

The State of New Hampshire

MERRIMACK, SS

SUPERIOR COURT

Linda B. Horan

v.

State of New Hampshire

No. 217-2015-CV-607

ORDER

The Petitioner, Linda Horan, is a 64-year-old woman suffering from terminal stage four lung cancer, which has spread to her brain and lymph nodes. Her prognosis is death within months, accompanied by painful side effects. She seeks to have the Court order that the Department of Health and Human Services ("DHHS") issue a registry identification card for the use of therapeutic cannabis pursuant to RSA chapter 126-X, because if DHHS does so, she can lawfully obtain therapeutic cannabis in Maine. The State does not dispute that the Petitioner qualifies for a registry identification card, but has refused to issue one because it believes that RSA chapter 126-X prohibits issuing such cards until cannabis dispensaries are open in New Hampshire. For the reasons stated in this Order, the Court GRANTS the Petition for a Preliminary Injunction and orders the State of New Hampshire, by its Commissioner of DHHS, to process the Petitioner's application for a registry identification card, as defined in RSA 126-X:1, XI, without undue delay and within the periods mandated by statute and rule and thereafter, if the application is approved, issue a registry identification card to the Petitioner within the time mandated by law.

I

In July 2013, the Legislature enacted the Therapeutic Use of Cannabis Act as RSA chapter 126-X. The Act allows certain individuals defined as “qualifying patients” and “designated caregivers,” to use and possess a quantity of cannabis for medicinal purposes. RSA 126-X:2. A “qualifying patient” is defined as “a resident of New Hampshire who has been diagnosed by a provider as having a qualifying medical condition and who possesses a valid registry identification card issued pursuant to RSA 126-X:4.” RSA 126-X:1, X. Additionally, the Act describes several “alternative treatment centers” (“ATCs”) that may sell medical cannabis to qualifying patients. RSA 126-X:1, I.

RSA 126-X:4, I provides, in relevant part, that DHHS shall create and issue a registry identification card to a person applying as a qualifying patient who submits all the following information:

- (a) Written certification as defined in RSA 126-X:1.
- (b) An application or a renewal application accompanied by the application or renewal fee.
- (c) A recent passport-sized photograph of the applicant’s face . . .
- (d) Name, residential and mailing address, and date of birth of the applicant . . .
- (e) Name, address, and telephone number of the applicant’s provider.
- (f) Name, address, and date of birth of the applicant’s designated caregiver, if any . . .
- (g) *Name of the alternative treatment center that the qualifying patient designates. A qualifying patient may designate no more than one alternative treatment center at any one time.*
- (h) A statement signed by the applicant, pledging not to divert cannabis to anyone who is not allowed to possess cannabis pursuant to this chapter and acknowledging that his or her diversion of cannabis is punishable as a class B felony . . .

(Emphasis added).

The critical issue in this case is the existence of ATCs. RSA chapter 126-X took effect on July 23, 2013. Under the statute, the Legislature authorized the creation of ATCs

that would manufacture and distribute cannabis to qualifying New Hampshire patients who are prescribed the medication by their physician. RSA 126-X:1, I. Since early 2014, DHHS has taken the position that it will not issue registry identification cards until an ATC becomes operational. It has taken the position that it is statutorily barred from issuing registration cards until the ATCs are operational because RSA 126-X:4, I requires applicants to designate an ATC as part of the application process. (State's Obj. 1, 2.)

The preliminary injunction hearing, held on November 12, 2015, proceeded by offers of proof. There do not appear to be any significant issues of fact. At the hearing, the State represented that no ATCs would be operational until at least the end of the first quarter or beginning of the second quarter of 2016. In light of the fact that the ATCs will apparently be operational soon, DHHS has allowed individuals to fill out applications and designate the treatment center at which they will receive therapeutic cannabis. However, at the hearing, the Petitioner noted that the ATCs were supposed to be opening this past summer.

