STATE OF RHODE ISLAND SUPERIOR COURT
PROVIDENCE, S.C.

RHODE ISLAND PATIENT ADVOCACY COALITION, INC.; RHODE ISLAND ACADEMY OF PHYSICIAN ASSISTANTS, INC.; RHODE ISLAND MEDICAL SOCIETY; and PETER NUNES, SR., Plaintiffs	}	
v.		**P.C. NO. 2012-5182**
MICHAEL FINE, MD, Individually and in his capacity as DIRECTOR OF THE RHODE ISLAND DEPARTMENT OF HEALTH, and THE RHODE ISLAND DEPARTMENT OF HEALTH, Defendants	}	

MEMORANDUM OF PLAINTIFFS ON APA APPEAL OF DENIAL OF THE NUNES APPLICATION

I. Introduction

The operative pleadings in relation to the APA appeal are the Plaintiffs' Second Amended Complaint and the Defendants' Answer, filed on March 13, 2013. Under Rule 15(a) of the Superior Court Rules of Civil Procedure, the Second Amended Complaint is now "substituted for the original [and for the First Amended Complaint] unless otherwise ordered by the Court." Although an earlier pleading is superseded or abandoned after an amendment, it may still be utilized on a limited basis for impeachment purposes. See Gormley v. Vartian, 121 R.I. 770, 403 A.2d 256 (1979). The defendants are also bound by their amended answer and do not

have the option to also rely on earlier theories of defense not included in the amended answer. Gross v. School Committee, 114 R.I. 358, 333 A2d 417 (1975).

Also to be considered by the Court at this stage is the administrative record of the denial of plaintiff Nunes' application, filed by defendants on March 25, 2013. The record as submitted consisted of four Exhibits, A through D, one of which was agreed to be under seal based on individual health care information, Exhibit D. Since the issues at this stage are legal disputes, rather than factual disputes, plaintiffs have not moved to strike any of the Exhibits but will simply argue their weight or relevance. For example, Exhibits A, B, and C were never shared with applicant Nunes prior to the September 5, 2012, denial, and Exhibit A, the Affidavit of Dr. Fine, did not exist until March 21, 2013, four days prior to submission of the "record" and long after the decision was made on Nunes' application. Thus that affidavit is more in the nature of a post-hoc argument than any part of a "record" of the agency proceedings to deny the Nunes' application.

This memorandum addresses the issues of APA review of the denial, which of course does involve an analysis of the Department's rules, regulations, and procedures used to effectuate that denial. Of the seven counts in the Second Amended Complaint, this memorandum addresses Counts I-III, the APA counts, and does not yet reach Counts IV-VII, although again there is by necessity some overlap of issues.

This case is administratively consolidated with P.C. 2012-4724, Sullivan et al v. Fine et al, but this memorandum addresses only the APA appeal counts in P.C. 2012-5182.

II. Background

1. Plaintiff Rhode Island Patient Advocacy Coalition, Inc. is a nonprofit 501(c)(3) Rhode Island corporation composed of medical marijuana patients, caregivers, doctors, advocacy groups and others interested in medical marijuana. It promotes advocacy, education, research, and policy development regarding the implementation of the Act.
2. Plaintiff Rhode Island Academy of Physician Assistants is a 501(c)(3) not for profit Rhode Island corporation whose mission is to provide the membership of the Academy with a forum for issues that relate to the role of the physician assistant in Rhode Island. It organizes panels and forums concerning the delivery and quality of health care services.
3. Plaintiff Rhode Island Medical Society is a voluntary association of physicians, physician assistants and medical students. It supports and advocates for all Rhode Island physicians in their efforts to provide the best possible care to their patients. The Society is the vehicle by which the medical community in Rhode Island meets the evolving challenges of medical practice and quality patient care. The Society represents the interests, values and needs of the medical profession and promotes enlightened public policy in the field of health care. The Society is a 501(c)(6) trade association listed with the IRS.
4. Plaintiff Peter Nunes, Sr. is a 50 year old resident of Bristol, Rhode Island, with a history of acute and chronic neck and back pain, determined by the

Social Security Administration Office of Disability Adjudication to be fully disabled after a career as a truck driver, with the back and neck pain exacerbated by a 2012 motor vehicle accident in which he was rear-ended at a red light. Nunes, currently taking prescription pain medication with negative side effects and also potentially addictive, applied for participation in the Rhode Island Medical Marijuana program and was denied on September 5, 2012, as more fully explained below.

