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September 6, 2019

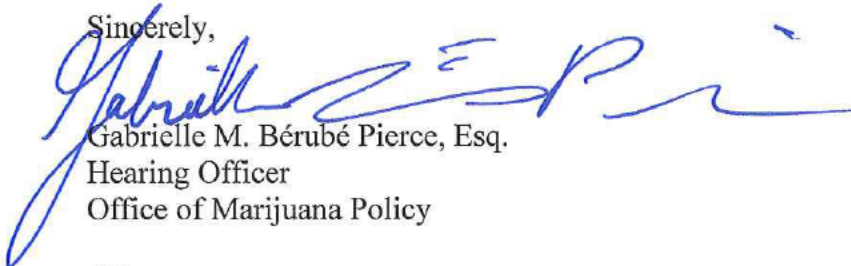
Eric Gustin  


***Re: E. Gustin Registry Identification Card Revocation -- Informal Administrative Hearing Decision***

Mr. Gustin:

Enclosed please find a copy of my decision regarding your appeal of the decision by the MMMP to revoke your caregiver registry identification cards. Please note that this decision constitutes final agency action subject to appeal in Superior Court. Thank you.

Sincerely,



Gabrielle M. Bérubé Pierce, Esq.  
Hearing Officer  
Office of Marijuana Policy

CC:

Scott Lever, Esq. – Deputy Director  
MMMP Program File  
Hearing Officer's File

Encl.: Decision of Hearing Officer

**MAINE DEPARTMENT OF ADMINISTRATIVE  
AND FINANCIAL SERVICES  
OFFICE OF MARIJUANA POLICY**

In Re: Eric Gustin	)	
Appeal of Revocation of Caregiver Registry	)	
Identification Cards	)	<b>Decision of Hearing Officer</b>
Card Nos. CGI3738, CGI3739, CGI3740,	)	
CGI3741, and CGI3742	)	

**INTRODUCTION AND BACKGROUND**

This is an appeal by Eric Gustin from a decision by the Office of Marijuana Policy (OMP), Department of Administrative and Financial Services (DAFS), to revoke five (5) caregiver registry identification cards issued to him (Caregiver registry identification card numbers: CGI3738, CGI3739, CGI3740, CGI3741, and CGI3742). The appeal is brought pursuant to 22 MRS § 2430-F, 5 MRS, Chapter 375, subchapter 4, and Chapter 2 of the Rules of the Office of Marijuana Policy, of the Department of Administrative and Financial Services (“Rules”).

A hearing officer was selected from the staff of OMP. The hearing officer had no contact with the parties regarding the matter except via written correspondence dated August 14, 2019 and at an informal evidentiary hearing held August 30, 2019, at which both Mr. Gustin and representatives from OMP were present. The hearing officer received via hand delivery on August 26, 2019, a case file from OMP including documentary evidence which the Office indicated it would rely upon at the informal evidentiary hearing, and which further identified two OMP staff that OMP reserved the right to call as witnesses. The informal evidentiary hearing was conducted at the offices of OMP and testimony of witnesses and documentary evidence was presented. After a review of all the arguments and evidence presented by the parties, the hearing officer makes the following findings of fact.

## FACTUAL BACKGROUND

Mr. Gustin was a registered caregiver with the Maine Medical Use of Marijuana Program (MMMP). Mr. Gustin employed five assistants to assist him with his caregiver operations. The record indicates that at least some of Mr. Gustin's caregiver activities were conducted at 531 Moosehead Trail in Newport, ME under the business name of Greenbear420.

On December 14, 2017, the MMMP issued five caregiver registry identification cards to Mr. Gustin with the following registration numbers: CGI3738, CGI3739, CGI3740, CGI3741, and CGI3742. All five caregiver registry identification cards had, on its face, an expiration date of December 13, 2018.

MMMP Field Investigator James York indicated in a "Memorandum for Record – Case No. ALMS-2019-MMP-6" dated February 8, 2019 that on November 30, 2018, during investigation of another matter, Investigator York noticed that Mr. Gustin's registry identification cards were due to expire on December 13, 2018. Investigator York reported that while he was with Mr. Gustin on November 30, 2018, he informed Mr. Gustin of the upcoming expiration of his identification cards and explained to Mr. Gustin that his renewal application would take "some time to process" and that Mr. Gustin would not "be able to serve his patients if he allows it to expire." Investigator York reported that Mr. Gustin indicated that he understood.

