MIKE HUNTER
ATTORNEY GENERAL

July 18, 2018

Tom Bates
Interim Commissioner of Health
1000 NE 10th Street
Oklahoma City, OK 73117

RE: *Dahn Gregg, et al. vs. State of Oklahoma, ex rel., The Oklahoma Department of Health*, No: CV-2018-1416 (Cleveland Cty.)

Dear Commissioner Bates:

I am in receipt of your letter dated July 16, 2018, requesting legal advice in the above referenced action. In my letter to you dated the same day, I indicated that I was in the process of assigning a team of attorneys from my office to advise me on the issues surrounding the actions taken by the Board of Health ("Board") concerning State Question 788 ("SQ 788") on July 10, 2018. I have since reviewed their legal analysis and come to the conclusion that the Board acted outside of its statutory authority in promulgating several rules pursuant to SQ 788.

Government agencies possess only those powers expressly given by the Constitution or statute, as well as "such powers as are necessary for the due and efficient exercise of the powers expressly granted, or such as may be fairly implied from the constitutional provision or statute granting the express powers." *Okla. Pub. Employees Ass'n v. Okla. Dep't of Central Servs.*, 2002 OK 71, ¶ 27, 55 P.3d 1072, 1084 (citations omitted). Thus, whether the Board's actions were consistent with law depends on the authority the Board has been given by law.

The State Board of Health was created by the Oklahoma Constitution, art. V, § 39, and has been vested with the authority to "[a]dopt such rules, and standards as it deems necessary to carry out any of the provisions of [the Oklahoma Public Health Code in Title 63]." 63 O.S. § 1-104(B)(2). The voters approved SQ 788, which enacts several laws in Title 63 specific to the regulation of marijuana.

In this case, the Board promulgated several rules in excess of its statutory authority.

First, the Board improperly limits and prohibits the sale of edible, smokable, vapable, and other forms of marijuana. OAC 310:681-2-11. The text of SQ 788 authorizes the cultivation, processing, sale, and use of "marijuana" in general terms, with few limitations on its form. *See, e.g.*, 63 O.S. § 420A(A) ("A person in possession of a statute issued medical marijuana license shall be able to … consume marijuana legally").[1] Where a term is not specifically defined by statute, "we must assume that the legislature intended the words used to have the meaning attributed to them in ordinary and usual parlance." *Hurst v. Empire*, 1993 OK 47, ¶ 18, 852 P.2d 701, 706. Because the ordinary and usual meaning of the term "marijuana" and the phrases "consume marijuana" and "use marijuana" encompasses smoking as well as consuming edible forms of marijuana, such consumption is legal and the Board does not have authority to, by its own initiative, prohibit it.

This conclusion is reinforced by the fact that SQ 788 contemplates various forms of medicinal marijuana, with no explicit limitation or prohibition on the manner in which licensed users may consume marijuana. For example, the law allows licensees to possess mature marijuana plants, seedling plants, concentrated marijuana, edible marijuana, and marijuana. 63 O.S. § 420A(A). Thus, while the Board rules effectively only allow possession of edible and concentrated marijuana, the text of the law clearly implies that marijuana can be possessed in forms in addition to the edible and concentrated form. Similarly, SQ 788 specifically allows licensed users to "[l]egally possess seventy-two (72) ounces of edible marijuana" and contemplates that licensed processors may "produc[e] products with marijuana as an additive," 63 O.S. § 423A(D), or "process these plants into concentrates, edible, and other forms for consumption." 63 O.S. § 423A(C). The same section expressly legalizes the sale, manufacture, distribution, and possession of "[a]ny device used for the consumption of medical marijuana." 63 O.S. § 423(F). The Board's explicit role in limiting the forms of marijuana products appears confined to "food safety standards" that are "in line with current food preparation guidelines" under the procedures and requirements in 63 O.S. § 423A(C)-(D). It is thus clear from the broad language of SQ 788 that the Board lacked authority to limit or prohibit the sale of smokable, vapable, edible, and other forms of marijuana.[2]

Second, the Board overstepped its authority when it imposed licensing requirements that conflict with the statute voters approved. SQ 788 specifically required that the Board "must approve all applications" for a dispensary, grower, or processor license that satisfy seven and only seven criteria:

(1) be age 25 or older;
(2) be a resident of Oklahoma (if an individual);
(3) show that members, managers, and board members are residents of Oklahoma;
(4) have no more than 25 percent non-Oklahoma ownership (for entities);
(5) be registered to conduct business in Oklahoma;

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[1] Similarly, when voters considered SQ 788, the Ballot Title informed them that "A yes vote legalizes the licensed use, sale, and growth of marijuana in Oklahoma for medicinal purposes."

[2] Other rules that regulate the shape and form of marijuana may also be inconsistent with the law that the voters approved. For example, Rule 310:681-2-11(d) says that "[m]edical marijuana product may not be dispensed to a patient" in "plant form." But under SQ 788, "a person in possession of a state issued medical marijuana license shall be able to … legally possess six mature marijuana plants." 63 O.S. § 420(A)(3).

(6) disclose all ownership; and
(7) not have a felony within the last 2 years, not have a violent felony in the last 5 years, and not be currently incarcerated.

63 O.S. §§ 421A(B), 422A(B), 423A(B). The Board has not been given any express or implied statutory authority to impose additional requirements on licensees. Thus, the Board rules improperly require every licensed dispensary to have "a current licensed pharmacist" present "on-site at least 40 hours per week." OAC 310:681-1-4; 310:681-5-14(e). Nothing in the text of SQ 788 expressly or impliedly authorizes this rule. Moreover, the emergency rule's impact statement failed to include a statement of whether mandating on-site pharmacists "may have an adverse economic effect on small business"; "an explanation of the measures the agency has taken to minimize compliance costs"; or "a determination of whether there are less costly or nonregulatory methods or less intrusive methods for achieving the purposes of the proposed rule." 75 O.S. § 253(B)(2).

Several other rules raise similar concerns about lack of statutory authority, including but not limited to:

- Restricting dispensaries to limited locations. OAC 310:681-5-18.[3]
- Prohibiting dispensaries from co-locating with other businesses. OAC 310:681-5-18(e).
- Requiring medical marijuana be grown, processed, and dispensed in enclosed structures. OAC 310:681-6-2.
- Requiring a surety bond for licensing. OAC 310:681-5-19.
- Setting hours of operation. OAC 310:681-5-16.
- Limiting the amount of tetrahydrocannabinol ("THC") in flower, leaf or concentrate for sale or distribution. OAC 310:681-5-12.[4]

Nowhere does the text of SQ 788 expressly or impliedly authorize these regulations.

I have no doubt that the Board in good faith sought to regulate marijuana in a manner it believed would best promote the health and safety of Oklahomans. However, in so doing, the Board made policy judgments not authorized by statute. Those policy judgments are the prerogative of the Legislature and the People.

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[3] While SQ 788 authorizes the board to prohibit dispensaries within one thousand feet from any public or private school entrance, 63 O.S. § 425A(G), there is no similar authorization for any further prohibitions.

[4] While SQ 788 authorizes licensed users to "[l]egally possess one (1) ounce of concentrated marijuana," 63 O.S. § 420A(A)(5), the statute does not limit the concentration to any specified level of THC.

It is therefore my recommendation that the Board reconvene to reconsider the rules promulgated on July 10, 2018, in a manner consistent with the advice in this letter.

Sincerely,

Mike Hunter
Oklahoma Attorney General