

**ATTORNEY ANDREW GLASSMAN'S COMMENTS TO THE STATE ELECTIONS
ENFORCEMENT COMMISSION REGARDING ITS PROPOSED DECLARATORY
RULING #2019-01 CONCERNING THE STATE CONTRACTOR STATUS OF
MEDICAL MARIJUANA LICENSEES**

On January 16, 2019, the Commission approved a Proposed Declaratory Ruling declaring that Marijuana Facility Licenses – licenses the state issues *in its regulatory capacity* granting the licensee the right to sell medical marijuana to those able to buy it - are "State Contracts" as General Statutes §9-612(f)(1)(C) defines that term, just like contracts the state makes *in its commercial capacity* when it buys construction labor and services from a construction company to build a state building.

Based on this inherently suspect conclusion, the Proposed Ruling reasons that the entities holding these licenses are "State Contractors" per §9-612(f)(1)(D),¹ and that as such, their "principals" are barred from making or soliciting political contributions to candidates for state offices. See General Statutes §9-612(A) et seq. The Proposed Ruling maintains that it is the "plain language" of §9-612(f)(1)(C) that compels these conclusions.

In its Proposed Ruling, the Commission responded to a request from Attorney Andrew Glassman, who wanted the Commission to declare that Marijuana Facility Licenses were not "State Contracts" and that consequently, the licensee's principals were not "State Contractors" and were free to contribute to the campaigns of state office candidates.

Attorney Glassman now accepts the Commission's invitation to comment on the Proposed Ruling. His comment is that the Proposed Ruling is wrong. He asks the Commission to reject it and to issue a different Ruling, one consistent with his contrary position. In the ensuing paragraphs, he articulates the basis for his comment and his position.

THE PROPOSED RULING IS UNSUPPORTED AND UNSUPPORTABLE

Although the Proposed Ruling purports to be based on §9-612(f)(1)(C)'s plain language, it is devoid of "textual analysis." That is to say, it fails to make even the slightest attempt to explain how the statute's words extend to Marijuana Facility Licenses; it simply proclaims that they do. To be sure, the Ruling does cite some extra-textual support for its conclusions, but this so-called support is just the staff's own determinations - one in the form of an Answer to a Frequently Asked Question posted on the Commission's website, the others being advisements to two entities making specific inquiries concerning their particular circumstances. Here too, however, the Ruling fails to justify or even explain the basis for these determinations. The Ruling merely asks the reader to accept the Commission's staff as an authority and the staff's previous determinations as binding precedents – as if the staff members were judges

¹ The pertinent statute defines "State Contractor" as "a person, business entity or non-profit organization that enters into a State Contract."

and their determinations were court decisions. In the final analysis, there is simply no support for the Proposed Ruling, none whatsoever.

On this basis alone, the Commission must reject the Proposed Ruling.

APPLICATION OF STATUTORY CONSTRUCTION PRINCIPLES SHOWS THAT A MARIJUANA FACILITY LICENSE IS NOT A “STATE CONTRACT”

The absence of support is reason enough to reject the Ruling, but there is another route that leads straight to this same conclusion – construing the language of §9-612 (f)(1)(C) per the applicable principles of statutory construction.

Section 9-612(f)(1)(C) defines “State Contract” as “an agreement or contract in writing with the state or any state agency . . . let through a procurement process or otherwise having a value of fifty thousand dollars or more . . . in a calendar year, for

- (i) the rendition of services;
- (ii) the furnishing of any goods, supplies, equipment or an 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.”

The applicable principles of statutory construction stem from the recognition that the fundamental objective of this analytical process “is to ascertain and give effect to the apparent intent of the legislature.” *Commissioner of Emergency Services and Public Protection v. FOIC*, 330 Conn. 372, 380 (2018). In the first instance, however, the task is not to scour the legislative history looking for statements of intent from the drafters. Instead, it is to examine the text of the statute itself and its relationship to other statutes.” General Statutes §1-2z. If this examination demonstrates that the text is “plain and unambiguous and does not yield absurd or unworkable results,” the legislature’s intent is deemed to be “apparent;” that is to say, it is what the text expresses. The courts say that under these circumstances, there is “no room for construction;” the statute must be applied as its words direct in accordance with their plain, common and ordinary meaning. *Warkentin v. Burns*, 223 Conn. 14, 22 (1992); *Williams v. General Nutrition Centers, Inc.*, 326 Conn. 651 (2017).