Investigator York reported that when he was investigating another matter on December 10, 2018, he again notified Mr. Gustin that his identification cards still had not been renewed and were set to expire December 13, 2018. Investigator York instructed Mr. Gustin "to get his renewal application in as soon as possible." Investigator York indicated that, "Mr. Gustin stated he understood."



Investigator York further reported the following series of events. When he returned to Mr. Gustin's store on December 31, 2018, to "put him back in compliance" for previous violations unrelated to this matter, and simultaneously made a new finding of non-compliance due to the expiration of Mr. Gustin's caregiver registry identification cards. At that time, "Mr Gustin stated he thought he sent in the renewal application." Investigator York contacted staff at the MMMP main office who confirmed that they had not received a renewal application from Mr. Gustin. Investigator York then explained to Mr. Gustin that he needed to submit his application to MMMP immediately and could not sell medical marijuana until he received his new registry identification cards. Investigator York instructed one of Mr. Gustin's employees to immediately stop a sale of medical marijuana that the employee was conducting at that time. Mr. Gustin was issued a notice of non-compliance based upon the expired identification cards (a copy of which was included in the materials provided to Mr. Gustin and the hearing officer as evidence in this matter), and informed Mr. Gustin and his employees that "any sale of medical marijuana at this point would be a violation of the MMMP statute and would not be tolerated." Mr. Gustin and his employees "...all related they understood and would not sell any medical marijuana or meet with patients until Mr Gustin was properly licensed." Afterwards, Investigator York notified to the Newport Police Chief "of the situation and stated the Chief would be notified when [Mr. Gustin and his employees] were allowed to sell again."

That same day Mr. Gustin, through an e-mail address labeled "Green Bear420" [REDACTED] sent Investigator York an e-mail ([James.York@maine.gov](mailto:James.York@maine.gov)) with the subject line: "Plan of action." Attached to the email was a document entitled, "GreenBear420 Plan of Action 12/31 (Expired Caregivers card.)" In the document, Mr. Gustin described a plan to correct the violation raised in the MMMP Notice of Non-Compliance issued earlier in the day.

Specifically, Mr. Gustin said, “(1) We will send out the duplicate Caregivers application form today as well as pictures of all forms to the State of Maine. (2) Wait to hear back on renewal forms.”

Later that same day, Mr. Gustin sent an email to [dhhs.mmp@maine.gov](mailto:dhhs.mmp@maine.gov) at 2:23 PM and forwarded that same e-mail to the MMMP e-mail account ([dhhs.mmmp@maine.gov](mailto:dhhs.mmmp@maine.gov)) at 2:35 PM enclosing a picture of a completed caregiver application, a certified mail receipt with no address listed, two separate money orders from Mr. Gustin dated 2018-12-31 and totaling \$1,000 and \$200, respectively, which were addressed to the Treasurer, State of Maine, along with a receipt for the same.

Nichole Schooler, MMMP staff, indicated in a statement dated February 8, 2019, that on December 31, 2018, she received a telephone call “from someone identifying themselves as Eric Gustin asking if I had processed an application for him as he had sent it in in November and it expired Dec 13<sup>th</sup>. I told him I had no records of receiving an application from him and he said that was ok because he had sent another application and was going to provide me pictures of the application.” In that same statement, Ms. Schooler further indicated, “I received an e-mail from [REDACTED] at 2:37 with pictures of the application, money orders and the receipt for the caregiver application. Someone called to verify that it was received and I confirmed it was.”

During the informal hearing, Investigator York asked Ms. Schooler if she told “one of these individuals they could begin selling medical marijuana while you were processing their renewal application,” to which Ms. Schooler stated “no.” In response, Mr. Gustin asked Ms. Schooler, “if you had said that we’d be ok if we sent these e-mails in.” Ms. Schooler replied, “I received the e-mails, I remember the phone conversation barely, I mean it was back in

December. Um, I do remember the conversation about you sending the e-mails and saying that you had thought you sent it in in November. And I checked around and didn't have it. I don't recall telling you you'd be all set. I recall telling you I'd let you know we received it.....what I do recall from the conversation was you asking if we had the application on hand, telling you no we didn't, and you said you'd get it in as quick as possible."

