COMMONWEALTH OF MASSACHUSETTS

**Division of Administrative Law Appeals**

**1 Congress Street, 11th Floor**

**Boston, MA 02114**

**www.mass.gov/dala**

**Department of Public Health, Medical Use of Marijuana Program**,

Petitioner

v. Docket No. PH-15-589

**James Willis**,

Respondent

**Appearance for Petitioner**:

James M. Strong, Esq.

Deputy General Counsel

Department of Public Health

250 Washington Street

Boston, MA 02018-4619

**Appearance for Respondent**:

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**Administrative Magistrate**:

Kenneth Bresler

**SUMMARY OF DECISION**

Department of Public Health may temporarily suspend and may revoke a dispensary agent’s registration because the application submitted on his behalf contained misleading, incorrect, and false information. It may do so under 105 CMR 725.425(A)(1); 105 CMR 725.425(A)(2); and 105 CMR 725.425(E), but, because of lack of notice, not under its Guidance for Registered Marijuana Dispensaries Regarding Background Checks or its policy that dispensary agents must be honest.

**DECISION**

 The petitioner, James Willis, appeals the Department of Public Health’s immediate suspension and proposed revocation of his registration as a medical marijuana dispensary agent.

Procedural history

 On October 1, 2015, DPH summarily suspended Mr. Willis’s registration as a medical marijuana dispensary agent for presenting a danger to the public health and safety, and proposed to revoke his registration. DPH invoked three regulations:

 • 105 CMR 725.425(A)(1), which authorizes DPH to revoke a dispensary agent’s registration because of “[s]ubmission of misleading, incorrect, false, or fraudulent information in the application”;

 • 105 CMR 725.425(A)(4), which authorizes revocation of a dispensary agent’s registration for “[s]elling, distributing, or giving marijuana to any unauthorized person”; and

 • 105 CMR 725.425(A)(2), which authorizes revocation for “[v]iolation of the requirements” of An Act for the Humanitarian Medical Use of Marijuana (which this decision calls “the medical marijuana statute”) or the DPH regulations implementing it. (Ex. 1.)

 On October 16, 2015, Mr. Willis appealed. (Ex. 3.)

 On February 3, 2016, DPH moved for summary decision and to dismiss Mr. Willis’s appeal as moot. On February 16, 2016, Mr. Willis opposed both DPH motions and cross-moved for summary decision.

 On February 25, 2016, I denied both DPH motions and partly granted Mr. Willis’s motion. I ruled that DPH could not temporarily or permanently revoke Mr. Willis’s registration as a dispensary agent for his conviction of a marijuana crime in 1998 because 105 CMR 725.425(A)(4) did not govern it.[[1]](#footnote-1) I allowed DPH to proceed on 105 CMR 725.425(A)(1) if it had better evidence. If it did not have better evidence, then DPH could proceed on 105 CMR 725.425(A)(2). Finally, in response to Mr. Willis’s argument that some of DPH’s regulations are not authorized by the medical marijuana statute and are therefore illegal, I opined that I do not have the authority to rule on the issue.[[2]](#footnote-2) I later reopened this issue and asked the parties to brief it.

 On March 23, 2016, Mr. Willis again moved for summary decision, this time on105 CMR 725.425(A)(2). On March 31, 2016, I denied the motion. I also stated:

DPH’s case under both 105 CMR 725.425(A)(1) and (A)(2) seems to rely, at least in part, on the revocation of Mr. Willis’s probation. Since the reason for the revocation is not readily apparent to me in the record, it occurs to me that resolving the remaining issues in the appeal will require testimony and more documentary evidence.

 I further stated:

DPH argues that it should be allowed to revoke Mr. Willis’s registration under 105 CMR 725.425(E)....However, DPH may not proceed under 105 CMR 725.425(E) unless it brings to my attention that its Notice of Agency Action and Notice of Claim for an Adjudicatory Proceeding invoke that provision, or unless it amends those notices and I am convinced that Mr. Willis is not prejudiced by the amendments.

On May 4, 2016, DPH moved to amend its notices to include 105 CMR 725.425(E), which allows DPH to revoke a dispensary agent’s registration on “any other ground that serves the purposes” of the medical marijuana statute or the DPH regulations implementing it. On May 5, 2016, I allowed the amendment. On May 10, 2016, DPH amended its notices to include 105 CMR 725.425(E).

Hearing

On June 28, 2016, I held an evidentiary hearing, which I recorded digitally. DPH called two witnesses: Karen Geoghegan, who works for its Medical Use of Marijuana Program (which this decision calls the “medical marijuana program”); and Stephani Eastwick, the Human Resources Manager for New England Treatment Access (NETA), which had employed Mr. Willis. I accepted into evidence 13 exhibits.

DPH proceeded against Mr. Willis under three regulations:

 • 105 CMR 725.425(A)(1) (authorizing revocation of a dispensary agent’s registration because of “[s]ubmission of misleading, incorrect, false, or fraudulent information in the application”);

• 105 CMR 725.425(A)(2) (authorizing revocation for violating the requirements of the medical marijuana statute or the DPH regulations implementing it); and

• 105 CMR 725.425(E) (authorizing revocation on “any other ground that serves the purposes” of the medical marijuana statute or the DPH regulations implementing it).

