

Cannabis Application Scoring Challenges Observed Across the Country

Missouri – Inconsistent Scoring Methodology

Missouri's medical marijuana program had a competitive score-based application process for 60 cultivation licenses, 192 dispensaries and 86 manufacturing facilities. The scoring, conducted by a third-party firm, was based on "character, veracity, background, qualifications and relevant experiences of principal officers". After inconsistencies in scoring methodology became apparent in individual scorecards, over 800 applicants appealed the decision. In addition to scoring and technical discrepancies, the 130 independent businesses awarded the 338 licenses have been permitted to change ownership interests, indicating passive permissions for a "straw man" lucrative award system. Applicants have brought three lawsuits forward, a handful of which are still being heard by the Administrative Hearing Commission. While licensing has continued, it has been estimated that it will take 6 years to hear all the appeals.¹

Maryland – Favoritism and Selective Attention to Racial Diversity

Maryland's Medical Cannabis Commission utilized a merit-based application process to award 15 preliminary licenses to grow cannabis. The commission hired Towson University to rank anonymous applications for growing marijuana on typical competitive application factors such as plans for public health and safety. Despite a blind evaluation requirement, statute provided discretion to the Commission in who was ultimately rewarded. After the evaluation results were provided, regulators rejected two higher-scoring companies in favor of authorizing growing operations to reduce geographic density and instead promote geographic diversity. Further, racial diversity was argued to be ignored during the selection process despite statutory obligations. None of the 15 selected licenses were led by racially diverse applicants. Multiple applicants sued the state based on the failure to operate under the statutory obligation to seek racial diversity, as well as the shuffling of recommendations post evaluation as illegal and arbitrary, claiming that the Commission told applicants that location "is not relevant" for preliminary licensing and later reversed course.² These lawsuits lasted 16 months and postponed the licensing until its 2018 settlement.³

New Jersey – Failure to "Cure" Application Upload Issues for to Meet Scoring Criteria

As a part of the medical marijuana program expansion, the Department of Health of New Jersey requested applications for 24 medical alternative treatment centers, inclusive of 4 vertically integrated permits, 5 cultivation permits, and 15 dispensary permits. The application had two major components; Part A, requiring the submission of specific objective information regarding corporate structure and financing, and Part B, requiring qualitative information as to why the applicant believes that awarding it a permit to operate would be in the best interests of the medical cannabis program. Of the 196 applications submitted, 51 applicants were disqualified for not submitting required materials requested in Part A. Of these 51 applicants, 8 challenged this as they alleged that they were rejected during a first round of cuts because reviewers could not open corrupt PDF files, which is a technical error on DOH's part. A single applicant sued on the basis that the DOH never defined what constituted local approval to operate in the town. Because of this, the applicant did not have

¹https://www.stltoday.com/news/local/marijuana/lawsuits-troubled-business-pasts-plague-some-winners-of-missouri-marijuana/article_ad75116d-5cea-5d25-a20c-ad1b580e20fc.html

²https://www.washingtonpost.com/local/md-politics/losing-maryland-medical-marijuana-grower-applicant-sues-the-state/2016/09/19/3e6b3f02-7e8b-11e6-8d13-d7c704ef9fd9_story.html

³<https://mjbizdaily.com/maryland-medical-cannabis-businesses-settle-long-running-lawsuit-threatened-program/>

local authorization, but argued that the multiple letters submitted did constitute approval.

The challengers were granted a stay request, prohibiting DOH from reviewing or awarding any of the 145 remaining applicants until the Appellate Court issues a decision on their appeal. Over a year later, the court ruled that the technical error was not at fault of DOH, and that the explicit instructions may have prevented the files from improper uploading. However, the unclear definition of what constitutes local approval did require further review. The court remanded that application to DOH for further consideration along with the other 145 applicants.⁴

These 2019 lawsuits come after the similar slew of 2018 lawsuits, of which seven applicants sued based on an unreasonable scoring system that lacked transparency.⁵ The courts sided with the applicants and required the state to not only create a new evaluation system, but to include failed applicants in their new evaluation.

Florida – Scoring Process Misaligned with Regulations

Florida's medical marijuana program has faced litigation since 2014 after its first application attempt utilizing a random lottery without any scoring.⁶ After learning the consequences of this model, their 2016 application process moved to a competitive model. In this competitive model, applicants were supposed to be scored based on criteria. Instead, applicants were sorted by rank, by inverting the rankings and calling them "scores". The ranking system permitted each evaluator to assign a numeric value to each of 14 items on the scorecard. This process did not consider qualitative differences between applications. Numerous applicants sued on differing basis. In multiple rulings, the court ruled that the officials did not follow their own rules for scoring, leading to a new application requests and process.⁷

In 2016, it was reported that Florida had spent over \$500,000 on private lawyers representing the department in lawsuits filed by losing applicants, delaying the implementation of Florida's 2014 law. The state has been in lawsuits for similar issues in the proceeding years.

