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DEPARTMENT OF HEALTH

STATE OF FLORIDA
DEPARTMENT OF HEALTH
OFFICE OF MEDICAL MARIJUANA USE

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DELEON'S BROMELIADS, INC.,

PETITIONER

CASE NO.:

v.

THE DEPARTMENT OF HEALTH,
OFFICE OF MEDICAL MARIJUANA USE,

RESPONDENT.

Date: 8/31/18 Time: 3:36
BM. NO. 251
is a certified process server in the Circuit
and County Courts in and for the Second
Judicial Circuit

PETITION FOR FORMAL ADMINISTRATIVE HEARING

Pursuant to §§120.569 and 120.57, Florida Statutes, and Rule 28-106.201, Florida Administrative Code, DeLeon's Bromeliads, Inc. ("DeLeon") petitions the State of Florida, Department of Health ("Department") for a formal administrative hearing to challenge the Department's anticipated denial of DeLeon's request for registration as a Medical Marijuana Treatment Center ("MMTC") and to challenge the scoring methodology that the Department utilized in evaluating DeLeon's request as an unadopted rule. In support of this petition, DeLeon states as follows:

Parties

1. DeLeon is a Florida for profit corporation that operates a nursery in Mt. Dora, Florida. DeLeon is located at 4055 Britt Road, Mt. Dora, Florida 32757. For the purpose of this proceeding, DeLeon's contact information is that of its undersigned counsel.

2. The affected state agency is the Department, located at 4052 Bald Cypress Way, Bin M-01, Tallahassee, Florida, 32399-3265. The Department is the state agency authorized

to administer §381.986, Florida Statutes, and to license and regulate MMTC. See §§381.986 and 385.212, Fla. Stat.

Anticipated Agency Action

3. DeLeon is filing this petition in anticipation of receiving the Department's denial of its Request for Registration as an MMTC dated August 29, 2018.¹ DeLeon bases this anticipated denial on the fact that all other similarly situated applicants have been recently denied. See Dewar Nurseries, Inc. v. Florida Dep't of Health, DOAH Case No. 18-4463; Tree King-Tree Farm, Inc. v Florida Dep't of Health, DOAH Case No. 18-4472; Perkins Nursery, Inc. v. Florida Dep't of Health, DOAH Case No. 18-4473; and Bill's Nursery, Inc. v. Florida Dep't of Health, DOAH Case No. 18-4474. In each of the preceding cases, the Petitioner requested Registration as an MMTC and was subsequently denied by the Department. Each denial letter was identical except for the applicant name.² While DeLeon requested Registration in a letter dated August 29, 2018, the Department has not yet issued the denial. However, based upon each of the similarly situated Petitioners referenced above, denial of DeLeon's request is reasonably anticipated. Each Department issued denial includes a notice of rights and, pursuant to §120.569, Florida Statutes, DeLeon would have a 21- day window in which to file a petition challenging the Agency Action.

Factual Background

4. In 2014, the Florida Legislature passed the Compassionate Medical Cannabis Act of 2014 authorizing the use of low-THC cannabis for certain medical conditions. As part of the act, the Department was required to license five dispensing organizations to cultivate, process, and dispense low-THC cannabis. The Department was to license one Dispensing

¹ DeLeon's Request for Registration is attached as **Exhibit A**.

² Department Denial Letters attached as **Exhibit B**.

Organization in each of the following regions: Northwest Florida, Northeast Florida, Central Florida, Southeast Florida, and Southwest Florida.

5. On or about July 2015, DeLeon timely filed an application with the Department to become a dispensing organization pursuant to §381.986, Florida Statutes (2014). DeLeon's application was deemed complete by the Department and reviewed, evaluated and scored pursuant to the provisions of Florida Administrative Code Rule 64-4.002.

6. DeLeon's application was scored in the Central Region which consisted of eight (8) applicants.

7. Rule 64.4002(5)(a) and (b) Fla. Admin. Code established that a panel of three (3) individuals would review and score the applications submitted in 2015. Specifically, Rule 64.4002(5) (a) and (b) state as follows:

(a) The department will substantively review, evaluate, and score applications using Form DH8007-OCU-2/2015, "Scorecard for Low-THC Cannabis Dispensing Organization Selection" herein incorporated by reference and available at <http://www.flrules.org/Gateway/reference.asp?No=Ref-05461>. The department's substantive review will be completed by:

1. Director of the Office of Compassionate Use,
2. A member of the Drug Policy Advisory Council appointed by the State Surgeon General; and,
3. A Certified Public Accountant appointed by the State Surgeon General.