5. Defendant Michael Fine, M.D. is Director of the Rhode Island Department of Health and in that capacity is charged with the administration of that agency's statutory duties.
6. Defendant Rhode Island Department of Health is an "agency" as defined at Rhode Island General Laws Section 42-35-1(1)(APA).
7. In 2005 the Rhode Island General Assembly (hereafter "Legislature" or "Assembly") first passed the Edward O. Hawkins and Thomas C. Slater Medical Marijuana Act, codified at Rhode Island General Laws Section 21-28.6-1 et seq.
8. The Legislature made the following findings, among a series of findings: Section 21-28.6-2 (1):

   Modern medical research has discovered beneficial uses for marijuana in treating or alleviating pain, nausea and other symptoms associated with certain debilitating medical conditions, as found by the National Academy of Sciences' Institute of Medicine in March 1999.
9. An applicant for medical marijuana must submit, among other things, a

written certification that is signed by a practitioner and states the specified chronic or debilitating disease or medical condition that qualifies under the Act. Section 21-28.6-3(14).

10. The written certification is only to be made "in the course of a bona fide practitioner-patient relationship after the practitioner has completed a full assessment of the qualifying patient's medical history." Section 21-28.6- 3(14).
11. Shortly after enacting the Act, the Legislature also passed what is known as the "global signature" act, Rhode Island General Laws Section 5-34-42, which states that whenever any general law requires the "signature, certification, stamp, verification, affidavit or endorsement by a physician," it "shall be deemed to include" the signature, etc., by a registered nurse practitioner. P.L. 2006, ch. 130, Sec. 1; P.L. 2006, ch. 156, Sec. 1.
12. In addition, at the same time, the Legislature amended the statute on physician assistants, Section 5-54-8(a), adding the same alternative signature language for physician assistants whenever any law or regulation requires a signature by a physician.
13. Registered nurse practitioners have "prescriptive privileges" pursuant to Rhode Island General Laws Section 5-34-39.
14. Physician assistants have "prescriptive privileges" pursuant to Rhode Island General Laws Section 5-54-8(c). Physicians, physician assistants, and registered nurse practitioners do not "prescribe" marijuana for medical purposes; rather they certify that a patient has a disease or illness

that qualifies as a debilitating illness under the Act.

15. Beginning in 2006 and continuing for six years, DOH accepted certifications under the Medical Marijuana Act, signed by registered nurse practitioners or by physician assistants, in addition to those signed by physicians.

16. The official DOH application forms for participation in the program all included express authorization for both the Physician Assistant and Registered Nurse Practitioner, licensed in Rhode Island, to qualify as a "practitioner." See DOH forms, all of which were utilized by the agency until late summer of 2012. Exhibit A to Second Amended Complaint.

17. Many applicants, including Peter Nunes in June of 2012, submitted paperwork to DOH, on DOH forms, utilizing certifications signed by RNPs or PAs, and for a period of six years such applications were approved, assuming all other criteria were met.

18. Peter Nunes' application, submitted June 21, 2012, met all required criteria. It was signed by an RNP who had previously signed such certifications for other patients and had them accepted.

19. The Act, at Section 21-28-6.9 (b), states that if DOH fails to issue a registration card within thirty-five days of the submission of a valid application, the registration "card shall be deemed granted."

20. DOH took no action on plaintiff Nunes' application following its June 21st submission until September 5, 2012, when DOH issued a denial notice,

based solely on the fact that the application was signed by a "licensed nurse practitioner or licensed physician assistant."

