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Colorado General Assembly

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MEMORANDUM

TO: Committee on Legal Services

FROM: Michael Dohr, Office of Legislative Legal Services

DATE: December 12, 2016

SUBJECT: Rules of the Marijuana Enforcement Division, Department of Revenue, concerning medical marijuana and retail marijuana, 1 CCR 212-1 and 1 CCR 212-2 (LLS Docket No. 160427 and 160428; SOS Tracking No. 2016-00342 and 2016-00343).[1]

Summary of Problems Identified and Recommendations

No statute authorizes the Marijuana Enforcement Division to promulgate rules regarding registering or licensing medical marijuana business operators. However, the division's rules create a registration or licensing scheme for medical marijuana business operators. **Because the division lacks statutory authority to promulgate a licensing scheme for medical marijuana business operators, we recommend that Rules M 1700 through M 1704 and the definition of "medical marijuana business operator" in Rule M 103 of the division not be extended.**

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[1] Under § 24-4-103, C.R.S., the Office of Legislative Legal Services reviews rules to determine whether they are within the promulgating agency's rule-making authority. Under § 24-4-103 (8)(c)(I), C.R.S., the rules discussed in this memorandum will expire on May 15, 2017, unless the General Assembly acts by bill to postpone such expiration.

Section 12-43.3-104 (1) and section 12-43.4-103 (1), C.R.S., define "direct beneficial interest owner" as a person. But the division's Rule M 103 and R 103 define "direct beneficial interest owner" as a natural person. **Because the definition of "direct beneficial interest owner" in Rules M 103 and R 103 conflicts with statute, we recommend that the definition of "direct beneficial interest owner" in Rules M 103 and R 103 of the division not be extended.**

Analysis

1. The division created a registration or licensing scheme for medical marijuana business operators without any statutory authority.

During the 2016 session, the general assembly passed H.B. 16-1261, the retail marijuana sunset bill, which included a new license, the retail marijuana business operator license. Since the sunset was limited to retail marijuana, the sunset report did not recommend a corresponding license for medical marijuana. No other bill during the 2016 session addressed a medical marijuana business operator license.

Rule M 103 includes a definition for "medical marijuana business operator," and Rules M 1700 through M 1704[2] create the registration or licensing scheme for medical marijuana business operators. However, there is no corresponding statutory authority for medical marijuana business operators.

The authority for retail marijuana business operators, section 12-43.4-407, C.R.S., does not provide any authority for the division to create a registration or licensing scheme for medical marijuana business operators. That authority is limited to the retail marijuana code.

The division has rule-making authority for licenses in the medical marijuana code:

> **12-43.3-202. Powers and duties of state licensing authority - rules**.
> (1) The state licensing authority shall:
> (e) **Develop** such forms, **licenses**, identification cards, and applications as are necessary or convenient in the discretion of the state licensing authority for the administration of this article or any of the rules promulgated under this article; (**Emphases added**)

And very broad catch-all rule-making authority:

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[2] See **Addendum A** for the text of Rules M 103 and M 1700 through M 1704.

> **12-43.3-202. Powers and duties of state licensing authority - rules.** (2) (a) Rules promulgated pursuant to paragraph (b) of subsection (1) of this section may include, but need not be limited to, the following subjects:
>
> (XX) Such other matters as are necessary for the fair, impartial, stringent, and comprehensive administration of this article; and

However, that general rule-making authority does not allow the division to create a licensing scheme without a specific grant of statutory authority. That authority should be read together with the division's authority to develop the licenses, in other words, providing the details necessary for a functioning license, not creating a new license.

Section 12-43.4-401 (1)(d) allows the division to issue occupational licenses or registrations to business operators:

> **12-43.3-401. Classes of licenses.** (1) For the purpose of regulating the cultivation, manufacture, distribution, and sale of medical marijuana, the state licensing authority in its discretion, upon application in the prescribed form made to it, **may issue and grant to the applicant a license** from any of the following classes, subject to the provisions and restrictions provided by this article:
>
> (d) **Occupational licenses and registrations** for owners, managers, **operators,** employees, contractors, and other support staff employed by, working in, or having access to restricted areas of the licensed premises, as determined by the state licensing authority. The state licensing authority may take any action with respect to a registration pursuant to this article as it may with respect to a license pursuant to this article, in accordance with the procedures established pursuant to this article. (**Emphases added**)

But, it cannot serve as the statutory authority to create a new business license. First, the medical marijuana business operator license is a business license, not an occupational license. The rules themselves distinguish the license as a business license not as an occupational license by requiring a medical marijuana business operator to maintain a place of business separate from the licensed premises of any medical marijuana business it operates:

> **M 1701 – Medical Marijuana Business Operator: License Privileges.**
>
> D. Separate Place of Business. A Medical Marijuana Business Operator shall designate and maintain a place of business separate from the Licensed Premises of any Medical Marijuana Business(es) it operates….