Extra-textual evidence of meaning cannot be considered when the statutory language is plain and unambiguous. *Commissioner of Emergency Services and Public Protection v. FOIC*, 330 Conn. supra at 380. Only when the language is otherwise can extra-textual/extrinsic sources (e.g., legislative history, the circumstance surrounding the statute's enactment, the policy the statute was designed to implement, etc.) be consulted for interpretative guidance. *Chairperson, Connecticut Medical Examining Board v. FOIC*, 310 Conn. 276, 283 (2013). And statutory language is "plain and unambiguous" when there is only one way to read it. *Id.*

Here, there is only one way to read § 9-612(f)(1)(C)'s language. The statute's "plain and unambiguous" words easily establish that the Proposed Ruling is wrong, that its author should never have concluded as he or she did.

1. Principles of Statutory Construction Show That Marijuana Facility Licenses Do Not Meet The Statute's Threshold Requirement Since they Are Not Agreements Or Contracts

The erroneous nature of the Proposed Ruling quickly becomes apparent when the statute's threshold requirement for "State Contract" status is considered. The threshold requirement is "an agreement or contract in writing with the state or any state agency." The question then is whether a Marijuana Facility License is "an agreement or contract in writing with the state or any state agency." The answer depends on the plain meaning of "agreement" and "contract."

Connecticut courts turn to the dictionary for answers to this type of question. *Tine v. Zoning Board of Appeals of Town of Lebanon*, 308 Conn. 300, 306 (2013). Webster's Ninth New Collegiate Dictionary ("Webster's") defines "agreement" as "an arrangement for a course of action," while Black's Law Dictionary (5th Ed.) ("Black's") says it is "the coming together in accord of two minds on a given proposition." "Contract," according to Webster's, is "a binding agreement between two or more persons or parties," while Black's says it is "an agreement between two or more persons which creates an obligation to do or not to do a particular thing."

So defined, the inescapable conclusion is that there is no agreement or contract here, let alone an agreement or contract in writing. There is just a license – and a state-issued license is not a contract between the state and the licensee. This is clear from Webster's omitting the words "agreement" or "contract" in its definition of "license." Webster's states that a license is merely "a permission to act." To the same effect is Black's, which defines "license" as "permission by competent authority to do an act which, without that permission, would be illegal, a trespass or a tort."

Most importantly, Black's explicitly states that a state-granted license is not a contract between the state and the licensee and goes so far as to cite authority for this seemingly self-evident proposition. See *Rosenblatt v. California State Board of Pharmacy*, 158 P. 2d 199, 203 (1945). In that case, the court recognized that this rule was "established by the great weight of authority," and noted that "[a] license has none

of the elements of a contract and [unlike a contract] does not confer an absolute right but a personal privilege to be exercised under existing restrictions and such as may thereafter be reasonably imposed.” *Id.* So much then for the Proposed Ruling’s unsupported and ultimately unsupportable assertion that in the eyes of the law, a state issued license is a contract between the state and the licensee.

Because the Proposed Ruling cannot satisfy the statute’s threshold requirement, there is no need for further discussion. The Proposed Ruling must be rejected and replaced with a Ruling that reaches the opposite result.