21. The denial letter was issued seventy-six days after the submission of the Nunes application. See two-page denial, issued by DOH to Nunes on September 5, 2012, attached as Exhibit B to Second Amended Complaint.

22. DOH had already accepted and deposited the payment that Mr. Nunes had sent in with his application. The Department invited him to apply for a refund.

23. The DOH policy of expressly allowing Registered Nurse Practitioners and Physician Assistants to sign the certifications, which continued for six years, was a practice or procedure or statement of general applicability and therefore a "rule" under Section 42- 35-1(8) of the APA.

24. The revised DOH policy of barring RNPs and PAs from signing the certifications is a practice or procedure or statement of general applicability and therefore a "rule" under Section 42-35-1(8) of the APA.

25. A registration card issued by DOH is a "license" within the meaning of Section 42-35-1(4).

26. The term "rule" under the APA includes the amendment of a prior rule. Section 42-35-1(8).

27. DOH engaged in no notice and comment procedures prior to the 2012 change in the rule. No compliance with Section 42-35-3 was even attempted, nor was Section 42-35-3.3 followed ("regulations affecting

small business").

28. Director Fine had stated in writing that the "change" in the Department policy was "effective August 22, 2012". See letter of Dr. Michael D. Fine, effective August 22, 2012, Exhibit C to the APA "record" submitted by DOH.
29. However, DOH applied the new policy to the Nunes application submitted on June 21, 2012.
30. However, DOH applied the new policy to the Nunes application submitted on June 21, 2012.

III. Jurisdiction

This Court has jurisdiction under the APA, Rhode Island General Laws Section 42-35-15, since the September 5, 2012, denial of the medical marijuana application was a final order of the Department and this action was then timely commenced under Section 42-35-15(b). In addition, Rhode Island General Laws Section 21-28.6-6(c) expressly makes the denial a final agency order subject to judicial review in the Superior Court. Since defendants contest jurisdiction in this Court of any APA appeal in this case, plaintiff presents the following paragraphs on the jurisdictional issues.

By the Department's own regulations[1], Peter Nunes, Sr. (Nunes) submitted an "application" for a registry identification card pursuant to the Act, Section 21-28.6-1

[1] Rules and Regulations Related to the Medical Marijuana Program, first issued March 2006, as amended on several occasions through March 2010. The Rules and Regulations, hereafter "Rules" are part of the existing law of which this Court may take judicial notice. For convenience, a copy is attached to this Memorandum.

et seq, on June 21, 2012. Using APA terminology, Nunes was applying for a "license", since that term "includes the whole or part of any agency permit, certificate, approval, registration, charter, or similar form of permission required by law, but it does not include a license required solely for revenue purposes." Rhode Island General Laws Section 42-35-1(4). The definition of license is thus very broad, with only one express exception, not applicable in this case.

Next, the Department engaged in a "licensing" process as that term is defined at Section 42-35-1(5). "Licensing includes the agency process respecting the grant, denial, renewal, revocation, suspension, annulment, withdrawal, or amendment of a license." Id. Again, the Legislature used a list of very broad terms. "Renewal" is also of particular importance in the present case because a medical marijuana "registry identification cared", once issued, expires two (2) years after the date of issuance and therefore must be renewed. Rules, at Section 4.2.

No hearing was offered to Nunes and his application was denied by the letter of September 5, 2012, solely on the grounds that the application was signed (certified) by a Nurse Practitioner or a licensed Physician Assistant (in Nunes' case, a nurse practitioner). The denial letter said nothing about hearings, contesting the decision, or judicial review. See letter of September 5, 2012, attached to Second Amended Complaint.

However, Section 4.4 of the Department's own Rules states that "rejection of an application or renewal is considered a final Department Action, subject to judicial review. Jurisdiction and venue for judicial review are vested in the Superior Court." See also Section 21-28.6-6(c).

This language also tracks the APA, Section 42-35-1(3), since it acknowledged that the denial occurred in a proceeding (licensing) "including but not limited to ratemaking, price fixing, and licensing." The legal rights of a "specific party" (Nunes) were determined by the agency, even though it provided him no hearing and no advance notice that the new rule about nurse practitioners was being applied to him, retroactively.