On January 2, 2019, Investigator York responded to Mr. Gustin's e-mail "Based on your plan the MMMP accepts your plan of correction. Please let me know this is complete so I can set up a follow-up visit. Thank you".

On January 4, 2019, at 11:55 AM an employee of Mr. Gustin's, Collin Popper sent to Ms. Schooler, an e-mail with the subject line: "Eric G Gustin Updated Form" and a message in the body of the e-mail which read, "Form plus \$31.00 background money order will be on way today thank you!" The e-mail included attachments with photos of Mr. Gustin's 3 page caregiver application and his State of Maine driver's license.

That same day, MMMP confirmed receipt of certified mail from Mr. Gustin enclosing a 2-page caregiver registration renewal application, money orders for \$200 and \$1000 as indicated above, and a photocopy of Mr. Gustin's State of Maine Driver's License.

Investigator York reported that on January 8, 2019, he received a phone call from the New Police Chief during which the Chief "related he had information that Mr. Gustin was still selling medical marijuana and had dozens of cars at his business on 01/05/19." Investigator York requested that, "if any of the Chief's officers witnessed any sales of medical marijuana to please forward that information."



On January 9, 2019, the MMMP indicated that it had received Mr. Gustin's 3-page caregiver application, dated 1-4-19, and a money order in the amount of \$31 made out to "Treasurer, State of Maine", and dated 2019-01-04.

On January 14, 2019, Investigator York received a police report from the Newport Police Chief reporting that on January 12, 2019. The Newport Police Officer's report, states that the Officer went into the Green Bear 420 storefront located at 531 Moosehead Trail and asked whether a doctor was on site to certify patients for the medical marijuana program. A cashier stated that a doctor was present and then led the Officer to a van in the parking lot. There the Officer met with the medical professional who issued her a patient certification which she then used to purchase an eighth of an ounce of medical marijuana from another van parked in the corner of the store's parking lot.

On January 15, 2019, MMMP renewed Mr. Gustin's caregiver registry identification cards with registration numbers CGI3738, CGI3739, CGI3740, CGI3741, and CGI3742.

On January 24, 2019, Investigator York conducted an on-site assessment of Mr. Gustin's store and was advised by Mr. Popper that Mr. Gustin was out of town. Investigator York requested that Mr. Popper have Mr. Gustin contact him by January 28th. Mr. Popper showed Investigator York the store's record of medical marijuana sales and Investigator York took pictures of the sales records for the period of January 8, 2019, through January 13, 2019. The records showed 64 sales of medical marijuana during that timeframe.

On February 5, 2019, Mr. Gustin contacted Investigator York to discuss the sales made during the time Mr. Gustin's registry identification cards had lapsed. Investigator York reported that at that time, "Mr. Gustin claimed he had contacted the MMMP office and Ms. Shcooler [sic] related she had received his application and said he could continue to make sales." At the

informal hearing, Mr. Gustin reiterated the same, “So basically, I kinda have a discreption [sic] between the inspector and you [Ms. Schooler]—I feel like, like when we first called you, you told us that if we sent the paperwork in with e-mails and pictures of our money order and certified letter and application, that as soon as you got it, you’d send our information through and we were all set to go. Um, and we did that and we got-- we kept calling and finally you said you got all the information and it was all set. In the meantime, the inspector showed up and said that we’re not all set.” Investigator York reported that upon inquiry as to whether, “anyone could legally tell him to break the law, ... Mr. Gustin stated no one could tell him he was allowed to break the law.”

In his Memorandum for Record dated February 8, 2019, Investigator York recommended that Mr. Gustin’s registry identification cards be revoked for: (1) Continued finding of violations during three prior cases; and, (2) Selling medical marijuana multiple times while unlicensed.

On July 11, 2019, the Office of Marijuana Policy, which, following its creation in February 2019, now includes the MMMP, provided notice to Mr. Gustin of its decision to revoke Mr. Gustin’s registry identification cards.

Mr. Gustin filed a timely appeal of the decision by OMP to revoke his caregiver registry identification cards and was granted his request for an informal hearing.

