IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

OHIO RELEAF, LLC, Plaintiff, v. JACQUELINE T. WILLIAMS, DIRECTOR, OHIO DEPARTMENT OF COMMERCE, *et al.*, Defendants.	:	Case No. 18CV-2463

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Squire Patton Boggs (U.S.) LLP, and Heather L. Stutz, C. Craig Woods, Christopher F. Haas, Jeffrey M. Walker, Andrew H. King, Special Counsel to the Attorney General for defendants Jacqueline T. Williams, Director, and Ohio Department of Commerce.

Tucker Ellis, LLP, and Brian J. Laliberte, Chad Eggspuehler for Buckeye Relief, LLC.

Gordon P. Shuler, LLC, and Gordon P. Shuler for Pure Ohio Wellness, LLC.

Mac Murray & Shuster LLP, and Helen M. Mac Murray, Patrick W. Skilliter, Kari R. Roush for Harvest Grows LLC.

Benesch Freidlander Coplan & Aronoff LLP, and Robert A. Zimmerman for Cresco Labs Ohio, LLC.; and John Stock for OPC Cultivation.

Markovits, Stock & DeMarco LLC, and Eric J. Kmetz for Riviera Creek Holdings, LLC.

Walter Haverfield LLP, and Darrell A. Clay, for Standard Wellness Company, LLC.

Taft Stettinius & Hollister LLP, and Gregory J. O'Brien, Deven M. Spencer for Grow Ohio Pharmaceuticals, LLC.

Vorys, Sater, Seymour and Pease LLP, and Elizabeth T. Smith, Henrique A. Geigel, Kara M. Mundy, Christopher A. LaRocco for Terradiol Ohio LLC.

Buckingham Doolittle & Burroughs LLC, and James S. Simon, Gregory P. Amend, Andrew J. Pullekins, and Murray Murphy Moul & Basil LLP, and James B. Hadden for Parma Wellness Center, LLC.

Brennan, Manna & Diamond LLC, and Donald W. Davis, Jr., Jason A. Butterworth, Alex J. McCallion for AT-CPC of Ohio, LLC.

Zeiger, Tigges & Little LLP, and Marion H. Little, Jr., and Crabbe Brown & James LLP and Larry H. James, Frank D. Tice for *Amici Curiae* in support of plaintiff.

The Patton Law Firm, LLC, and David Patton for Ohio Patient Network.

Barnes & Thornburg LLP, and David Paragas for Columbia Care.

Opinion

Richard A. Frye, Judge.

I. Introduction.

In September 2016 the General Assembly enacted new statutes authorizing a Medical Marijuana Control Program in Ohio. As relevant here the Program is under the control of defendants Ohio Department of Commerce, and Director Jacqueline T. Williams. Administrative rules were adopted in May 2017 to further guide the roll-out of the Program. Applications for provisional licenses to cultivate were accepted in June 2017 from 109 applicants. After reviewing and scoring them, in late 2017 defendants provisionally granted twelve Level I and twelve Level II cultivator licenses.

Ohio Releaf, LLC ["Releaf"] is one of the 97 unsuccessful applicants for a Level I provisional cultivator license. Technically Releaf (and other unsuccessful applicants) has not yet been "denied" a license because no hearing was offered to any of them; defendants merely issued a so-called notice of intent to deny their application on December 14, 2017, and simultaneously offered an administrative hearing if requested within 30 days. Like dozens of other unsuccessful applicants, Releaf requested a hearing pursuant to the Ohio Administrative Procedure Act. The Department responded by scheduling a hearing for January 24, 2018, but in the same letter "continued the hearing on its own motion" purportedly "[i]n order to more efficiently conduct *** business." (Joint Ex. 8.)

Releaf filed this suit because no hearing has, to date, been re-scheduled for Releaf (or any other unsuccessful Level I applicant for that matter.)[1] Releaf became increasingly alarmed as weeks turned into months because the initial provisional licenses could become permanent certificates of operation, and begin to effectively freeze-out unsuccessful applicants permanently.

Last December a public records request was submitted by plaintiff. In filing this suit Releaf contended the defendants have not been motivated to respond in a timely

[1] Releaf was a Level I applicant. (Such applicants seek a substantially larger cultivation facility of 25,000 sq. ft. as opposed to Level II applicants cultivating no more than 3,000 sq. ft.) Level II applicants are not affected by this case. No one disputes the fact that Level II cultivators will in due course generate some medical marijuana for Ohio consumers regardless of this court's ruling in this case about Level I applicants.

fashion as required by Ohio law, prompting a part of this case to seek a Writ of Mandamus ordering production of all public records.

Releaf seeks an injunction having broad potential impact. It argues that the court should enjoin conversion of all provisional Level I cultivator licenses to permanent licenses – effectively stopping final licensing of any Level I cultivator and precluding them from beginning to grow medical marijuana – until defendants catch-up with their administrative responsibilities. This broad request not surprisingly triggered anxiety from defendants, the so-far successful license applicants, prospective users of medical marijuana, and others.[2]

After considering the entire situation the court concludes that Releaf is entitled to a preliminary injunction ordering defendants to proceed promptly to an administrative hearing. Defendants have never contested their obligation to conduct such a hearing. The Department even obtained a supplemental appropriation of $300,000 in 2017 so it could retain five additional hearing officers to help meet this obligation. The public interest is served by requiring defendants to provide the hearing required by the Ohio Revised Code. Beyond that, however, Releaf is not entitled to injunctive relief. There has been insufficient evidence produced to justify a halt in further work on permanent licensing of Level I cultivators. A peremptory writ of mandamus is also not appropriate, since defendants are making a good faith effort to locate, review and produce public records.