Thus there can be no real dispute that the denial of a "license", by a state agency comes squarely within the intended coverage of the APA's judicial review of a final agency "order" which causes a specific individual to be "aggrieved", as those terms are used in Section 42-35-15.

Contested Case and the APA

The defendants, understandably reluctant to attempt an explanation of why no rule-making procedure was followed after six years of official recognition of registered nurse practitioners and physicians' assistants, urge that this Court lacks jurisdiction because there is no APA review of the denial of Peter Nunes' license application. This argument fails.

In addition to the discussion already set forth, showing the applicability of various definitions from the APA, there is also clear support for the fact that denial fits within this Court's jurisdiction for review of a final order in a contested case.

A detailed discussion of the contested case requirement is set forth in Mosby v. Devine, 851 A2d 1031 (RI 2004). There an application to carry a concealed weapon was held to not create a contested case for APA purposes, based on a close analysis of the statue at issue. If an applicant's "rights" are to be determined, then such a

proceeding is a contested case, as in Colonial Hilton Inns of New England v. Rego, 109 R.I. 259, 284 A2d 69 (1971), where the Court found a statute specific enough to constitute a "state-created interest." Mosby, at 1049. By contrast the gun permit process in Mosby did "not impose an express limitation on the department's decision-making authority." Mosby, at 1049-50.

The presence or absence of an express administrative hearing requirement in the statute at issue is not determinative. This is because the nature of the interest involved may qualify as a constitutionally protected property or liberty interest, in which at least an informal hearing may be required by procedural due process. See Mosby v. Devine, 851 A2d 1031, 1049 (R.I. 2004); Colonial Hilton Inns v. Rego, 109 R.I. 259, 284 A.2d 69, 71 (R.I. 1971) (hearing required, and APA applicable, even though statute at issue "did not expressly provide for a hearing.") Mosby, at 1049. See also extensive discussion by Justice Flanders on the APA, property and liberty interests, and hearing requirements in Mosby, supra, 1052-1083 (dissenting opinion, in which Justice Flanders would have found APA contested case status in Mosby also, not just in Rego or in the present case.)

Not all applicants or requests for permissions or licenses, directed to public agencies, would trigger the APA. For another example, see Property Advisory Group v. Rylant, 636 A2d 317 (R.I. 1994) (application to RI Housing for review of an application for mortgage financing not subject to APA review). Similarly, state agencies often put jobs out for bid or invite applicants to apply for grants. No one can claim he then holds a "state-created interest" by his application and the agency is constrained in its decision-making authority.

Turning to the Medical Marijuana Act, however, we can see that both the statute and the Regulations are not "discretionary" as was the statute in Mosby, id, at 1048. Rules, 3.1, 4.2, and especially Rule 4.3 (which tracks the exact language of Section 21-28.6-6(c) :

> *The Department may deny an application or renewal only if the applicant did not provide the information required pursuant to the Act, or if the Department determines that the information provided was falsified.*

In addition, the statute imposes tight time constraints: the department shall approve or deny an application within fifteen days of receiving it, Section 21-28.6-6(c), and the registration shall be deemed granted within thirty-five days even if the Department takes no action within the required time-frame.[2]

It is also important to note that Nunes submitted an appropriately complete application as of June 21, on the current DOH application form which was properly signed by a nurse-practitioner below the DOH-printed language which said:

I hereby certify that I am a physician duly licensed to practice medicine in one of the following states: Rhode Island, Massachusetts or Connecticut or I am a Physician Assistant licensed to practice in Rhode Island or a Nurse Practitioner-Prescriptive licensed to practice in Rhode Island. I have a practitioner-patient relationship with the qualifying patient and have completed a full assessment of the patient's medical history. The above-named patient has been diagnosed with a debilitating medical condition as listed above. Marijuana used medically may mitigate the symptoms or effects of this patient's condition. Further, it is my professional opinion that the potential benefits of the medical use of marijuana would likely outweigh the health risks for this patient.