Second, the retail marijuana business operator license has its own statutory authority and does not rely on the authority for occupational licenses or registrations:

12-43.3-401. Classes of licenses. (1) For the purpose of regulating the cultivation, manufacture, distribution, and sale of medical marijuana, the state licensing authority in its discretion, upon application in the prescribed form made to it, may issue and grant to the applicant a license from any of the following classes, subject to the provisions and restrictions provided by this article: (a) Medical marijuana center license; (b) Optional premises cultivation license; (c) Medical marijuana-infused products manufacturing license; (c.5) Medical marijuana testing facility license; (d) Occupational licenses and registrations for owners, managers, operators, employees, contractors, and other support staff employed by, working in, or having access to restricted areas of the licensed premises, as determined by the state licensing authority. The state licensing authority may take any action with respect to a registration pursuant to this article as it may with respect to a license pursuant to this article, in accordance with the procedures established pursuant to this article. (e) Medical marijuana transporter license.	**12-43.4-401. Classes of licenses.** (1) For the purpose of regulating the cultivation, manufacture, distribution, sale, and testing of retail marijuana and retail marijuana products, the state licensing authority in its discretion, upon receipt of an application in the prescribed form, may issue and grant to the applicant a license from any of the following classes, subject to the provisions and restrictions provided by this article: (a) Retail marijuana store license; (b) Retail marijuana cultivation facility license; (c) Retail marijuana products manufacturing license; (d) Retail marijuana testing facility license; (e) Occupational licenses and registrations for owners, managers, operators, employees, contractors, and other support staff employed by, working in, or having access to restricted areas of the licensed premises, as determined by the state licensing authority. The state licensing authority may take any action with respect to a registration pursuant to this article as it may with respect to a license pursuant to this article, in accordance with the procedures established pursuant to this article. (f) Retail marijuana transporter license; and **(g) Retail marijuana business operator license.**

Finally, the authority in section 12-43.3-401 (1)(d), C.R.S., is limited to issuing and granting a license not creating a new license. Therefore, section 12-43.3-401 (1)(d), C.R.S., cannot serve as the authority to create a medical marijuana business operator license.

In addition to the statutory provisions governing licenses, licensure is also governed by case law. The primary principle is that licensing determinations cannot be arbitrary or

capricious. Moreover, the issuance, revocation, and renewal of licenses must be done by clear and settled policy.

The Colorado Supreme Court in *Prouty v. Heron*[3], considered a case with facts analogous to the rules promulgated by the division. In *Prouty*, the state statute provided for licensure of engineers. The State Board of Engineer Examiners of Colorado subsequently promulgated rules establishing engineer licenses by classification. By rule, licenses were divided into separate classifications that limited licensees to practice only in a specific branch of engineering. The state board had, by rule, created types of licenses not contained in the statute. The Colorado Supreme Court stated that, once qualified for a license, a licensee acquires a valuable property right and is entitled to due process under both the United States and Colorado constitutions. This right cannot be abridged except for cause determined after given due notice and a fair and impartial hearing by an unbiased tribunal. The general assembly may not delegate to an agency the power to establish classifications of licenses not in statute. The court held that the state board's rule creating license categories not found in statute was void.

Prior to the adoption of the medical marijuana business operator license solely in rule, the marijuana codes had followed the edict of *Prouty*. All of the business licenses—medical marijuana center license; optional premises cultivation license; medical marijuana-infused products manufacturing license; medical marijuana testing facility license; and medical marijuana transporter license—were specifically created in statute with corresponding rules that developed the individual license framework:

> **12-43.3-401. Classes of licenses.** (1) For the purpose of regulating the cultivation, manufacture, distribution, and sale of medical marijuana, the state licensing authority in its discretion, upon application in the prescribed form made to it, may issue and grant to the applicant a license from any of the following classes, subject to the provisions and restrictions provided by this article:
>
> (a) Medical marijuana center license;
>
> (b) Optional premises cultivation license;
>
> (c) Medical marijuana-infused products manufacturing license;
>
> (c.5) Medical marijuana testing facility license;
>
> (d) Occupational licenses and registrations for owners, managers, operators, employees, contractors, and other support staff employed by, working in, or having access to restricted areas of the licensed premises, as determined by the state licensing authority. The state licensing authority may take any ac-

[3] *Prouty v. Heron*, 255 P.2d 755 (CO 1953). See **Addendum B** for the text of the case.

tion with respect to a registration pursuant to this article as it may with respect to a license pursuant to this article, in accordance with the procedures established pursuant to this article.

(e) Medical marijuana transporter license.

The principle announced in *Prouty* prohibits the division from creating a medical marijuana business operator license without specific statutory authority.

Moreover, the general assembly is aware of current law and the bills that it considers during the session and thus knew it was creating a license only for retail marijuana business operators and not a corresponding license in the medical marijuana code. In fact, the retail sunset bill, H.B. 16-1261, also included a license for retail marijuana transporters. To ensure there was a license for medical marijuana transporters, the general assembly passed H.B. 16-1211, which created licenses for both retail marijuana and medical marijuana transporters. Therefore, the division does not have the authority to create a license without corresponding statutory authority.

2. The division's definition of "direct beneficial interest owner" conflicts with the statutory definition by limiting it to natural persons.

During the 2016 session, the general assembly passed S.B. 16-040, concerning changes to the requirements for owners of a licensed marijuana business, and, in connection therewith, making an appropriation. The bill was intended to allow for more investment, particularly out-of-state investment, in Colorado marijuana businesses. Among others, S.B. 16-040 created the concept of a direct beneficial interest owner.