II. Procedural Background.

The court held an evidentiary hearing on May 11 and 14, 2018 at which seven witnesses testified, and numerous exhibits were admitted. (Even though the hearing was expedited, the parties exchanged documents and took pre-hearing depositions of several people before it commenced.) A stipulation of facts, and a set of Joint Exhibits were received. The court also admitted a short deposition of Director Williams, who was

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[2] Following two conferences on the record in April, the court denied plaintiff's motion for a temporary restraining order and set the matter for a preliminary injunction hearing. Due to the broad potential impact of the injunction requested, including specifically possible impact on those holding provisional licenses, and to comply with the joinder requirement of Ohio's declaratory judgment statute, the court suggested all existing "successful" Level I provisional license holders needed to be joined. *See, Gannon v. Perk,* 46 Ohio St.2d 301 (1976) (*Per Curiam*). Plaintiff did so. The May 14, 2018 Motion to Dismiss of Buckeye Relief, LLC, one such provisional licensee, is therefore **DENIED.**

unable to attend in person. In lieu of live testimony, affidavits from additional people who asserted concern about the impact of the broad relief sought by plaintiff were admitted. In most respects there remain no genuine disputes of material fact. The question for the court comes down to what relief, if any, is equitably issued at this juncture.

An outline of the basic structure of the Program is attached as Exhibit "A" for the convenience of the reader.

III. The Right to a Hearing.

The Ohio Administrative Procedure Act explicitly provides for hearings requested by those seeking a license:

> Unless a hearing was held prior to the refusal to issue the license, every agency shall afford a hearing upon the request of a person whose application for a license has been rejected and to whom the agency has refused to issue a license, whether it is a renewal or a new license * * *[.]
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> R.C. 119.06.

> Whenever a party requests a hearing in accordance with * * * section 119.06 of the Revised Code, the agency shall immediately set the date, time, and place for the hearing and forthwith notify the party thereof. The date set for the hearing shall be within fifteen days but not earlier than seven days, after the party has requested a hearing, unless otherwise agreed to by both the agency and the party.
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> R.C. 119.07.

It is well-settled that Ohio law demands "strict compliance with R.C. 119.06, which affords an applicant an opportunity for a hearing prior to the issuance of an adjudication order." *Waste Mgmt. of Ohio, Inc. v. Board of Health of Cincinnati,* 159 Ohio App.3d 806, 2005-Ohio-1153, 825 N.E.2d 660, ¶ 41 (10th Dist.) (French, J.). The license at issue here constitutes an "adjudication" under the broad definition in R.C. 119.01(D). *Ohio Boys Town, Inc. v. Brown,* 69 Ohio St.2d 1 (1982) (*Per Curiam*).

No statute in Ohio's medical marijuana laws, R.C. Chapter 3796, altered the general rule in Ohio referenced above, guaranteeing a licensing hearing. Defendants do not contend otherwise. While it seems evident that in enacting Chapter 119 many years ago the General Assembly never remotely contemplated a situation like this one, in which

a state agency is confronted with scores of simultaneous, competing, first-impression license applications for a business still deemed illegal under federal law, Ohio law must be applied as it stands. The General Assembly could have adopted a different procedural framework for licensing hearings in this medical marijuana setting, but chose not to do so. No statutory exception was made to R.C. 119.06 and 119.07. In passing it is also noteworthy that the General Assembly required this new Program be in place within a very tight time frame: a two-year deadline was required for it to be "fully operational." 2016 HB 523, uncodified § 3, reprinted in "Editor's Notes" to Page's Ohio Rev. Code [LexisNexis 2017 Supplement to Vol. 56]. That suggests the General Assembly may have wanted license applicants to receive hearings quickly under the generally applicable 15-day schedule in R.C. 119.07.

In any event, Releaf was promised in the plainest of language that "[u]nless a hearing was held ***prior*** to the refusal to issue the license, every agency ***shall*** afford a hearing upon the request of a person whose application for a license has been rejected and to whom the agency has refused to issue a license ***." R.C. 119.06 (emphasis added). R.C. 119.07 contains a 15-day time frame for such administrative hearings. There too defendants have abandoned any pretense of compliance with Ohio law.

At preliminary conferences with counsel the court suggested that neither common sense nor anything in Ohio law absolutely required complete, exhaustive administrative hearings be given in one sitting. Instead, preliminary, truncated "mini-hearings" tailored to *these* unusual circumstances could afford some protection to the rights of unsuccessful applicants without overly burdening defendants or their hearing examiners. Mini-hearings could use time limits – a half day each, perhaps - allowing presentation of evidence to focus squarely on exactly why individual applicants were scored in a certain manner, and to allow applicants to respond to department witnesses on the spot about obvious points. Likely most applicants would welcome a short, quick "mini-hearing" to satisfy themselves that no obvious, glaring error had been made by the Department, and to allow prompt responses to concerns raised by Department witnesses. Perhaps hearings could also be expedited by videotaping some of the defendants' witnesses who necessarily will give somewhat redundant testimony in each and every hearing about the scoring process. To be sure, these and other efficiencies would not satisfy every applicant. Some would want a full-blown hearing for which they might have to wait weeks or months. But

predictably many applicants would welcome an initial, short, focused hearing to ferret-out obvious errors, if any, and perhaps avoid spending time and money in a longer process.

Unfortunately, suggestions in this regard fell on deaf ears.[3] Defendants chose to ignore the innumerable cases recognizing that Due Process hearings are intended to be "'flexible and call[] for such procedural protections as the particular situation demands.'" *In re B.C.,* 141 Ohio St.3d 55, 2014-Ohio-4558, ¶ 17, citing *Morrissey v. Brewer,* 408 U.S. 471, 481 (1972).

IV. Plaintiff's Constitutional "Due Process" Claim.

Having been rebuffed in its effort to gain any sort of a hearing, Releaf argues that it is being denied constitutional Due Process rights. (*E.g.,* April 20, 2018 Transcript pgs. 27-29). In considering this argument the court notes that Due Process rights in the Fourteenth Amendment to the United States Constitution and in Art. I, Section 16 of the Ohio Constitution are coextensive. *In re B.C., supra,* ¶ 17, citing *Direct Plumbing Supply Co. v. Dayton,* 138 Ohio St. 540, 544-545 (1941).