There is another major distinction between a case such as the Nunes' license denial and a case such as Mosby v. Devine. In the latter, a case involving what the

[2] This is in fact what happened in the Nunes case – application of June 21, 2012, "deemed granted" on or about July 27, 2012; "denial" letter sent September 5, 2012.

Court called "broad discretion to deny Mosby's application," id, at 1051, the statute was silent on judicial review so the only review was by writ of certiorari from the Supreme Court. Id.

The present case involves, inter alia, Section 21-28.6-6(c), which expressly calls for judicial review "in the Superior Court." Id. The Superior Court reviews final agency orders by way of the APA, and the Legislature, by Section 21-28-6-6(c) has fully vested jurisdiction in this Court to review the denial of September 5, 2012.

IV. Standard of Review

This Court itself has fully set forth the state of the law on standard of review in a case such as the present one. Park Row Properties, Ltd. v. R.I. Dept. of Labor and Training et al, P.C. 2011-5077, Decision filed 11-8-12, by Carnes, J. at 10-12.

Review of a final decision of an agency is governed by the APA, assuming the appellant has exhausted administrative remedies. Id., at 10. This Court may affirm or remand, under Section 42-35-15(g) or may reverse or modify a decision if:

> "substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Affected by other error or law;
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." See §42-35-15(g).

The present case does not involve review of disputed factual findings or any questions about the weight of the evidence. Park Row, at 11.

What is significant, however, is the appropriate level of deference to be given the agency's interpretation of a statute. "In general, this Court will accord deference to an agency's interpretation of a statute whose administration and enforcement have been entrusted to the agency." Park Row, at 11 citing Town of Richmond v R.I. Dept. of Env. Mgt., 941 A.2d 151, 157 (R.I. 2008).

On the other hand, where an agency has completely altered its own prior interpretation, then the new interpretation is entitled to "considerably less deference." Park Row, at 11, 17. Such a switch may in fact constitute arbitrary and capricious action. Park Row, at 11-12.

The situation in Park Row was complicated by the fact that the Legislature had indeed altered the statute at issue. Park Row, at 5. In the present case, the agency's written policy of inviting certifications from registered nurses and physicians' assistants, in addition to physicians, had continued for six years, and the Legislature had not amended anything in relation to this issue. This was true despite the Legislature revisiting the Act in 2012 and making significant changes in the sections dealing with Compassion Centers. See Section 21-28.6-12; P.L. 2012, ch.88, Sec. 1; P.L. 2012, Ch. 242, Sec 1. [3]

When an agency does an about-face on its own policy, the normal sense of deference to the expertise of that agency evaporates. Not only does a court no longer "accord deference", Park Row, supra at 11, but the public is affected as well. This was a major concern in FCC v. Fox Television, 567 U.S. ____ , 132 S. Ct. 2307 (2012), where the "Commission changed course and held that fleeting

[3] The Legislature in 2012 also added Section 21-28.6-13 ("This chapter shall be liberally construed so as to effectuate the purposes thereof."

expletives could be a statutory violation" of the television broadcasting standards. FCC, at 2318. To compound the problem, the FCC not only created a new rule but then applied that new rule to Fox and ABC even though the rule at the time of the broadcasts in question was different and would not have been violated.[4] Applying the FCC due process notion to the present case, it is clear that Nunes' application was rejected after it was completed in a manner that was required in June 2013, namely inclusion of a certification that the person signing was a physician in Connecticut or Massachusetts or a physician "or I am a Physician Assistant licensed to practice in Rhode Island or a Nurse Practitioner-Prescriptive licensed to practice in Rhode Island." See DOH Application form, attached to Second Amended Complaint. In FCC, the Commission argued that the broadcasters "should have known" about the risk of fleeting expletives, FCC at 2315, an argument which was unsuccessful on due process grounds. In the present case, it is absurd to postulate that Nunes should have known that after six years of DOH approval of nurse practitioners, and after using a DOH form which expressly provided for nurse practitioner certification, his application would be denied for the sole reason that it had been completed in accordance with the long-standing and then-current DOH instructions.

