

IN THE COURT OF APPEALS OF THE STATE OF OREGON

HERBAN INDUSTRIES OR, LLC,
an Oregon limited liability company, dba Dyme Distribution,
Petitioner,

v.

OREGON LIQUOR CONTROL COMMISSION,
Respondent.

Court of Appeals No. A172546

ORDER GRANTING STAY

Petitioner seeks judicial review of temporary administrative rules adopted by the Oregon Liquor Control Commission (OLCC): OAR 845-025-2805 and OAR 845-025-5760(5) and (6). Petitioner moves to stay enforcement, pending judicial review, of OAR 845-025-2805, a rule that, among other things, prohibits the manufacture and sale of cannabis vapor products that contain flavor or "non-marijuana terpenes." Petitioner asserts that, absent a stay, "OAR 845-025-2805 will force financial losses that will be immeasurable and will threaten permanent closure of its business." OLCC opposes the request for a stay. As explained below, the motion is granted.

OAR 845-025-2805 was adopted by OLCC as part of its implementation of the Governor's Executive Order 19-09. Petitioner holds a recreational marijuana wholesaler license and is the sole distributor of the "Winberry" or "Winberry Farms" brand of flavored cannabis vape cartridges. According to petitioners, "Winberry Farms branded vape cartridges contain butane hash oil * * * distillate blended with a proprietary mix of natural terpenes that replicate the taste and smell of terpenes found in cannabis." Because the cartridges contain "non-marijuana terpenes," under OAR 845-025-2805, petitioner is prohibited from manufacturing the cartridges and also from distributing and selling cartridges that were produced prior to October 15, 2019, the effective date of the rule.

As explained in *Northwest Title Loans, LLC v. Division of Finance*, 180 Or App 1, 10, 42 P3d 313 (2002), this court has authority to stay enforcement of an administrative rule pending completion of judicial review.¹ In determining whether to exercise the

¹ Although *Northwest Title Loans* was vacated as moot, the court continues to refer to the portions of that decision that remain persuasive. *Lovelace v. Board of Parole and Post-Prison Supervision*, 183 Or App 283, 288 n 3, 51 P3d 1269 (2002).

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authority to grant a stay pending completion of the rule-challenge proceedings, the court considers the likelihood that petitioner will prevail on judicial review,² the likelihood of irreparable harm to petitioner in the absence of a stay, and the likelihood of harm to the public if a stay is granted. See *id.* at 13 & n 7 (stating that a stay will not be granted in the absence of a showing that failure to grant a stay will result in irreparable harm; suggesting that, in evaluating whether a stay should be granted in judicial review proceeding under ORS 183.400, the court could require a petitioner to meet requirements analogous to those imposed in ORS 183.482). In this case, the court concludes that those factors weigh in favor of granting a stay pending judicial review.

The court begins by considering petitioner's likelihood of success on judicial review. In conducting judicial review of an administrative rule under ORS 183.400, the court is limited to an examination of the rule itself, the statutory provisions authorizing the rule, and copies of documents necessary to demonstrate compliance with applicable rulemaking procedures. ORS 183.400(3). The court will declare a rule invalid only if it determines that the rule "[v]iolates constitutional provisions; * * * [e]xceeds the statutory authority of the agency; or * * * [w]as adopted without compliance with applicable rulemaking procedures." Here, petitioner asserts that OAR 845-025-2805 is invalid, "primarily because * * * [OLCC] failed to substantially comply with the rulemaking procedures necessary to justify a temporary rule." Specifically, petitioner argues that OLCC did not comply with the requirements of ORS 183.335(5). Petitioner also asserts that the rule is invalid because it lacks a rational basis and violates free-speech rights.

In general, ORS 183.335 sets forth rulemaking procedures that an agency must use prior to the adoption of a rule. Those include, among other things, a public notice of rulemaking, an opportunity for interested persons to submit data or comments on the proposed rule, and opportunities for oral hearings. However, under ORS 183.335(5), an agency may adopt a rule without prior notice or hearing or with abbreviated notice and hearing,

"if the agency prepares:

"(a) A statement of its findings that its failure to act promptly will result in serious prejudice to the public interest or the interest of the parties concerned and the specific reasons for its findings of prejudice;

² Petitioner submits that its showing of irreparable harm alone is sufficient for this court to grant a stay. It also observes that it has raised several "colorable claims of error." Although, in considering a stay pending judicial review in a contested case, the court evaluates whether a petitioner has demonstrated a "colorable claim of error," see ORS 183.482(3)(a)(B), in considering a motion to stay in a rule challenge under ORS 183.400, the court evaluates, more generally, a petitioner's likelihood of success on review.