Both the Ohio Supreme Court and the United States Supreme Court evaluate whether constitutional due process is owed in a particular setting using three criteria:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.
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> *In re B.C., supra,* ¶ 18, quoting *Mathews v. Eldridge,* 424 U.S. 319, 335 (1975).

"The Fourteenth Amendment's Due Process Clause protects persons against deprivations of life, liberty, or property; and those who seek to invoke its procedural protection must establish that one of these interests is at stake." *Wilkinson v. Austin,* 545 U.S. 209, 221 (2005). Mere noncompliance with a state procedural requirement such as

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[3] Defendants' response to the suggestion of some faster, streamlined process was that it was "unauthorized" by Chapter 119. That seems both wooden and self-serving.

that in R.C. 119.06 does not *ipso facto* become a constitutional due process violation. Constitutional and statutory rights are not coextensive. Remedies used for constitutional violations ordinarily are not available for statutory violations. *E.g., State v. Green,* 158 Idaho 884, 888-89, 354 P.3d 446 (2015); *Martin v. Commonwealth*, 2018 Va. App. LEXIS 128, * 8 (Ct. Appeals 2018) (Memorandum Op. not for publication).

"To demonstrate a procedural due process violation of a property right, the plaintiff must establish that there is '(1) a cognizable property interest; (2) a deprivation of that property interest; and (3) a denial of due process'. [citation omitted]." *Khan v. Bland,* 630 F.3d 519, 527 (7th Cir. 2010). "To claim a property interest protected by the Fourteenth Amendment, 'a person *** must have more than a unilateral expectation of the claimed interest. He must, instead, have a legitimate claim of entitlement to it.'" *Id.,* quoting *Bd. of Regents of State Colls. v. Roth,* 408 U.S. 564, 577 (1972) [internal punctuation omitted]; *see also O'Donnell v. City of Cleveland,* 838 F.3d 718, 730 (6th Cir. 2016). "A property interest of constitutional magnitude exists only when the state's discretion is 'clearly limited' such that the plaintiff cannot be denied the interest 'unless specific conditions are met.'" *Khan, supra* [internal citations omitted]. "[T]he existence of a policy – written or otherwise – is not enough to create a property interest. [citations omitted]. The terms of that policy must constrain the discretion of the official" before a property interest will be found. *MedCorp, Inc. v. City of Lima,* 296 F.3d 404, 411 (6th Cir. 2002).

In *Kahn, supra,* the Seventh Circuit relied upon an earlier decision holding that a disappointed bidder had no property interest in a contract even though it was the low bidder, where a municipality retained the right to reject any and all bids. The court concluded that the plaintiff in *Khan* had shown nothing that would entitle him to continue to participate in a Section 8 housing program beyond completion of existing contracts, and therefore that "[d]ue process does not necessarily require that Khan be given a predeprivation hearing where there is no present entitlement and the issue is an ordinary state law claim" and "[w]here a 'postdeprivation hearing not only is feasible but will give the deprived individual a completely adequate remedy.'" *Khan* at 531 [internal citations omitted].

Releaf's situation is similar. It is a disappointed applicant. At this stage Releaf lacks any property interest for constitutional purposes. It gained no reliable assurance of property in an Ohio cultivator license merely because it applied for one.

Due process protection can also be triggered if a "liberty" interest is implicated by state action. Sometimes a government decision includes stigmatizing statements about a person or business, such as suggesting immorality or dishonesty. *E.g., MedCorp, Inc., supra,* 296 F.3d, at 413-414. Nothing of that sort has been proven by Releaf, either. Releaf's reputation has not been harmed by mere denial of an Ohio provisional license, so Due Process protection cannot be invoked on that basis. *See also, Crosby v. Univ. of Ky.,* 863 F.3d 545, 556 (6th Cir. 2017) and cases cited.

Unquestionably Releaf has demonstrated a statutory right to a hearing. Yet because no constitutional right is infringed under either the federal or state constitutions, Releaf's right to an injunction must be limited.

V. The Criteria for a Preliminary Injunction.

A four-factor legal standard is used to examine a request for a preliminary injunction.

> "The purpose of a preliminary injunction is to preserve the status quo of the parties pending a final adjudication of the case upon the merits. *** In ruling on a motion for preliminary injunction, a trial court must consider whether (1) the moving party has shown a substantial likelihood that he or she will prevail on the merits of their underlying substantive claim; (2) the moving party will suffer irreparable harm if the injunction is not granted; (3) issuance of the injunction will not harm third parties; and (4) the public interest would be served by issuing the preliminary injunction. The party seeking the preliminary injunction must establish each of these elements by clear and convincing evidence. [citations omitted]."
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> *Fifth Third Bank (Central Ohio) v. Welch,* Franklin Co. C.P. No. 09CV-7343, 2009 Ohio Misc. LEXIS 544, *11, quoting *DK Products, Inc. dba System Cycle v. Miller* (12th District), Case No. CA2008-05-060, 2009-Ohio-436, 2009 Ohio App. LEXIS 362, at ¶ 6. *See also, Stephens v. City of Akron,* 9th Dist. No. 28701, 2018-Ohio-941, ¶ 10; *Gardner v. Windham,* 11th Dist. No. 2015-P-76, 2017-Ohio-5632, 94 N.E.3d 7, ¶ 33; *Elec. Classroom of Tomorrow v. Ohio Dept. of Educ.*, 10th Dist. Nos. 16AP-863 and 871, 2017-Ohio-5607, 92 N.E.3d 1269, ¶ 33.