Section 12-43.3-104 (1), C.R.S., and section 12-43.4-103 (1), C.R.S., define the term "direct beneficial interest owner" as follows:

> **12-43.3-104. Definitions.** As used in this article, unless the context otherwise requires:
>
> (1) "Direct beneficial interest owner" means a **person** or closely held business entity that owns a share or shares of stock in a licensed medical marijuana business, including the officers, directors, managing members, or partners of the licensed medical marijuana business or closely held business entity, or a qualified limited passive investor. (**Emphasis added**)

> **12-43.4-103. Definitions.** As used in this article, unless the context otherwise requires:
>
> (1) "Direct beneficial interest owner" means a **person** or closely held business entity that owns a share or shares of stock in a licensed retail marijuana business, including the officers, directors, managing members, or

partners of the licensed retail marijuana business or closely held business entity, or a qualified limited passive investor. (**Emphasis added**)

The division's definitions read:

M 103 – Definitions

Definitions. The following definitions of terms, in addition to those set forth in section 12-43.3-104, C.R.S., shall apply to all rules promulgated pursuant to the Medical Code, unless the context requires otherwise:

"Direct Beneficial Interest Owner" means a **natural person** or a Closely Held Business entity that owns a share or shares of stock in a licensed Medical Marijuana Business, including the officers, directors, members, or partners of the licensed Medical Marijuana Business or Closely Held Business Entity, or a Qualified Limited Passive Investor. Each natural person that is a Direct Beneficial Interest Owner must hold an Associated Key License. Except that a Qualified Limited Passive Investor need not hold an Associated Key License and shall not engage in activities for which an Occupational License is required. (**Emphasis added**)

R 103 – Definitions

Definitions. The following definitions of terms, in addition to those set forth in section 12-43.4-103, C.R.S., shall apply to all rules promulgated pursuant to the Retail Code, unless the context requires otherwise:

"Direct Beneficial Interest Owner" means a **natural person** or a Closely Held Business entity that owns a share or shares of stock in a licensed Retail Marijuana Establishment, including the officers, directors, members, or partners of the licensed Retail Marijuana Establishment or Closely Held Business Entity, or a Qualified Limited Passive Investor. Each natural person that is a Direct Beneficial Interest Owner must hold an Associated Key License. Except that a Qualified Limited Passive Investor need not hold an Associated Key License and shall not engage in activities for which an Occupational License is required. (**Emphasis added**)

Although it may appear that there is no substantive difference between the terms "person" and "natural person," there is a significant difference. Sections 12-43.3-104 (13) and 12-43.4-103 (13), C.R.S., define "person" as "a natural person, partnership, association, company, corporation, limited liability company, or organization, or a manager, agent, owner, director, servant, officer, or employee thereof." That statutory definition of person includes businesses and other legal entities and is not limited to "natural persons." Applying the division's definition to the statutory definition of "person," only an individual would qualify as a natural person, leaving out all of the legal entities that are statutorily defined as persons. Using the term "natural person" in

the rule thus conflicts with the statutory definition since it limits who can be a direct beneficial interest owner more than the statutory definition.

Recommendations

We therefore recommend that Rules M 1700 through M 1704 and the definition of "medical marijuana business operator" in Rule M 103 of the division not be extended because the division lacks statutory authority to promulgate Rules M 103 and M 1700 through M 1704.

We therefore recommend that the definition of "direct beneficial interest owner" in Rules M 103 and R 103 of the division, concerning direct beneficial interest owners, not be extended because the rules conflict with statute.

Addendum A

M 103 – Definitions

Definitions. The following definitions of terms, in addition to those set forth in section 12-43.3-104, C.R.S., shall apply to all rules promulgated pursuant to the Medical Code, unless the context requires otherwise:

"Medical Marijuana Business Operator" means an entity that holds a registration from the State Licensing Authority to provide professional operational services to one or more Medical Marijuana Businesses for direct remuneration from the Medical Marijuana Business(es), which may include compensation based upon a percentage of the profits of the Medical Marijuana Business(es) being operated. A Medical Marijuana Business Operator may contract with Medical Marijuana Business(es) to provide operational services. A Medical Marijuana Business Operator's contract with a Medical Marijuana Business does not in and of itself constitute ownership.

M 1700 Series – Medical Marijuana Business Operators

Basis and Purpose – M 1701

The statutory authority for this rule is found at subsections 12-43.3-202(1)(a), 12-43.3-202(1)(b)(I), 12-43.3-202(2)(a)(XX) and 12-43.3-401(d), C.R.S. The purpose of this rule is to establish that it is unlawful for a Medical Marijuana Business Operator registrant to exercise any privileges other than those granted by the State Licensing Authority and to clarify the registrant privileges.

M 1701 – Medical Marijuana Business Operator: License Privileges

A. Privileges Granted. A Medical Marijuana Business Operator shall only exercise those privileges granted to it by the Medical Code, the rules promulgated pursuant thereto and the State Licensing Authority. A Medical Marijuana Business Operator may exercise those privileges only on behalf of the Medical Marijuana Business(es) it operates. A Medical Marijuana Business shall not contract to have more than one Medical Marijuana Business Operator providing services to the Medical Marijuana Business at any given time.

B. Licensed Premises of the Medical Marijuana Business(s) Operated. A separate License is required for each specific Medical Marijuana Business Operator, and each such licensed Medical Marijuana Business Operator may operate one or more other Medical Marijuana Business(es). A Medical Marijuana Business Operator shall not

have its own Licensed Premises, but shall maintain its own place of business, and may exercise the privileges of a Medical Marijuana Business Operator at the Licensed Premises of the Medical Marijuana Business(es) it operates.

C. Entities Eligible to Hold Medical Marijuana Business Operator License. A Medical Marijuana Business Operator License may be held only by a business entity, including, but not limited to, a corporation, limited liability company, partnership or sole proprietorship.