The State does not dispute the Petitioner's representation that on July 29, 2015 she was diagnosed with lung cancer which has metastasized to her lymph nodes and brain and is growing rapidly, with no likelihood of successful treatment. She has treated with a chemotherapy oncologist who stated that while her incurable cancer will not be abated, the quality of her life might be improved by a clinical chemotherapy trial. She began chemotherapy on November 2, 2015. Her treating physicians have stated that she qualifies for therapeutic cannabis. They have informed her that therapeutic cannabis could be useful in controlling anxiety and assisting in rest and sleep. The Petitioner suffers from nausea and is losing weight at an alarming rate, now weighing less than 100 pounds. Her

physician has certified to the State that the side effects of the Petitioner's cancer include both wasting and cachexia, a related condition. Her doctors have told her that cannabis can be useful in combating such wasting and in reducing nausea. The Petitioner has been told that therapeutic cannabis will both delay and minimize to the extent possible the need to use narcotics to control pain, thereby allowing her to stay awake and aware of her surroundings. She represented that it is likely she will not live until the ATCs open in New Hampshire.

At the hearing on the Motion for a Preliminary Injunction, the Petitioner established that DHHS has begun accepting applications for registry identification cards and introduced a copy of the application she has filled out, dated November 2, 2015, on which she selected one of the four ATCs available, Lebanon-Temescal Wellness Center, an ATC listed on the form. On November 3, 2015, the Petitioner's application for a registry identification card was filed, which was accompanied by a certification from her treating physician stating that she suffered from cancer, a qualifying condition, and that she exhibited qualifying symptoms that met the requirements of RSA chapter 126-X. The State does not dispute the Petitioner's condition or prognosis or that, if her application were processed, she would be entitled to a registry identification card.

II

The Petitioner's principal argument is that she will suffer irreparable harm that could be remedied if she were to receive a registry identification card for therapeutic cannabis because, even though there are no ATCs currently open in New Hampshire, she could receive cannabis in sister states, such as Maine. She seeks injunctive relief that the Court order DHHS to "process the application of Petitioner without due delay and within

the periods mandated by statute and rule and thereupon, if the application is approved, issue a patient registration card for therapeutic marijuana . . . within the time period mandated by law.” (Pet’rs Proposed Order.) The State argues the law does not permit it to grant a registry identification card until ATCs are open and operating.

A

A preliminary injunction is an extraordinary remedy. “The issuance of injunctions, either temporary or permanent, has long been considered an extraordinary remedy. A preliminary injunction is a provisional remedy that preserves the status quo pending a final determination of the case on the merits.” New Hampshire Dep’t of Env. Servs. v. Mottolo, 155 N.H. 57, 63 (2007) (internal citations omitted). Ordinarily, to obtain injunctive relief, a plaintiff must show a likelihood of success on the merits, immediate danger of irreparable harm, that there is no adequate remedy at law, and that an injunction is in the public interest. Id.

The State does not dispute that the Petitioner will suffer irreparable harm if she is unable to take therapeutic cannabis, and will thereby suffer greatly. Money damages, even if available, would be inadequate to compensate her for suffering during the last months of her life. If New Hampshire law authorizes her to receive therapeutic cannabis, then injunctive relief would plainly be in the public interest. The issue, therefore, is whether or not the Petitioner has a likelihood of success on the merits. This, in turn, depends upon the interpretation of RSA chapter 126-X.

