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DEPARTMENT OF HEALTH  
OFFICE OF HEALTH CARE ASSURANCE  
STATE OF HAWAII

In the Matter of the Application for Medical )	APPLICATION NO. 4527
Marijuana Dispensary License of )	
HALE O LAULIMA, LLC )	HALE O LAULIMA'S NOTICE OF
Applicant-Appellant. )	APPEAL REGARDING THE NOTICE
)	OF DENIAL FOR MEDICAL MARIJUANA
)	DISPENSARY LICENSE, DATED JUNE 16,
)	2016
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HALE O LAULIMA'S NOTICE OF APPEAL REGARDING  
THE NOTICE OF DENIAL FOR MEDICAL MARIJUANA  
DISPENSARY LICENSE, DATED JUNE 16, 2016

NOTICE IS HEREBY GIVEN that Applicant-Appellant Hale O Laulima, LLC ("HOL"),  
by and through its attorneys, Ashford & Wriston, a Limited Liability Law Partnership, LLP,  
hereby appeals the Notice of Denial For Medical Marijuana Dispensary License, dated June 16,  
2016 (the "Denial").

The Denial was delivered in an envelope postmarked on June 22, 2016 and HOL received  
notice that it was delivered to its address on June 24, 2016. The Denial states that HOL has "a

right to appeal the decision within 20 days of receipt of this notice pursuant to section 329D-21, HRS, and sections 11-850-24 and 11-850-101, HAR.” Accordingly, HOL’s appeal is timely.

The Denial indicated that the application of HOL had violated certain provisions of HRS § 329D and HAR §11-850. Specifically, the Department of Health (“DOH”) stated: (1) that HOL’s “application did not meet the requirements of section 329D-3(b), Hawaii Revised Statutes, (HRS)...”; and (2) that HOL’s application was denied for a “[d]isqualifying background history pursuant to section 11-850-17(b)(2).”

HOL respectfully submits this appeal from the Denial and asserts herein that it believes such conclusion by DOH is in error. While HOL sets out below certain reasons as to why it believes such determination is in error, HOL also reserves the right to amend this appeal pending the receipt of information that has previously been timely requested from DOH, as well as pending discovery of any new information supporting this appeal.

It should be noted that HOL has repeatedly requested that DOH provide additional information to support the alleged deficiencies with HOL’s application as well as whether such alleged deficiencies had any impact on HOL’s conveyed application score of 460 (which would have ranked our group 4th behind scores of 475 and two scores of 470). One day before the date of filing this appeal, on July 12, 2016, DOH finally provided HOL with a copy of the scoring sheets. HOL has also requested additional information, and DOH has still not timely provided the full and complete information to enable a proper review of the Denial. Such information is directly relevant to the issues HOL raises herein below and this appeal and proper consideration of the application of HOL is dependent upon its being able to review facts that are held by DOH.

1. **DOH Erroneously Concluded that the Application did not Meet the Requirements of HRS §329D-3(b) and Erroneously Failed to Rank the Application for Merit**

HRS § 329D 3(b), in relevant part, states:

*The application shall be submitted to the department and shall include supporting documentation to establish the following:*

*(1) That the individual application:*

*(C) Has had no felony convictions;*

*(2) That the applying entity:*

*(G) Is composed of principals or members, each of whom has no felony convictions.*

Pursuant to such section of the underlying and controlling statute, it is clear that the sole consideration as to the criminal history of the applicant, and any principals or members thereof, was limited to felony convictions. The statute's focus on matters involving felony convictions is further supported by §§329D-6(d), and 7. No person associated with HOL, whether directly or indirectly, has been convicted of a felony.

Furthermore, because of HOL's compliance with §329D-3(b), and considering §§329D-4(l) and 4(m), it would have been improper for HOL's application to be disqualified and "not ranked for merit." In relevant part, such sections state:

*§329D-4(l) The department shall verify that the information submitted in the application is true and valid and meets the requirements established in section 3(b).*

*§329D-4(m) Upon verification of the minimum requirements, the department shall place the verified application in to the pool of applicants for further review and selection based on merit by the department.*

Accordingly, failure to rank HOL's application for merit would be in error.

2. **DOH Erroneously Concluded that the Application Did Not Meet the Requirements Set Forth in HAR Ch. 11-850, or HRS Ch. 329D, Including Disqualifying Background History Pursuant to HAR §11-850-17(b)(2)**

As discussed above, HOL has not violated chapter 329D HRS as no individual associated with HOL, whether directly or indirectly, has been convicted of a felony.

HAR § 11-850-17, in relevant part, states:

- (a) *The following are subject to background checks conducted by the department or its designee:*
- (1) *The individual applicant or licensee;*
  - (2) *All officers, directors, shareholders with at least twenty-five percent ownership interest or more, members, and manager of an entity applicant or licensee;*
  - (3) *Each employee of a dispensary;*
  - (4) *Each subcontractor of a dispensary;*
  - (5) *All officers, directors, shareholders with at least twenty-five percent ownership interest or more, members, and managers of a subcontracted production center or retail dispensing location;*
  - (6) *Each employee of a subcontracted production center or retail dispensing location*
  - (7) *Any person permitted to enter or remain in dispensary facilities pursuant to sections 329D-6, 329D-15, and 329D-16, HRS; and*
  - (8) *Agents of any of the above persons.*
- (b) *A person subject to a background checks as provided in subsection (a) shall be disqualified as an individual applicant or licensee, be disqualified as an entity applicant or licensee, be prohibited from entering a dispensary, and be prohibited from having any responsibility for operating a dispensary if the person:*
- (1) *Has a felony conviction;*
  - (2) *Has a conviction related to use, possession, or distribution of drugs or intoxicating compounds;*