 Both parties submitted post-hearing briefs.

**Findings of Fact**

 Statute, regulations, guidance, and policy[[3]](#footnote-3)

 1. On November 6, 2012, the people of Massachusetts approved a ballot question that became the medical marijuana statute. St. 2012, c. 369. It has not been codified into the Massachusetts General Laws.

 2. The medical marijuana statute became effective on January 1, 2013. St. 2012, c. 369, § 16.

 3. The medical marijuana statute provides: “No one shall be a dispensary agent who has been convicted of a felony drug offense.” St. 2012, c. 369, § 10(D).

 4. The statute also provides:

The department [of public health], after a hearing, may revoke any registration card issued under this law for a willful violation of this law.

St. 2012, c. 369, § 14(A).

 5. On May 24, 2013, DPH issued the regulations under the medical marijuana statute, 105 CMR 725.000.

 6. On May 15, 2015, DPH updated its “Guidance for Registered Marijuana Dispensaries Regarding Background Checks.” (Ex. 10.)[[4]](#footnote-4) (This decision calls the document “the background check guidance.”)

 7. According to the background check guidance itself, its purpose is to “update[] policies.” It “establishes guidelines and sets expectations for DPH to follow….” (Ex. 10.) Thus, it is both a policy and a guideline; DPH used the terms interchangeably.

 8. DPH intended the background check guidance to supplement its regulations on issues that it had not considered when it promulgated regulations. (Geoghegan testimony.)[[5]](#footnote-5)

 9. The background check guidance includes a section on “Determination of Suitability.” The section discusses disqualifying a person from registering as a dispensary agent or associating with a Registered Marijuana Dispensary (RMD). The section largely consists of two components: Table A,[[6]](#footnote-6) which lists disqualifying offenses; and lettered items, not in table form, called “Review of Non-Disqualifying Offenses or Information.” (Ex. 10.)

 10. Table A disqualifies a person from registering as a dispensary agent or associating with an RMD if he or she has been convicted of:

A. felonies:

i. for drugs;

ii. for a “weapons violation involving narcotics”[[7]](#footnote-7);

iii. involving “violence against a person”; or

iv. “involving theft or fraud.”

 There is no time limit on disqualification for these felonies. (Ex. 10.)

 B. narcotics non-felonies, and it has been

[l]ess than 5 years from disposition[[8]](#footnote-8) or less than 5 years from release of supervision on a possession charge,[[9]](#footnote-9) whichever is later.

(Ex. 10.)

C. non-felony narcotics distribution offenses. There is no time limit on disqualification. (Ex. 10.)

 D. non-felony “[w]eapons violation[s] involving narcotics.”[[10]](#footnote-10)

 11. If a conviction does not appear in Table A, the background check guidance provides that DPH or an RMD “shall consider whether the offense or information renders the subject unsuitable” from registering as a dispensary agent or associating with an RMD. That is, DPH or an RMD may disqualify a person for things that do not appear in Table A “on the basis of the following factors:”

a. time since the conviction, pending offense, or incident;[[11]](#footnote-11)

b. age of the candidate at the time of the offense or incident;

c. nature and specific circumstances of the offense or incident;

d. sentence imposed and length of any period of incarceration, if criminal;

e. penalty or discipline imposed, including damages awarded, if civil or administrative;

e.[[12]](#footnote-12) relationship of the offense or incident to the nature of the work to be performed;

f. number of offenses or incidents;

g. whether offenses or incidents were committed in association with a dependence on drugs or alcohol, from which the candidate has since recovered;

h. if criminal, any relevant evidence of rehabilitation or lack thereof, such as information about compliance with conditions of parole or probation, including orders of no contact with victims and witnesses; and the individual’s conduct and experience since the time of the offense, including but not limited to educational or professional certifications obtained; and

i. any other relevant information, including information submitted by the subject, or requested by DPH.[[13]](#footnote-13)

12. In deciding whether to grant registration under the medical marijuana program, DPH views the “whole picture,” the “totality,” of deciding whether an applicant is suitable. (Geoghegan testimony.)

13. DPH has a policy that dispensary agents must be honest. (Geoghegan testimony.)

 Mr. Willis and the criminal justice system

 14. On December 7, 1998, police in Franklin arrested Mr. Willis for possessing marijuana and possessing it with intent to distribute it. (Ex. 7, p. 3.)

 15. According to a Franklin Police Department report, dated December 8, 1998:

 A. Two Franklin police officers had been receiving information that Mr. Willis and another person had been selling marijuana at Franklin High School and at a residence, 474 Maple Street, Franklin. A confidential source told the police that he had personally bought marijuana from Mr. Willis.

 B. On December 7, 1998, at 474 Maple Street, Franklin, an undercover law enforcement officer bought marijuana in a hand-to-hand transaction from a person whose description matched Mr. Willis.[[14]](#footnote-14)

 C. As soon as the undercover officer left, various Franklin police officers entered 474 Maple Street, Franklin. On the second floor, they entered a room with approximately 10 youths present, at least some of whom were drinking beer from cans. The room smelled of freshly burnt marijuana. On a coffee table, the officers saw a small pile of marijuana, two boxes of sandwich baggies, miscellaneous empty baggies with the corners ripped off, and a large amount of money.