"'Irreparable harm exists where there is no plain, adequate and complete remedy at law, and for which money damages would be impossible, difficult, or incomplete.'" *Brakefire, Inc. v. Overbeck,* 144 Ohio Misc.2d 35, 2007-Ohio-6464, 878 N.E.2d 84, ¶58 (Clermont Co. C.P.) [internal citations omitted]. Irreparable harm is generally found when the government is a party, since it is ordinarily immune from damages or any alternative form of remedial relief. Laycock, *The Death of the Irreparable Injury Rule,* 103 Harv. L. Rev. 687, 717-718 (1990).

In considering what remedy is appropriate, courts are obligated to exercise "'[p]articular caution * * * in granting injunctions, especially in cases affecting a public interest where the court is asked to interfere with or suspend the operation of important works or to control the action of another department of government.'" *Danis Clarkco Landfill Co. v. Clark Co. Solid Waste Mgt. Dist.*, 73 Ohio St.3d 590, 604 (1995), quoting *Leaseway Distribution Centers, Inc. v. Ohio Dept. of Adm. Serv.*, 49 Ohio App.3d 99, 106, 550 N.E.2d 955 (10th Dist. 1988). Caution is particularly appropriate where administrative remedies are available but not yet used. *Keystone ReLeaf LLC v. Pa. Dept. of Health,* Commonwealth Ct. No. 399 M.D. 2017, 2018 Pa. Commw. LEXIS 140. Yet, whether to grant or deny an injunction always remains "a matter solely within the discretion of the trial court * * *." *Danis Clarkco, supra,* 73 Ohio St.3d at 604. "Crafting a preliminary injunction is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents." *Trump v. Int'l Refugee Assistance Project,* 582 U.S. ___, 137 S. Ct. 2080, 2087, 198 L.Ed.2d 643 (2017) (*Per Curiam).*

VI. Findings of Fact and Analysis.

Releaf spent approximately a half-million dollars to prepare and submit its Ohio cultivator application. The application fee alone was $20,000. It is denied the administrative process promised if no timely and meaningful hearing is afforded.

Randal Smith serves as plaintiff's chief executive officer. He has the same role with The Pharm, Inc., which is one of the largest vertically integrated medical marijuana cultivators in the United States. It operates a greenhouse in Arizona of 330,000 sq. ft. (Interestingly, that single facility is roughly the total area currently anticipated for all

cultivation licenses in Ohio.) Based upon his substantial experience, Mr. Smith made a strong showing that an administrative hearing on Releaf's application is no vain act.[4]

Defendants do ***not*** contend that they need not offer Releaf an administrative hearing. That obligation has been explicitly acknowledged in writing by the Department, and is consistent with the Ohio Administrative Procedure Act. Moreover, the timeliness of the hearing is addressed in R.C. 119.07, and in § 2.1 and § 2.5 of the Department's Administrative Hearings Manual. (Joint Exhibit 9.) Moreover, beginning in the summer of 2017, defendants obtained a supplemental appropriation of $300,00 to hire more administrative hearing officers. The Department awarded contracts late in 2017 retaining five new hearing examiners to supplement five already available. The additional personnel were added with administrative hearings for this Program in mind. Despite these acknowledgements of the obligation to afford unsuccessful applicants a meaningful administrative hearing, nothing has been scheduled for Releaf or conducted for any other Level I applicant.

The absence of administrative hearings took on greater urgency in early 2018. One basis for concern is that roughly two-thirds of Ohio applicants were simply "disqualified." Releaf's witness Mr. Smith has substantial experience running a large cultivation operation in Willcox, Arizona. According to Mr. Smith the expected disqualification rate for marijuana applicants would be in the 2½ - 5% range, not the 66% range. No defense testimony squarely refutes his opinion. One knowledgeable defense witness speculated that in other states "disqualification" may be a little used tool, because all applications are simply scored and rank-ordered to identify the best applicants on the assumption those with higher scores will not be "disqualified." It is sufficient at this stage to conclude that Mr. Smith's concern about the seemingly extraordinarily high disqualification rate is one justification for granting immediate relief in this case.

Another concern about the integrity of Ohio's application scoring came to light in February 2018. The Auditor of State formally expressed concern after three weeks of work by a "team from this office." Auditor Yost concluded that the Ohio Medical Marijuana Program had a "control weakness" which "could allow an administrator access to

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[4] At the preliminary injunction hearing defendants attempted to demonstrate that Releaf had a hopelessly flawed application, and no justifiable claim it could succeed at an administrative hearing. The court concludes that evidence offered by defendants on this point is not conclusive.

manipulate documents, such as scoring, while logged in the portal as an account holder rather than their own administrative account." (Joint Ex. 3, Auditor Yost letter to Dir. Williams, Feb. 6, 2018) The Auditor further concluded that "[b]ecause of this critical flaw in the procedure's [sic] design, neither this office, nor the public, can rely upon the cultivator application score results." *Id.*

Days later Director Williams candidly revealed that "on February 12, 2018 [the Department] identified inadvertent data input errors in the financial data plan scoring of cultivator applications." (Joint Ex. 4, Williams to Yost, Feb. 15, 2018.) Auditor Yost responded on February 21 confirming that scoring mistake had "changed the final determination" of the top Level 1 applicants. (Joint Ex. 5, Yost to Williams, Feb. 21, 2018.) Interestingly, the Auditor's Office nevertheless concluded that "the window to 'pause' [the roll-out of Ohio's Medical Marijuana Program] has probably closed" because in reliance on earlier decisions awarding provisional licenses, investments had been made by successful prospective cultivators. (*Id.*) Auditor Yost concluded that the Program should probably move forward "allowing the program flaws to be addressed through the administrative appeals process, or other litigation." (*Id.*) That scoring error apparently yields a 13th Level I provisional license, despite the limit of 12 licenses in the Department's administrative regulations. These events also add weight to Releaf's demand for a hearing.

