



Open Session Meeting Minutes

Monday, October 17, 2022
11:02 am – 11:28 am

Cannabis Control Appeals Panel
400 R Street
Sacramento, CA 95811

Members present via teleconference:

- Dr. Diandra Bremond, Chairperson (in Los Angeles County)
- Sharon-Frances Moore, J.D. (in San Diego County)
- Majority Leader Ian Calderon (in Orange County)

Staff present via teleconference:

- Anne Hawley, Executive Director, Cannabis Control Appeals Panel
- Christopher Phillips, Chief Counsel, Cannabis Control Appeals Panel
- Sarah M. Smith, Senior Staff Attorney, Cannabis Control Appeals Panel
- Brian Hwang, Staff Attorney, Cannabis Control Appeals Panel
- Melita Deci, Administrative and Business Services Coordinator, Cannabis Control Appeals Panel

Summary:

1. Call to Order and Establishment of Quorum.

Chairperson Diandra Bremond called the teleconference meeting to order at 11:02 am.

Melita Deci took the roll call vote. Panel Members Diandra Bremond, Sharon-Frances Moore, and Ian Calderon were present. A quorum was established.

2. Approval of September 23, 2022 Meeting Minutes.

Chairperson Bremond asked the Panel if there were any additions or corrections to the minutes of the September 23, 2022 meeting. There were no additions or corrections. No comments from the public.

Motion (Moore): Approve the minutes of the September 23, 2022 meeting as submitted. Seconded (Calderon). Melita Deci took a roll call vote on the motion. Motion passed 3-0.

3. Discussion and Action Regarding Proposed Revisions to Action Item Regulation Text, Title 16, Division 43, § 6014 Stay.

Legal staff made a presentation regarding making changes to CCAP's administrative rules and regulations.

Chief Counsel Chris Phillips opened by notifying the Panel that CCAP staff has another proposed rulemaking package. This agenda item is an action item which will require a vote from the Panel. The proposed rulemaking is different from previous rulemakings. For example, the last time CCAP's regulations were amended, it was for housekeeping items such as cleaning up regulatory language following consolidation of the three licensing entities, updating CCAP's office address, and adding the online portal as a new way to file appeals with CCAP. This time however, staff is asking the Panel for a policy change.

As a refresher, Phillips noted the Business and Professions Code requires that the Panel adopt procedures similar to those of the Alcoholic Beverage Control Appeals Board (ABCAB). CCAP staff has identified a provision within CCAP's regulations that can be amended to better align with ABCAB's procedures. The proposed change will mitigate certain disincentives against filing an appeal that potential appellants encounter due to CCAP's current merit-based stay. The goal is that this change will provide more access and due process to a greater number of licensees. This proposed change may also impact caseload by increasing the likelihood that certain types of appeals will be filed; currently, it is futile for some licensees to file an appeal with CCAP based on their particular circumstances.

This agenda item presentation will be broken into two parts. First, Staff Attorney Brian Hwang will review the likely reasons why the Panel has a low caseload and demonstrate that today's proposal is one of the few ways that CCAP can undertake that will provide better access to meaningful due process. Following that, Senior Staff Attorney Sarah Smith will get into the details of what an automatic stay is, how it differs from the current merit-based stay, and the incentives created by each.

Staff Attorney Brian Hwang began by noting the low caseload has been a persistent issue ever since CCAP came into being. He then reviewed the four key reasons behind the lack of cases.

First, most cannabis licenses are provisional, which hold no appeal rights. According to the Department of Cannabis Control's (DCC) website, nearly two-thirds of active licenses are provisional. This means that most licensees facing denial or discipline cannot appeal to CCAP. Provisional licenses are also being phased out. DCC stopped accepting provisional applications on March 31 of this year, and stopped issuing provisional licenses on June 30. These deadlines, however, are extended until 2023 for equity applicants. Bottom line, however, is that all provisionals will expire on January 1, 2026.

Second, DCC's focus is spread across many different areas – including a significant emphasis on the illicit market. According to their July 12th press release, in their first year as an entity, the DCC brought 200 enforcement actions against the illicit market. For example, in San Bernardino alone, the DCC has been sending 10-15 investigators every week to assist local law officials in actions against illegal operators. In their August 25th press release, the DCC highlighted that – to date – they have seized over \$1 billion in illegal cannabis from the illicit market. In their October 5th press release, the DCC announced the recent creation of the “Unified Cannabis Enforcement Taskforce”. This brand-new taskforce is co-chaired by the DCC and the Department of Fish and Wildlife, and is tasked with improving the coordination between agencies when it comes to combatting illegal cannabis operations. As of August, 56% of California cities and counties still do not allow any cannabis businesses. Given the above, DCC should be expected to continue to dedicate significant resources towards combatting the illicit market. All this means, in practical terms, is that the less time the DCC spends disciplining annual licensees, the fewer potential appeals there are being filed with CCAP.