 D. When the youths saw the officers, some youths began hiding marijuana and money in their pockets, and knocking the marijuana off the table.

 E. During a search of 474 Maple Street, Franklin, police officers located, among other things, two notebooks listing names, prices, money owed, and money received.

(Ex. 7, p. 8.)[[15]](#footnote-15)

 16. On February 15, 1999, three charges against Mr. Willis were disposed of in Wrentham District Court. The charges were for possessing alcohol while younger than 21 years; possessing marijuana; and violating G.L. c. 94C, § 32C. (The first two charges are not at issue in this appeal.)

 17. G.L. c. 94C, § 32C makes it a crime for a person to “manufacture[], distribute[], dispense[] or cultivate[], or possesses with intent to manufacture, distribute, dispense or cultivate” marijuana.

 18. The criminal docket in Mr. Willis’s case did not specify whether Mr. Willis was charged with manufacturing, distributing, dispensing, or cultivating marijuana; possessing it with intent to do any of these things; or any combination of those crimes. The docket simply read: “Mfg./Distrib./Cultivate Class D. Sub. c94C s32C.” (Ex. 7, p. 1)(all capitals reduced to some lower case). Nonetheless, Mr. Willis *was* charged with distribution of marijuana. (Stipulation.)

 19. The three charges against Mr. Willis were disposed of with a continuation without a finding (CWOF) for two years, until February 15, 2001. (Ex. 7, p. 1.)

 20. The conditions for Mr. Willis’s CWOF – in effect, the terms of his probation – included that he not use illicit drugs and that he receive random drug testing. (Ex. 7, p. 1; Ex. 11.)

 21. On February 8, April 11, and May 3, 2000, Mr. Willis tested positive for THC, an ingredient of marijuana. (Ex. 12; Geoghegan testimony.)

 22. On April 18, 2000, Mr. Willis was notified of two probation violations: failing to attend a weekly Norcap Group[[16]](#footnote-16); and testing positive for THC on February 8 and April 11, 2000.[[17]](#footnote-17) A hearing was scheduled for May 10, 2000. (Ex. 13.)

 23. On May 10, 2000, Mr. Willis was found in violation of probation. His CWOF was changed to a guilty finding and he was placed on probation for 18 months, until November 9, 2001. (Ex. 7, p. 11.)[[18]](#footnote-18)

 Mr. Willis’s application to be a dispensary agent

 24. In 2015, Mr. Willis applied to be a dispensary agent with NETA. (Stipulation.)

 25. On July 28, 2015, a Criminal Offender Record Information (CORI) report was conducted of Mr. Willis for NETA. It reported his three criminal convictions, including a misdemeanor for “Mfg Class D Cont Sub.”[[19]](#footnote-19) (Ex. 5, p. 4)(all capitals reduced to some lower case). Thus, it mentioned manufacturing, but not distribution.

 26. On August 6, 2015, Mr. Willis emailed Ms. Eastwick, apparently in response to an inquiry from her. The subject line was “Background check.” The substantive portion of the email follows:

When I was 17[[20]](#footnote-20) and very much a teenager, I was at a house with some of my friends. I was young, irresponsible, and immature. I was engaging in underage drinking and was in the presence of others that were engaging in other activities as well.[[21]](#footnote-21) I was in the wrong place at the...wrong time,[[22]](#footnote-22) yet was also not doing the right thing myself. The police arrived and noted that there were empty beer cans,[[23]](#footnote-23) and marijuana in our present [sic], as well as a small plant that was found in the house.[[24]](#footnote-24) I along with the others present were charged with possession of [a] class D substance, a possession manufacturing charge[[25]](#footnote-25) –due to the plant-[[26]](#footnote-26) and minor in possession of alcohol. I admitted to[] my mistake and took responsibility for my actions and for the charges. I am 34 years old and haven’t been in trouble since.[[27]](#footnote-27)

(Ex. 9.)[[28]](#footnote-28)

 27. Also on August 6, 2015, NETA submitted to DPH a “Background Check Report: Review of Non-Disqualifying Offenses of Information.” (Ex. 6.) The format of NETA’s report to DPH followed that of the background check guidance with its lettered factors, letters “a” through “i,” with two factors lettered “e.” (Ex. 10.)

 28. NETA’s report revealed that it wanted to hire Mr. Willis as a cultivation team member. It reported his misdemeanor convictions for being a minor in possession of alcohol; possessing a Class D substance; and manufacturing a Class D substance.” (Ex. 6.)

 29. NETA’s report stated: “a. The offense in question was 17 years ago.” (Ex. 6.) This statement was misleading, although NETA did not know it or intend it to be.

 30. NETA’s report stated: “b. The candidate was 17 at the time of the offense....” (Ex. 6.) Strictly speaking, this was correct. The report did not mention that Mr. Willis was 18 or 19 when he tested positive for drugs and had his probation revoked. This statement was misleading, although NETA did not know it or intend it to be.

