

**IN THE SUPERIOR COURT OF DECATUR COUNTY
STATE OF GEORGIA**

CURALEAF GA HOLDINGS, LLC)
)
 Petitioner,)
)
 v.)
)
 GEORGIA ACCESS TO MEDICAL)
 CANNABIS COMMISSION,)
 BOTANICAL SCIENCES, LLC, AND)
 TRULIEVE GA, INC.,)
)
 Respondents.)

**CIVIL ACTION
NO. 22CV00276**


Cecilia Willis, Clerk
Decatur County, Georgia

FINAL ORDER

The above-captioned matter is before this Court on “Georgia Access to Medical Cannabis Commission’s Special Appearance Emergency Motion to Dismiss and Brief in Support Thereof” (hereinafter the “Motion”). Having considered the record, the arguments and submissions of the parties in support of and in opposition to the Motion, this Court hereby grants the Motion and this action is dismissed for the following reasons:

I. FINDINGS OF FACT

Georgia’s Hope Act (the “Act”), O.C.G.A. §§ 16-12-200 through 16-12-236, was enacted in 2019, and it created GMCC. Petition ¶¶ 8, 9; O.C.G.A. § 16-12-202. Section 2 of the preamble to the Act states that the legislative purpose and intent of the Act is to allow the legitimate use of medical cannabis for health care, including palliative care. Ga. L. 2019, p. 43, § 4/HB 324. To that end, GMCC is authorized to oversee the regulated licensing of in-state growing of cannabis and the production, manufacturing, and sale of low THC oil. See Petition ¶ 9; O.C.G.A. § 16-12-210. The Act authorizes GMCC to grant a total of six production licenses, including two Class 1 licenses (which allow 100,000 square feet of indoor cultivation space) and

four Class 2 licenses (which allow 50,000 square feet of indoor cultivation space). O.C.G.A. §§ 16-12-211 and 16-12-212.

The Act provides that Class 1 and Class 2 production licenses shall be granted by GMCC “under [Part 2] pursuant to contracts awarded through competitive sealed bids or competitive sealed proposals as provided for in Article 3 of Chapter 5 of Title 50 [the “State Purchasing Act”].” O.C.G.A. § 16-12-221(a). GMCC publicly released a Competitive Application Request for Proposals for Class 1 and Class 2 production licenses (the “RFP”) on November 23, 2020, and the RFP closed on January 27, 2021. Petition ¶ 12. Petitioner applied for both classes of production licenses. *Id.* ¶ 13. The RFP includes Pre-Award and Post-Award Protest Procedures (collectively “Protest Procedures”) to “provide applicants an opportunity to challenge both the process of the competitive application request for proposal and grant of the Notice of Intent to Award a contract” See Motion Exhibit 2 for Pre-Award and Post-Award Protest Procedures for both Class 1 and 2; *see also* Petition ¶ 16 (acknowledging Petitioner filed a post-award protest pursuant to the Post-Award Protest Procedures). Pursuant to the deviation section of the Georgia Procurement Manual (“GPM”), GMCC requested and was granted a deviation by the Georgia Department of Administrative Services (“DOAS”) from the GPM for its Protest Procedures on November 19, 2020. *See* Petition ¶ 10; *see also* GPM Section I.2.7.

After evaluating and scoring the applications received in response to the RFP, GMCC announced the prospective winning applicants on July 24, 2021. *See* Petition ¶¶ 13, 14. The prospective Class 1 winning applicants were Botanical Sciences, LLC, and Trulieve Ga, Inc. *Id.* 14. Based on scoring of the RFP, Petitioner did not score high enough to be selected for the award of a contract for a production license. *See Id.* at 13, 14. Petitioner then filed a timely protest with GMCC pursuant to the Post-Award Protest Procedure, and Executive Director

Andrew Turnage was initially designated as the hearing officer. Petition ¶¶ 16, 20. On May 5, 2022, GMCC voted to transfer the designation of hearing officer for all Post-Award Protests to OSAH. Petition ¶ 21; *see also* Post-Award Protest Procedures Section 3.0 (hearing officer to be Executive Director or designee). After a hearing, ALJ Stephanie Howells from OSAH, acting as hearing officer, issued a final decision on September 16, 2022, denying Petitioner's request for relief. Petition ¶¶ 22, 29. Because GMCC's post-award protest procedures provide that the hearing officer's decision is final, no additional administrative appeals were available to Petitioner at that point. Motion Exhibit 2 p. 9.

