. Proc., 2007 Sess., pp. 51-52, remarks of Senator Slossberg on Public Act 07-01.

I. Background

In 2012, Public Act 12-55, An Act Concerning the Palliative Use of Marijuana, became law. This Act permits the medical use of marijuana statewide for certain medical conditions, making Connecticut the seventeenth state to enact such a law. *See* Chapter 420f of the General Statutes (as amended by Public Act 12-55). The Act tasked the

Department of Consumer Protection ("DCP") to run the medial marijuana program. There are three types of licenses issued by the State under the Program: (1) dispensary licenses; (2) dispensary facility licenses; and (3) producer licenses.[1] All licenses issued under the Program expire one year after the date of their issuance and annually thereafter if renewed. Regs., Conn. State Agencies § 21a-408-25 (b). Licensees are required to file a renewal application and the proper fees, as set forth below, 45 days prior to the expiration of the license. Regs., Conn. State Agencies § 21a-408-28 (a).

A. Dispensary Licenses

A dispensary license is given to individuals who are qualified to acquire, possess, distribute, and dispense marijuana. The individual must have both an active pharmacist license in good standing issued by DCP and have a position with a medical marijuana dispensary facility that has been awarded a license by DCP. The initial license fee is $100 and the annual renewal fee is $100, all of which are nonrefundable. General Statutes § 21a-408h; Regs., Conn. State Agencies § 21a-408-29 (6).

B. Dispensary Facility Licenses

A dispensary facility license is given to a place of business that qualifies to dispense or sell at retail marijuana to qualifying patients and primary caregivers. Only a dispensary facility that has obtained a license from DCP may dispense marijuana to such individuals. The initial application fee is $5,000 with a $5,000 license fee, if approved, and a $5,000 renewal fee, all of which are nonrefundable. General Statutes § 21a-408h; Regs., Conn. State Agencies § 21a-408-29 (7) & (8).

C. Producer Licenses

A producer license allows the holder to operate a secure, indoor facility in which the production of marijuana occurs.

The initial application fee is $25,000 with a $75,000 license fee, if selected to be a producer, and a $75,000 annual renewal fee. All of these fees are nonrefundable. General Statutes § 21a-408i; Regs., Conn. State Agencies § 21a-408-29 (13).

After the 2012 legislation passed legalizing medical marijuana and DCP's regulations for the program were approved, consistent with its charge of administering the program, DCP issued a request for applications for producer licenses, seeking to award three, with an application deadline of November 15, 2013. There were 16 applications and the State awarded four licenses after two tied for third.[2]

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[1] All of the information in this Background section is taken from DCP's website, https://portal.ct.gov/DCP/Medical-Marijuana-Program/Medical-Marijuana-Program, unless otherwise noted, and confirmed in discussions with its staff.

[2] Ken Dixon, "Four companies win marijuana-growing licenses," Connecticut Post, January 28, 2014, https://www.ctpost.com/news/article/Four-companies-win-marijuana-growing-licenses-5183225.php.

As of April 2018, the number of producers has remained at four, and the number of dispensary facilities has increased from six to nine.[3] In addition, DCP awarded nine more dispensary facility licenses in December 2018.

II. Relevant Statutes

General Statutes § 9-612 (f) (1) (C) defines "state contract" as ***any agreement*** or contract:

- ***with the state or any state agency*** or any quasi-public agency,
- let through a procurement process ***or otherwise***,
- having ***a value of fifty thousand dollars or more***, or a combination or series of such agreements or contracts having a value of one hundred thousand dollars or more ***in a calendar year***,
- for (i) the rendition of services, (ii) ***the furnishing of*** any goods, material, supplies, equipment or ***any items of any kind***, (iii) the construction, alteration or repair of any public building or public work, (iv) the acquisition, sale or lease of any land or building, (v) ***a licensing arrangement***, or (vi) a grant, loan or loan guarantee.[4]

The statute goes on to state that "state contract" does not include any agreement or contract with the state, any state agency or any quasi-public agency that:

- is exclusively federally funded,
- an education loan,
- a loan to an individual for other than commercial purposes
- or any agreement or contract between the state or any state agency and the United States Department of the Navy or the United States Department of Defense.