(b) Each reviewer will independently review each application and score using Form DH8007-OCU-2/2015, "Scorecard for Low-THC Cannabis Dispensing Organization Selection." Scorecards from each reviewer will be combined to generate an aggregate score for each application. The Applicant with the highest aggregate score in each dispensing region shall be selected as the region's Dispensing Organization.

See Rule 64.4002(5) (a) and (b), Fla. Admin. Code.

8. The methodology used by the Department for scoring applications and generating the above discussed aggregate score was not described in the rule or on the scorecard.

9. On November 23, 2015, the Department issued a denial letter to DeLeon.³

10. DeLeon's denial letter stated that DeLeon's application was "substantively reviewed, evaluated, and scored by a panel of evaluators according to the requirements of Section 381.986, Florida Statutes and Chapter 64.4 of the Florida Administrative Code."⁴

11. The November 2015 denial letter issued by the Department did not state DeLeon's score. Rather, the letter stated that DeLeon was denied as it was not the highest scoring applicant in the Central Region.⁵

12. DeLeon did not challenge the Department's denial.

13. In 2016, the Florida Legislature passed chapter 2016-123, Laws of Florida, which amended §381.986 to authorize the use of medical cannabis for certain patients who have terminal conditions. Additionally, Chapter 2016-123 provided a pathway for prior applicants who were not awarded dispensing organization licenses to obtain licenses. The relevant part is as follows:

Section 3. (1) Notwithstanding s. 381.986(5)(b), Florida Statutes, a dispensing organization that receives notice from the Department of Health that it is approved as a region's dispensing organization, posts a \$5 million performance bond in compliance with rule 64-4.002(5)(e), Florida Administrative Code, meets the requirements of and requests cultivation authorization pursuant to rule 64-4.005(2), Florida Administrative Code, and expends at least \$100,000 to fulfill its legal obligations as a dispensing organization; or any applicant that received the highest aggregate score through the department's evaluation process, notwithstanding any prior determination by the department that the applicant failed to meet the requirements of s. 381.986, Florida Statutes, must be granted cultivation authorization by the department and is approved to operate as a dispensing organization for the full term of its original approval and all subsequent renewals pursuant to s. 381.986, Florida Statutes. Any applicant that qualifies under this subsection which has not previously been approved as a dispensing organization by

³ The November 23, 2015 denial letter is attached as **Exhibit C**.

⁴ Id.

⁵ Id.

the department must be given approval as a dispensing organization by the department within 10 days after the effective date of this act, and within 10 days after receiving such approval must comply with the bond requirement in rule 64-4.002(5)(e), Florida Administrative Code, and must comply with all other applicable requirements of chapter 64-4, Florida Administrative Code.

(2) If an organization that does not meet the criteria of subsection (1) receives a final determination from the Division of Administrative Hearings, the Department of Health, or a court of competent jurisdiction that it was entitled to be a dispensing organization under s. 381.986, Florida Statutes, and applicable rules, such organization and an organization that meets the criteria of subsection (1) shall both be dispensing organizations in the same region. During the operations of any dispensing organization that meets the criteria in this section, the Department of Health may enforce rule 64-4.005, Florida Administrative Code, as filed on June 17, 2015.

See. Ch. 2016-123,3, at 17-18, Law of Fla. (2016) (emphasis added).

14. Pursuant to the above language, any applicant that is determined by the Department, the Division of Administrative Hearings, or any court to be entitled to be a dispensing organization under §381.986 shall be licensed as such.

15. Florida voters approved the Florida Medical Marijuana Legalization Initiative (Amendment 2) on November 8, 2016.

16. Amendment 2 formed §29, Article X of the Florida Constitution and authorized the medical use of marijuana for the treatment of debilitating medical conditions.

17. In 2017, §381.986 was amended to implement Amendment 2.

18. These changes to §381.986 directed the Department to license the existing dispensing organizations as MMTCs.⁶ Additionally, a process was established for licensing ten (10) new MMTCs. The relevant language is as follows:

(8) MEDICAL MARIJUANA TREATMENT CENTERS.—

⁶ The license name changed to Medical Marijuana Treatment Center as a result of this legislation.

(a) The department shall license medical marijuana treatment centers to ensure reasonable statewide accessibility and availability as necessary for qualified patients registered in the medical marijuana use registry and who are issued a physician certification under this section.