On September 20, 2022, in accordance with the Georgia Open Meetings Act notice requirements, O.C.G.A. § 50-14-1(d)(2), GMCC noticed a meeting to occur on September 21, 2022, to issue Notices of Award for the Class 1 and Class 2 production licenses and to designate and authorize signing of the contracts. *See* Petition ¶ 31. On September 21, 2022, GMCC voted to authorize the Executive Director to sign and execute the Class 1 production license contracts, and the contracts have been signed and the production licenses have been issued to Botanical and Trulieve. Petition ¶ 32.

Petitioner filed its Petition in the above-styled action on September 30, 2022, seeking review of the final decision of GMCC issued by its hearing officer. Petition ¶¶ 1, 34. Petitioner invokes this Court's jurisdiction to review the final decision pursuant to O.C.G.A. §§ 50-13-19 and 50-13-20.1 of the APA. Petition introductory paragraphs and ¶¶ 2, 3, 30.

I. CONCLUSIONS OF LAW

A. The APA does not apply to the grant of a production license.

This Court concludes that the process chosen by the General Assembly for the grant of a production license is different than that for a typical license subject to the APA. The typical

licensing process in Georgia, such as the issuance of licenses by Georgia's 44 professional licensing boards, involves submission of an application and, if certain minimum requirements are met without disqualifying events, issuance of a license regardless of how many other licenses have been issued. *See, e.g.*, O.C.G.A. §§ 43-3-9 (qualifications for certificate of certified public accountant), 43-4-11 (qualifications for certificate of registration as architect), and 43-18-41 (qualifications for licensure as embalmer or funeral director). If the application for a professional license under Title 43 is denied, the APA applies and the aggrieved applicant may file a petition for judicial review of the final decision in a contested case. *See* O.C.G.A. §§ 50-13-18(a) and 50-13-19(a, b); *see, e.g.*, O.C.G.A. §§ 43-3-23(b) (APA applies to hearings before State Board of Accountancy), 43-4-13(b) (APA applies to hearings before State Board of Architects and Interior Designers), and 43-18-47(b) (APA applies to hearings before State Board of Funeral Service). In those licensing cases under the APA, the superior court determines whether the final decision should be affirmed, reversed, modified, or remanded, without having to decide whether another applicant will have to forego its license to make one available for the aggrieved applicant. O.C.G.A. § 50-13-19(h).

Unlike the typical licensing process, the Act expressly provides that GMCC “shall grant initial [Class 1 and Class 2 production licenses] under this part pursuant to contracts awarded through competitive sealed bids or competitive sealed proposals as provided for in Article 3 of Chapter 5 of Title 50.” O.C.G.A. § 16-12-221(a). Article 3 of Chapter 5 of Title 50 is more commonly referred to as the State Purchasing Act, O.C.G.A. §§ 50-5-50 through 50-5-85, which is administered by DOAS. *See* O.C.G.A. §§ 50-5-51, 50-5-57, and 50-13-2(1) (DOAS excluded from definition of “agency” in APA). This Court concludes that the Act creates a competitive process that requires evaluation and scoring of applications under the State Purchasing Act for

the grant of a limited number of licenses pursuant to the award of contracts to only a select number of applicants. O.C.G.A. §§ 16-12-211 (two Class 1 production licenses), 16-12-212 (four Class 2 production licenses), and 16-12-221(a) (General Assembly directed issuance of production licenses must follow state procurement process). In providing for this process, the General Assembly did not amend the State Purchasing Act or state in the Act that the APA was to apply to the grant of a license pursuant to the award of a contract through a request for proposals (or the protest of such an award). *Cf. Pandora Franchising, LLC v. Kingdom Retail Group, LLP*, 299 Ga. 723, 728 (2016) (statute could have easily been written to provide that defendant could remove case to another deemed residence but legislature did not do so); *Colon v. Fulton County*, 294 Ga. 93, 98 fn. 5 (2013) (if legislature intended for disclosures giving rise to potential retaliation claim to be limited to programs or operations funded by state, legislature could have expressly stated so), *overruled on other grounds, Rivera v. Washington*, 298 Ga. 770, 778 (2016).