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"(b) A citation of the statutory or other legal authority relied upon and bearing upon the promulgation of the rule;

"(c) A statement of the need for the rule and a statement of how the rule is intended to meet the need;

"(d) A list of the principle documents, reports or studies, if any, prepared by or relied upon by the agency in considering the need for and in preparing the rule, and a statement of the location at which those documents are available for public inspection * * *."

Because, here, the agency adopted OAR 845-025-2805 as a temporary rule without prior notice or hearings, it was required to comply with ORS 183.335(5).

OLCC's statement of need and justification of the temporary rule is as follows:

"NEED FOR THE RULE(S):

"On October 4, 2019 the Governor issued Executive Order 19-09 which directs the Oregon Liquor Control Commission to immediately adopt temporary rules banning the sale and manufacture of all flavored vaping products for 180 days.

"JUSTIFICATION OF TEMPORARY FILING:

"It is imperative that the Oregon Liquor Control Commission take actions necessary to protect the health and safety of Oregonians as directed by the Governor in Executive Order 19-09. Nationally there is an ongoing vaping public health crises, with an alarming outbreak in recent months of lung injuries among previously healthy individuals who have used vaping products. According to the [Centers for Disease Control], as of October 10, 2019, there have been more than 1,200 vaping-related lung injury cases and 28 deaths nationally, with nine vaping related injuries and two deaths in Oregon. The Oregon Health Authority has issued a public health advisory, warning all Oregonians not to use vaping products or e-cigarettes, but it is imperative for the State to take evidence based action immediately to protect Oregonians, especially Oregon's youth, from the harms associated with vaping products.

"No specific types of e-cigarettes, vaping devices, or liquids have been conclusively identified as a cause of the illnesses at this time; the FDA is testing vaping products from cases around the United States to determine which specific products or ingredients may be the cause. Until a cause has been identified, the Commission must act promptly, in accordance with the Governor's Executive Order, to protect Oregonians,

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and failure to act promptly will result in serious prejudice to the public interest."

According to petitioner, that statement fails to comply with the requirements of ORS 183.335. Petitioner argues, in part, that OLCC failed to include a statement of the need for the rule and how the rule is intended to meet the need as required by ORS 183.335(5)(c). OLCC responds that it met the requirements of ORS 183.335(5): It identified the Governor's executive order as the need for the rule and it is apparent on its face how the rule meets that need because the rule does what the Governor ordered. OLCC also points to Executive Order 19-09, itself, as setting forth the need for the temporary rule.

As the court has explained,

"[r]eview of the adequacy of a 'statement of need' for the adoption of a temporary rule is made in the context of whether the agency substantially complied with rulemaking *procedures*. Under ORS 183.335(5)(c), the agency is required to articulate an explanation for the need to adopt a temporary rule. The statement of 'need' for a temporary rule is identical to that required for permanent rulemaking. ORS 183.335(2)(b)(C) ('need' statement consists of a 'statement of the need for the rule and a statement of how the rule is intended to meet the need'). In reviewing the adequacy of an agency's statement of need, it is not the function of a reviewing court to assess the substance of the agency's asserted 'need' for * * * a rule. Rather, the 'need' contemplated by that statute is 'a need that the rule-proposing agency *perceives*.'"