 31. NETA’s report stated:

c. The nature of the incident was...a possession of alcohol as a minor and possession and manufacturing of Marijuana while the candidate was a youth and was disposed on the occurrence of his 17th birthday.

(Ex. 6.) This statement was misleading, incorrect, and false because it did not reveal that Mr. Willis’s conviction was for distribution of marijuana. NETA did not know that the statement was misleading, incorrect, and false, or intend it to be. Mr. Willis’s criminal case was not disposed of on his seventeenth birthday, but that is a minor inaccuracy.

 32. NETA’s report to DPH did not mention Mr. Willis’s conviction for distributing marijuana because the CORI report and Mr. Willis’s email did not mention it. (Eastwick testimony.)

 33. Had Ms. Eastwick known about Mr. Willis’s conviction for distributing marijuana, she probably would have considered him disqualified from applying for registration to be a dispensary agent. (Eastwick testimony.)

 34. NETA’s report stated: “f. There were no other offenses or incidents since the occurrence of this offense.” (Ex. 6.) This statement was misleading, incorrect, and false, because Mr. Willis later tested positive for drugs and had his probation revoked. NETA did not know that the statement was misleading, incorrect, or false, or intend it to be.

 35. NETA’s report stated there was no evidence that Mr. Willis had not been rehabilitated. (Ex. 6.)[[29]](#footnote-29) The information was misleading, incorrect, and false, because Mr. Willis later tested positive for drugs, demonstrating that he was not rehabilitated from his use of drugs or rehabilitated regarding his compliance with the demands of the criminal justice system. NETA did not know that this statement was misleading, incorrect, and false or intend it to be.

 36. Mr. Willis did not directly submit to DPH his email to Ms. Eastwick or any misleading, incorrect, false, or fraudulent information. Mr. Willis did not directly submit any information to DPH.

 37. NETA did not submit to DPH Mr. Willis’s email to Ms. Eastwick.

 38. The source of the misleading, incorrect, or false information in NETA’s report to DPH was Mr. Willis’s email, the CORI report, or both.

 39. Had DPH known about Mr. Willis’s conviction for distributing marijuana, it would not have approved his registration. (Geoghegan testimony.)

 40. In August 2015, Mr. Willis received registration as a dispensary agent, and NETA hired him as a cultivation team member. (Stipulation.)

 41. On or about September 11, 2016, DPH audited background check documents at NETA’s facility in Franklin. (Stipulation.)

 42. DPH’s audit led to its obtaining the court docket for and police report involving Mr. Willis, which in turn led to its actions against him. (Stipulation.)

43. On October 1, 2015, DPH summarily suspended Mr. Willis’s registration as a medical marijuana dispensary agent and proposed to revoke his registration. (Ex. 1.)

 44. On October 16, 2015, Mr. Willis appealed. (Ex. 3.)

**Discussion**[[30]](#footnote-30)

If cases exist explaining how to discern the will of the people in enacting legislation through initiatives and referenda, I have been unable to locate them. However, “[t]he primary source of legislative intent is the plain language of the statute.” *Boston Retirement Board v. Contributory Retirement Appeal Board*, 441 Mass. 78, 81 (2004)(citation omitted). Therefore, the primary source of the intent of the 1,914,747 voters who approved the medical marijuana statute, www.sec.state.ma.us/ele/elebalm/balmresults.html#year2012, must also be the plain language of the statute.

 The “[p]urpose and [i]ntent” of the medical marijuana statute was that

there should be no punishment under state law for qualifying patients, physicians and health care professionals, personal caregivers for patients, or medical marijuana treatment center agents for the medical use of marijuana....

St. 2012, c. 369, § 1. Other language in the medical marijuana statute indirectly and subtly reveals the will of the people. The statute does not explicitly assign responsibility to the Department of Public Health to enforce it; however, by assigning various functions to DPH, the statute assumes that DPH will enforce it. And DPH is of course concerned with the public health. *See e.g.*, G.L. c. 17, § 4.

 Therefore, by enacting the medical marijuana statute, the people intended, not only that the medical marijuana program would entail “no punishment under state law” for participants in the medical marijuana program, St. 2012, c. 369, § 1, but that the program be implemented in a way that protects the public health.

 The statute authorized DPH to issue regulations in specific areas: 60-day supplies of marijuana for qualifying patients, St. 2012, c. 369, § 8; nonprofit medical marijuana treatment centers, and registration of dispensary agents, hardship cultivation, and patients and caregivers. St. 2012, c. 369, § 11. This was not a case of “*expressio unius est exclusio alterius*, the expression of one thing is the exclusion of another,” *Aquino v. Civil Service Commission*, 34 Mass. App. Ct. 538, 541 (1993)(citations omitted) – that the people intended to authorize DPH to issue regulations only in specified areas.