Testimony from Mark Nye, one of the Department's high-level Program administrators, established another reason. At some point following completion of scoring on Level I applications (in which he was a "Team Leader" for a three-person group) Mr. Nye destroyed his personal notes. He did this knowing, he concedes, that administrative hearings were likely to occur at which he would be expected to be a witness. He concedes now that with so many hearings to be held, plus the passage of time, his original notes would be useful to refresh his memory about individual applications. Having material from last year which more accurately explains scoring decisions would seem to be an obvious reason to maintain notes, rather than destroy them. Now, as things stand, Mr. Nye must attempt to reconstruct his reasoning on each application rather than simply referring to notes about what he actually thought at the time. There are apparently 15 scorers other than Mr. Nye. (April 13, 2018 Transcript, pg. 14) The status of their notes is unknown. (*Id.*) Considering everything, the loss of notes - even if limited just to

Team Leader Nye - is another factor weighing in favor of an injunction assuring Releaf obtains a prompt hearing.

The court was frankly startled to learn that contemporaneous working notes had been destroyed. Two lines of legal authority counsel against it. First, unlike private business American government has a general policy of maintaining records rather than purging them. Ohio law has an expansive definition of a state "record." "'[A]ny record that a government actor uses to document the *** functions, decisions, procedures, operations or other activities of a public office can be classified reasonable as a record. The document need not be in final form to meet the statutory definition of 'record'.'" *Barnes v. Columbus,* 10th Dist. No. 10AP-637, 2011-Ohio-2808, ¶ 9, quoting *Kish v. Akron,* 109 Ohio St.3d 162, 2006-Ohio-1244, 846 N.E.2d 811, ¶ 20, [internal punctuation omitted.] Whether so-called personal notes are public records is often litigated. *E.g, Hart v. Liberty Twp.,* 5th Dist. No. 17CA1-05-0031, 2017-Ohio-7820 and cases cited.[5]

Second, Ohio law recognizes the concept of "spoliation of evidence." *Elliott-Thomas v. Smith*, Ohio Supreme Ct. Slip Opinion No. 2018-Ohio-1783, ¶ 10; *Smith v. Howard Johnson Co., Inc.*, 67 Ohio St.3d 28, 29, 615 N.E.2d 1037 (1993). To establish a prima facie case for spoliation of evidence there must be "(1) pending or probable litigation involving the plaintiff, (2) knowledge on the part of defendant that litigation exists or is probable, (3) willful destruction of evidence by defendant designed to disrupt plaintiff's case, (4) disruption of the plaintiff's case, and (5) damages proximately caused by the defendant's acts." *Smith* at 29, *see also Heimberger v. Zeal Hotel Grp. Ltd.,* 10th Dist. No. 15AP-99, 2015-Ohio-3845, ¶ 37. Thus, while the loss of Mr. Nye's contemporaneous notes may not in the end be destruction of public records or true spoliation of evidence, in the overall context of the Program this raises grave concern about the integrity of the process being used by defendants. That concern increases if administrative hearings are further delayed. Reconstructing an explanation for scores or

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[5] The court makes no determination that these notes are public records, because at this stage that is not squarely before the court. However, the court notes that under *TBC Westlake, Inc. v. Hamilton Cty. Bd of Revision,* 81 Ohio St.3d 58 (1998) (*Per Curiam)* these notes do not appear to be privileged. That case recognized that notes used in a quasi-judicial administrative proceeding are like judge's private notes and are not public records. However, Mr. Nye was not a hearing officer, or otherwise sitting in a quasi-judicial capacity so that decision did not legitimize his destruction of notes.

disqualifications – particularly when working with what appear to be somewhat subjective criteria –only increases in difficulty as time passes.

Other developments surrounding the Medical Marijuana Program warrant brief mention. Difficulties memorialized in this case have not escaped notice at the General Assembly. It is undisputed that additional funding of roughly $5 million was recently approved by the Controlling Board, an arm of the General Assembly, to better staff the Program, retain the Squire Patton Boggs law firm to address litigation, and retain an outside accounting and auditing firm. ("Lawmakers Approve Additional $5M for Medical Marijuana Program," Gongwer Ohio Report No. 78, 4/23/2018.) Using a part of those funds defense counsel hired Ernst & Young for an independent review. Because the E & Y report was not presented to the Department until this week (following completion of the preliminary injunction hearing,) the record does not include E & Y's conclusions. It has also been reported that at least one member of the General Assembly recently suggested additional legislation may be appropriate "to remove any clouds of suspicion or impropriety from the licensing process." ("Senator Backing Medical Marijuana Audit Bill Supports Review by Commerce Department," Gongwer Ohio Report No. 77, 4/20/2018, reportedly quoting Sen. Bill Coley (R-Liberty Twp.)) It is evident that the General Assembly or the Executive branch have a continuing opportunity to get involved if this new Program is mired in problems, but that does not preclude reasonable action by this court in response to this law suit.

Releaf argues that its opportunity to do business in Ohio will be harmed, if not irretrievably lost, should the court not issue a broad preliminary injunction. In their view current provisional licensees will become permanent licensees, and few if any other applicants will be able to overtake them commercially as this hearing process moves at glacial speed. A site inspection of each provisionally approved cultivator's facility is needed before permanent status is reached. The first is scheduled within the next few days. Additional Level I site inspections are scheduled in July 2018. Permanent cultivator licenses may issue quickly following each site inspection, since according to the evidence from provisional licensees they are all spending large sums of money and great effort to assure success in Ohio. (According to a summary prepared by Level I provisional licensees and filed May 10, approximately $44.65 million has already been invested by just seven of them to get cultivation up and running in Ohio.) Releaf will fall further and

further behind the competition if the hearing process continues to be stalled, assuming that it is entitled to be licensed.