D. Separate Place of Business. A Medical Marijuana Business Operator shall designate and maintain a place of business separate from the Licensed Premises of any Medical Marijuana Business(es) it operates. A Medical Marijuana Business Operator's separate place of business shall not be considered a Licensed Premises, and shall not be subject to the requirements applicable to the Licensed Premises of other Medical Marijuana Businesses, except as set forth in Rules M 1702 and M 1704. Possession, storage, use, cultivation, manufacture, sale, distribution, or testing of Medical Marijuana or Medical Marijuana-Infused Product is prohibited at a Medical Marijuana Business Operator's separate place of business.

E. Agency Relationship and Discipline for Violations. A Medical Marijuana Business Operator and each of its Direct Beneficial Interest Owners required to hold an Associated Key License, as well as the agents and employees of the Medical Marijuana Business Operator, shall be agents of the Medical Marijuana Business(es) the Medical Marijuana Business Operator is contracted to operate, when engaged in activities related, directly or indirectly, to the operation of such Medical Marijuana Business(es), including for purposes of taking administrative action against the Medical Marijuana Business being operated. *See* § 12-43.4-601(1), C.R.S. Similarly, a Medical Marijuana Business Operator and its Direct Beneficial Interest Owners required to hold an Associated Key License, as well as the officers, agents and employees of the Medical Marijuana Business Operator, may be disciplined for violations committed by the Direct Beneficial Interest Owners, agents or employees of the Medical Marijuana Business acting under their direction or control. A Medical Marijuana Business Operator may also be disciplined for violations not directly related to a Medical Marijuana Business it is operating.

F. Compliance with Applicable State and Local Law, Ordinances, Rules and Regulations. A Medical Marijuana Business Operator, and each of its Direct Beneficial Interest Owners, agents and employees engaged, directly or indirectly, in the operation of the Medical Marijuana Business(es) it operates, shall comply with all state and local laws, ordinances, rules and regulations applicable to the Medical Marijuana Business(es) being operated.

Basis and Purpose – M 1702

The statutory authority for this rule is found at subsections 12-43.3-202(1)(a), 12-43.3-202(1)(b)(I), 12-43.3-202(2)(a)(XX) and 12-43.3-401(d), C.R.S. The purpose of this rule is to clarify those acts that are limited in some fashion, or prohibited, by a Medical Marijuana Business Operator.

M 1702 – Medical Marijuana Business Operators: General Limitations or Prohibited Acts

A. Prohibited Financial Interest. A Person who is a Direct Beneficial Interest Owner or an Indirect Beneficial Interest Owner of a Medical Marijuana Business Operator shall not be a Direct Beneficial Interest Owner or Indirect Beneficial Interest Owner of, or otherwise have a direct or indirect financial interest in, a Medical Marijuana Business operated by the Medical Marijuana Business Operator. Except that such Person shall have the right to compensation for services provided in accordance with these rules.

B. Sale of Marijuana Prohibited. A Medical Marijuana Business Operator is prohibited from selling, distributing, or transferring Medical Marijuana or Medical Marijuana-Infused Product to another Medical Marijuana Business or a consumer, except when acting as an agent of a Medical Marijuana Business(es) operated by the Medical Marijuana Business Operator.

C. Consumption Prohibited. A Medical Marijuana Business Operator, and its Direct Beneficial Interest Owners, agents and employees, shall not permit the consumption of marijuana or marijuana products at its separate place of business.

D. Inventory Tracking System. A Medical Marijuana Business Operator, and any of its Direct Beneficial Interest Owners, agents or employees engaged in the operation of the Medical Marijuana Business(es) it operates, must use the Inventory Tracking System account of the Medical Marijuana Business(es) it operates, in accordance with all requirements, limitations and prohibitions applicable to the Medical Marijuana Business(es) it operates.

E. Compliance with Requirements and Limitations Applicable to the Medical Marijuana Business(es) Operated. In operating any other Medical Marijuana Business(es), a Medical Marijuana Business Operator, and its Direct Beneficial Interest Owners, agents and employees, shall comply with all requirements, limitations and prohibitions applicable to the type(s) of Medical Marijuana Business(es) being operated, under state and local laws, ordinances, rules and regulations, and may be disciplined for violation of the same.

F. Inventory Tracking System Access. A Medical Marijuana Business may grant access to its Inventory Tracking System account to the Direct Beneficial Interest Owners who are required to hold Associated Key Licenses, as well as the licensed agents and employees of a Medical Marijuana Business Operator having duties related to Inventory Tracking System activities of the Medical Marijuana Business(s) being operated.

1. The Direct Beneficial Interest Owners, agents and employees of a Medical Marijuana Business Operator granted access to a Medical Marijuana Business's Inventory Tracking System account, shall comply with all Inventory Tracking System rules.

2. At least one Direct Beneficial Interest Owner of a Medical Marijuana Business being operated by a Medical Marijuana Business Operator must be an Inventory Tracking System Trained Administrator for the Medical Marijuana Business's Inventory Tracking System account. That Inventory Tracking System Trained Administrator shall control access to its Inventory Tracking System account, and shall promptly terminate the access of the Medical Marijuana Business Operator's Direct Beneficial Interest Owners, agents and employees:

a. When its contract with the Medical Marijuana Business Operator expires by its terms;

b. When its contract with the Medical Marijuana Business Operator is terminated by any party; or

c. When it is notified that the License of the Medical Marijuana Business Operator, or a specific Direct Beneficial Interest Owner, agent or employee of the Medical Marijuana Business Operator, has expired, or has been suspended or revoked.