In this case any "deference" to the DOH interpretation of the Hawkins-Slater

[4] The broadcasts which generated the litigation involved separate incidents in which Cher, Nicole Richie, and the singer Bono of U2 all used a "fleeting expletive" during different televised awards ceremonies. Justice Kennedy's opinion for himself and six other members of the Court focused not on administrative law or the First Amendment but on the fundamental due process problem of applying a new policy to conduct occurring under a prior policy. "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." FCC, at 2317. It remains to be seen whether the FCC has again "changed course" on "fleeting expletives" in light of its approval of the April 2013 use of the same word by David Ortiz in a Fenway Park telecast, the same word that led to trouble for Bono, Richie, Cher, Fox, and ABC.

Act no longer exists. However, as will be explained below, this Court need not yet reach the merits of whether a physician-assistant or nurse-practitioner certification is sufficient.

V. The Record on Review

The defendants have submitted what they refer to as the APA Administrative Record, consisting of four items. Only Exhibit D was consistent with the statute in terms of notice to Mr. Nunes of what was being considered. Exhibit A, an extensive affidavit from Dr. Michael Fine, Director of DOH, did not exist until March 21, 2013, long after the Nunes application was rejected. And Exhibit C is an undated "Health Announcement" to Nurse Practitioners, from Director Fine, stating that "effective August 22, 2012" DOH would no longer allow LPNs to certify medical marijuana usage. This date was also well past the Nunes application and certification, past the fifteen days allowed for a decision on the Nunes application, Section 21-28.6-6(c), and past the thirty-five day period after which the Nunes application became "deemed granted" under Section 21-28.6-9(b), and under DOH's own Rule 4.2.1. Thus, neither Exhibit A nor Exhibit C could have any bearing on the Peter Nunes application of June 21, 2012.

Most baffling of all is the inclusion of Exhibit B, a "Hearing Officer's Decision" in an unrelated declaratory ruling about ownership of, or income from, a medical marijuana compassion center. See Exhibit B, Defendants' Submission of APA Record. Defendant Fine refers to it as a "Decision", and the document was signed by Hearing Officer Catherine Warren on March 16, 2011. However, by its own terms, it summarizes testimony, contains "discussion", and concludes with

"findings of fact." What was omitted by Defendants from Exhibit B, and what was omitted by Dr. Fine from his affidavit (paragraphs 8, 9, Exhibit A) was the fact that it never became a ruling until Dr. Fine "adopted" it on August 21, 2012. Defendants failed to include the page by which DOH made it a ruling, dated August 21, 2012, and signed by Dr. Fine. For sake of completeness, plaintiffs attach a copy of that August 21, 2012, page, once again a date well past the July 27, 2012, date when the Nunes application became "deemed granted" by operation of statute.

Not only were Exhibits A, B, and C not operative at all in relation to the Nunes license "proceedings", but he was given no notice that DOH would be considering anything at all on the legal issue of whether his application, completed in accordance with then-current DOH forms and procedures, would be denied because the agency was doing a "180-degree turn" regarding nurse-practitioners. FCC, at 2315 (quoting the Second Circuit's description of the FCC action). As in FCC, fundamental principles of fair notice and due process lead to the conclusion that Exhibits A, B, and C, as submitted to this Court by DOH, can in no way justify the agency's action on Nunes' statutory application.

In short, the "record" in this case cannot include items which did not exist as of June 2012 and also cannot include any matters for which all parties were not afforded the opportunity to see, respond, and present evidence. Section 42-35-9(c). This applies to "all issues." Id. Exhibits A, B, and C, presented by the defendants, are not part of any "record" under Section 42-35-9(e).

VI. ARGUMENT

A. The Decision of the Department to Deny the Nunes Application was Contrary to Law

Count I of the Plaintiffs' Second Amended Complaint alleges that the denial of the Nunes application was contrary to applicable law, arbitrary, capricious, not supported by substantial evidence, made upon unlawful procedure, an abuse of discretion and an unwarranted exercise of discretion.

