

Before the
Administrative Hearing Commission
State of Missouri



DELTA EXTRACTION, LLC,

Petitioner,

v.

DEPARTMENT OF HEALTH AND
SENIOR SERVICES,

Respondent.

No. 23-0608

ORDER

The emergency motion for stay filed by Delta Extraction, LLC (Delta) is denied.

Procedure

On August 3, 2023, Delta filed a complaint to appeal an order of the Department of Health and Senior Services (Department) imposing an immediate suspension of Delta's operations. On August 9, 2023, Delta filed an emergency motion for stay. On August 14, 2023, the Department filed a response in opposition. We held a hearing on the motion on August 14, 2023. Charles W. Hatfield of Stinson LLP and Lowell D. Pearson of Husch Blackwell LLP represented Delta. Joshua E. Douglas of Mickes O'Toole, LLC, represented the Department. Both parties filed proposed findings of fact and conclusions of law on August 22, 2023, and reply briefs on August 25, 2023.

Analysis

Having fully considered the evidence, pleadings, and arguments of the parties with respect to the emergency motion for stay, this Commission concludes that Delta has failed to

meet its burden to demonstrate it is entitled to a stay of the order of immediate suspension of operations.

Delta holds a comprehensive marijuana-infused products manufacturing facility license. Our authority to consider this matter derives from Mo. Const. Art. XIV, § 2.4(4)(i) and 19 CSR 100-1.020(4)(A)2, as an appeal by a licensee from a penalty imposed by the Department. Article XIV, §2.4(4)(i) provides that a “licensee may choose to challenge any penalties imposed by the department through the administrative hearing commission.” A “penalty” imposed by the Department includes “[o]rders to immediately cease or suspend operations.” 19 CSR 100-1.020(3)(A)4. As to the instant motion, § 621.035, RSMo 2016, and our rules provide that we “may stay or suspend any action of an administrative agency pending the commission’s findings and determinations in the cause.” *See also* 1 CSR 15-3.320(1).

In this proceeding, we consider only the motion for stay. As an initial matter, it is to be noted that this Commission’s authority to issue a stay or refrain from doing so is discretionary; we “may stay or suspend any action of an administrative agency pending the commission’s findings and determinations in the cause.” 1 CSR 15-3.320(1) (emphasis added). This Commission’s rule on stays does not set forth the matters to be considered and applied in ruling on a motion for stay, except in specified types of proceedings not applicable here. *See* 1 CSR 15-3.320(2). In the comparable situation of a trial court suspending an administrative action under judicial review, four factors are considered in deciding whether a stay is appropriate: (1) the movant’s probability of success on the merits; (2) the threat of irreparable harm to the movant if the stay is not granted; (3) the balance between the harm to the movant if the stay is not granted and the harm that would be inflicted on others if the stay is granted; and (4) the public interest involved. *State ex rel. Dir. of Revenue v. Gabbert*, 925 S.W.2d 838, 839-840 (Mo. banc 1996). The burden of proof is on the movant, Delta, who must provide evidence to support each of these

factors. *Id.* at 840. “The movant must show that the probability of success on the merits and irreparable harm decidedly outweigh any potential harm to the other party or to the public interest if a stay is issued.” *Id.* at 840 (emphasis added).

Likelihood of Success on the Merits

Article XIV of the Constitution specifically allows for immediate suspension of operations by a marijuana licensee “in instances where there is a credible and imminent threat to public health or public safety.” Mo. Const. Art. XIV, § 2.4(1)(a) and § 2.4(4)(a). Article XIV further authorizes the Department to give meaning to the constitutional language: “in instances where there is a credible and imminent threat to the public health or public safety.” *See* Mo. Const. Art. XIV, § 2.4(4) and (4)(a). Pursuant to this constitutional authorization, the Department promulgated 19 CSR 100-1.020(3)(G), which states in relevant part:

Prior to revoking or suspending a facility license, the department shall issue a notice to the designated contact for the licensee by sending such notice to the email address provided by the designated contact for the licensee. The notice shall list the basis for a pending revocation or suspension. *Except where there is a credible and imminent threat to public safety*, the revocation or suspension will not take effect until thirty (30) days from the date the notice is sent. . . .

1. *If there is a credible and imminent threat to public safety, the department may order the licensed facility to immediately suspend all or part of the operations*, including placing an administrative hold on marijuana product, until the threat has been eliminated. An imminent threat to public safety includes, but is not limited to:

A. A dangerous condition at the facility that is likely to harm employees or the public;

B. A credible report, such as from law enforcement, that diversion or inversion of marijuana product is occurring at the licensed facility;

C. A credible report that a facility’s practices are permitting marijuana product to enter the regulated market without being compliantly tested.

(Emphasis added.)