Vier ex rel Rory v. SOSCF, 159 Or App 369, 376, 997 P2d 425 (1999) (emphases in original). Thus, where an agency perceives a need for rulemaking, it need only adequately explain that perception in its statement of need. *Id.*

Petitioner acknowledges that standard; in its view, however, OLCC has failed to articulate an explanation of what the need for the rule is or how the rule is intended to meet that need. It is not clear to the court that a statement of need that only identifies the Governor's order "direct[ing OLCC] to immediately adopt temporary rules banning the sale and manufacture of all flavored vaping products for 180 days" is a sufficient explanation of the agency's perception of the need for the rule. It is even less clear that it is sufficient for the agency to fail to include "a statement of how the rule is intended to meet the need," ORS 183.335(5)(c), because "it is apparent on its face how the rule meets" the need. ORS 183.335(5)(c) expressly requires that a temporary rule include a statement of how the rule meets the need identified by the agency, but no such statement is included in OAR 845-025-2805. Thus, although OLCC makes persuasive arguments in support of its view that the rule will be held valid on judicial review, the court is nonetheless persuaded that petitioner has *some* likelihood of success.

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With respect to the likelihood of irreparable harm in the absence of a stay, petitioner explains that enforcement of the rule is having a catastrophic effect on its business. See *Bergerson v. Salem-Keizer School Dist.*, 185 Or App 649, 660, 60 P3d 1126 (2003) (irreparable harm is one for which a party cannot receive a reasonable or complete remedy in law). Sales of its Winberry brand flavored vape cartridges represent more than 80 percent of petitioner's monthly revenue. Because OAR 845-025-2805 prohibits the sale of that product, petitioner is losing more than 80 percent of its monthly revenue and, in the absence of those revenues, "cannot sustain [its] workforce of over 30 farmers, drivers, packagers and sales associates." It asserts that, if enforcement of the rule is not stayed, it "is likely to lose all seven members of its professional sales force, and will be forced to consider laying off a total of 50 [percent] of its workforce statewide." In addition, according to petitioner, its relationships with OLCC-licensed recreational marijuana retailers are being damaged by enforcement of the rule. Retailers have demanded that petitioner buy back its product, which it cannot afford to do. Similarly, petitioner's relationships with its suppliers is being damaged because petitioner is unable to pay its accounts with those suppliers. In the absence of a stay, petitioner asserts that it may be "forced out of business entirely." OLCC does not dispute petitioner's assertions relating to the harms that it faces, nor does it dispute that that harm is irreparable. The court is persuaded that petitioner has demonstrated that irreparable harm to it is likely to result unless enforcement of the rule is stayed.

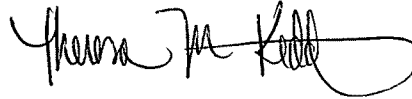
OLCC asserts, however, that a stay will likely result in harm to the public. In particular, OLCC points out that the vaping-related illnesses that the rule is aimed at addressing are serious; as of the date that OLCC's response was filed, 1,888 cases of the illness had been reported nationwide and 37 people--two in Oregon--had died. According to the state, petitioner's losses do "not outweigh the public interest in safety if in fact the products are causing serious injury." The court agrees that, if there was any showing that the products were causing injury to the public, that would weigh strongly against granting a stay. The problem with OLCC's argument is that, as OLCC itself acknowledged in its statement of justification for the rule, it adopted the rule without knowing what was causing the lung injuries at issue. It specifically stated that no type of "e-cigarette, vaping devices, or liquids" had "been conclusively identified as a cause of the illnesses at this time." And, at the time it filed its response to the motion to stay, OLCC remained unable to tie the lung injury cases to the type of flavored vape cartridges at issue. Indeed, OLCC, in its response, states that "[p]ublic health professionals across the country are working to determine the cause of the outbreak and how to stop it." In the absence of any evidence connecting the sale of cannabis vapor products *that contain flavor or "non-marijuana terpenes"* to the lung injuries, the court is not convinced that there is a risk of harm to the public if enforcement of the rule is stayed.³

³ As is clear from the Governor's Executive Order 19-09, the statement of justification for the temporary rule, and the state's response, the available information relating to public risk may be expected to develop as public health officials continue their work in pinpointing the causes of the injuries and how to prevent those injuries.

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In sum, the court has considered petitioner's likelihood of success on judicial review, the likelihood of irreparable harm to petitioner absent a stay, and the likelihood of harm to the public if a stay is granted, and concludes that those factors weigh in favor of granting a stay. Accordingly, petitioner's motion is granted. Enforcement of OAR 845-025-2805 is stayed pending judicial review or further order of the court.



THERESA M. KIDD
APPELLATE COMMISSIONER
11/14/2019 3:32 PM

c: Kevin J Jacoby
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