2. Statutory Construction Furnishes Additional Reasons Why The Proposed Ruling Cannot Stand

Even though the Proposed Ruling cannot make it past the statute’s threshold requirement, statutory construction furnishes additional reasons why the Commission should reject the Proposed Ruling. The foundation of that Ruling is its determination that a Marijuana Facility License is a “licensing arrangement” as that term is used in the list of “agreements or contracts” in §9-612(f)(1)(C) and, therefore, makes it a “State Contract.” Yet, if the legislature intended to have “State Contracts” extend to licenses like Marijuana Facility Licenses – licenses the state issues *in its regulatory capacity* that grant the licensee permission to conduct a state-regulated business here, there surely were better words than “licensing arrangement” to express that intent.

If, as the Proposed Ruling concludes, a Marijuana Facility License is a “licensing arrangement,” then it must follow that every such license the state issues in *its regulatory capacity* should come within that definition and be deemed a “State Contract.” This would include insurance companies, attorneys, doctors, plumbers, barbers and a host of others. It bears repeating that a statutory interpretation that produces absurd results is not a sustainable interpretation. General Statutes §1-2z. And it would be the paradigm of absurdity to interpret “licensing arrangement” to include these regulatory licenses. Just as a barber’s license cannot be a “licensing arrangement,” a Marijuana Facility License cannot be what the legislature was envisioning when it used the words “licensing arrangement” in this statute.²

To ascertain what the legislature did have in mind with the words “licensing arrangement,” an additional statutory construction principle comes to the fore, the principle of *noscitur a sociis*. This principle directs that the meaning of a word or phrase in a statute be determined through reference to the other words or phrases in the

² The Proposed Ruling points out that another portion of §9-612(f)(1)(C) eliminates what it acknowledges to be the absurdity of making the holder of a Connecticut barber’s license a “State Contractor” per that statute; namely, the requirement that the “agreement or contract . . . for . . . a licensing arrangement” must have a value of at least fifty-thousand dollars in a calendar year. Barber licenses, it argues, indeed most regulatory licenses, cost less than fifty-thousand dollars. A Marijuana Production Facility License costs exactly fifty-thousand dollars. This argument misses its mark for two reasons. First, it does obviate the conclusion that barber licenses are “licensing arrangements” according to the Ruling’s argument. Second, it assumes that the value of a licensing agreement per this statute is the licensing fee – and there is no basis for that assumption. Certainly, the Proposed Ruling does not offer one.

statute with which it is associated. See *Dattco, Inc. v. Commissioner of Transportation*, 324 Conn. 39, 46 (2016). In simplest terms, what this requires in this case is gleaning the meaning of “licensing arrangement” by giving due consideration to the characteristics of the other agreements and contracts the statute makes “State Contracts.”

To this end, it is apparent that each of these other agreements or contracts shares a common characteristic or trait: in each instance, the state is acting not as regulator, but as a *buyer or a seller (that is, in its commercial capacity)* with money moving from the buyer to the seller for the item being sold. Either a person is selling services to the state in exchange for money, selling or leasing property to the state in exchange for money, building something for the state in exchange for money, or selling its promise to the state to advance some state interest or policy in exchange for a grant, loan or loan guarantee from the state. Under the principle of *noscitur a sociis*, the licensing arrangements the statute makes “State Contracts” should all have this trait.

It necessarily follows, then, that “licensing arrangements” in the subject statute means arrangements where there is a commercial transaction – a purchase and sale of licensing rights. Either the state is selling licensing rights to a person, entity or non-profit and receiving money in exchange, or the state is buying licensing rights and paying money to the person, entity or non-profit selling them. “Licensing arrangements” cannot possibly include a Marijuana Facility License, because the state is not selling these licenses. The very thought of our legislature treating the issuance and receipt of a regulatory license as a commercial transaction – as a sale and purchase - is simply outrageous. Yet, that is precisely what the Proposed Ruling attempts to do.

Lest there be any doubt that Marijuana Facility Licenses (or for that matter, all other regulatory licenses) are not “licensing arrangements” within the meaning of the §9-612(f)(1)(C), it quickly disappears once the significance of the word “value” in this statute is considered. “Value” simply means “the monetary worth of something” (www.merriam-webster.com/dictionary/value), and no one would dispute that the “value” of a sale and purchase contract is the price the contract establishes for the item in question. But it cannot fairly be said that the “value” of a Marijuana Facility License or a barber license is the fee the applicant pays for the license.