In this regulation, the Department defines “imminent threat to public safety” in terms of three specific *per se* situations that constitute an imminent threat, and leaves open the possibility of other situations that would pose an imminent threat. In this case, the immediate suspension is based on two of the three *per se* situations identified as an imminent threat: (1) a credible report of inversion of marijuana product, and (2) a credible report of marijuana product reaching the market without being compliantly tested. 19 CSR 100-1.020(G)1.B and C.

Credible Report of Inversion of Marijuana Product

The term “inversion” in 19 CSR 100-1.020(3)(G)1.B is not defined. Under the principles of statutory construction, which apply equally to the construction of administrative regulations, words are generally to be given their plain and ordinary meaning. *See Doe v. St. Louis Community College*, 526 S.W.3d 329, 336 (Mo. App. E.D. 2017). The dictionary includes many definitions of “inversion,” including “a reversal of position, order, form or relationship;” and “the condition of being turned inward or inside out.” MERRIAM-WEBSTER DICTIONARY, online ed., www.merriam-webster.com/dictionary/inversion. None of these definitions leads to a reasonable reading of the regulation. We conclude that the term “inversion of marijuana product” as used in this regulation is intended to be applied in a technical sense and given its technical meaning. *State v. Fox*, 658 S.W.3d 186, 191 (Mo. App. W.D. 2022). We can ascertain the meaning of technical words and phrases by referring to persons with knowledge on the subject or by consulting books of reference. *City of Aurora v. Spectra Communications Group, LLC*, 592 S.W.3d 764, 784 (Mo. banc 2019). The Department’s Deputy Director of the Section for Compliance & Enforcement within the Division of Cannabis Regulation qualifies, based on her background and experience, as such a person. As explained in her affidavit and testimony:¹

Inversion occurs when cannabis seeds, plants, or products made from them come into the regulatory market from outside the

¹ Delta did not offer an alternative definition of this technical term.

system. This can happen in several ways, including when cannabis seeds, plants, or products come from producers outside of Missouri's system or when hemp-derived chemically modified ("converted") cannabinoids are added to products.

Resp. Ex. R ¶ 9 at 2.

A "credible report" is also not defined by the regulation. In this instance, the words are not used in a technical sense, so we give them their plain and ordinary meanings from the dictionary. *Teague v. Mo. Gaming Comm'n*, 127 S.W.3d 679, 686 (Mo. App. W.D. 2003). Credible means "1. Capable of being believed; believable; plausible. 2. Worthy of confidence; reliable." THE AMERICAN HERITAGE DICTIONARY OF THE AMERICAN LANGUAGE 311 (College ed. 1976).

We find that Delta is unlikely to prevail on the issue of whether the Metrc² data relied on by the Department are credible reports of information about inversion and release of marijuana product into the marketplace without being compliantly tested. The Metrc system is the seed-to-sale tracking system authorized by Article XIV and implemented by the Department. Mo. Const. Art. XIV, § 2.4(1)(d); 19 CSR 100-1.130(1).

The substance of those reports credibly indicates inversion. The reports show that marijuana products manufactured by Delta increased in weight or volume from sources outside the Missouri-regulated market. In addition, the hearing testimony corroborated the credibility of the reports of inversion in Metrc (and could be considered a credible report in its own right), as it shows that Delta was incorporating hemp-derived tetrahydrocannabinol into its marijuana products in violation of emergency rule 19 CSR 100-1.170(2)(E), 48 Mo. Reg. at 426. That rule was in effect from February 3, 2023, until August 1, 2023, and provided:

² "Metrc" (pronounced "metric") is the name of the vendor of the seed-to-sale tracking system used by the Department. Metrc is an acronym for "Marijuana Enforcement Tracking Reporting Compliance." Resp. Ex. R ¶ 7 at 2.

Any tetrahydrocannabinol in a marijuana product manufactured by a manufacturing licensee shall only be derived from marijuana cultivated in Missouri by a licensed cultivator.

19 CSR 100-1.170 (2)(E), 48 Mo. Reg. at 426. Tetrahydrocannabinol is the scientific name for THC, the chief intoxicant found in marijuana. MERRIAM-WEBSTER DICTIONARY, online ed., www.merriam-webster.com/dictionary/tetrahydrocannabinol. Marijuana was defined by the Department's regulations as:

“Marijuana” or “Marihuana” means *Cannabis indica*, *Cannabis sativa*, and *Cannabis ruderalis*, hybrids of such species, and any other strains commonly understood within the scientific community to constitute marijuana, as well as seeds, clones, and resin extracted from the marijuana plant. “Marijuana” or “Marihuana” does not include industrial hemp as defined by Missouri statute, or commodities or products manufactured from industrial hemp.