Plaintiffs have already discussed much of the agency's irregularity in the preceding sections and will simply incorporate those points rather than restating them. However, a limited explanation of how the denial was contrary to law and procedure, as well as arbitrary, is worth reviewing.

On June 27, 2012, Peter Nunes followed the then in place procedures for application, even using the DOH form which expressly allowed for certification by a nurse practitioner. This was a DOH practice in place for six years and no intervening legislative changes had touched on the practice. Thus it is clear that DOH changed its rule and procedure 180 degrees after Nunes submitted his application, never informed him it was considering doing so, and never engaged in any notice and comment rule-making on the issue. Section 42-35-1(8), (a practice or procedure of general applicability is a "rule" under the APA).

Applicable law also includes due process protections, and the 180 degree turn, applied to the Nunes application, also implicated all of the problems discussed in FCC v. Fox, supra.

Although this Court can decide the present issue without reaching the

"merits" of the Department's new rule, it is worth noting the following support for the six-year practice by DOH of expressly inviting certifications from nurse practitioners and physicians' assistants:

i) **The statutory definition of "practitioner."**

The definition, at Section 21-28.6-3(8) has not changed. A practitioner is "a person who is licensed with authority to prescribe drugs pursuant to Chapter 37 of Title 5 or a physician licensed with authority to prescribe drugs in Massachusetts or Connecticut." Id. (emphasis added) The defendants pin all their hopes on the reference to Chapter 37. At best, for them, the statute is unclear on the prescriptive privileges issue, which is irrelevant when one realizes that no one can "prescribe" medical marijuana, not even a physician. The most that any practitioner can do is to certify the application's statement of appropriateness. As will be seen by reference to other sections of the Act, the inclusion by DOH for six years of nurses and physician assistants is consistent with the overall purposes of the Act.

Most important, DOH cannot explain why the Legislature chose the word "person" for Rhode Island and "physician" for Connecticut and Massachusetts. If the Legislature intended the position now advanced by DOH, then Section 21-28.6-3(8) would have simply read "a physician licensed with authority to prescribe drugs in Rhode Island, Massachusetts or Connecticut." Why bother to use the word "person" if the requirement were to be uniform for all three - namely physicians only? DOH argues that the wording used is meaningless and surplusage, a cannon of construction not granted to DOH. See R.I. Medical Society v. Nolan, 723 A.2d 1123, 1126 (R.I. 1999) ("DOH may not amend the statute by interpretation.")

Nolan was a "great deference" case and still led to a result against the DOH interpretation. The present case, as explained above, involves no such deference due to the 180-degree turn.

Lastly, the Legislature revisited the Act in 2012, including changing some definitions in Section 3. It did not in any way alter Section 21-28.6-3(8).

ii) **The practitioner-patient relationship**

Once again, the Legislature did not use the term "physician-patient" relationship when it easily could have, in Section 21-28.6-3(14) when it required that the written certification was to be made "in the course of a bona fide practitioner-patient relationship after the practitioner has completed a full assessment of the qualifying patient's medical history."

Although both the nurses (RNPs) and the physician assistants (PAs) have prescriptive privileges by statute, Section 5-34-9, Section 5-34-8(c), both are practitioners and the use of prescriptive privilege is irrelevant in any event since medical marijuana is never "prescribed." The practitioner only certifies that a patient has a disease or illness that qualifies as a debilitating illness under the Act.

iii) **The Legislature even used the term "practitioner nurse"**

Elsewhere in the Act, the Legislature even used the term "practitioner nurse" when it was ensuring that such a person could not be punished in any way "for discussing the benefits or health risks of medical marijuana… with a patient." Section 21-28.6-4(l). These duties of discussion are among the things that a "practitioner" must do in order to properly complete a "written certification." Section 21-28.6-3(14). Once again DOH would have us accept that Section 21-28.6-4(l) was meaningless

surplusage.