 The people’s intent to authorize DPH to issue detailed regulations implementing all aspects of the medical marijuana program can be discerned in three ways. One, the statute assigned DPH to implement the medical marijuana statute, and implementation implies issuing regulations. (DPH’s having *implici*t authority to issue regulations is not the same thing as having *inherent* authority, which DPH does not have and no administrative body has. *Telles v. Commissioner of Insurance*, 410 Mass. 560, 565 (1991).) Two, some language in the statute implied that DPH would issue regulations, and practically required it. For example, the statute reads in part:

Section 14. Penalties for Fraudulent Acts.
(A) The department, after a hearing, may revoke any registration card issued under this law for a willful violation of this law....

St. 2012, c. 369, § 14. The absence of a definition of “[f]raudulent [a]cts” – the definition section contains no such definition, St. 2012, c. 369, § 2 – implicitly called on DPH to issue regulations. And it did so. *E.g.*, 105 CMR 725.425.

 And three, the medical marijuana statute consists of broad brush strokes. That too implies that DPH was going to fill in the gaps, major and minor, with regulations. And it did so. The statute is silent about sanitary conditions and security of marijuana dispensaries, but DPH has added extensive requirements about these and other operational issues for marijuana dispensaries. *E.g.*, 105 CMR 725.105 and 110 (*12 pages* of regulation).

 As the Supreme Judicial Court has ruled:

Frequently, administrative agencies are charged, implicitly or explicitly, with the task of crafting regulations that are more detailed than statutes and tailored to more situations than the legislation specifies. [Citation omitted.] In examining the regulatory response to statutory silence or ambiguity, it is unimportant whether we would have come to the same interpretation of the statute as the agency. [Citation omitted.]....Statutory silence, like statutory ambiguity, often requires that an agency give clarity to an issue necessarily implicated by the statute but either not addressed by the Legislature or delegated to the superior expertise of agency administrators. [Citation omitted.] Our deference is especially appropriate where, as here, the statutes in question involve an explicit, broad grant of rule-making authority.

*Goldberg v. Board of Health of Granby*, 444 Mass. 627, 633-34 (2005). The “broad grant of rule-making authority,” *id.* at 634, is implicit here, whereas it was explicit in *Goldberg*, but the point remains valid.

[T]the deference given to the board’s interpretation of its enabling statute is never greater than where, as here, the board must interpret a legislative policy which is only broadly set out in the governing statute.

*Worcester Sand and Gravel Co. v. Board of Fire Prevention Regulations*, 400 Mass. 464, 466 (1987)(citation omitted).

 In general, “a properly promulgated regulation has the force of law, [citation omitted,] and must be accorded all the deference due to a statute.” *Borden, Inc. v. Commissioner of Public Health*, 388 Mass. 707, 723 (1983)(citation omitted), *cert. denied*, 464 U.S. 936 (1983). A person against whom a rule is enforced may try to prove “the absence of any conceivable ground upon which [the rule] may be upheld.” *Id.* at 722 (citation and internal quotation marks omitted; bracket in the original). See also *Garry v. Board of Public Accountancy*, 394 Mass. 118, 126 (1985) in light of G.L. c. 30A, § 14(7)(b). However, I need not explore the slight possibility left open in *Borden* because the medical marijuana statute authorized DPH to issue the regulations at issue in this appeal, and there is no allegation that DPH promulgated them improperly.

 Another related way to view the regulations as proper is that they are “rationally related to…statutory goals.” *American Family Life Assurance Co. v. Commissioner of Insurance*, 388 Mass. 468, 477 (twice) (1983), *cert. denied*, 464 U.S. 850 (1983).

 As I’ve discussed, sometimes “the expression of one thing is the exclusion of another,” *Aquino*, 34 Mass. App. at 541. One must do one’s best in deciding whether that is so in a particular circumstance. My sense is that the medical marijuana statute consists of broad brush strokes, as I’ve said, and that the disqualification of a person “who has been convicted of a felony drug offense” from being a dispensary agent, St. 2012, c. 369, § 12(D), is a floor, not a ceiling. I surmise, and that’s the best I can do, that the people of Massachusetts did not intend a felony conviction for a drug offense to be the only disqualifying factor for a dispensary agent.

[A] regulation...need not necessarily find support in a particular section of [the enabling statute]; it is enough if it carries out the scheme or design of the chapter and is thus consistent with it.

*Entergy Nuclear Generation Company v. Department of Environmental Protection*, 459 Mass. 319, 331 (2011)(citation and quotation marks omitted; brackets in the original). An enabling statute “need not mention” topics “explicitly…to encompass them within the department’s broad regulatory mandate.” *Id.*

 When DPH issued its regulations, it added another factor: A dispensary agent must be older than 21. 105 CMR 725.030(A)(1). I doubt that anyone would challenge DPH’s authority to add that requirement. When DPH issued its regulations, it added requirements for dispensary agents to obtain and maintain their registration. The medical marijuana statute does not explicitly authorize any of the provisions in 105 CMR 725.425, but DPH was authorized to issue them nonetheless.