Relief points out as well that the administrative rules for the Program limit the pool of successful applicants to 12 Tier I cultivator provisional licenses until September 8, 2018 (of which two are set-aside for economically disadvantaged businesses, for which Releaf does not qualify.) Ohio Administrative Code ["OAC"] § 3796:2-1-01(A). Releaf claims not to understand how the defendants can ever lawfully issue more than 12 licenses. Yet, because of the admitted mistake that came to light in February, the Department has committed to issue a thirteenth in reliance upon the Director's general authority to take corrective action. In short, Releaf's case is primarily premised on the notion that even if it is ultimately successful in an administrative hearing the numerical limit in the current version of the administrative Rule may block its effort to obtain a cultivator license within the foreseeable future.

The simple answer to this concern is that there is no statutory limit to the number of licenses which may be issued, and in fact defendants have already exceeded their own limit of 12 licenses, apparently for legitimate reasons. Defendants have publicly committed to granting as many Tier I cultivator licenses as are justified following administrative hearings. Defense witnesses concede this may add dozens more, if a full review of Releaf's case and other applications demonstrates that scores were incorrectly set too low or applicants were improperly "disqualified." Director Williams has so testified in her deposition (at page 64). Mark Hamlin, the executive recently brought in at the top of administration of the Program below the Director, did as well in his court testimony. That obviates the primary concern of plaintiff over the presumptive limit on cultivator licenses, and their best argument for broad relief by preliminary injunction thereby falls away.

In addition, the Department explicitly reserved the right to increase the number of licenses after September 2018 to meet documented need. Releaf's witness Randall Smith acknowledged the current number of cultivator licenses in Ohio appears artificially low when compared to other states. Published reports appear to confirm his testimony.[6] No

[6] Published reports seem to confirm the anticipated growth likely to occur. According to an Associated Press article, Colorado has 1,471 grow operations, while the state of Washington has 1,115. "Budtenders to be in high demand in Michigan," Columbus Daily Reporter, April 24, 2018, page 2. While

one from the Department contradicted it although defendants have not yet begun to formally evaluate adding more licenses. The possibility of additional licenses being added to the pool available in Ohio thus also cuts against Releaf's position that the Program should be enjoined at the present time. Having said that, there are also equities on Releaf's side because those seeking any such new licenses will be required to prepare a new application and pay even more fees. Balancing everything, the prospect of additional licenses being made available in the future does not eliminate the need for an injunction enforcing Releaf's existing right to an administrative hearing on its current application; but does undermine the argument that the current number of licenses is set in stone justifying a complete halt to the process.

A collateral concern has been raised by Releaf. Plaintiff claims that unless enjoined the defendants will use their regulatory authority to allow cultivators already licensed to expand cultivation areas and, practically speaking, discourage new applicants from market entry. *See* OAC § 3796:2-1-09. Under that Rule, defendants do have authority to permit individual cultivators to expand initial cultivation areas up to 50,000 sq. ft. each; and later expand again up to 75,000 sq. ft. each. If this occurred, plaintiff worries, it could further lock-in the businesses already licensed while others are stalled awaiting administrative hearings. The risk of any such expansion of cultivation areas can be addressed without a broad injunction stopping the entire Program merely by ordering that Releaf's R.C. 119.06 hearing be held promptly. Further, no evidence has been presented that defendants have any such expansion plan actively underway.

In closing, several conclusions drawn from proceedings to date should be memorialized. The court has been presented with no evidence that defendants have any nefarious hidden agenda, are using truly "unannounced criteria" or are exercising favoritism – political or otherwise – in making decisions on cultivator applications. Candidly, it does seem evident that from the outset defendants badly underestimated the complexity of the new Program. Defendants failed to give more than lip service to the statutory obligation to afford unsuccessful applicants timely administrative hearings.

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unlike Ohio both states have completely legalized marijuana, those are staggering numbers when compared to the initial number of cultivator licenses in Ohio. An Op-Ed in the New York Times recently reported that the legal marijuana business nationally "raked in $9 billion in sales last year and is expected to bring in $11 billion this year." Southerland and Steinberg, "Boehner's Hypocrisy on Marijuana," N.Y. Times April 20, 2018, page A-27.

Only recently have defendants begun meaningful steps to recover. The novelty and complexity of this new Program does not redeem defendants' failure to follow the statutes and grant a hearing to Releaf. However, the absence of more negative evidence precludes the broader relief sought by plaintiff.

VII. Releaf is Entitled to a Prompt Hearing.

Releaf's chief executive officer testified that it could be ready to proceed with the long-delayed administrative hearing on short notice after receiving public records. The court is satisfied that a reasonable effort has been made to provide Releaf with the records most directly in issue (other than those discussed above which were destroyed), and that are most likely to be useful in its administrative hearing. Accordingly, the court is issuing an injunction ordering the hearing for Releaf within the next fifteen (15) days unless Releaf agrees to a later hearing date.

In tentatively scheduling administrative hearings defendants opted to place unsuccessful applicants in que based upon the date each requested a hearing. As a result, Releaf ended up far down the list at number 57. At some points it has been suggested that hearings might occur no more rapidly than once a week, despite the ten hearing examiners available. Absent court intervention this schedule would leave Releaf a year away from a hearing.

Defendants' informal policy to que those seeking a hearing does not preclude an order from this court granting plaintiff a hearing more quickly. Defendants' choice to assign hearings in the order requested is a completely arbitrary protocol. It makes as much sense as assigning hearings alphabetically. This conclusion is compelled because when plaintiff (and other unsuccessful applicants) were told of their right to request a hearing, the defendants failed to mention that such hearings would be scheduled in the order hearing requests were received. Instead, Releaf and others were merely told they had 30 days to request a hearing. This sequence of communication occurred, moreover, during late-December and early-January when many take vacations and celebrate holidays.

Defendants persist in seeking to enforce this arbitrary scheduling policy – loosely framed as a laches argument[7] – that is highly prejudicial to Releaf because it was the 57th requestor. The scheduling process has no basis in statute or administrative Rule.[8] The court emphatically refuses to require Releaf to wait longer for its hearing simply so that others, who did not come to court seeking a remedy, are addressed first.