1. As soon as practicable, but no later than July 3, 2017, the department shall license as a medical marijuana treatment center any entity that holds an active, unrestricted license to cultivate, process, transport, and dispense low-THC cannabis, medical cannabis, and cannabis delivery devices, under former s. 381.986, Florida Statutes 2016, before July 1, 2017, and which meets the requirements of this section. In addition to the authority granted under this section, these entities are authorized to dispense low-THC cannabis, medical cannabis, and cannabis delivery devices ordered pursuant to former s. 381.986, Florida Statutes 2016, which were entered into the compassionate use registry before July 1, 2017, and are authorized to begin dispensing marijuana under this section on July 3, 2017. The department may grant variances from the representations made in such an entity's original application for approval under former s. 381.986, Florida Statutes 2014, pursuant to paragraph (e).

2. The department shall license as medical marijuana treatment centers 10 applicants that meet the requirements of this section, under the following parameters:

a. As soon as practicable, but no later than August 1, 2017, the department shall license any applicant whose application was reviewed, evaluated, and scored by the department and which was denied a dispensing organization license by the department under former s. 381.986, Florida Statutes 2014; which had one or more administrative or judicial challenges pending as of January 1, 2017, **or had a final ranking within one point of the highest final ranking in its region under former s. 381.986, Florida Statutes 2014;** which meets the requirements of this section; and which provides documentation to the department that it has the existing infrastructure and technical and technological ability to begin cultivating marijuana within 30 days after registration as a medical marijuana treatment center.

See §381.986(8)(a), Fla. Stat. (2017) (emphasis added).

19. Pursuant to the above language, there are four requirements for an applicant to obtain an MMTTC license: (1) an application as a dispensing organization which was reviewed, evaluated and scored, and denied; (2) litigation or a final ranking within one point of the highest

final ranking in its region; (3) meets the requirements of §381.986; and (4) provides documentation of the infrastructure and technical and technological ability to begin cultivating within 30 days of registration.

20. On November 1, 2017, Emergency Rule 64ER 17-7 was promulgated by the Department.

21. Emergency Rule 64ER 17-7 attempted to define certain statutory terms. Namely, those terms related to the determination of which 2015 applicants were determined to be “within on point” of the highest ranked regional applicant.

22. On June 15, 2018, Administrative Law Judge Van Laningham, in a Final Order, ruled that the Emergency Rule 64ER 17-7 constituted an invalid exercise of delegated legislative authority.⁷

23. Further, ALJ Van Laningham’s Final Order ruled that the Scoring Methodology utilized by the Department to score the 2015 applications was an unadopted rule in violation of §120.54(1)(a), Florida Statutes.⁸

24. In a letter dated August 29, 2018, DeLeon proved to the Department that DeLeon met each of the statutory criteria to be registered as an MMTC pursuant to the 2017 Law. In that same letter, DeLeon requested to be registered as an MMTC.⁹

25. The Department’s denial of this request for registration is reasonably anticipated as all other similarly situated applicants were provided denial letters.¹⁰

⁷ Nature’s Way Nursery of Miami, Inc. v. Florida Department of Health DOAH Case Number 17-5801RE.

⁸ Nature’s Way Nursery of Miami, Inc. v. Florida Department of Health DOAH Case Number 18-0720RU.

⁹ Exhibit A.

¹⁰ Attached as Exhibit B.

26. It appears that the Department continues to rely on the provision of rule 64ER 17-7 and the 2015 scoring methodology which have been deemed invalid.¹¹

DeLeon's Substantial Interest

27. DeLeon submitted an application in July 2015 that, pursuant to §381.986(8)(a)2.a., Florida Statutes, and chapter 2016-123, Laws of Florida (2016), entitle it to registration as an MMTC. The Department's denial of DeLeon's request for registration adversely impacts DeLeon's substantial interests because it denies DeLeon the opportunity to operate as an MMTC.

28. DeLeon is also substantially affected by the Department's unadopted rule relating to the 2015 scoring methodology. Rule 64ER17-7's determination of which applicants qualify under the "within one point" qualification is based solely on the 2015 scoring methodology. Because the Department's anticipated denial of DeLeon's request for registration is based on the "final rank" assigned to DeLeon's 2015 dispensing organization application, DeLeon is substantially affected by the Department's unadopted rule. Pursuant to §120.57(1)(e)1., Florida Statutes, the Department is precluded from basing its denial of DeLeon's request for registration on an unadopted rule.