General Statutes § 9-612 (f) (1) (C).

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[3] Matthew Ormseth, "Medical Marijuana Patients Say There's a Pot Shortage In Connecticut," Hartford Courant, April 20, 2018, http://www.courant.com/news/connecticut/hc-news-marijuana-grower-shortage-20180326-story.html; https://portal.ct.gov/DCP/Medical-Marijuana-Program/Connecticut-Medical-Marijuana-Dispensary-Facilities.

[4] The statute provides in full: ***"State contract" means an agreement or contract with the state or any state agency*** or any quasi-public agency, let through a procurement process or otherwise, having ***a value of fifty thousand dollars or more***, or a combination or series of such agreements or contracts having a value of one hundred thousand dollars or more ***in a calendar year***, for (i) the rendition of services, (ii) the furnishing of any goods, material, supplies, equipment or any items of any kind, (iii) the construction, alteration or repair of any public building or public work, (iv) the acquisition, sale or lease of any land or building, (v) ***a licensing arrangement***, or (vi) a grant, loan or loan guarantee. "State contract" does not include any agreement or contract with the state, any state agency or any quasi-public agency that is exclusively federally funded, an education loan, a loan to an individual for other than commercial purposes or any agreement or contract between the state or any state agency and the United States Department of the Navy or the United States Department of Defense. General Statutes § 9-612 (f) (1) (C) (emphasis added).

If a given license qualifies as a state contract under the above language, then a company holding the license will be deemed a "state contractor" and a certain limited group of people within the company will be deemed "principals of state contractor" pursuant to General Statutes § 9-612 (f) (1) (D) & (E). The designation as principal will result in limitations on contributions. General Statutes § 9-612 (f) (2) (B).

III. Analysis

The plain and broad language of General Statutes § 9-612 (f) (1) (C) indicates that the medical marijuana industry licenses would be considered agreements to enter a licensing arrangement and therefore state contracts. The legislative history further bolsters this interpretation, as more fully discussed below.

In his petition, Mr. Glassman essentially makes four assertions as to why the medical marijuana producer license should not be considered a state contract. The Commission does not find any of these arguments persuasive and will address them in turn.

> **Argument 1 – The definition of a "state contract" requires that the State is the party giving money and receiving products or services in return, which is not the case in the context of a medical marijuana industry license.**

The Petitioner argues that in order to be a "state contract," there must be a bilateral negotiated written agreement wherein the contractor is *receiving* $50,000 or more from the State rather than the State being the party receiving payment. According to the Petitioner's preferred definition, the State must be receiving products or services and giving money.

While this might be a fine statutory definition of "state contract", it is not *the* definition in Connecticut's state contractor provisions. There is nothing in the plain language of General Statutes § 9-612 (f) that indicates the state contractor provisions are only triggered when the State is the party paying over $50,000 for something of value provided by the contractor as opposed to the contractor paying over $50,000 for something of value provided by the State.

Arrangements resulting in payments to the State rather than from the State also fall within the definition of state contract. The Commission has long advised this. For example, the Commission's Frequently Asked Questions webpage for the state contractor provisions provide:

> **Question**: Is a contract with a state agency that produces revenue to the state included in the definition of a state contract and therefore subject to the contribution and solicitation ban?
>
> **Answer**: Yes. Contracts that result in revenue to the state of Connecticut, ***such as payments paid by airlines*** to Bradley International Airport for use of communication towers, are considered state contracts for purposes of the ban.

SEEC Website, "Frequently Asked Questions for State Contractor Provisions," https://www.ct.gov/seec/cwp/view.asp?a=3563&q=505580.

In 2008, staff advised that a sales tax emption program would be considered a state contract even though under the program, the quasi-public agency would be the party selling the goods – specifically, in that case, it was the Connecticut Development Authority purchasing construction materials and selling them to program participants to essentially pass on its sales tax exemption. In 2016, Commission staff members advised a nonprofit that had hired a local community college to provide services to them for over $50,000 that the arrangement would be considered a state contract even though the state was the party providing services and getting paid. The statute is written broadly and works both ways. Staff also advised that year that the state's deal with Sikorsky Aircraft, where it offered the company millions of dollars in sales tax exemptions and grants, would also be covered because, again, the provisions work in both directions.