California Jurisdictions, San Bernadino – Publishing of Scoring Showed Discrepancy

In 2019, the city of San Bernadino utilized a competitive scoring system for their adult use applicants, wherein 16 were considered successful and awarded. The city, per procedure, published the scores and applications for public viewing. Three separate lawsuits were filed after it became apparent that the scores had discrepancies among those who were zoning compliant and those noncompliant. The lawsuits alleged that some applicants who were not compliant with the setbacks required for their sites and failed to obtain the required approval letter from the city zoning department received scores similar or better than those applications that were zoning compliant. Similarly, many applicants who were not compliant with the city's general plan received scores that were similar or better to those that were. The individual lawsuits all claimed that there was no rational basis for the scoring and that the city's system and allocation of licenses to those noncompliant were corrupt.⁸ As such, a judge issued temporary restraining orders to the seven

⁴ <https://www.nj.com/marijuana/2021/02/nj-can-resume-issuing-new-med-marijuana-licenses-after-court-ruling-settles-lawsuit.html>

⁵ <https://www.nj.com/marijuana/2020/11/medical-marijuana-applicants-denied-in-2018-could-get-a-second-shot-thanks-to-court-ruling.html>

⁶ https://www.doah.state.fl.us/DocDoc/2014/004296/14004296_408_09152014_12565191_e.pdf

⁷ <https://www.orlandoweekly.com/Blogs/archives/2016/09/14/judge-blasts-florida-health-officials-over-medical-marijuana-scorecards>

⁸ <http://iebusinessdaily.com/third-lawsuit-filed-challenging-cannabis-business-permits/>

awardees who submitted applications that were not zoning compliant.⁹ The city filed a motion to bifurcate and to stay discovery but was denied in late August of 2019. At this same time, the trial was discontinued due to COVID-19.¹⁰

California Jurisdictions, Chula Vista – Subjective Scoring Even with a Grading System

In late 2020, after issuing the cap of eight dispensaries licenses in a competitive system with 84 applicants, the city of Chula Vista faced three lawsuits alleging that the licensing and scoring processes were both arbitrary and capricious, claiming that the city did not follow its own rules. The city of Chula Vista hired an outside consulting firm to score the applications. The firm, allegedly, did not utilize the grading system put forth by the city. One lawsuit alleged that despite the fact that all of the applicant's principals have years of experience in the cannabis industry, its application only scored 125 out of 150 in its "Experience" without justification. Additionally, the applicants were deducted 28.5 points from the Operating Plan portion of its application without reasoning. A judge ruled in favor of the applicants, claiming that Chula Vista violated its own laws during the application process and the city must reprocess the applications.¹¹

California Jurisdictions, Pasadena – Multiple Reviewers for Each Application

In 2017, the city of Pasadena passed a measure that would permit for six dispensaries to operate within city limits. In 2019, six applicants were awarded after a competitive scoring evaluation. The city rules required three scorers to each independently judge a single application. These three separate scores per application would be totaled and averaged. However, documents from a city consultant indicate only one person scored each application¹². Over a dozen lawsuits were filed, most of which were for running afoul of the city rules and utilizing an arbitrary and capricious scoring system. Though harshly criticized, the city's system has withstood all legal challenges to date.¹³ However, the city and those who operate in the city, continue to spend hundreds of thousands of dollars in litigation.

⁹ <https://www.sbsun.com/2019/02/27/judge-halts-licensing-process-for-7-commercial-cannabis-businesses-in-san-bernardino/>

¹⁰ <https://www.jdsupra.com/legalnews/challenging-state-and-local-cannabis-48710/>

¹¹ <https://www.sandiegouniontribune.com/communities/south-county/chula-vista/story/2020-11-30/chula-vista-faces-a-third-cannabis-dispensary-lawsuit>

¹² <https://www.pasadenastarnews.com/2020/01/26/did-pasadena-break-its-own-laws-scoring-cannabis-dispensary-applications/>

¹³ <https://www.pasadenastarnews.com/2021/03/05/judge-sides-with-pasadena-in-another-cannabis-lawsuit-applicant-will-appeal/>