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Fight festers over medical pot licenses

Potential producers say state fails to live up to agreement

Phaedra Haywood | The New Mexican

Posted: Thursday, March 01, 2012

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The attorney for six would-be medical marijuana producers who are suing the New Mexico Department of Health said this week the agency has failed to live up to promises made in a mediated agreement in the case.

But it appears the lawsuit has prompted the department to speed up the process of creating a more formal system for reviewing applications from potential pot growers, unbeknownst to those who filed suit alleging the department lacked such a system.

Attorney Paul Livingston filed the suit last April, claiming that the process for becoming a state-approved producer is so vague and arbitrary that it denies applicants their due process rights.

More than 100 applications were pending at the time and the department had never formally denied an application.

The parties agreed in January to pause the case temporarily with the understanding that Health Secretary Catherine Torres would make a decision "as to the denial or granting" of the six plaintiff's applications by Feb. 29 and, if the applications were deemed denied, would provide "the specific reason or reasons why such denial occurred."

But, Livingston said letters delivered Feb. 29, informing five of his clients that their applications "did not meet the criteria to be a producer" don't contain any reasons why. One client got a letter telling him his application did meet the criteria but that the department "at this time is not adding new producers."

Chris Woodward, assistant general counsel for the Health Department, said Thursday the agency did give reasons for the denials and pointed to language in the letters that reads: "When considering whether to license additional non-profit producers, the Department considers the overall health needs of qualified patients, the safety of the public, and the sufficiency of the supply available to qualified patients, among other factors."

Letters that included that language went to Livingston's clients as well as 98 other potential producers.

"We don't consider it responsive in any way to the settlement agreement that they agreed to," Livingston said, "other than the fact that they went through some process of review and that is a good sign."

Woodward said Thursday if Livingston felt the department's response was insufficient "he can take it up through the court."

The crux of the lawsuit has been that the department has no set criteria for approving or denying applicants for licenses to produce medical marijuana, leaving applicants in the dark about the basis on which their applications were being judged.

But the department provided a scoring document Thursday that Woodward said was used to evaluate 102 recently reviewed applications from would-be producers, some of which had been pending for years.

The four-page document rates producer applications in seven different categories each worth a varying number of points with a total potential score of 100.

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Woodward said the four producers who were not denied all scored 75 or above.

Woodward said the scoring method was "brand new" and had been "created in response to the mediation and pending litigation." He later amended his statement, saying the evaluation sheet had been in process for a while but had been "expedited" in response to the litigation.

When a reporter called Livingston on Thursday for comment on the rating system, he said he had never heard of or seen the document.

"I really did not know about this," Livingston said. "One would think they would run this by us. Their attorneys are absolutely negligent about communicating with us. I can only see this as a desperation move by them," he said. "Let's see what they did in terms of how valid it is. Why so late? Why did it take so long? Are they now willing to settle the case? How could they do a rating system like that and decide that only four of the 102 passed? It sounds to me like there is nothing but questions that are raised."

Department of Health spokeswoman Aimee Barabe said in an email Thursday that individual applicants would be able to get copies of the sheets showing how they scored "if they requested it."

Asked if Livingston had seen the scoring system, Barabe responded via e-mail "I don't know ... but frankly, that's what the discovery process in the pending litigation is for."

The New Mexican forwarded Livingston a copy of the scoring sheet, which is public record.

After viewing the document, he responded, "It seems to me essentially meaningless. It's an amateur version of something you would put together quickly if you had to justify something."

The state has come under fire in the past for not approving enough producers to meet the demand of the thousands of patients enrolled in the program. Unlike that of other states, New Mexico's medical marijuana law tasks the state Health Department with regulating producers to provide the herb legally to patients who can't or don't grow their own.

The supply and demand ratio seemed to have settled into a more even keel in December 2010 when eight new producers were licensed, bringing the total number of producers to 25. At that time there were about 3,300 patients in the program.

Since then, however, two of those producers have chosen not to renew their licenses while the patient numbers have continued to increase. There are currently 23 producers who supply cannabis for 5,500 patients. About half of those patients are authorized to grow their own but it's unclear how many are able to produce all of their own medicine.

Len Goodman, director of New MexiCann Natural Medicine, a Santa Fe-based medical marijuana producer, said last month that he has felt more pressure to produce since the two producers -- one of which was located in Santa Fe -- dropped out.

Secretary Torres said she has directed her staff to study the amount of marijuana being used by patients so that the department can more accurately gauge the number of producers needed to provide an adequate supply.

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Christine A Martinez, Born and raised. Mother, widow, grandmother, aunt. Retired.

The Department of Health would have to have sufficient staff to approve the medical marijuana

licenses, yet they continue to run at half the needed staff.

Federal work is at risk, clients and patients are at risk as the new recruitment system at the state personnel office continues to kick out qualified applicants.

I am sure a death is going to be needed before the administration realizes you cannot run government on shoestrings. Everyone I know in state government is truly disgusted...even those who voted for the Governess thinking she would bring change! It changed alright, from doing two jobs to doing three and four.

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