While the Commission itself has not yet had occasion to opine this in formal, written guidance until now, it agrees with its staff's longstanding advice. There is simply nothing in the statute that indicates it only covers contracts where the money is going in one direction but not the other.

It is also worth noting that the original state contractor ban enacted with Public Act 05-5 included in the definition of "state contract" the "rendition of ***personal*** services" rather than "rendition of services" and included no definition of the phrase "rendition of personal services." In Opinion of Counsel 2006-6, Commission staff construed this phrase to mean: "*any* agreement for *any* service rendered to the state, a state agency, or quasi-public agency for which the provider receives a fee, remuneration, or ***any compensation of any kind, either directly from the state or through the contractual arrangement with the state***, unless otherwise specifically exempted."

The legislature agreed with this broad interpretation and actually amended the statute to make sure that the broad application was clear. In Public Act 07-1, the definition of state contract was modified to include the phrase "rendition of services" rather than "rendition of personal services" and a definition of this phrase tracking that from Opinion of Counsel 2006-6 was also added to General Statutes § 9-612 (g) (1) (I) (now General Statutes § 9-612 (f) (1) (I)). The legislature went on to further broaden other areas of the definition of state contract as well by amending the language we must now interpret as follows:

> (C) "State contract" means an agreement or contract with the state or any state agency or any quasi-public agency, let through a procurement process or otherwise, having a value of fifty thousand dollars or more, or a combination or series of such agreements or contracts having a value of one hundred thousand dollars or more in a [fiscal] calendar year, for (i) the rendition of [personal] services, (ii) the furnishing of any goods, material, supplies,[or] equipment or any items of any kind, (iii) the construction, alteration or repair of any public building

> or public work, (iv) the acquisition, sale or lease of any land or building, (v) a licensing arrangement, or (vi) a grant, loan or loan guarantee. "State contract" does not include any agreement or contract with the state, any state agency or any quasi-public agency that is exclusively federally funded, an education loan or a loan to an individual for other than commercial purposes.

The bill also added to the definition exceptions to the definition for education loans and for loans to an individual that were not for commercial purposes; thus, making it clear that all other loans are covered.

The legislative history of the 2007 changes to the definition of state contracts includes this description of the legislature's intent in doing so: "[O]ne of the things that this bill does is it expands the application of the prohibitions on contributions and solicitations by principals of state contractors ***to cover virtually any agreement, contract, or arrangement with the state for which the value is at least $50,000 in a calendar year***, which includes fees, compensation, or remuneration of any kind." S. Proc., 2007 Sess., pp. 51-52, remarks of Senator Slossberg (emphasis added).

Individuals and entities who receive commercial loans, grants and tax incentives with large payments involved also have a motivation to protect that relationship and to endear themselves to the very people who control the award of such benefits.[5] So do those whose business receives a lucrative license in return for a payment of $50,000 or more. It is precisely this type of licensing arrangement that the state contractor provisions are designed to prevent from influencing campaign finance.

> **Argument 2 – The term "licensing arrangements" in General Statutes § 9-612 (f) (1) is only meant to include arrangements where there is a bilateral understanding or agreement between the parties.**

The Petitioner also argues that the term "licensing arrangement" is only meant to include those arrangements where there is a bilateral understanding or agreement between the party and the State and therefore does not include the acquisition of a license required to run a business within the State. He contends that "licensing arrangements" as used in the statute refers only to "the use of real estate or facilities often called 'licenses' because licenses tend to be for shorter terms than leases and do not convey interests in real estate."