Third, cannabis licenses being annual in nature incentivizes against filing an appeal. Annual cannabis licenses are valid for 12 months and are renewed annually. However, if a licensee has been disciplined, they must weigh the option of contesting that matter against applying for a license renewal that year. The DCC has discretion whether to grant a license renewal. They may (but are not required to) deny a renewal application. This places an annual licensee in a sensitive position where they may go from potentially being opposing parties with the DCC in a disciplinary matter to then seeking the DCC's approval of their renewal application afterwards. This creates an incentive to enter into a settlement agreement with the DCC. By waiving their right to a hearing and subsequent appeal, the licensee may do so believing it may result in a more favorable review of their renewal application by the DCC. In comparison, alcoholic beverage licenses are permanent. Generally speaking, those licenses are held indefinitely as long as fees are paid and licensees are in compliance. The exception is when a license is being revoked, but those specific and limited circumstances are defined in statute. So, in contrast to a cannabis licensee, alcohol licensees can afford to be more adversarial. There is little incentive for an alcohol licensee to waive their right to a hearing and appeal.

Fourth, CCAP's current stay mechanism also incentivizes against filing an appeal. A stay temporarily pauses the DCC's discipline from going into effect while an appeal is pending with CCAP. As a comparison, alcohol licensees receive a stay automatically when they file an appeal with ABCAB. There is no similar provision for cannabis licensees. Instead, they may only request a stay by filing a motion with CCAP. A motion for a stay must establish 3 factors – each of which are complex:

- First, an appellant must demonstrate there is a substantial likelihood that they will prevail in the appeal. Having just lost against the DCC in an administrative hearing, they're now attempting to argue – in an expedited brief and timeline – that they will overcome that ruling and win the appeal. While it sounds simple, the reality is that this is a high hurdle to overcome.

- Second, an appellant must demonstrate that they will experience immediate and irreparable harm without a stay. Irreparable harm is a special type of harm that is not easy to establish. Examples include: a violation of a constitutional right, pollution of an ocean, or business trade secrets being revealed. The primary argument a licensee is likely to raise in their motion is that they will suffer financial distress if a stay is not granted. The problem, however, is that irreparable harm generally excludes monetary loss. Overall, an average licensee – especially those operating without legal representation – would not be aware of the nuances involved in this issue.
- Third, an appellant must demonstrate that the stay would not be detrimental to the health and welfare of the public. But how do you use evidence to show something will not happen? It's one thing to argue from the DCC's side how a stay would be detrimental. However, it's more of a challenge to prove a negative – that granting a stay would not be detrimental to the public.

Taken together, establishing all three factors in the motion presents a significant challenge. However, even if a licensee meets all three factors, a stay is still discretionary. The Panel may, but is not required to, grant a stay under CCAP's current regulations. Without a stay, this means that licensed businesses may not continue to operate. Another issue is that if a licensee is facing suspension, the time it takes for them to draft and submit their motion for a stay, and then for CCAP to review the motion, will likely outrun the suspension itself. Essentially, this would make requesting a stay meaningless. Even if they still pursued an appeal with CCAP and prevailed, doing so would have little value if the suspension has already been served. In addition to the complexities involved in drafting the motion, there are also financial hurdles. Does the licensee have funding to put their operations on hold? Do they have the funding to hire legal representation? Bottom line is that if a licensee cannot hold out financially, they are more likely to cut their losses and opt against pursuing an appeal with CCAP.

Of the four reasons behind the lack of cases, Hwang informed the Panel that CCAP staff has targeted the last one (the lack of an automatic stay). This is because the stay mechanism is the only item within CCAP's area of control since it is part of CCAP's regulations. As Chief Counsel Phillips noted earlier, under CCAP's controlling statutes, the Panel is required to adopt appeal procedures like those of ABCAB. By updating CCAP's stay mechanism to be automatic instead of merit-based, it would bring CCAP's procedures more in line with those of ABCAB. This proposed solution would level the playing field and provide greater fairness to a larger number of potential appellants. It would also remove one barrier to potential appeals being filed with CCAP. Hwang then concluded his presentation and handed the floor back to Phillips, who then introduced Sarah Smith.