The issue for the Court is, ultimately, what the Legislature intended. A review of the statute leads inexorably to the conclusion that the Legislature intended citizens of New Hampshire who require cannabis for medically determined, therapeutic purposes may

receive the medication from sources that are knowledgeable and provide patients with appropriate educational materials regarding the selection, dosage, modes of administration, and side effects of therapeutic cannabis, and that are subject to inspections by the State. It is equally true that the statute establishes careful controls over the use of cannabis so that it is not abused by those who do not medically require it. The State points out a plethora of provisions that the Legislature obviously enacted in order to insure that therapeutic cannabis is not abused. (State's Obj. 1, 4.) For example, a qualifying patient must designate the ATC that he or she will use, and may only designate one ATC, RSA 126-X:4, I (G); notify DHHS prior to changing ATCs, RSA 126-X:4, IX; receive a new registry identification card and identification number prior to changing ATCs, RSA 126-X: 4, IX; and obtain no more than two ounces of cannabis from an ATC during a ten-day period, RSA 126-X:8, XIII.

The issue before the Court narrows itself to the following: does RSA chapter 126-X prohibit issuance of registry identification cards because no ATCs are open in the State despite that fact that Petitioner has complied with the provisions of RSA 126-X: 4, I which requires that, upon compliance with the requirements of the statute, DHHS *shall* create and issue a registry identification card"? The State argues that DHHS cannot issue registry identification cards until the ATCs are established in New Hampshire because, until the ATCs are created, there is no legal source of cannabis for qualifying patients, which is required by the statute. The State's recognizes that the statute does not state that registry identification cards cannot be issued until the ATC's are operational, but nonetheless argues the statute must be so interpreted, because RSA chapter 126-X does not permit patients to legally possess cannabis "no matter the source." (State's Obj. 1, 7.) The State

reasons that to interpret the statute as allowing possession of cannabis from any source would eviscerate the system of tight controls over distribution of cannabis that RSA chapter 126-X envisions:

If, as the Petitioner asserts, a qualified patient could obtain cannabis in another state or from another source that DHHS cannot verify or monitor, then the chapter's tight controls over the cultivation and dispensation of cannabis in New Hampshire would be rendered superfluous. Under the present law, an ATC is required to verify that the dispensing of cannabis to a qualified patient would not "cause the qualified patient to receive more cannabis than is permitted in a 10-day period." RSA 126-X:8, XIII(a). An ATC would be unable to adequately perform this statutory requirement if the statute is deemed to permit a patient to obtain cannabis from other sources that DHHS does not have the ability to inspect or regulate.

(State's Obj. 1, 8.)

The flaw in the State's argument is that the statute, as written, specifically envisions a qualifying patient possessing cannabis without the oversight provided by the statute.

RSA 126-X:2, V specifically provides that:

A valid registry identification card, or its equivalent, that is issued under the laws of another state . . . that allows, in the jurisdiction of issuance, a visiting qualifying patient to possess cannabis for therapeutic purposes, shall have the same force and effect as a valid registry identification card issued by the department in this state provided that:

(a) The visiting qualifying patient shall also produce a statement from his or her provider stating that the visiting qualifying patient has a qualifying medical condition as defined in RSA 126-X:1; and

(b) A visiting qualifying patient shall not cultivate or purchase cannabis in New Hampshire or obtain cannabis from alternative treatment centers or from a qualifying New Hampshire patient.

The State argues that "to accept Petitioner's argument. . . would be to permit New Hampshire citizens to obtain cannabis from sources that are not held to the high standards required by the remainder of the same statute." (State's Obj. 1, 9.) But the statute, by its terms, permits non-New Hampshire residents to obtain cannabis that may

or may not be “held to the high standards required by” RSA chapter 126-X. Nowhere does the statute say that a qualifying patient can only obtain cannabis from a New Hampshire ATC. It is axiomatic that a court may not add words to the statute the Legislature did not see fit to include. In re City of Franklin, 137 N.H. 723, 727–28 (1994).

Moreover, the reference in RSA 126-X:2, V to “visiting qualifying patient” from States that issue a “valid registry identification card, or its equivalent” suggests that the Legislature was well aware of the fact that other states would establish registries for use of therapeutic cannabis, and decided it would allow the compassionate use of cannabis by such individuals in this State. The statute also suggests that the Legislature was aware that other states would have similar provisions which would allow New Hampshire citizens to obtain therapeutic cannabis.