He cites the 5th edition of Black's Law Dictionary (1979) for the following definition of "license" – "permission accorded by competent authority to do an act which, without

[5] The Petitioner, in a February 1, 2019 comment to the Commission's proposed draft, then argued that the language covers only situations where the state is acting as either a buyer or a seller for an item being sold. This argument ignores the explicit statutory language covering grants, loans, loan guarantees and licensing arrangements. The legislature recognized the breadth of its language when it specifically exempted out education loans and loans to an individual for other than commercial purposes. It did not choose to exempt out all occupational licenses or permits issued by the state, even those with a fee of over $50,000, although it certainly could have done so.

such permission, would be illegal, a trespass, or a tort." Under this definition that the Petitioner himself has cited, it is enough that the act would be illegal to make the permission by a competent authority conferring a right into a license. It does not have to be a trespass on real estate. The marijuana producer license is a permission accorded by a competent authority, conferring the right to produce pot products which without such authorization would be illegal.

The Petitioner further refers to the definition of "license" in Black's 5th edition in which the following statement and citation is made: "A [state-granted] license is not a contract between the state and the licensee, but is a mere personal permit." *Rosenblatt v. California State Board of Pharmacy*, 69 Cal. App. 23, 158 P.2d 199, 203 (1945). He goes onto assert that a state-issued license cannot possibly be construed to be a contract between the state and the licensee.

The Commission is not required to determine that a medical marijuana dispensary facility license is a contract. Rather, it must determine whether, pursuant to General Statutes § 9-612 (f) (1)'s definition of "state contract," such a license is a contract *or an agreement.* In the same 1979 edition of Black's, the definition of "agreement" states: "Although often used as synonymous with 'contract', agreement is a broader term; e.g. an agreement might lack an essential element of a contract." The most recent 10th edition of Black's Law Dictionary further expands upon this in the definition of "agreement":

> The term "agreement" although frequently used as synonymous with the word "contract," is really an expression of greater breadth of meaning and less technicality. Every contract is an agreement; but not every agreement is a contract. In its colloquial sense, the term "agreement" would include any arrangement between two or more persons intended to affect their relations (whether legal or otherwise) to each other. . . . [E]ven an agreement which is intended to affect the legal relations of the parties does not necessarily amount to a contract in the strict sense of the term. For instance, a conveyance of land or a gift of a chattel, though involving an agreement, is . . . not a contract; because its primary legal operation is to effect a transfer of property, and not to create an obligation.

Black's Law Dictionary (10th ed. 2014) (citing 2 *Stephen's Commentaries on the Laws of England* 5 (L. Crispin Warmington ed., 21st ed. 1950)).

With this context in mind, the Commission believes that there *is* an agreement between the State and the licensee in the context of a medical marijuana producer license. In order to have the license, the producers must agree to abide by a number of terms as laid out in the statutes and regulations. They must agree to not produce or manufacture marijuana in any place except their approved production facility, to not sell, deliver, transport or distribute marijuana from any place except in their approved production facility, to not produce or manufacture marijuana for use outside of Connecticut, and to establish and maintain an escrow account in a financial institution in Connecticut in the amount of $2 million, to name a few. Regs., Conn. State Agencies § 21a-408-54. There

are also requirements on how licensed producers keep records, which types of marijuana products they may sell, how they package, label, and transport their products, and how they maintain proper security at their facility. Regs., Conn. State Agencies §§ 21a-408-56 through 21a-408-57, 21a-408-62 through 21a-408-66. And of course they are required to hold the license they receive (in exchange for submitting an application and payment and then, if chosen, abiding by the terms laid out in the statutes and regulations) in order to sell marijuana to dispensaries legally.

The Petitioner's offer of an alternative definition makes no sense. In order to argue that "licensing arrangements" are really short-term real estate leases, he ignores the structure of the statute and seems to be applying the interpretive principle of *noscitur a sociis* which basically says that you interpret items in a list to be similar. The problem with his argument, however, is that in order for it to work, the statute would have had to have been written with the following changes so that the term licensing arrangement really was part of the list that pertains to real estate:

> *"State contract" means an agreement or contract with the state or any state agency* or any quasi-public agency, let through a procurement process or otherwise, having *a value of fifty thousand dollars or more*, or a combination or series of such agreements or contracts having a value of one hundred thousand dollars or more *in a calendar year*, for (i) the rendition of services, (ii) the furnishing of any goods, material, supplies, equipment or any items of any kind, (iii) the construction, alteration or repair of any public building or public work, (iv) the acquisition, sale or lease of any land or building, [(v)] or *a licensing arrangement*, or [(vi)] (v) a grant, loan or loan guarantee. "State contract" does not include any agreement or contract with the state, any state agency or any quasi-public agency that is exclusively federally funded, an education loan, a loan to an individual for other than commercial purposes or any agreement or contract. (Emphasis added).