G. Limitations on Use of Documents and Information Obtained from Medical Marijuana Businesses. A Medical Marijuana Business Operator, and its agents and employees, shall maintain the confidentiality of documents and information obtained from the other Medical Marijuana Business(es) it operates, and shall not use or disseminate documents or information obtained from a Medical Marijuana Business it operates for any purpose not authorized by the Medical Code and the rules promulgated pursuant thereto, and shall not engage in data mining or other use of the information obtained from a Medical Marijuana Business to promote the interests of the Medical Marijuana Business Operator or its Direct Beneficial Interest Owners, Indirect Beneficial Interest Owners, agents or employees, or any Person other than the Medical Marijuana Business it operates.

H. Form and Structure of Allowable Agreement(s) Between Operators and Owners. Any agreement between a Medical Marijuana Business and a Medical Marijuana Business Operator:

1. Must acknowledge that the Medical Marijuana Business Operator, and its Direct Beneficial Interest Owners, agents and employees who are engaged, directly or indirectly, in operating the Medical Marijuana Business, are agents of the Medical Marijuana Business being operated, and must not disclaim an agency relationship;

2. May provide for the Medical Marijuana Business Operator to receive direct remuneration from the Medical Marijuana Business, including a portion of the profits of the Medical Marijuana Business being operated, subject to the following limitations:

a. The portion of the profits to be paid to the Medical Marijuana Business Operator shall be commercially reasonable, and in any event shall not exceed the portion of the net profits to be retained by the Medical Marijuana Business being operated;

b. The Medical Marijuana Business Operator, and any Person associated with the Medical Marijuana Business Operator, shall not be granted, and may not accept:

i. a security interest in the Medical Marijuana Business being operated, or in any assets of the Medical Marijuana Business;

ii. an ownership or membership interest, shares, or shares of stock, or any right to obtain any direct or indirect beneficial ownership interest in the Medical Marijuana Business being operated, or a future or contingent right to the same, including but not limited to options or warrants;

c. The Medical Marijuana Business Operator, and any person associated with the Medical Marijuana Business Operator, shall not guarantee the Medical Marijuana Business's debts or production levels.

3. Shall permit the Medical Marijuana Business being operated to terminate the contract with the Medical Marijuana Business Operator at any time, with or without cause;

4. Shall be contingent on approval by the Division; and

5. Shall not be materially amended without advance written approval from the Division.

I. A Medical Marijuana Business Operator may engage in dual operation of a Medical Marijuana Business and a Retail Marijuana Establishment at a single location, to

the extent the Medical Marijuana Business being operated is permitted to do so pursuant to subsection 12-43.4-401(2)(a), C.R.S., and the Medical Marijuana Business Operator shall comply with the rules promulgated pursuant to the Medical Code and the Retail Code, including the requirement of obtaining a valid license as a Retail Marijuana Establishment Operator.

Basis and Purpose – M 1703

The statutory authority for this rule is found at subsections, 12-43.3-202(1)(a), 12-43.3-202(1)(b)(I), 12-43.3-202(2)(a)(XX) and 12-43.3-401(d), C.R.S.. The purpose of this rule is to establish occupational license requirements for the Medical Marijuana Business Operator's Direct Beneficial Interest Owners, agents and employees, including those directly or indirectly engaged in the operation of other Medical Marijuana Business(es).

M 1703 – Medical Marijuana Business Operators: Occupational Licenses for Personnel

A. Occupational Licenses Required. All natural persons who are Direct Beneficial Interest Owners, and all natural persons who are agents and employees, of a Medical Marijuana Business Operator that are actively engaged, directly or indirectly, in the operation of one or more other Medical Marijuana Business(es), including but not limited to all such persons who will come into contact with Medical Marijuana or Medical Marijuana-Infused Product, who will have to access Limited Access Areas, or who will have access to the Inventory Tracking System account of the Medical Marijuana Business(es) being operated as part of their duties, must have a valid Occupational License.

1. Associated Key Licenses. All natural persons who are Direct Beneficial Interest Owners in a Medical Marijuana Business Operator must have a valid Associated Key License, associated with the Medical Marijuana Business Operator License. Such an Associated Key License shall satisfy all licensing requirements for work related to the business of the Medical Marijuana Business Operator and for work performed on behalf of, or at the Licensed Premises of, the Medical Marijuana Business(es) operated by the Medical Marijuana Business Operator.

2. Key Licenses. All other natural persons who are agents or employees of a Medical Marijuana Business Operator that are actively engaged, directly or indirectly, in the operation of other Medical Marijuana Businesses, must hold a Key License. The Key License shall satisfy all licensing requirements for work related to the business of the Medical Marijuana Business Operator and for work at the Licensed Premises of, or on

behalf of, the Medical Marijuana Business(es) operated by the Medical Marijuana Business Operator.

B. Occupational Licenses Not Required. Occupational Licenses are not required for Indirect Beneficial Interest Owners of a Medical Marijuana Business Operator, Qualified Limited Passive Investors who are Direct Beneficial Interest Owners of a Medical Marijuana Business Operator, or for natural persons who will not come into contact with Medical Marijuana or Medical Marijuana-Infused Product, will not have access to Limited Access Area(s) of the Medical Marijuana Business(es) being operated, and will not have access to the Inventory Tracking System account of the Medical Marijuana Business(es) being operated.

C. Designation of the Manager of a Medical Marijuana Business Operated by a Medical Marijuana Business Operator. If a Medical Marijuana Business Operator is contracted to manage the overall operations of a Medical Marijuana Business's Licensed Premises, the Medical Marijuana Business shall designate a separate and distinct manager on the Licensed Premises who is an officer, agent or employee of the Medical Marijuana Business Operator, which shall be a natural person with a valid Associated Key License or Key License, as set forth in paragraph A of this rule, and the Medical Marijuana Business shall comply with the reporting provisions of subsection 12-43.4-309(11), C.R.S.