Disputed Issues of Material Fact

29. The disputed issues of material fact include, but are not limited to, the following:

- a. Whether the Department properly calculated the final scores for applicants in the central region;
- b. Whether the Department accurately calculated DeLeon's final score as not falling within "one point" of the highest ranking in the Central Region;

¹¹ See. Nature's Way, Case Nos. 17-5801RE and 18-0720RU.

c. Whether the Department exercised an invalid rule in denying DeLeon's request for registration;

d. Whether the Department relied on an unadopted rule in the denial of DeLeon's request for registration;

e. Whether the Department's methodology that resulted in the aggregate scores is an agency statement of general applicability that violates §120.54(1)(a), Florida Statutes; and

f. Whether DeLeon was entitled to licensure as a dispensing organization pursuant to chapter 2016-123, Law of Fla. (2016).

30. DeLeon reserves the right to raise additional disputed issues of material fact and law that may be identified in the future through discovery in this case.

Statement of Ultimate Facts

31. The Department's denial of DeLeon's request for registration relies exclusively on the Department's calculation of DeLeon's score in relation to the highest scoring applicant in the Central Region. Namely, the Department's calculations placing DeLeon's scores as not being within one point was in error. Further, the Department's calculation is unreasonable, arbitrary, capricious, and based upon both an invalid rule and an unadopted rule.

32. The Department's 2015 scoring methodology resulted in "final ranks" that held the Department out as having conducted a quantitative review of the applicants. In actuality, the Department conducted a qualitative review. In other words, rather than score the applicants, the Department only ranked the applicants.

33. The Department's denial of DeLeon's request for registration is based on an invalid rule. Rule 64ER17-7 was deemed invalid.¹²

34. Rule 64ER 17-7 was deemed to be an invalid exercise of delegated legislative authority on the following grounds:

- a. the rule enlarges, modified, or contravenes the law implemented;
- b. the rule exceeds the Department's grant of rulemaking authority; and
- c. the rule is arbitrary and capricious.¹³

35. Likewise, the Department's denial is based upon an unadopted rule, namely, the Department's 2015 scoring methodology. As discussed above, the scoring methodology utilized by the Department in 2015 was deemed to be an unadopted rule.¹⁴

36. An Administrative Law Judge's determination that a rule is invalid is a final agency action which is subject to judicial review pursuant to §120.56(1). The invalid rule becomes void and unenforceable when the time for filing an appeal expires pursuant to §120.56(3)(b). If an administrative appeal is filed, the invalid rule only becomes void and ineffective as of the date the reviewing court's decision becomes final.¹⁵ Accordingly, rule 64 ER17-7 is not void until the conclusion of the Department's appeal.

37. That said, "[i]f an administrative law judge enters a final order that all or part of an unadopted rule violates s. 120.54(1)(a), the agency must immediately discontinue all reliance upon the unadopted rule or any substantially similar statement as a basis for agency action."¹⁶

¹² See. Nature's Way, Case Nos. 17-5801RE and 18-0720RU.

¹³ Id.

¹⁴ Id.

¹⁵ State, Board of Optometry v Florida Society of Ophthalmology, 538 So. 2d. 878 (Fla. 1st SCA 1989).

¹⁶ See. §120.54(4), Florida Statutes.

38. Therefore, the Department is foreclosed upon relying on the 2015 scoring methodology, and rule 64ER 17-7 which incorporated the methodology, as the basis for denying DeLeon's request for registration.

Statutes and Rules

39. The statutes and rules that support the relief requested by DeLeon are: §§120.52, 120.54, 120.56, 120.569, 120.57, and 381.986, Florida Statutes, and chapter 2016-123, Laws of Florida (2016).

Relief

40. DeLeon respectfully requests that the Department refer this matter to the Division of Administrative Hearings for a formal administrative hearing, enter a final order granting DeLeon's request for registration as a MMTC, award DeLeon its reasonable costs and attorney's fees pursuant to §120.595(4), Florida Statutes, and grant DeLeon such further relief as deemed appropriate.

Respectfully submitted this 31st day of August 2018.



Frank Herrera
Florida Bar no. 494801
fherrera@hnewmedia.com
Alana Hoffman
Florida Bar no. 119206
a.hoffman@hnewmedia.com
2001 Broadway Avenue, Suite 560
Riviera Beach, Florida 33404
Tel: 561-841-6380
Fax: 561-619-2111

Certificate of Service

I certify that on this 31st day of August 2018, I served through the use of a Process Server a true copy of this document via hand delivery on the following:

Agency Clerk
Office of the General Counsel
Florida Department of Health
4052 Bald Cypress Way, Bin A-02
Tallahassee, Florida 32399

s/FRANK HERRERA
Frank Herrera

Exhibit A

H New Media Law



2001 Broadway Avenue, Suite 560 • Riviera Beach, Florida 33404 • Phone: 561.841.6380
By Appointment

Only E-Mail: therrera@hnewmedia.com • Web: <http://www.hnewmedia.com>

August 29, 2018

VIA: Certified Mail

Courtney Coppola, Acting Director
Office of Medical Marijuana Use
Florida Department of Health
4052 Bald Cypress Way, Bin M-01
Tallahassee, Florida 32399

RE: DeLeon's Bromeliads Request for Immediate Action on Registration as a Medical Marijuana Treatment Center

Dear Ms. Coppola,

This firm represents DeLeon Bromeliads, Inc. (hereinafter "DeLeon"). This letter is a formal request to register DeLeon as a Medical Marijuana Treatment Center pursuant to §381.986(8)(a)2.a., Florida Statutes.

As you are aware, DeLeon's is a nursery located in Mt. Dora, Florida. In July 2015, DeLeon submitted an application to the Department of Health (hereinafter "DOH") for licensure as a Dispensing Organization in the Central Region. DeLeon's application was reviewed, evaluated, and scored by the DOH. DeLeon's application was denied in November 2015.

DeLeon's Compliant with Section 381.986(8)(a)2.a.

Section 381.986(8)(a)2.a. provides as follows:

- a. As soon as practicable, but no later than August 1, 2017, the department shall license any applicant whose application was reviewed, evaluated, and scored by the department and which was denied a dispensing organization license by the department under former s. 381.986, Florida Statutes 2014; which had one or more administrative or judicial challenges pending as of January 1, 2017, or had a final ranking within one point of the highest final ranking in its region under former s. 381.986, Florida Statutes 2014; which meets the requirements of this section; and which provides documentation to the department that it has the existing infrastructure and technical and technological ability to begin cultivating marijuana within 30 days after registration as a medical marijuana treatment center.

(Emphasis added).

Section 381.986(8)(a)2.a. states that an applicant must meet certain conditions to be licensed as an MMTTC. The applicant must have submitted an application that was reviewed, evaluated, and

scored by the department and that was denied a dispensing organization license by the department pursuant to former section 381.986 (2014). DeLeon meets this condition. A copy of DOH's letter denying DeLeon's application is attached as Exhibit A.

DeLeon's is in compliance with section 381.986 and has the existing infrastructure and technological ability to demonstrate that DeLeon could begin cultivating marijuana within 30 days of registration as an MMTC.

Invalid Scoring Methodology

The final condition, "within one point," is invalid. The final condition relates to the applicant having a final ranking within one point of the highest final ranking in its region under former s. 381.986, Florida Statutes 2014. In June 2018, the scoring methodology that was implemented to determine the rankings was declared invalid. In Nature's Way Nursery of Miami, Inc. v. DOH Case Nos. 17-5801RE and 18-0720RU, Judge Van Laningham ordered that Emergency Rule 64ER17-7(1)(b)-(d) constitutes an invalid exercise of delegated legislative authority. Additionally, the Scoring Methodology constituted an unadopted rule in violation of §120.54(1)(a), Florida Statutes.

The Scoring Methodology violates §120.54(1)(a), Florida Statutes, therefore, the methodology utilized in scoring and ranking the applicants is invalid. Because the Scoring Methodology is invalid it is impossible to determine which applicants qualify as being "within one point" of the highest final ranking in its region under former §381.986, Florida Statutes 2014. Further, because the Scoring Methodology is invalid, it is reasonable to conclude that condition is not relevant as it is impossible to meet this condition as the scores and rankings are also invalid. Allowing an impossible condition to delay DeLeon's registration goes against the spirit of the statute which, is to ensure reasonable statewide accessibility and availability as necessary for qualified patients registered in the medical marijuana use registry.

Because DeLeon met all of the other conditions of section 381.986 (submitted an application to DOH, the application was reviewed, evaluated and scored by the DOH, and was denied by the DOH) and has the infrastructure and technological ability to begin cultivating marijuana within 30 days of registration as an MMTC, DeLeon should be registered as an MMTC in accordance with section 381.986(8)(a)2.a. Florida Statutes. Further delay or denial of this request simply put, goes against the spirit of section 381.986(8)(a) as well the Florida voter's November 2016 decision to legalize medical marijuana in the State of Florida.

For the reasons expressed, DeLeon's respectfully requests that DeLeon be registered as an MMTC in accordance with section 381.986(8)(a)2.a. Florida Statutes.

Any questions relating to this matter should be directed to this firm.

Sincerely,

s/FRANK HERRERA

Frank Herrera
H New Media, LLC.

EXHIBIT A