Finally, the Legislature established different deadlines for the adoption of regulations regarding ATCs and the issuance of registry identification cards. Under RSA chapter 126-X, the Legislature created an 18-month deadline for the rules and regulations governing the creation of the ATCs and a 12-month deadline for the rules and regulations governing the issuance of registry identification cards. RSA 126-X:6. The Court agrees with the Petitioner that if the Legislature intended to have DHHS delay issuing registry identification cards until the ATCs open, then the different deadlines would serve no purpose.

The evident purpose of the statute is to allow New Hampshire citizens suffering from painful and debilitating diseases to obtain a drug that will benefit them. There is no doubt that the State also has an interest in ensuring that cannabis is not used for nonmedical purposes. In interpreting a remedial statute, the Court must construe the

statute to effect its purpose, in favor of the Petitioner, a person plainly within the class of those the statute is intended to protect. See Alex Builders & Sons, Inc. v. Danley, 161 N.H. 19, 24 (2010). RSA 126-X, fairly read does not prohibit DHHS from issuing registry identification cards merely because the four ATCs it has designated are not yet operational.

B

The State nonetheless argues the Petitioner cannot succeed based upon the Court's decision in Kuligowski v. Toumpas, Merrimack County Superior Ct., No. 14-CV-641 (Mar. 26, 2015) (Order, Smukler, J.). In Kuligowski, the plaintiff alleged DHHS illegally promulgated a rule when it failed to follow New Hampshire's Administrative Procedure Act ("APA") before making statements on its website regarding applications for registry identification cards. Id. at 3. The Court denied the plaintiff's request for a registry identification card and dismissed his claim, holding the DHHS web notices were not rules. Id. at 5. In explaining why DHHS was not required to follow APA rulemaking procedures, the Court also noted that RSA 126-X:4, I(g) requires DHHS to issue a registry identification card to an applicant who submits all of the required information including "the name of [the] alternative treatment center that the qualifying patient designates," and that "if no alternative treatment centers yet exist, DHHS is statutorily barred from issuing registry identification cards." Id. According to the order, "DHHS will not accept any registration forms for registry identification cards until at least one alternative treatment center exists." Id.

However, DHHS is now accepting registration forms for registry identification cards and has identified four ATCs that applicants can designate. Designation is all that is

required by the statute. RSA 126-X:4, I(g). Unlike the petitioner in Kuligowski, who could not provide an ATC on his registration form, the Petitioner here has done so. Kuligowski is therefore distinguishable.

C

At oral argument, the Court raised *sua sponte* the issue of whether or not the Petitioner would actually obtain relief if this Court were to, as she requests, order processing of her card. She represented that if she had a valid registry identification card she would be able to obtain therapeutic cannabis in the neighboring State of Maine, but the State disputed her offer of proof. The parties provided supplemental briefing. After review of the briefing, it appears that under Maine law, as under New Hampshire law, a “visiting qualifying patient” may obtain therapeutic cannabis under certain circumstances.

See generally 22 M.R.S. § 2423-D. A visiting qualifying patient is described as a person that:

is visiting the State [of Maine] from another jurisdiction that authorizes the medical use of marijuana pursuant to a law recognized by the department who possesses a valid written certification . . . from the patient’s treating medical provider and a valid medical marijuana certification from that other jurisdiction and photographic identification or a driver’s license from that jurisdiction.

M.R.S. § 2423-D; see generally Savage v. Maine Pretrial Servs., 58 A.3d 1138, 1141 (Me. 2013).