This Court concludes that making the State Purchasing Act apply rather than the APA was a deliberate legislative choice. This conclusion is supported by the process under the Act for granting Class 1 and Class 2 production licenses. There are a limited number of licenses to be issued and the evaluation and scoring of the applications is needed to determine the applicants who best meet or exceed the requirements to carry out the purposes of the Act. This Court also concludes that the Act expressly references the application of the APA to actions that GMCC can take with respect to a licensee but does not make the APA applicable to the act of granting initial licenses to six applicants pursuant to the award of a contract through a request for proposals under the State Purchasing Act. *Compare* O.C.G.A. §§ 16-12-203(17) (APA expressly made applicable to fines or orders to operations by licensee), 16-12-222(c) (APA expressly made

applicable to appeals where licensee denied transfer of license by GMCC), and 16-12-223(b) (APA expressly made applicable to appeals by licensee where license revoked by GMCC), *with* O.C.G.A. § 16-12-221(a) (APA is not made expressly applicable, instead, the State Purchasing Act is made expressly applicable to the grant of licenses pursuant to contracts awarded through competitive sealed bids or competitive proposals). *See also New Cingular Wireless PCS, LLC v. Ga. Dep't of Revenue*, 303 Ga. 468, 472 (2018) (discussing requirement that courts must “avoid a construction that makes some language mere surplusage”); *City of Marietta v. Summerour*, 302 Ga. 645, 656 (2017) (“When we consider the meaning of a statutory provision, we do not read it in isolation, but rather, we read it in the context of the other statutory provisions of which it is a part.”); *Pandora*, 299 Ga. at 728 (“[W]here the legislature uses certain language in one part of the statute and different language in another, the Court assumes different meanings were intended.”). This Court holds that the APA does not apply in this case, and that it, therefore, lacks subject matter jurisdiction.

B. GMCC’s grant of a production license does not meet the APA definition of a “contested case.”

Alternatively, even if the APA applies, this Court holds that this is not a “contested case.” The term “contested case” is defined in the APA as “a proceeding, including, but not restricted to, rate making, price fixing, and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing.” O.C.G.A. § 50-13-2(2); *see also* O.C.G.A. § 50-13-19(a) (“Any person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter.”). This Court concludes that this case does not fit within that definition because the “legal rights, duties, or privileges of”

Petitioner are not “required by law to be determined by an agency after an opportunity for hearing.” See *Welcker v. Ga. Bd. of Exam'rs of Psychologists*, 340 Ga. App. 853, 856 (2017) (“a contested case arises only when the law mandates that the applicant be provided the opportunity for a hearing.”). This Court concludes that there are no statutes or rules related to the Act or the State Purchasing Act that require that Petitioner have an opportunity for a hearing.

In an attempt to satisfy the “required by law” element of a “contested case,” Petitioner nonetheless contends that the ALJ’s “hearing on Curaleaf’s protest was ‘required by law’ within the meaning of section 50-13-2(2) because GMCC's rules required the hearing.” Petitioner Response pp. 6-8, *citing* O.C.G.A. §§ 16-12-203(15) (authorizing GMCC to “draft, adopt, amend, repeal, and enforce such rules and regulations as it deems necessary for the administration and enforcement of this article in the protection of public health, safety, and welfare”) and 16-12-210(a)(11) (GMCC authorized to “[p]romulgate rules and regulations and adopt policies and procedures necessary to carry out the provisions of [Part 2 that issues Class 1 and 2 licenses]”); *Panfel v. Boyd*, 187 Ga. App. 639, 643 (1988) (interpreting Ga. Comp. R. & Regs. 520-1-.34, repealed, holding that adopted rules and regulations have same force and effect as a statute).¹ Even if *Panfel* stands for the proposition that a duly promulgated rule satisfies the “required by law to be determined by an agency after an opportunity for hearing” element of a “contested case” (which is not discussed or the holding in *Panfel*), this Court holds that *Panfel* is not controlling because the Post-Award Procedures are not a “rule.” Instead, they are policies and procedures that the Commission chose to make a part of the RFP pursuant to a deviation granted by DOAS pursuant to the Georgia Procurement Manual (“GPM”) under the State

¹ This Court holds that the additional cases cited by Petitioner are also inapplicable because they involve “rules.” Petitioner Response pp. 9, 10, *citing* *Schieffelin & Co. v. Strickland*, 253 Ga. 385, 385 (1984), and *White v. Ga. Peace Officers Standards & Training Counsel*, 269 Ga. App. 747, 748-49 (2004).