Basis and Purpose – M 1704

The statutory authority for this rule is found at subsections 12-43.3-202(1)(a), 12-43.3-202(1)(b)(I), 12-43.3-202(2)(a)(XX) and 12-43.3-401(d), C.R.S. The purpose of this rule is to establish records retention standards for a Medical Marijuana Business Operators.

M 1704 – Medical Marijuana Business Operators: Business Records Required

A. General Requirement. A Medical Marijuana Business Operator must maintain all required business records as set forth in Rule R 901 - Business Records Required, except that:

1. A Medical Marijuana Business Operator is not required to maintain secure facility information, diagrams of its designated place of business, or a visitor log for its separate place of business, because a Medical Marijuana Business Operator will not come into contact with Medical Marijuana or Medical Marijuana-Infused Product at its separate place of business; and

2. A Medical Marijuana Business Operator is not required to maintain records related to inventory tracking, or transport, because a Medical Marijuana Business Operator is prohibited from engaging in activities on its own behalf that would require inventory tracking or transport. All records relating to inventory tracking activities and records related to transport pertaining to the Medical Marijuana Business(es) operated by the Medical Marijuana Business Operator shall be maintained at the Licensed Premises of such Medical Marijuana Business(es).

B. All records required to be maintained shall be maintained at the Medical Marijuana Business Operator's separate place of business, and not at the Licensed Premises of the Medical Marijuana Business(es) it operates.

Addendum B

Caselaw

Prouty V. Heron, 7 Colo. 168

Supreme Court of Colorado

March 9, 1953, Decided

No. 16,590

Reporter
127 Colo. 168 * | 255 P.2d 755 ** |

Prouty et al. v. Heron

Subsequent History:

Rehearing Denied April 6, 1953.

Counsel: Mr. John W. Metzger, Attorney General, Mr. Allen Moore, Deputy, Mr. Donald C. McKinlay, Assistant; Mr. Duke W. Dunbar, Attorney General, Mr. H. Lawrence Hinkley, Deputy, Mr. Charles M. Soller, Assistant, Mr. Frank A. Wachob, Assistant, Mr. James D. Parriott, Jr., Assistant, for plaintiffs in error.

Mr. George K. Thomas, for defendant in error.

Mr. Louis I. Hart, Jr., amicus curiae.

Judges: En Banc. Mr. Justice Moore delivered the opinion of the court.

Opinion by: MOORE

Opinion

[*169] [**755] Defendant in error was plaintiff in the trial court and we will herein refer to him as plaintiff. Plaintiffs in error were defendants in the trial court and we will hereinafter refer to them as defendants or board.

Plaintiff filed his complaint in the district court of the City and County of Denver, in which he sought to enjoin defendants from classifying qualified engineers as to specific branches of their profession and thereby limiting the practice of such engineers to those phases of the profession properly belonging to the classification in which such engineers were placed by the board. Plaintiff further sought by court order to correct the roster, and licensing cards, issued by the board to registered engineers, in such manner as to entitle registrants to practice the profession of engineering [**756] without limitation as to class or branch of the profession; and for a declaratory judgment holding certain rules and regulations [*170] adopted by the defendant board to be void. He further sought to enjoin the printing and publication, by defendants, of a pamphlet containing, among other things, a roster of engineers authorized to practice their profession in Colorado and the branch of the profession in which each engineer had been classified.

November 4, 1949, the trial court granted the relief sought by plaintiff, and thereafter the board brought the case to this court by writ of error to review that judgment.

Chapter 161, of the 1951 Session Laws of Colorado, relating to "Engineering and Land Surveying," became effective March 29, 1951, and pursuant to joint motion of the parties the cause was remanded to the trial court for the purpose of permitting defendants to file a motion for modification of the judgment and for dissolution of the injunction. Said motion was based upon the ground that the stated act of the legislature expressly commanded the performance by defendants of those acts which the trial court had enjoined, and fully authorized the board to do those things of which plaintiff complained.

Plaintiff filed an answer to defendants' motion, in which the 1951 Act of the legislature was attacked on constitutional grounds, which we hereinafter consider. Nine witnesses were examined at the hearing which followed. November 16, 1951, the motion for modification of the judgment and for dissolution of the injunction was denied.

The trial court stated that chapter 161, Session Laws of Colorado 1951, operated as an "infringement on petitioner's rights under the Fourteenth Amendment and the pertinent section of our own Article 2 of the Colorado Constitution, the court holds the present act unconstitutional." The trial court accordingly refused to dissolve the injunction.

Facts essential to the proper solution of this controversy are as follows: Plaintiff was duly licensed to practice [*171] the profession of engineering in the State of Colorado on May 12, 1921, under authority vested in the State Board of Engineer Examiners by an Act of the General Assembly approved April 9, 1919. S.L. '19, c. 185. This license

contained, inter alia, the following statement: "The State Board of Engineer Examiners of Colorado having determined that Kenneth A. Heron has fully complied with said act and is entitled to a license to practice the Profession of Engineering, do hereby license him to practice said profession." Thereafter plaintiff left the State of Colorado, returning in the year 1945, and in December of that year he reapplied for registration as a professional engineer in Colorado, paid the required fee, and received a registration card certifying that he was especially qualified to practice in the branch of civil engineering. Plaintiff protested the limitation implied by this qualified registration, and requested a license without limitation or classification, but this never was issued.