Issuance of an injunction ordering a prompt hearing will not harm other licensees, the public, or third parties. Applicants previously viewed as ahead of Releaf in the que for administrative hearings seem likely to want to see the entire process move more quickly, imperfect though it is, but can hardly claim harm if Releaf goes ahead of them after it has carried the expense and burden of this court case.

So, after four months of inaction on Releaf's hearing request an injunction enforcing the unquestioned right to a hearing must issue. The court declines to issue a broader injunction to halt the overall Level I licensing process while Releaf obtains its hearing. Medical marijuana supplies through Level II cultivators could still be available under the injunction requested by plaintiff, to be sure, but the evidence suggests that shortages of marijuana, coupled with increased costs due to lower supply, might result. The potential harm to third parties does not tip in favor of a broader injunction.

The public interest weighs heavily in this case. R.C. 119.06 plainly supports an injunction enforcing Releaf's right to a hearing. However, the public interest does not tip further and favor Releaf insofar as it seeks a broader injunction. No constitutional right to a hearing is at issue. The court must accord great respect to the General Assembly's overriding policy decision that a Medical Marijuana Program should be available in this state. The legislature empowered defendants to put it in place, and to a degree has funded that effort to create and operate this Program with appropriations over and above fees paid by Releaf and other applicants. The evidence does not demonstrate that it would be in the public interest to further delay the Program, even for Level I cultivators, under the

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7 Laches involves unexplained delay in asserting a right, with actual or constructive knowledge of the injury or wrong, and prejudice to the other party. "The prejudice must be the result of plaintiff's delay, not merely the result of the plaintiff's assertion or exercise of a right." *Watson v. Caldwell Hotel, LLC,* 7th Dist. No. 16-NO-432, 2017-Ohio-4007, 91 N.E.3d 179, ¶ 45. No prejudice to defendants exists here.

8 It can be observed in passing that scheduling hearings first for applicants that apparently had the highest unsuccessful score - and presumably the best chance to move up and succeed in getting licensed after a hearing – would have been a fair procedure, but that was neither used by defendants nor suggested in any proceeding before the court as something they would do.

circumstances presented. Halting ongoing licensing could result in significant harm to businesses that have already invested significant time and money premised on their provisional licenses, while not really aiding the plaintiff in its pursuit of a license. Beyond these commercial realities, the court cannot disregard the risk to potential patients having one of the 23 specified medical conditions for which Ohio has concluded marijuana may be efficacious. R.C. 3796.01(A)(6).

VIII. Releaf's Request for a Writ of Mandamus.

Mandamus is the appropriate remedy to compel compliance with Ohio's Public Records Act. *State ex rel. ACLU of Ohio v. Cuyahoga County Bd. of Comm'rs*, 128 Ohio St.3d 256, 2011-Ohio-625, 943 N.E.2d 553, ¶ 24.

The counterpart to a preliminary injunction is a peremptory writ of mandamus. "When the right to require performance of an act is clear and it is apparent that no valid excuse can be given for not doing it, a court, in the first instance, may allow a peremptory mandamus." R.C. 2731.06. "[A] peremptory writ of mandamus should issue in the first instance only when material facts are admitted disclosing that relator is entitled to relief as a matter of law and fact. An alleged right to performance is unclear when * * * it has not been established that no valid excuse can be given for nonperformance of the alleged duty." *State ex rel. Beacon Journal Publ. Co.*, 57 Ohio St.3d 102, 103, 566 N.E.2d 661 (1991), quoting *State ex rel. Temke v. Outcalt*, 49 Ohio St.2d 189, 191, 360 N.E.2d 701 (1977). The party requesting the peremptory writ must establish entitlement to the relief by clear and convincing evidence. *State ex. rel. Cowan v. Gallagher*, Slip Opinion No. 2018-Ohio-1463, ¶ 10; *see also State ex rel. E. Cleveland v. Norton*, 8th Dist. No. 98772, 2013-Ohio-3723, ¶ 2 (a writ will not issue in doubtful cases).

Pursuant to R.C. 149.43(B)(1), "all public records responsive to the request shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours. * * * [U]pon request, a public office or person responsible for public records shall make copies of the requested public records available at cost and within a reasonable period." In *State ex. rel. Bott Law Group, LLC v. Ohio Dep't of Natural Res.*, the Tenth District explained that "promptly" means "without delay and with reasonable speed." 10th Dist. No. 12AP-448, 2013-Ohio-5219, ¶ 18.

On December 13, 2017, Ohio Releaf submitted a broad public records request to the Department (Amend Compl., ¶ 26, Ex. C). It was one of 191 filed within 60 days, according to defense counsel. (April 13, 2018 Transcript, p. 13.) The Department began producing records on January 2, 2018 and has since produced thousands of pages of documents. Just since April 23 the defendants produced over 11,000 of additional documents in response to Releaf's public records request. More importantly, defendants have committed to continue to produce documents every Wednesday and Friday until Releaf's request is completely met. (Stipulation, filed May 11, 2018, ¶¶ 35 – 36.)

As to the many documents produced to date plaintiff's mandamus request is moot. *Strothers v. Norton*, 131 Ohio St.3d 359, 2012-Ohio-1007, 965 N.E.2d 282, ¶ 13. Further, the court is not persuaded by clear and convincing evidence that the Department is not currently making a good faith effort to comply with plaintiff's public records request promptly and within a reasonable period of time. Accordingly, plaintiff's request for a peremptory writ of mandamus must be **DENIED.**

IX. Conclusion.

A preliminary injunction must be **GRANTED** to enforce Ohio Releaf, LLC's statutory right to an administrative hearing. The criteria for issuance of such an injunction have been satisfied. There is no justification for further delay in providing a hearing to plaintiff. Consistent with R.C. 119.07, defendants are ordered to schedule the hearing for Releaf within fifteen days, but not earlier than seven days after the date of the court order (being separately entered) unless a different schedule is mutually agreed upon by defendants and Releaf. Immaterial statutory formalities such as notice of the hearing by registered mail can, no doubt, be waived by stipulation to minimize expense and unnecessary burden on defendants and the hearing examiner.