Based on the actual language of HAR §11-850-17(a), no individual associated with HOL that is properly subject to a background check pursuant to HAR §11-850-17(a) had any sort of felony or other disqualifying conviction. The “individual applicant” had no disqualifying convictions, no “officers, directors, shareholders with at least twenty-five percent ownership interest or more, members, and managers” of HOL have been convicted of a felony or any other disqualifying offense and the same applies to the remaining individuals identified in such section. The language of HAR §11-850-17(a) should reasonably be interpreted to only apply to individuals in positions to exert a level of management/control of the operation (“officers, directors...managers”) and persons with a substantial ownership position (persons “with at least twenty-five percent ownership interest or more”). Even under a strict reading of the language

(which apparently, whether intentionally or unintentionally, could be interpreted to make a distinction between a corporation and its owners, or “shareholders”, and a limited liability company and its owners, or “members”), the position of HOL holds true -- no “member” of HOL, as defined under HRS Chapter 428, the Uniform Limited Liability Company Act, has been convicted of a felony or any other type of disqualifying conviction. It should be noted that HOL is a “manager managed” LLC and, therefore, HOL’s members are not considered “managers” or “agents” unless specifically identified as such. Moreover, under Chapter 428, the definition of an LLC member does not include the shareholders of a constituent member that is a corporation.

It should also be noted that there are inconsistencies in the language of §11-850. While §11-850-17(b) lists several types of non-felony convictions that could disqualify individual applicants and certain persons affiliated with an applicant, such additional types of non-felony convictions are not contemplated in the underlying statute (HRS Chapter 329D) and they are inconsistent with the immediately preceding section of the rule itself. Such preceding section, in relevant part, states:

*§11-850-16(a)(2)(I) to establish proof of no felony convictions for each individual listed in section 329D-12, HRS, an applying entity shall provide the following documentation for each:*

(emphasis added)

As stated in §11-850-17(b), the background matters identified therein are only relevant for “persons subject to a background check as provided in subsection (a).” If the DOH has identified any individuals that are indirectly associated with HOL that have non-felony convictions or other background history pursuant to §11-850-17(b), but are not subject to the background check requirements as set forth in §11-850-17(a), any such background history and/or convictions should not be factored in the review of HOL’s application and should not be

grounds for disqualification of the applicant entity or factor into the scoring of the applicant entity's application.

The effort to file an application was significant. HOL's score of 460 indicates that its application, receiving one of the highest scores even with the alleged deficiencies identified by DOH, was a very credible one. It is reasonable for HOL to presume that the alleged deficiencies leading to the disqualification impacted HOL's final score which, had points not been withheld, may have had the highest scoring application on the island of Oahu. HOL was never provided with any notice that there was an alleged deficiency in any of the information contained in such background checks nor was HOL provided with an opportunity to address or cure such alleged deficiencies. The Notice of Disqualification came well after the licensees were named (approximately 8 full weeks after) and did not provide the facts upon which the disqualification was based. While HOL is now offered a right to appeal, that right is diminished by the issuance of licenses prior to issuing the Denial and the failure of DOH to timely communicate with HOL. DOH has refused to answer clarifying questions from the applicant and has failed to produce documents that would provide the facts needed by the applicant to reasonably identify the basis for disqualification.

**3. DOH's Scoring System Was Arbitrary and Capricious and Did Not Fairly Evaluate HOL's Application.**

As noted above, HOL only received the scoring sheets the day before filing this appeal. Upon initial review of the score sheets, however, it is apparent that the scoring was arbitrary and capricious. DOH's Application Merit Criteria, dated December 16, 2015 indicates that, for each of the thirteen merit criteria, applications were to be scored on a 10 point scale. However, the scoring sheets reveal that evaluators were only permitted to give scores of 10, 5, 1.5 or 0 to each

applicant. This arbitrary scaling system prevented evaluators from distinguishing competing applicants based on merit and quality of the application responses, pursuant to HRS § 329D-5. It also resulted in significant discrepancies between evaluators across each category for all applicants.


HOL also believes that there were instances where its application was not scored fairly. As one example, for the “Revoked Business License” category, HOL was given three scores of 10 (designated as “Meets All or Exceeds Requirements”) and one score of 5 (“Meets Most Requirements But Not All”). Even if applying DOH’s flawed scoring system, HOL’s response could not have scored anything less than a 10 in this category because HOL has never had a revoked business license. DOH has also not provided any information that would allow HOL to reasonably identify why it received this or other scores for each of the thirteen criteria.

Accordingly, and pursuant to HRS Chapters 91 and 329D and HAR Title 11, HOL requests that this appeal be granted as follows:

- That this matter be set for a contested-case hearing and that a reasonable schedule be established for briefing, discovery, and the presentation of evidence;
- That the facts related to any deficiencies cited by DOH in the Denial be provided to the applicant;
- That it be determined that only the backgrounds of individuals subject to the specific language contained in §11-850-17(a) be considered for purposes of the application;
- That DOH be ordered to provide HOL with information sufficient to determine the specific reasons HOL received each merit category score from each evaluator;

- That it be found that DOH's Denial exceeded its statutory authority under Chapter 329D and HAR Chapter 11-850, acted upon unlawful procedure, acted in error of law, was clearly erroneous, and/or was arbitrary and capricious.
- If applicable, that the application score for HOL be amended as required; and,
- If applicable, that a dispensary license be issued to HOL in the event that HOL's corrected score be one of the top three scores awarded for the island of Oahu.

DATED: Honolulu, Hawaii; JULY 13, 2016.

  
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