In December, 1947, plaintiff again applied for a renewal license to practice his profession for the year 1948 and requested that his registration be carried on the records of the defendant board as "professional engineer" without limitation or classification. The request, however, was denied and again the registration card was issued stating that plaintiff was qualified in the branch of civil engineering. Plaintiff demanded a hearing, which was denied.

In the year 1949 plaintiff again was registered as an engineer qualified in the branch of civil engineering, and on June 23rd of that year he, by his attorney, protested such limited registration and made formal demand on the board for the withdrawal of all limitations on his license to practice engineering in Colorado, and demanded a correction of his registration, including the license card and the roster of engineers, in such manner as to show that he was licensed to practice the profession of engineering without qualification or limitation. [*172] Upon refusal of defendant board to comply with this demand, suit was instituted.

[**757] In the complaint, counsel for plaintiff set forth the foregoing facts and alleged that defendant board was about to print and publish for free distribution a pamphlet containing, among other things, a roster of registered engineers and the classification to which each was assigned, and further alleged that there was no authority under the law for the printing and distribution of such a roster.

Defendant board in its answer set out the regulations which it had adopted purporting to authorize the classification of engineers and publication of the roster of which plaintiff complained. In the pleadings two questions were raised which were correctly stated by the trial court as follows:

"First: Has the State Board of Examiners of Engineers and Land Surveyors of the State of Colorado the right and authority to license an engineer and to issue a certificate limiting and qualifying such practice by the words such as 'Civil,' 'Electrical,' 'Mechanical,' etc.

"Second: Is there authority in the law for the printing and free distribution of the annual report and roster of engineers to be paid out of the funds collected by said Board as license fees."

No specific authority for the classification of professional engineers was contained in the applicable statute. Its validity depends upon the legality of certain rules and regulations adopted by the board. We deem it unnecessary to set them forth in detail. Suffice it to say that the trial court correctly held that the regulations, upon which the board relied as authority for their classification of engineers, and for the publication and distribution of a roster including such classifications, were void.

Chapter 161, Session Laws of Colorado 1951, as hereinbefore stated, was enacted subsequent to the entry of the trial court's judgment which granted the relief [*173] sought by plaintiff. Upon reconsideration of the case on the questions raised by the motion to dissolve the injunction, and the answer thereto which was filed by plaintiff, the trial court considered the 1951 Act at length and stated, inter alia:

"The court has given serious and careful consideration as to whether the 1951 Act, Chapter 161, is unconstitutional on the following grounds: First: That it is discriminatory; Second: That it constitutes special legislation; Third: That there was an unauthorized delegation of power by the Legislature to the Board and that such delegation is arbitrary, capricious and unreasonable."

The Attorney General, on behalf of defendant board, asserted in his brief that the questions legitimately raised concerning the subject matter of the action were: "(a) Whether or not there was an unconstitutional delegation of legislative authority to the Board; (b) whether or not the legislature unlawfully granted legislative authority for the printing and distribution of classified rosters and cards; (c) whether or not the classification directed by the legislature constituted a deprivation of property without due process of law; (d) whether or not classification directed by the legislature was discriminatory." Consideration and resolution of two of these queries will suffice to determine the rights of plaintiff in the instant action, and to more clearly define the powers of the legislature with regard to the classification of those who in the future may apply for a license to practice the profession of engineering in all or any of its branches.

Questions to be Determined.

[1] First: *Is the right to practice a profession, once legally granted, within the rights protected by the Constitutions of the United States and of the State of Colorado, which provide that no person shall be* deprived of life*, liberty or property without due process of law?*

This question is answered in the affirmative. Our [*174] court has heretofore stated that the professions of law, medicine and dentistry are generally considered as learned professions, and that, "Neither is an ordinary [**758] trade or calling which all citizens alike may pursue." *People v. Painless Parker*, 85 Colo. 304, 275 Pac. 928. The profession of engineering is no "ordinary trade or calling." That profession also involves "personal skill, presupposes a period of novitiate, intensive preparation, due examination and admission, and that the licentiate's sheepskin is solely his own." *State Board of Dental Examiners v. Savelle*, 90 Colo. 177, 8 P. (2d) 693. In *Chenoweth v. State Board of Medical Examiners*, 57 Colo. 74, 141 Pac. 132, our court said that the right to practice a learned profession was a "valuable right."

The right to practice such a profession has been recognized as a "valuable right" or a "property right" in other jurisdictions. *State v. Schultz*, 11 Mont. 429, 28 Pac. 643; *Baker v. Department of Registration*, 78 Utah 424, 3 P. (2d) 1082; *Bley v. Board of Dental Examiners*, 87 Cal. App. 193, 261 Pac. 1036. From the case of *Abrams v. Jones*, 35 Idaho 532, 207 Pac. 724, we quote the following: "Where the state confers a license upon an individual to practice a profession, trade or occupation, such license becomes a valuable personal right which cannot be *denied or abridged* in any manner except after due notice and a fair and impartial hearing before an unbiased tribunal." (Emphasis supplied.)

We are in accord with the authorities above cited and approve the language quoted therefrom as being applicable to this controversy. In the instant case plaintiff was duly licensed to practice the profession of engineering. He was not limited to any particular branch of that profession. We hold that one who has qualified for admittance and license to practice engineering without restriction, under the standards applicable at the time of admission, thereby acquires a valuable right fully protected and covered by the due process clause of the Federal and State Constitutions. It follows, therefore, [*175] that the legislature cannot by statute deny or abridge that right in any manner except for cause and "after due notice and a fair and impartial hearing before an unbiased tribunal."