Other than the obligation to conduct a hearing promptly and in accordance with R.C. Ch. 119, nothing in this Opinion should be taken as binding upon the hearing examiner assigned to plaintiff's case, or to suggest the court's view on how factual issues ought to be resolved following that hearing.

Plaintiff's request for broader injunctive relief suspending further Level I licensing work by defendants, and plaintiff's request for a peremptory Writ of Mandamus on its public records request are **DENIED.**

Because only limited relief is granted, and recognizing the fact that this injunction is squarely premised upon applicable Ohio law which is not genuinely challenged by defendants, pursuant to Civ. R. 65(C) the court finds that no Bond is required before the injunction becomes effective.

IT IS SO ORDERED.

APPENDIX: Ohio's Framework for Medical Marijuana.

House Bill 523 became effective in September 2016, commencing this program to permit lawful cultivation, processing, and sale of medical marijuana in Ohio. R.C. 3796.02 delegated primary responsibility for licensing and regulating cultivators like the plaintiff to the Department of Commerce.

The Bill set deadlines. The Department was required to adopt "rules establishing standards and procedures for the licensure of cultivators" by May 6, 2017. R.C. 3796.03(A)(2). Other rules were required to be adopted by September 8, 2017. The legislature required the Medical Marijuana Control Program to be fully operational by September 8, 2018. Uncodified § 3 of HB 523.

The Department issued Rules regulating cultivators in the Ohio Administrative Code under chapter 3796:2, effective May 6, 2017. Under these initial Rules, the Department may issue up to twelve (12) Level I cultivator provisional licenses and twelve (12) Level II cultivator provisional licenses prior to September 8, 2018. OAC § 3796:2-1-01. After September 8, 2018, the Department, at the director's discretion, may issue additional provisional licenses beyond 12. OAC § 3796:2-1-01. Further, "[i]n the event additional cultivator provisional licenses are deemed necessary, the department will follow the application procedures outlined in rule 3796:2-1-02[,]" which describes the requirements for the cultivator license application process. OAC § 3796:2-1-01.

OAC § 3796:2-1-02 required the Department provide advance notice to the public of the acceptance period for provisional license applications. The application period and a copy of the rules, applications forms, and instructions are posted on an official Ohio Medical Marijuana Control Program government website.[9] Prospective applicants were instructed to submit a non-refundable fee and a written application consisting of two sections. Cultivator Application – Request for Applications (RFA)/Instructions Packet (MMCP-C-1000), available at https://medicalmarijuana.ohio.gov/cultivation. The first section of the application requested detailed company information. *Id.* at pp. 8-10; OAC § 3796:2-1-02(A). The second section requested a detailed outline of the applicant's business plan, operation plan, quality assurance plan, security plan, and financial plan. *Id.* at pp. 10-11; OAC § 3796:2-1-02(B). It was in the scoring of these "plans" that the

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9 https://medicalmarijuana.ohio.gov/cultivation

difficulties described above arose. *See also,* Cultivator Application Information Release, available at https://medicalmarijuana.ohio.gov/cultivation.

According to OAC § 3796:2-1-03 applicants must be ranked using an impartial and numerical process set by the Department and pursuant to the criteria in OAC § 3796:2-1-02. R.C. 3796.03. The Department's review of each application included a two-step process. In round one, every application was assessed to ensure compliance with the mandatory criteria set forth in OAC § 3796:2-1-03(A). Cultivator Application, *supra*, p. 11. In round two, applications were reviewed by four teams comprised of three individuals to evaluate responses pursuant to the criteria in OAC § 3796:2-1-03(B), (C). *Id.* The individuals reviewing applications consisted of both outside consultants and state employees. *See*, https://www.com.ohio.gov/mmcp.aspx. Section two of the application was divided into five parts, which were scored independently by one of the teams, who were supposed to review and evaluate only that individual section on each application, with the exception of one team scoring two parts (Business Plan and Financial Plan) of each application. *Id.* Each team was required to reach a consensus score on each of their respective portions of the application for each applicant. *Id.* A final score for each applicant were compiled by a separate three-person team. *Id.*

A maximum raw score of 100 points was possible and each applicant had to achieve a minimum raw score of 60, with a minimum score requirement for each part of Section two of the application. Cultivator Application, *supra*, p. 12. After the raw scores were calculated, conversion factors were applied to reach weighted scores for each applicant. *Id.* at p. 13; *see also* Scoring Reference Guide, available at https://medicalmarijuana.ohio.gov/cultivation. Reviewers were not supposed to have access to any identifying information about any applicant. Department of Commerce website, *supra.*

Provisional licensees were afforded nine months from the date they were notified of selection to obtain a certificate of operation. OAC § 3796:2-1-06. A certificate of operation is issued "once all applicable inspections are passed, a certificate of occupancy issued by the building department having jurisdiction for such use is obtained, and the provisional licensee demonstrates that it conforms to the specifications in the application, as well as the requirements imposed by law and rules." *Id.* If a provisional licensee fails to fulfill obligations in that nine-month window, the Director has the discretion to extend

the time for compliance or "take action pursuant to 3796:2-1-01." Once a certificate of operation is issued, the provisional license becomes null and void. OAC § 3796:2-1-06.

Franklin County Court of Common Pleas

Date: 05-18-2018

Case Title: OHIO RELEAF LLC -VS- JACQUELIN T WILLIAMS OHIO DEPT COMMERCE ET AL

Case Number: 18CV002463

Type: DECISION

It Is So Ordered.

/s/ Judge Richard A. Frye