Smith emphasized that the burden of requesting the stay falls on the appellant. Echoing Hwang, Smith noted that the motion for a stay must establish the three factors. As background, when the DCC imposes discipline, the licensee may request reconsideration, but the DCC has total discretion whether to grant reconsideration. After this point, the imposed discipline goes into effect approximately two weeks later. The effect of the stay is to halt that disciplinary action until the appellant has had the opportunity to be heard by CCAP. Currently, without an

automatic stay, there is no incentive to appeal and a strong incentive to settle outside of a hearing. This deprives the appellant of due process. For example, if their license is suspended, the appellant loses income for the entire term of the suspension. If their license is revoked, they lose their stream of income entirely.

As Hwang noted, CCAP currently requires the appellant to request a stay by filing a motion with the Panel. Within this current regime, Smith shared that one solution CCAP staff considered was to recommend to the Panel that they be extremely lenient in granting these requests for a stay. However, this still places the burden of requesting a stay on the appellant. In addition, the appellant will hedge their bets and refrain from filing an appeal lest they do so and lose on the motion for a stay.

Under the recommended changes, Smith explained it would shift the burden to the DCC. Specifically, the amended regulations would require the DCC to request that a stay be withheld. CCAP staff discussed what this standard should look like – in other words, what standard the DCC must meet to have the stay withheld. After many discussions, staff concluded that where there is an immediate harm to public health and safety, then it may be appropriate to withhold the stay. This reflects the same practice that occurs with ABCAB when there is an immediate harm to the public. This is a rare situation. When it happens in other practices, it involves something like the immediate trade of drugs. But where the DCC can demonstrate immediate and irreparable harm, then it would be appropriate to withhold the stay. Overall, the key point is that the burden would be on the DCC to move to withhold the stay. The burden would not fall on the appellant.

Smith cautioned, however, that changing CCAP's regulations would not fix every problem. As Hwang noted earlier, cannabis licenses are annual. Even if an annual licensee filed an appeal and the disciplinary action against them were stayed, the DCC may still decide not to grant their license renewal at the end of the year. Thus, there will still be disincentives to filing an appeal with CCAP which are not present in ABCAB appeals. With that said, however, today's proposed change will provide substantially more due process to appellants, it will put the burden on the DCC to move to withhold the stay, and it will alleviate much of the financial pressure that may otherwise prevent appellants from pursuing an appeal with CCAP. Smith concluded and then handed the floor back to Phillips.

Phillips made some additional remarks. He noted that staff does not expect this change will have any budgetary or fiscal impacts. Under the current regulations, the motion for a stay must be filed by the appellant. Under the proposed change, no motion would need to be filed by the appellant. This would lead to a potential decrease in CCAP workload although, in some instances, the DCC would probably file a motion requesting that the stay be withheld. Overall, any change in staff's workload will be insignificant and easily absorbed by existing resources. There are no known risks associated with the proposed change. There are several benefits, however, that have been identified. Most notably, an automatic stay will help to provide meaningful due process to all appellants regardless of their financial condition or the nature of the enforcement action pending against them. This proposed change will also align CCAP's

procedures more closely with ABCAB's procedures as required by Business and Professions Code section 26042.

Phillips then recommended that the Panel approve the proposed regulation text and authorize CCAP staff to: (1) complete and submit the rulemaking package to the Office of Administrative Law to formally notice the proposed regulation amendments and schedule a hearing on the rulemaking to amend the regulations, and (2) make any non-substantive changes to the language as needed.

Phillips concluded by reminding the Panel that today is just the first step in the rulemaking process. After this, assuming Panel approval on this agenda item, staff will draft the necessary documents to initiate the rulemaking process. These documents will then go to Agency (Business, Consumer Services and Housing Agency) for approval, which will take about a month. Following this approval, the rulemaking package will be filed with the Office of Administrative Law (OAL) which is when the rulemaking process officially begins. From this point, CCAP will have one year to finish the rulemaking process. Once CCAP has filed with OAL, there will be a public notice period and, at the end of that period, a public hearing.

No comments from the Panel. No comments from the public.

Motion (Moore): Proceed with the rulemaking process to amend Rule 6014 as proposed by CCAP staff. Seconded (Calderon). Melita Deci took a roll call vote on the motion. Motion passed 3-0.

4. Public Comments on Items Not on the Agenda.

Chairperson Bremond warned any comment should not involve pending or future appeals, complaints, applications, or any disciplinary actions that may come before the Panel. No comments from the public.

5. Future Agenda Items.

No comments from the Panel. No comments from the public.

6. Adjournment.

Motion (Moore). Adjourn the meeting. Seconded (Calderon). Meeting adjourned at 11:28 am.