 When DPH issued its background check guidance, it added many more disqualifying factors. DPH could have added those factors to the regulations, but did not. That does not mean that DPH cannot enforce the guidance. In *Boston Retirement Board v. Contributory Retirement Appeal Board*, the Public Employees Retirement Administration Commission issued a memorandum – that is, not a regulation – interpreting a statute. The Supreme Judicial Court upheld the memorandum’s interpretation as reasonable. 441 Mass.at 80, 82. The guidance does “not carry the force of law” but is still “entitled to substantial deference.” *Global NAPs, Inc. v. Awiszus*, 457 Mass. 489, 497 (2010).

 The circumstances here are not of a new agency interpreting a new statute or its own new regulations. The circumstances here are of an experienced agency interpreting a new statute and drawing on its vast experience in protecting the public health in numerous areas to protecting the public health in a new area. DPH deserves deference for its “expertise and experience,” *MCI Telecommunications Corp. v. Department of Telecommunications and Energy*, 435 Mass. 144, 150 (2001).

Proceeding under 105 CMR 725.425(A)(1) (authorizing revocation of a dispensary agent’s registration because of “[s]ubmission of misleading, incorrect, false, or fraudulent information in the application”)

 DPH may temporarily suspend and may revoke Mr. Willis’s registration under this regulation. The regulation does not identify *whose* submission might be “misleading, incorrect, false, or fraudulent information” for the regulation to apply. In the case of applications to become dispensary agents, individual people do not apply; dispensaries apply for them. 105 CMR 725.030(A). Thus, if Mr. Willis submitted misleading, incorrect, false, or fraudulent information to NETA, and NETA submitted it in the application for Mr. Willis’s registration, DPH could revoke his registration on the basis of NETA’s act, not his. If NETA submitted misleading, incorrect, false, or fraudulent information to DPH for Mr. Willis’s registration, even if Mr. Willis were not responsible for or aware of the information, DPH could revoke his registration.

 NETA’s background report contained misleading, incorrect, and false information. Because NETA did not know that the information was misleading, incorrect, or false, or intend it to be, the information was not fraudulent.

 DPH may not proceed against Mr. Willis under 105 CMR 725.425(A)(1) for the email that he sent to Ms. Eastwick. During the hearing and in its post-hearing brief, DPH suggested that because the email was in NETA’s files and because DPH audited NETA’s files, Mr. Willis violated 105 CMR 725.425(A)(1). That is not what the regulation provides.

 As the Appeals Court has held:

In reviewing an agency’s interpretation of applicable regulations, “[w]e interpret a regulation in the same manner as a statute, and according to traditional rules of construction. Thus, we accord the words of a regulation their usual and ordinary meaning. We ordinarily accord an agency’s interpretation of its own regulation considerable deference. However, this principle is deference, not abdication, and courts will not hesitate to overrule agency interpretations when those interpretations are arbitrary, unreasonable, or inconsistent with the plain terms of the regulation itself.” *Warcewicz v. Department of Envtl. Protection,* 410 Mass. 548, 550, 574 N.E.2d 364 (1991) (citations omitted). Moreover, our judicial deference “may be tempered” when (as in the present case) the agency interpretation at issue is not one of long-standing or consistent application. *United States Gypsum Co.* v. *Executive Office of Envtl. Affairs,* 69 Mass.App.Ct. 243, 249 n. 16, 867 N.E.2d 764 (2007).

*Beverly Port Marina, Inc. v. Commissioner of Department of Environmental Protection*, 84 Mass. App. Ct. 612, 620–21 (2013)(footnote omitted).

 DPH’s interpretation does not deserve deference for two reasons. Its interpretation is inconsistent with the plain terms of the regulation itself. And its interpretation is not long-standing. This case may be the first time that DPH has interpreted “[s]ubmission of…information in the application” to DPH under 105 CMR 725.425(A)(1) – and repeated use of the word “submission” in 105 CMR 725.000 demonstrates that it means “submission to DPH” – to mean submission of information to *other* than DPH or to a place where DPH is authorized to find it. If DPH has previously interpreted 105 CMR 725.425(A)(1) to govern submission of information other than to DPH, it is not in the record.

Proceeding under 105 CMR 725.425(A)(2) (authorizing revocation for violating the requirements of the medical marijuana statute or the DPH regulations implementing it)

105 CMR 725.425(A)(1) was violated, as discussed above. If DPH wishes to temporarily suspend and to revoke Mr. Willis’s registration under 105 CMR 725.425(A)(2) because, in turn, 105 CMR 725.425(A)(1) was violated, it may do so.

Proceeding under 105 CMR 725.425(E) (authorizing revocation on “any other ground that serves the purposes” of the medical marijuana statute or the DPH regulations implementing it).

 As I’ve discussed, one purpose of the medical marijuana statute is to protect the public health. DPH issued 105 CMR 725.425(A)(1) to protect the public health. Therefore, enforcing 105 CMR 725.425(A)(1) serves a purpose of the medical marijuana statute. If DPH wishes to temporarily suspend and to revoke Mr. Willis’s registration under 105 CMR 725.425(E) because, in turn, 105 CMR 725.425(A)(1) was violated, it may do so.

 DPH also issued the background check guidance to protect the public health. Therefore, enforcing the background check guidance serves a purpose of the medical marijuana statute. If DPH wishes to temporarily suspend and to revoke Mr. Willis’s registration under 105 CMR 725.425(E) because the background check guidance disqualifies Mr. Willis, it may do so.