Every statute providing for the licensing of those engaged in a learned profession contains, or can provide, procedures for suspension or revocation of a license held by one who actually is found to be unfit or unworthy to continue in the practice. This is a sufficient protection to the public and affords ample opportunity for a reasonable exercise of the police power in the public interest. The trial court was correct in holding that, by the statute in question, the plaintiff was deprived of a valuable right without due process of law.

Second: *Assuming that the profession of engineering is one which may be divided into branches, and that those licensed to practice may be limited to a particular branch thereof by proper statutory inactment, does chapter 161 of the 1951 Session Laws of Colorado, illegally delegate legislative powers to administrative officials*?

This question is answered in the affirmative. Upon the question of whether the profession of engineering is subject to regulation by classification into branches, we express no opinion. For the purpose of testing the 1951 engineering statute with reference to the above question we assume that the profession might conceivably be thus regulated. The statute contains, inter alia, the following provisions:

"The term 'professional engineer' within the meaning and intent of this Act shall mean a person who, by reason of his special knowledge of the mathematical and physical sciences and the principles and methods of engineering analysis and design, acquired by professional education and practical experience, is qualified to practice engineering as hereinafter defined, as attested by his legal registration as a professional engineer.

"The term 'practice of engineering' within the meaning [*176] and intent of this Act shall mean any professional service or creative work requiring engineering education, training and experience and the application of special [**759] knowledge of the mathematical, physical and engineering sciences of such professional services or creative work as consultation, investigation, evaluation, planning, design, and supervision of construction for the purpose of assuring compliance with specifications and design, in connection with any public or private utilities, industrial buildings, structures, machines, equipment, processes, works, or projects."

No definition of any particular branch of engineering is contained in the statute, and no standards are fixed and determined by which a classification could be made. Section 11 of the Act provides in part:

"The engineering branches in which the registrant may be listed as having qualified for registration are the following: 'Agricultural Engineering,' 'Chemical Engineering,' 'Civil Engineering,' 'Electrical Engineering,' 'Mechanical Engineering,' 'Mining Engineering' and 'Structural Engineering.'"

No standards are fixed by the Act which shall be applied in determining the distinctions to be drawn between these various specializations of the broad field of engineering. Without question, many fundamental scientific principles are common to all of them, and every field of the profession overlaps into another. Without standards fixed

by the law, the discretion to declare what the law is, is delegated to the board. This cannot legally be done.

Other instances in which there is a total absence of adequate standards are found in the following portions of the statute: In section 12 are the following provisions, the objectionable portions of which we have italicised: "The following shall be considered as minimum evidence satisfactory to the Board that the applicant is qualified for registration as a professional engineer, or land surveyor, or for certification as an engineer-in-training, [*177] respectively: (1) As a professional engineer: a. Graduation in an approved engineering curriculum of four years or more from a school or college approved by the Board as of satisfactory standing; and a specific record of an additional four years or more of experience in engineering work of a character satisfactory to the Board, and indicating that the applicant is competent to practice engineering (in counting years of experience, the Board at its discretion may give credit, not in excess of one year, for satisfactory graduate study in engineering), provided that in a case where the evidence presented in the application does not appear to the Board conclusive *nor warranting the* issuing of a certificate of registration, the applicant may be required to present further evidence *for the consideration of the Board*, and may also be required to pass on oral or written examination, or both, *as the Board may determine*; or

"b. A specific record of eight years or more of experience in engineering work *of a character satisfactory to the Board* and indicating that the applicant is competent to practice engineering; and successfully passing a written, or written and oral, examination designed to show knowledge and skill approximating that attained through graduation in an approved four-year engineering curriculum; or

"c. A specific record of twelve years or more of *lawful* practice in engineering work *of a character satisfactory to the Board* and indicating that the applicant is competent to practice engineering *and provided applicant is not less than thirty-five years of age*.

"(3) As a Land Surveyor: a. Graduation from a school or college *approved by the Board* as of satisfactory standing, including the completion of *an approved* course in surveying; and an additional two years or more of experience in land surveying work *of a character satisfactory to the Board*and indicating that the applicant is competent to practice land surveying; or [*178] [**760] b. A specific record of six years or more experience *of a character satisfactory to the Board* c. A specific record of ten years or more of *lawful* practice in land surveying work *of a character satisfactory to the Board and provided applicant is not less than thirty years of age*."

[3] A study of these provisions leads inescapably to the conclusion that upon the whole question of qualifications for registration of engineers, there has been an illegal delegation of legislative authority to the board. The applicable law is stated in the opinion of this court in *Sapero v. State Board of Medical Examiners*, 90 Colo. 568, 11P. 2d 555, as follows:

"The general assembly may not delegate the power to make a law; but it may delegate power to determine some fact or a state of things upon which the law, as prescribed, depends. *Colorado and Southern Railway Co. v. State Railroad Commission*, 54 Colo. 64, 84, 129 Pac. 506; *Field v. Clark*, 143 U.S. 649, 694, 12 Sup. Ct. 495, 36 L. Ed. 294. See also 48 C.J., page 1096, section 64, as applied to physicians and surgeons.

[4] "The subject of nondelegable powers covers a wide range, but we adopt the concise statement employed by our highest court in *Field v. Clark, supra*, at pages 693, 694 of its opinion, which reads: "'The true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.'"

The judgment is affirmed.