Purchasing Act, and, unlike *Panfel*, they are not promulgated rules and regulations of GMCC pursuant to the APA. See Petition ¶ 10, 11; Petitioner Response Exhibit 1; O.C.G.A. §§ 50-13-4 through 50-13-7 (statutes governing the promulgation of a “rule”); see also O.C.G.A. § 50-13-2(6) (term “rule” includes regulation). DOAS administers the State Purchasing Act (O.C.G.A. §§ 50-5-51 and 50-5-57), and it created the GPM to govern purchases made by certain state government entities. GPM Section I.1. The GPM authorizes DOAS to grant a “deviation” that includes: “[t]he issuance and/or use of any policy, procedure, provision, or instruction of any kind at any stage of the procurement process, which is inconsistent with a policy, procedure, or provision, set forth in the GPM or provision directive governed by state entities and others subject to the State Purchasing Act[.]” GPM Section I.2.7. This Court concludes that a deviation is authorized for those subject to the State Purchasing Act (which GMCC is for purposes of granting licenses pursuant to a contract award), and the Protest Procedures are not promulgated “rules” under the APA. O.C.G.A. § 16-12-221(a).


The Court holds that the applicable case here is *Olvera v. Univ. Sys. Of Georgia's Bd. Of Regents*, 298 Ga. 425 (2016). In *Olvera*, the Supreme Court held that the Board’s “policy regarding residency requirements was merely the agency’s interpretation of an internal manual, not an independently promulgated agency rule, and did not bring plaintiff within the scope of OCGA § 50-13-10.” *Id.* at 427 (punctuation omitted). Like the residency requirements in *Olvera*, this Court concludes that the Post-Award Procedures are not a “rule,” and they do not bring the relevant protest proceedings within the scope of a contested case “in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing.” See O.C.G.A. § 50-13-2(2) (“contested case” defined); *Cf. Olvera*, 298

Ga. at 427 (Board did not issue residency requirements pursuant to APA and has never issued any rule pursuant to APA).

Finally, Petitioner contends that OSAH only hears “contested cases.” Petitioner Response p. 13, *citing* Ga. Comp. R. & Regs. 616-1-2-.03. This Court concludes that Rule 616-1-2-.03(a) does not provide that OSAH only hears “contested cases,” providing instead that, with respect to agency referrals, “[e]xcept as provided in section (2) of this Rule, or unless otherwise provided by law, whenever an agency receives a request for a hearing in a contested case, the agency shall submit the hearing request to the Court within a reasonable period of time not to exceed thirty (30) calendar days after the agency’s receipt of the request.” Importantly, OSAH Rule 616-1-2-.02(2) provides that the procedural requirements of the rules may be relaxed consistent with the APA or other applicable law. This Court concludes that, in this case, the other applicable laws are the Act and the State Purchasing Act. O.C.G.A. § 16-12-221(a). This Court concludes that Petitioner failed to show that the designation of OSAH as the hearing officer under the Protest Procedures makes the APA applicable. *See* Motion Exhibit 2 Post-Award Protest Procedure Section 3.0 (hearing officer to be Executive Director or designee).

Because the APA does not apply in this matter, and, alternatively, because the grant of a production license pursuant to a contract award (or the protest thereof) is not a “contested case,” this Court lacks subject matter jurisdiction, and the Petition is dismissed in its entirety.

SO ORDERED this 22nd day of November, 2022.


HOWARD E. McCLAIN, SENIOR JUDGE
SUPERIOR COURT OF DECATUR COUNTY
SOUTH GEORGIA JUDICIAL CIRCUIT

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