19 CSR 100-1.010(45), 48 Mo. Reg. No. 5 at 361. Given these definitions, under emergency regulation 19 CSR 100-1.170 (2)(E), a manufacturer was only permitted to use THC in its products that came from marijuana grown in Missouri by a Missouri-licensed cultivator. THC can be produced by chemical processes that convert THC-A and CBD to THC. Tr. at 88, 260, 271. The regulation prohibited manufacturers from including in their products any THC produced by the conversion of THC-A or CBD from any source other than marijuana grown in Missouri by a Missouri-licensed cultivator. The use of THC produced from THC-A or CBD from industrial hemp plants was prohibited.³ In addition to being a violation of 19 CSR 100-1.170(2)(E), when THC-A or CBD from industrial hemp plants is converted to THC and the THC is incorporated into marijuana products, there is also an “inversion of marijuana product” as that phrase is used in 19 CSR 100-1.020(G)1.B, because “hemp-derived chemically modified

³ We agree with the Department that language added to the permanent rule 19 CSR 100-1.170(2)(E), effective August 1, 2023, did not change the requirement of the emergency rule that THC in marijuana products could only be derived from marijuana cultivated by a Missouri-licensed cultivation facility.

(“converted”) cannabinoids⁴ are added to products.” Resp. Ex. R ¶ 9 at 2. Based on the evidence presented at the stay hearing on these issues, Delta is not likely to succeed on the merits of whether there is a credible report of inversion.⁵

Credible Report of Marijuana Product Reaching the Market
Without Being Compliantly Tested

The Department also based its order of immediate suspension on there being “[a] credible report that a facility’s practices are permitting marijuana product to enter the regulated market without being compliantly tested.” The Department relied on two examples from Metrc-derived information showing that a particular lot of product was tested on one date and that additional product was added to the tag for that particular lot after the testing date. Delta’s general manager/lab manager testified that the large volume of product being manufactured at the facility meant that mistakes would be made in inventorying, packaging, and storing manufactured product and that it might be months later when the error was discovered. This describes a facility practice that would permit marijuana product to enter the market without being tested because it shows that product was being added to inventory lots after those lots had been tested. The evidence presented at the stay hearing demonstrates that Delta is not likely to succeed on the merits of whether there is a credible report that a facility’s practices are permitting product to enter the regulated market without being compliantly tested.

Irreparable Harm to Delta

Delta is suffering harm from the order of immediate suspension of operations, but the amount of that harm is not quantifiable. Delta’s business is shuttered so that it is not

⁴ THC, THC-A and CBD all come within the dictionary definition of “cannabinoid.” MERRIAM-WEBSTER DICTIONARY, online ed., www.merriam-webster.com/dictionary/cannabinoid.

⁵ Delta has three lines of product. With respect to one line – Midwest Magic – the evidence shows that this product contained THC obtained from THC-A that was converted to THC through a butane process. Delta did not offer evidence explaining the butane process or the source of the THC-A. It has not shown a likelihood of success on the merits with respect to this line of products, even if we could issue a stay of the suspension order as to one product and not another. There was no information provided whatsoever on the process or source of THC for the white label products, which were products manufactured by Delta for sale under another’s label.

manufacturing products for future sales and manufactured products are on administrative hold, which means they cannot be sold on the market. Delta has no contracts for delivery of marijuana products, but relies on dispensaries and other manufacturers to place orders on an *ad hoc* basis. There was also no evidence or estimate of how long the suspension would likely remain in place before this Commission makes a final decision on the merits of this case, or the time in which the suspension might otherwise remain in place until lifted. Pursuant to 19 CSR 100-1.020(3)(G)1, immediate suspensions are not permanent and are to remain in place only “until the threat has been eliminated.”

The quantification of the harm to Delta is further complicated by the fact that some of the product being held by it and intended for future sale may have been manufactured by a process prohibited under the Department’s regulations. It may not be permitted to sell those products. There was also testimony that 80 percent of Delta’s sales was of products involving the conversion of THC-A into THC, which Delta intended to discontinue after August 1, 2023. The monetary harm to Delta is not quantifiable under the evidence, but is still significant. Delta also experienced reputational harm from the order of immediate suspension and will continue to suffer harm of that type with continuing and potential customers while the order is in place.

The Interest of Other Parties

Article XIV gives the Department broad powers to regulate Missouri’s marijuana market. These powers include the authority to take immediate action to suspend or revoke a license when it determines that a licensee is engaging in activities that present a credible and imminent threat to public health or public safety. Mo. Const. Art. XIV, § 2.4(1)(a) and § 2.4(4)(a). In addition to this specific power, the Department is also empowered to promulgate rules and regulations necessary for the proper regulation and control of the legal marijuana industry in Missouri and enforcement of the constitutional provisions in Article XIV. Mo. Const. Art. XIV, §2.4(1)(a)

and (2). In furtherance of this power, the Department promulgated 19 CSR 100-1.020(3)(G). From these provisions, the Department has a substantial interest in carrying out the duties entrusted to it under Article XIV. The Department's interest in enforcing the regulation of the marijuana industry through the processes provided by the constitution and its regulations without interference by the extraordinary remedy of a stay of its action must be given some weight in the balance of interests.