 For DPH to bar someone from the medical marijuana program because doing so serves the purposes of the medical marijuana statute or DPH’s regulations is potentially overbroad, but I do not reach that possibility in this decision.

 Proceeding under the background check guidance

DPH may temporarily suspend and may revoke Mr. Willis’s registration, but not directly under the background check guidance.

 Although I do not doubt that DPH could have proceeded against Mr. Willis – and may proceed against other dispensary agents and applicants to be dispensary agents – directly under the background check guidance, it did not do so in its notices of agency action. (Exs. 1 and 2.) DPH knew that I was concerned that Mr. Willis know under what authority DPH was proceeding against him. In other words, I had put DPH on notice that it must put Mr. Willis on notice. It did not do so with the background check guidance.

Proceeding under DPH policy or policies

 “Like any administrative agency,” DPH “may, at its discretion, announce and apply new rules and standards in an adjudicatory proceeding.” *Town of Brookline v. Commissioner of Department of Environmental Quality Engineering*, 387 Mass. 372, 379, (1982)(citing *SEC v. Chenery Corp.,* 332 U.S. 194, 202–204 (1947).)

 “Policies announced in adjudicatory proceedings may serve as precedents for future cases.” *Arthurs v. Board of Registration in Medicine*, 383 Mass. 299, 313(1981)(citations omitted). I do not read too much into the word “future.” A policy announced in one adjudicatory proceeding may generally serve as authority to rule in that proceeding, not only in future proceedings.

[T]he choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency.

*Id.* (citations and internal quotation marks omitted).

 An agency’s decisions through adjudication “are entitled to deferential review.” *Board of Appeals of Woburn v. Housing Appeals Committee*, 451 Mass. 581, 593 (2008). However, “the application of new principles or standards announced in a decision may be so unfair as to amount to an abuse of discretion.” *Town of Brookline*, 387 Mass. at 379 (citation omitted). There was no abuse of discretion in that case. *Id.*

 DPH made it clear during the hearing that it has a policy that dispensary agents and applicants to be dispensary agents must be honest. It generally may enforce this policy. It considered Mr. Willis’s email to NETA to demonstrate his dishonesty, and I agree. However, DPH may not enforce this policy against Mr. Willis.

 The record does not reveal when or how DPH adopted or enunciated this policy. Ms. Geoghegan’s testimony may or may not have been the first time that DPH has enunciated it in public. In any event, as far as I know, DPH did not notify Mr. Willis before the hearing that it would be proceeding against him under this policy. It did not do so in its notices of agency action. (Exs. 1 and 2.) To proceed against Mr. Willis under this policy would be unfair. *Town of Brookline*, 387 Mass. at 379.

(My preference for how much notice an agency must give to a party about what authority it is proceeding under may or may not be higher than what the U.S. and Massachusetts Constitutions require. U.S. Const., amend. XIV; Mass. Const., Pt. I, art. XII. Thus, it is possible that this decision is not authority or precedent in future cases on the issue of notice. In any event, I’m not going to lower, during this case, the amount of notice that DPH must give Mr. Willis, whether about a regulation, guidance, or policy.)

 DPH may temporarily suspend and may revoke Mr. Willis’s registration, but not under this policy.

 DPH did not make it clear during the hearing that it was trying to proceed against Mr. Willis under other policies, as opposed to its interpretations of existing regulations, such as that submitting misleading, incorrect, false, or fraudulent information to an RMD constitutes submitting it to DPH if DPH may audit the RMD’s files.

**Conclusion and Order**

 DPH may temporarily suspend and may revoke Mr. Willis’s registration as a dispensary agent under 105 CMR 725.425(A)(1), (A)(2), and (E) because the application submitted on his behalf contained misleading, incorrect, and false information.

 DIVISION OF ADMINISTRATIVE LAW APPEALS

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 Kenneth Bresler

 Administrative Magistrate

Dated: September 19, 2016

1. At the hearing on June 28, 2016, DPH attempted to reopen this issue by presenting testimony about DPH’s interpretation of 105 CMR 725.425(A)(4). In its post-hearing brief, DPH continued to argue this issue. [↑](#footnote-ref-1)
2. DPH later moved for reconsideration, which I denied. In its brief, DPH stated:

In accordance with...801 CMR 1.01(11)(c)(1), the Department objected to the Magistrate’s Order and Denial. The respondent did not respond to the Department’s objection.