A hearing was held on Friday, August 30, 2019 at the Office of Marijuana Policy. Mr. Gustin represented himself in the proceeding, OMP was represented by Deputy Director Scott Lever, Esq. Also present at the hearing were OMP staff Tracy Jacques, Esq., Director of Licensing, Field Investigator James York, and Office Specialist Nichole Schooler. Mr. Gustin presented his case and examined Ms. Schooler as indicated above. Attorney Lever presented the



State's case and asked that the case file presented to the parties before the hearing be entered into the record as evidence.

### GOVERNING LAW AND STANDARD OF REVIEW

The issue before the hearing officer is whether Mr. Gustin met his burden of proving by a preponderance of the evidence<sup>1</sup> that OMP erred in its decision to revoke Mr. Gustin's caregiver registry identification cards due to: (1) factual error, (2) error of law, or (3) arbitrary and capricious enforcement of the laws and rules governing caregiver registry identification cards.

Neither the relevant portions of the Maine Administrative Procedures Act nor the Maine Medical Use of Marijuana Act specifies an evidentiary standard for appeals of OMP decisions; however, as indicated in *Board of Licensure in Medicine v. Diering*, KEN AP-08-23, ¶14 (Ken. Sup. 2008), the court explained "Although the Law Court has not explicitly recognized a default preponderance of the evidence standard in Maine's Administrative Procedure Act, this standard is common in professional disciplinary cases." In the absence of direct statutory guidance, the hearing officer will review the evidence presented to determine whether Mr. Gustin met his burden of proof by a preponderance of the evidence.

In determining whether OMP's decision was arbitrary or capricious, the hearing officer must not substitute her judgement for that of the Office. *International Paper Co. v. Board of Environmental Protection*, 1999 ME 135, ¶ 29, 737 A.2d 1047, 1054. There is a presumption that the OMP's actions were not arbitrary or capricious. *Central Maine Power Co. v. Waterville Urban Renewal Authority*, 281 A.2d 233, 242 (Me. 1971).

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<sup>1</sup> At the August 30 hearing the hearing officer improperly identified that the standard of proof for the appellant as "clear and convincing evidence". The correct standard is proof by a "preponderance of the evidence". The hearing officer finds that this is a reversible error that does not have a prejudicial effect on the appellant's due process rights because the hearing officer applied the less rigorous "preponderance" standard when reaching her decision in this matter.

## DECISION

The hearing officer has determined that Mr. Gustin has not met his burden of proving by a preponderance of the evidence that the MMMP's decision to revoke his caregiver registry identification cards was based upon a factual error, violation of the law, or arbitrary and capricious. The issues raised by Mr. Gustin on appeal are discussed below.

### **1) Mr. Gustin did not intentionally break any rule.**

Mr. Gustin argues that he did not intend to break any rule or law of the MMMP and should therefore should not be subject to revocation of his caregiver identification cards. Intent to break program rules or the law governing the administration of the MMMP, however, is not a prerequisite for the revocation of a registry identification card. 22 MRS § 2430-F states, "The department may suspend or revoke a registry identification card for violation of this chapter and the rules adopted under this chapter." The *Maine Medical Use of Marijuana Program Rule*, 18-691 CMR, ch. 2, sec. 10, sub-§ I states in part:

Grounds for revocation of a registry identification card are governed by this rule and the statute and include, but are not limited to, the following: 1. The Department determines the cardholder is non-compliant with this rule or the statute, including failure to cooperate with on-site assessment or allow entry for inspection.... 4. The cardholder commits, permits, aids or abets any illegal practices or unauthorized conduct related to the cultivation, processing, acquisition, dispensing, delivering or transfer of marijuana....

Neither of the grounds listed above require the registry identification cardholder to act with any particular state of mind to be liable for violation of the rules. Other provisions of subsection I do require the registry identification cardholder to act with a specific intent in order to be liable for a violation of the rule; for instance, subsection I(3) requires that "The cardholder *knowingly* violates the confidentiality of information protected by statute." [emphasis added] As a result, Mr. Gustin's intent to violate MMMP rules and statute is not relevant to the

determination of whether Mr. Gustin violated MMMP rules and statute by selling marijuana for medical use after his registry identification cards expired and before he was issued new registry identification cards.