The statute is not so written. Instead the term licensing arrangement stands alone and separate from the language regarding real estate. The Petitioner is attempting to subsume item (v) of the list into item (iv). Such a result would essentially render the term meaningless since the language used in item (iv) is already so broad as to cover short-term leases. *See Sylvan R. Shemitz Designs, Inc., v. Newark Corp.*, 291 Conn. 224, 235 (2009) ("It is a basic tenet of statutory construction . . . that the legislature does not intend to enact meaningless provisions." (internal quotation marks omitted)).

The statute, as written, simply does not support the Petitioner's argument that licensing arrangements are only real estate licenses.

Argument 3 – Determination of the $50,000 threshold should not be based on the income derived from the contract.

The Petitioner maintains that Commission staff verbally advised him that it is the income derived by the licensee in the industry that is the operative amount considered in determining whether the $50,000 threshold has been met. He goes on to assert that this would cover most licensees in the State because most of them generate an income and profit for the license holder greater than $50,000.

Staff never advised the Petitioner that the determination of the $50,000 threshold would be based on what a person or entity earned as a result of holding the license. Rather, the Petitioner was advised that the $50,000 threshold is determined by the payment exchanged. With respect to two of the three marijuana licenses, this means they are not covered because the payment involved with those two licensing arrangements is well below $50,000 per year. The payment for a dispensary license is $100-$200 annually and the payment for a dispensary facility license is $5,000-$10,000 annually. In the case of the medical marijuana provider license, however, the cost of obtaining and/or maintaining the license each year is easily determined and is well over the $50,000 threshold.

Argument 4 – Deeming the medical marijuana industry licenses to be state contracts would mean that occupational licenses such as those for hairdressers, barbers, doctors, lawyers, liquor store operators, and restauranteurs would also be covered.

The Petitioner also argues that "the logical extension of [Commission staff's] position would result in everyone who needs an occupational permit or license to be considered a state contractor."

As previously discussed, the legislature defined "state contract" to require, among other things, that payments involved between the state and contractor had to amount to $50,000 or more in a calendar year. Unlike the medical marijuana producer license, the licenses required of hairdressers, barbers, lawyers, and liquor store operators do not involve payments of $50,000 or more. In fact, while the Department of Consumer Protection issues over 200 types of licenses, permits and credentials, only one of them costs over $50,000 per year – the medical marijuana producer license.[6]

[6] Email from Department of Consumer Protection Commissioner Michelle Seagull, dated November 29, 2018. Commissioner Seagull noted in her email that sealed ticket distributors pay a license fee per year of only $2,500 but often pay over $50,000 per year to the State as they are required to pay a percentage of their sales back to the State. Whether they would be considered state contractors would be a separate discussion. Sealed tickets are lottery type scratch-off tickets that are sold typically to nonprofit organizations to sell at their fundraising events where the nonprofit pays out any winnings. Telephone conversation with Charles Kostruba and James Schmitt of the Department of Consumer Protection's Charitable Games Unit, November 30, 2018.

IV. Conclusion

Given that the cost of a medical marijuana producer license exceeds $50,000 per year and the definition of state contractor includes "a licensing arrangement," the Commission concludes that the producer license is covered under the state contractor restrictions while the remaining two types of licenses issued under the program, dispensary and dispensary facility, are not given that they cost less than $50,000 per year.[7]

Adopted this 20th day of February, 2019 at Hartford, Connecticut by a vote of the Commission.

Salvatore Bramante, Vice Chair

[7] The resulting contribution and solicitation restrictions laid out in General Statutes § 9-612 (f) do not apply to everyone who works at the licensee but only to those who are considered principals. Anyone seeking guidance on whether they meet the definition of principal is urged to call Commission staff.