To be sure, the Proposed Ruling does contend that the licensing fee is the license’s worth in monetary terms. But here too, it cites no authority or even a rationale for this contention. Nor could it. The claim makes no sense. The conclusion might be otherwise if these licenses could be bought and sold and there was a market for them, but the licenses are not transferrable.

Moreover, as already noted, the fees for regulatory licenses are generally small in dollar terms. Yet, they grant the licensee the right to make hundreds of thousands, in some cases millions, of dollars. Certainly, in the licensee’s eyes, the right to make money at a certain level establishes the “value” of the license. But if value were measured this way, “licensing arrangement” would have to be interpreted so as to apply

to barber's and virtually all other occupational licenses, and even the Proposed Ruling concedes that this would be absurd.

The point here is simply that the concept of "value" does not fit with an interpretation of "licensing arrangement" that would include regulatory licenses, but it does fit comfortably with an interpretation that says it means the sale and purchase of licensing rights. And in the final analysis, this is just further confirmation that the legislature never had regulatory licenses in mind when it inserted the words "licensing arrangement" into §9-612(f)(1)(C).

The Commission must reject the Proposed Ruling.³

3. Extra-Textual Considerations Do Not Undermine Attorney Glassman's Position

As previously noted, the Commission cannot consider extra-textual evidence if, as here, the statutory language is not susceptible to more than one reasonable interpretation. Nevertheless, it is plain that the true foundation of the Proposed Ruling is an extra-textual consideration, a policy consideration – that just as persons seeking to do business with the state could perceive state procurement as a "pay to play" process with campaign contributions influencing the outcome, a person seeking a Marijuana Facility License could likewise perceive that campaign contributions could increase his prospects for success. In other words, the problem the statute was designed to address is present not just in state procurement, but in regulatory licensing as well, at least in connection with very valuable Marijuana Facility Licenses, and thus persons seeking this license should be treated no differently than persons who wish to do business with the state. Attorney Glassman submits that even if the Commission were to consider this policy argument, it should not be deterred for a moment from ruling in his favor.

The Proposed Ruling's policy argument is fatally flawed, and the flaw is readily apparent. The argument assumes that the legislature must legislate so as to eliminate entirely any evil it chooses to address; that if it addresses a problem, it cannot do so partially. That assumption is plainly incorrect. Anyone familiar with, or who follows, the legislative process, indeed anyone with even a modicum of common sense, knows this.

Suffice it to say, a flawed policy argument cannot overcome the subject statute's unambiguous language and what it so clearly directs.

³ The foregoing discussion should not be construed as demonstrating that the term "licensing arrangement" is ambiguous. Just because a word or term needs to be interpreted to discern its meaning does not make the word or term ambiguous. Ambiguity, as noted, requires that there be more than one reasonable meaning for the word or term in question. Here, as demonstrated, a textual analysis that follows the law of statutory construction firmly establishes that there is but one reasonable meaning of "licensing arrangement" in the subject statute.

CONCLUSION

The Proposed Ruling's policy argument does trigger an appropriate concluding thought. The question of whether applying for a Marijuana Facility License presents the same "pay to play-type" risks state procurement presents and whether these applicants should be subject to the same campaign contribution restrictions to which persons seeking state business are subject are questions for the legislature to answer, not this Commission. If the Commission were to adopt the Proposed Ruling, it would be exercising a power it does not possess, a function committed to others in our system of state government – a purely legislative function. This it cannot do.

The Commission's job in this case is not to make the law; it is simply to follow the law the legislature assigned it to administer. If the Commission does that here, there is only one sustainable result. The Proposed Ruling must be rejected and replaced with a Ruling that reaches exactly the opposite result.

Attorney Glassman respectfully requests the Commission to rule accordingly.

Respectfully submitted this 1st day of
February, 2019



Andrew Glassman, Esquire