Mr. Gustin reported to Investigator York, OMP staff, and the hearing officer that he did not intend to operate without a license and believed that he had applied to renew his registry identification cards in November, the month prior to the expiration of the cards. However, Mr. Gustin did not produce any documents evidencing a renewal application filed in November. While neither party produced evidence specific to Mr. Gustin's state of mind during the period between when Mr. Gustin's cards expired on December 13, 2018, and when MMMP issued renewed cards on January 15, 2019, Investigator York's notes are clear that he provided Mr. Gustin notice on November 30 and December 10, 2018, that his cards were due to expire on December 13th. Nothing in the record indicates that Mr. Gustin took steps between November 30 and December 13, 2018, to determine whether the MMMP was in receipt of his renewal application or whether such an application had been approved.

Furthermore, following notice from Investigator York that he was out of compliance and must immediately cease all sales of medical marijuana and all other activities related to his caregiver registration, Mr. Gustin affirmed in an e-mail to Investigator York that same day that he would immediately complete the renewal application and "wait to hear back" from the MMMP regarding those forms. Investigator York reported in his memorandum that he confirmed with Mr. Gustin and his employees that no medical marijuana could be sold at Mr. Gustin's store until his registry identification cards had been renewed.

Despite that understanding, the medical marijuana sales records photographed by Investigator York show that Mr. Gustin and his employees continued to make sales of medical



marijuana to patients during the period when Mr. Gustin's registry identification cards had expired.

**2) Mr. Gustin believed he had authorization from MMMP to proceed with the cultivation and sale of marijuana for medical use.**

Mr. Gustin argues that because he believed, as a result of a telephone conversation with an MMMP employee, that his caregiver registry identification card had been renewed and he was authorized to continue to sell marijuana for medical use. *Maine Medical Use of Marijuana Program Rule*, 18-691 CMR, ch. 2, sec. 9, sub-§A requires that "Persons who are required to register pursuant to statute and this rule, must possess a valid registry identification card issued by the Department and Maine-issue photographic identification to establish proof of authorized conduct."

Mr. Gustin claims that he believed that he had authorization to proceed with his caregiver activities, after speaking with Ms. Schooler from the MMMP on December 31, 2018, and the hearing officer heard evidence from Mr. Gustin and Ms. Schooler at the informal hearing to this effect. However, by his own admission, Mr. Gustin acknowledged that, "no one could tell him he was allowed to break the law."

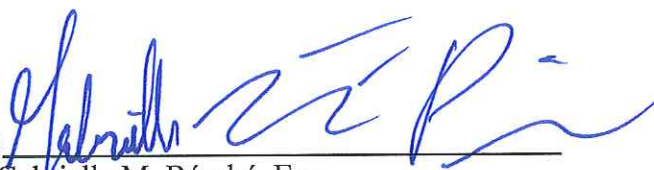
There is sufficient evidence in the record to find that Mr. Gustin did not possess a valid registry identification card from December 13, 2018 until the cards were renewed by the MMMP on January 15, 2019. As indicated above, the Medical Use of Marijuana Program Rule requires possession of a registry identification card to conduct caregiver activities, from December 13, 2018 to January 14, 2019, Mr. Gustin was not in possession of a valid registry identification card.

Further, there is sufficient evidence in the record to find that Mr. Gustin was aware that he could not operate as a registered caregiver under the MMMP with registry identification cards that had expired.

**CONCLUSION**

The hearing officer has determined that Mr. Gustin has not met his burden of proving by a preponderance of the evidence that the MMMP's decision to revoke his caregiver registry identification cards was based upon a factual error, a violation of the law, or arbitrary and capricious. Regardless of Mr. Gustin's intent to break the law, the record demonstrates that Mr. Gustin was conducting caregiver activities during a period which he did not possess an active caregiver registry identification card, in violation of MMMP rule and statute. Accordingly, the hearing officer affirms the decision by the MMMP to revoke Mr. Gustin's caregiver registry identification cards as of July 14, 2019.

Date: 9/5/19

Signed:   
Gabrielle M. Bérubé, Esq.

**STATEMENT OF APPEAL RIGHTS**

This decision constitutes a final agency action. Any aggrieved party may appeal this decision by filing a petition for review in Superior Court for the County where one or more of the parties reside or have their principal place of business, where the agency has its principal office, or where activity which is the subject of this proceeding is located. Any such appeal must be filed within 30 days of the receipt of this decision.