There are eight medical marijuana treatment centers in the State of Maine, and they have formed an association known as the Maine Dispensary Operators Association. The president of that organization, Timothy Smale, has provided an affidavit which states, in relevant part, that he has been the Executive Director of Remedy Compassion Center in Auburn, Maine for the last five and a half years, which has continually held the certificate

of registration by the State of Maine Department of Health and Human Services. He states that it is his understanding that the Maine dispensaries may and do serve visiting qualified patients who are not residents of the State of Maine. He states that:

It is our understanding that Maine law allows for Visiting Qualifying Patients to obtain medical cannabis if visiting Maine for an extended period of time. It is not meant to allow for persons to obtain medical cannabis in Maine and then return immediately back to their home states. In order to be in strict compliance with our law and DHHS rules, Remedy Compassion Center requires that a Visiting Qualified Patient completes a form to state the location of their extended stay while in Maine. If the Visiting Qualified Patient cannot complete this form, we cannot sell them medical cannabis products.

(Smale Aff., Nov. 17, 2015.)

The State does not dispute operation of Maine's therapeutic cannabis law. It has submitted a document that it represents is an explanation of Maine's regulations from the program manager for the Maine Medical Marijuana Program, Marietta D'Agostino, which states:

The visiting qualified patient must meet all the terms of the Maine statute, and that includes the list of qualified medical conditions. The law was intended to serve those patients in Maine for a vacation or a school term and was not intended to allow people to drive up for the day to purchase medical marijuana and then drive home.¹

(State's Supplemental Pleading, Ex. A.)

The Petitioner has filed a supplemental affidavit stating that she intends to obtain treatment in Maine when she travels to Maine and to remain in Maine as required by law:

I have received invitations [to] stay overnight at this time from friends in Old Orchard Beach, South Portland and Portland. It is my intent to visit these people to say my goodbyes and thank them for their support in my life. During my extended visit in Maine, I expect I will return to the dispensary if

¹ However, the Petitioner has attached an affidavit from a Massachusetts resident who is a breast cancer survivor and who, prior to the Massachusetts dispensaries opening, was able to obtain cannabis by driving from Massachusetts to Maine for the day. (Sauro Aff., Nov. 17, 2015.)

there are any problems with the type of medications that I have received.

No matter what the dispensary that I ultimately choose tells me in terms of the length of stay needed to qualify for medical marijuana, I will comply because I desperately need the medication in order to live the last of my time on earth with a semblance of dignity and with my mental processes intact as long as possible.

(Horan Aff., Nov. 18, 2015.)

It therefore appears that if the Petitioner obtains injunctive relief, the otherwise irreparable harm she will suffer will be ameliorated, and she will not be in violation of either Maine or New Hampshire law.

III

In sum, the Petitioner has established a likelihood of success on the merits and that she has no adequate remedy at law. She is suffering from a painful, terminal disease and is also undergoing chemotherapy. There is no dispute that cannabis can ameliorate some of her suffering. She will suffer irreparable harm if relief is not granted.

The New Hampshire Legislature recognized that it is in the public interest to allow those who could benefit from therapeutic cannabis to receive it in 2013 when it enacted RSA chapter 126-X, which is captioned "Use of Cannabis for Therapeutic Purposes." The Court believes the Legislature intended to relieve the suffering of cancer patients such as the Petitioner when it enacted RSA chapter 126-X and that the Legislature's intent can be effectuated by processing the Petitioner's application for a registry identification card, as the statute requires, now that DHHS has designated ATCs in accordance with RSA 126-X:4, I(g). Because this case can be resolved by the terms of the statute, the Court need not consider the Petitioner's various constitutional claims.

Accordingly, in the unique circumstances of this case, the Court GRANTS the

Petition for a Preliminary Injunction and orders the State of New Hampshire, by its Commissioner of DHHS, to process the Petitioner's application for a registry identification card, as defined in RSA 126-X:1, XI, without undue delay and within the periods mandated by statute and rule and thereafter, if the application is approved, issue a registry identification card to the Petitioner within the time mandated by law.

SO ORDERED.

11/24/15
DATE

Richard B. McNamara
Richard B. McNamara,
Presiding Justice

RBM/