iv) **The Global Signature Act, Section 5-34-42(Nurses)**

Also in 2006, shortly after enacting the Hawkins-Slater Act, the Legislature enacted Section 5-34-42 (Global Signature authority of certified registered nurse practitioners), which provides that when any provision of a general law requires a signature, certification, etc. of a physician, it shall be deemed to include a signature, certification, etc. of a certified RNP. Given the reference already in Section 21-28.6-4(l) to the practitioner-nurses role with medical marijuana patients, the Legislature re-emphasized the nature of the "certification" requirement under the Hawkins-Slater Act.

v. **The Global Signature Act, Section 5-54-8 (Physician-Assistants)**

Similarly, and also in 2006, the Legislature enacted revisions to Section 5-54-8 covering the signature authority of PAs on, inter alia, a "certification." Both global signature statutes were enacted after the Medical Marijuana Act, and the Legislature has not seen fit to alter or revoke them since 2006.

B. The Nunes Application for a Registry Identification Card was Deemed Granted by Law as of July 27, 2012

Count II of the Second Amended Complaint is quite simple. Under Section 21-28.6-9 a valid application is deemed granted as a matter of law after thirty five days from the date it is submitted. Section 21-28.6-9(b).

There are only two reasons the Department may deny an application. First,

if an applicant does not provide the information required by the Act. The Nunes application provided everything that the DOH form asked for. Secondly, the Department may deny an application if the information submitted is falsified. Rule 4.3. DOH never asserted either cause against Nunes, and these are the "only" reasons on which a denial can be based. See Rule 4.3, tracking the statute.

The Department's duty to make a decision, approving or denying an application, shall be made within fifteen (15) days of receiving it. Rule 4.1. That did not happen here. As a result, the statute mandates that the application was "deemed granted" as of July 27, 2012. Rule 4.2.1; Section 21-28.6-9(b).

The Department's only argument is that the application was not valid because it did not contain a physician's signature. Not only does that position once again call upon all of the issues previously discussed in this memorandum, but even if it were true, DOH had fifteen days after receipt of the June 21, 2012, application to notify Nunes that his application did not contain all of the required information, namely a physician's signature. Instead, DOH attempted to change the rules, "effective August 22, 2012" (See DOH Exhibit C, APA "Record"). Then on September 5, DOH purported to deny an application that had been statutorily deemed granted.

C. The September 5, 2012 Agency Action was a Revocation, under Section 42-35-14(c)

Since the Nunes application had been deemed granted, by operation of statute, as of late July 2012, what DOH did on September 5, 2012, was actually a revocation of a state-granted license or registration. As such, even if DOH's view of an initial

medical marijuana application were correct (i.e. that it does not present a contested case under the APA), no revocation or withdrawal is valid in the absence of a notice of intended action, with an opportunity for a pre-deprivation hearing for the affected individual. Section 42-35-14(c). Clearly the Legislature wanted to emphasize that taking away something already deemed granted is even more serious than an initial denial. See also Mosby, supra, at 1019, n. 39.

CONCLUSION

For the reasons set forth, the September 5, 2012, purported denial of the Nunes application must be reversed and/or set aside and remanded to the Department of Health for further proceedings consistent with both the Hawkins-Slater Act and the Administrative Procedure Act.

Respectfully submitted
Plaintiffs
By their Attorney

John W. Dineen #2346
Cooperating Attorney
R.I. Affiliate
American Civil Liberties Union
305 South Main Street
Providence, RI 02903
Tel. 401-223-2397
Fax 401-223-2399

CERTIFICATE OF SERVICE

I hereby certify that on April _____, 2013, I delivered a copy of the within to: **Michael Field, Assistant Attorney General, 150 South Main Street, Providence, RI 02903,** and by mail to**: Tom Folcarelli, Esq., 478 A Broadway, Providence, RI 02903,** and to **Benjamin Copple, Esq., Department of Health, 3 Capitol Hill, Providence, RI 02908.**

_____
John W. Dineen