The significance of this paragraph, including Mr. Willis’s failure to respond, is unclear. 801 CMR 1.01(11)(c)(1) covers tentative decisions, not rulings on motions. [↑](#footnote-ref-2)
3. The statute, regulations, and guidance for the medical marijuana program provide background for the other facts of this decision. [↑](#footnote-ref-3)
4. When DPH first issued this document is not in evidence. [↑](#footnote-ref-4)
5. Ms. Geoghegan did not know why DPH had not updated its regulations instead of issuing the guidance. [↑](#footnote-ref-5)
6. There is no Table B, and so on. [↑](#footnote-ref-6)
7. Presumably, Table A does not intend to distinguish between drugs and narcotics. [↑](#footnote-ref-7)
8. Presumably, this means “disposition of the case,” and presumably conviction. [↑](#footnote-ref-8)
9. This provision apparently does not apply to *non*-possession non-felonies. [↑](#footnote-ref-9)
10. Another column of Table A indicates that “[w]eapons” are “[f]irearms.” It is unclear what a weapons violation involving narcotics means. That a person was convicted of a weapons offense and narcotics offense for the same transaction? Presumably, there is no time limit on disqualification. [↑](#footnote-ref-10)
11. “Pending offense” presumably means an alleged offense that is still pending in court. The background check guidance provides for disqualifying a person for bases other than convictions: pending offenses and incidents. As “d” and the first “e” in this list of factors indicate, an incident can refer to a non-criminal incident. [↑](#footnote-ref-11)
12. The list of factors has two “e”s. [↑](#footnote-ref-12)
13. Notice how vague this factor is. The background check guidance provides that DPH may disqualify a person from registering as a dispensary agent or associating with an RMD on the basis of “relevant information.” It is not that DPH has *discretion* to *waive* disqualifying offenses or incidents based on relevant information. It is that DPH can decide that an offense or incident that is not categorically disqualifying should disqualify a person, based on relevant information. [↑](#footnote-ref-13)
14. Mr. Willis was never identified as the seller. Although DPH has asserted that Mr. Willis was involved in a hand-to-hand marijuana sale (Geoghegan testimony, DPH brief), that is double hearsay. A Trooper Dziadosz, who did not testify at the hearing, reported the hand-to-hand transaction to Sergeant Scott L. Heagney, who wrote the report and also did not testify. In addition, Trooper Dziadosz did not say that he bought marijuana from Mr. Willis. He described the seller, and Sergeant Heagney said that the description of the seller matched Mr. Willis. Thus, this is hedged double hearsay. DPH also states without qualification that the distribution charge was related to the hand-to-hand sale. That is a reasonable assumption, but because Mr. Willis did not go to trial, it is unknown whether Mr. Willis was charged because of the hand-to-hand sale and/or because of the accoutrements of distribution: the logs of names and money, and the baggies, which I discuss below. [↑](#footnote-ref-14)
15. This entire police report is hearsay. I do not find as facts the contents of the report. However, it is useful background to discuss the position of DPH, which relies on the report. [↑](#footnote-ref-15)
16. The following is not in evidence: what Norcap stands for; that Mr. Willis was ever ordered to attend a group; and what constituted his alleged failure to attend. [↑](#footnote-ref-16)
17. The third positive test result for THC was on May 3, 2000, after the notice of probation violations was issued. It is unclear from the record if the third positive test for THC was ever the subject of adjudication. [↑](#footnote-ref-17)
18. Much of the docket, which is handwritten and contains abbreviations that went unexplained in the record, is hard to decipher. [↑](#footnote-ref-18)
19. Presumably “Cont Sub” is “controlled substance.” [↑](#footnote-ref-19)
20. This is strictly accurate but misleading. Mr. Willis was arrested when he was 17. He was found in violation of probation one year and five months later, when he was 18 or 19. [↑](#footnote-ref-20)
21. Mr. Willis did not specify what these “other activities” were. If the Franklin Police Department report was accurate, and I did not make factual findings about its accuracy, the other activities included smoking, possessing, and distributing marijuana. If the report was accurate, Mr. Willis distributed marijuana. [↑](#footnote-ref-21)
22. If the Franklin Police Department report was accurate, then this was misleading because Mr. Willis had been selling marijuana at this address. [↑](#footnote-ref-22)
23. If the police report was accurate, this was incorrect. The police saw open and unopened cans containing beer. [↑](#footnote-ref-23)
24. The police report does not mention a plant. [↑](#footnote-ref-24)
25. This was not precisely the charge against Mr. Willis. And only one other person was charged with this offense. (Ex. 7, p. 3.) [↑](#footnote-ref-25)
26. Since the police report does not mention a plant, I assume that Mr. Willis was charged with distribution *not* because of a plant. [↑](#footnote-ref-26)
27. This was incorrect, because Mr. Willis failed three drug tests, and one year and five months after the CWOF, was found to have violated its terms, and had his CWOF changed to a conviction. Failing drugs tests, violating the terms of a CWOF, and having a CWOF changed to a conviction constitute being in trouble. [↑](#footnote-ref-27)
28. The inaccuracies in this email ultimately do not matter in this decision. I discuss them because DPH’s position is that they matter. [↑](#footnote-ref-28)
29. The corresponding part of the background check guidance, disqualifying factor “h,” refers to “compliance with conditions of…probation” as evidence of rehabilitation. See Factual Finding 11. [↑](#footnote-ref-29)
30. I asked the parties to brief various issues. I read their briefs on these issues, more than once, and the cases they cited. Ultimately, I do not discuss all of the issues because I have decided that some issues were not as pertinent as I had initially suspected they would be, possibly because one party or another persuaded me as much. [↑](#footnote-ref-30)