Consumers of marijuana products also have an interest in the Department enforcing measures designed to ensure the safety of the products they are consuming. Further, consumers and members of the industry have an interest in the integrity of, and trust in, the Missouri marijuana market, both in terms of confidence in the safety of the products being produced and sold and in preventing illicit products from entering into the Missouri market.

The Public Interest

Article XIV, § 2.1 states, in relevant part:

The purpose of this section is to make marijuana legal under state and local law for adults twenty-one years of age or older, and to control the commercial production and distribution of marijuana under a system that licenses, regulates, and taxes the businesses involved while protecting public health. The intent is to . . . remove the commercial production and distribution of marijuana from the illicit market; prevent revenue generated from commerce in marijuana from going to criminal enterprises; . . . [and]; protect public health by ensuring the safety of marijuana and products containing marijuana[.]

The Department may also issue rules and regulations “to ensure the right to, availability, and safe use of marijuana by consumers,” Mo. Const. Art. XIV, § 2.4(4), including “[r]equirements and standards for safe cultivation, processing, and distribution of marijuana and marijuana-infused products by marijuana facilities, including health standards to ensure the safe preparation of marijuana-infused products[.]” Mo. Const. Art. XIV, § 2.4(4)(b). The constitutional provision

also recognizes the importance of testing marijuana product to protect the public health and being able to track marijuana product through the vertical and horizontal stages of the market. Mo. Const. Art. XIV, § 2.4(4)(c) and (5); Mo. Const. Art. XIV, § 2.4(1)(d).

Finally, Article XIV, § 2.4(1)(a) and § 2.4(4)(a) recognize that the public interest includes empowering the Department to immediately suspend or revoke a license without providing for a reasonable cure period “in instances where there is a credible and imminent threat to public health or public safety[.]”

While Article XIV recognizes a public interest in making marijuana lawful for persons over 21 years of age, where it was once unlawful, it also recognizes the paramount public interest in regulation of the marijuana product manufactured and sold in the marketplace to ensure the public health and safe use of marijuana products. In support of this paramount interest, the constitution also recognizes the public interest in putting the health and safety of the public first in cases where there is a credible and imminent threat to public health and safety. The public has a strong interest in the safety of marijuana products.

Balance of Interests and Factors

We find that Delta has failed to meet its burden of showing “that [its] probability of success on the merits and irreparable harm decidedly outweigh any potential harm to the other party or to the public interest if a stay is issued.” *Gabbert*, 925 S.W.2d at 840 (emphasis added). The balance of interests and factors weigh in favor of denying Delta’s emergency motion for stay. Delta did not satisfy its burden of proving by a preponderance of the evidence that it is likely to succeed on the merits of this case. The interest of the Department, other third parties and, most importantly, the public, in public health and safe use of marijuana products, outweighs the potential harm to Delta if the immediate suspension of operations remains in place until resolution on the merits of this case.

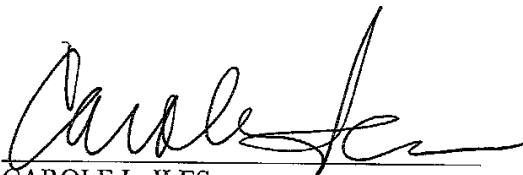
Summary

Delta's emergency motion for stay is denied.

Unlike other statutory provisions allowing for emergency suspension of licenses or withholding of government funds, Article XIV does not provide for an expedited hearing on the merits of an immediate suspension of operations. While we have authority to advance matters on the docket, Delta sought a stay of the Department's action rather than an expedited hearing. Having ruled on the motion before us, we exercise our authority to advance the case on the docket and set the matter for a hearing on the merits for Monday, September 11, 2023, at 9:00 a.m. A notice of hearing with further details will be issued separately.

It is important to note that, in the context of the hearing on the merits of the complaint, the scope of the issues before us is limited. In a hearing on the merits, and pursuant to 19 CSR 100-1.020(3)(G), we determine only whether: (1) the Department has a credible report either that inversion is occurring at the licensed facility or that marijuana product is entering the regulated market from the facility; (2) the suspension should be lifted because the threat to public health or public safety has been eliminated, and (3) the investigation as it relates to a credible and imminent threat to public health or safety is no longer ongoing.

SO ORDERED on August 29, 2023.


CAROLE L. ILES
Commissioner