

STATE OF FLORIDA
DEPARTMENT OF HEALTH

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DEWAR NURSERIES, INC.

Petitioner,

vs.

CASE NO.: _____

FLORIDA DEPARTMENT OF HEALTH,
an executive branch agency of
the State of Florida,

Respondent.

**PETITION FOR FORMAL ADMINISTRATIVE HEARING AND ADMINISTRATIVE
DETERMINATION REGARDING UNADOPTED RULES**

Pursuant to sections 120.569 and 120.57(1), Florida Statutes, and rule 28-106.201, Florida Administrative Code, Dewar Nurseries, Inc. ("Dewar") requests a formal administrative hearing to contest the initial decision by the Department of Health ("Department") to deny Dewar's July 26, 2018 request for registration as a medical marijuana treatment center ("MMTC"). Dewar supports this petition with the following information:

I. Parties

1. The agency affected is the Florida Department of Health, 4052 Bald Cypress Way, Tallahassee, Florida 32399. The Department is the state agency vested with regulatory authority over Florida's medical marijuana program. Art. 10, § 29, Fla. Const.; § 381.986, Fla. Stat. Its duties include licensing Florida businesses to cultivate, process and dispense medical marijuana to qualified patients. § 381.986(8), Fla. Stat.

2. The name and address of the petitioner is Dewar Nurseries, Inc., 625 West Keene Road Apopka, FL 32703. For purposes of this proceeding, contact information for Dewar shall be that of its undersigned counsel.

II. Notice of Agency Action

3. Dewar received a copy of the Department's denial of its request for MMTC registration on July 26, 2018 and, pursuant to the attached notice of rights, had 21 days to file its petition challenging the Department's decision. A copy of the Department's July 26, 2018 denial letter is attached as Exhibit A.

III. Factual Background

4. Dewar is a nursery located in Apopka, Florida that has been in business since 1964. The 32nd largest grower in the nation¹, Dewar delivers more than 6,100,000 units of plants throughout the country annually and operates under the State of Florida's Best Management Practices for container nurseries. It is also one of just a small handful of companies that is certified by both Veriflora and MPS for its sustainability practices.

5. Dewar applied to the Department in 2015 for licensure as a medical marijuana Dispensing Organization ("DO") in the Central Region.² Dewar submitted its application pursuant to section 381.986, Florida Statutes (2014). The Department deemed Dewar's application complete, and it evaluated and scored the application pursuant to the provisions of rule 64-4.002, F.A.C. A panel of three evaluators reviewed all complete applications utilizing a scorecard incorporated by reference in rule 64-4.002.

¹ <https://www.greenhousegrower.com/management/2018-greenhouse-grower-top-100-growers-the-complete-list-and-more/>

² The Department was tasked with licensing one DO in each of five regions throughout Florida: Northwest, Northeast, Central, Southwest, and Southeast.

6. Rule 64-4.002(5)(b), F.A.C. required the Department to combine the three evaluators' scorecards to generate an aggregate score for each application submitted. This subsection stated:

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.

The Department's scoring process and its method for generating an aggregate score were not described in the rule and were not readily apparent from the scorecards.

7. Through a letter sent on November 23, 2015, the Department informed Dewar that it was not selected for licensure. A copy of this 2015 denial letter is attached as Exhibit B. Dewar filed a petition challenging the denial of its application on December 14, 2015. However, that petition was voluntarily dismissed from the Division of Administrative Hearings ("DOAH") and an Administrative Law Judge ("ALJ") entered an order closing the case file on February 22, 2016.

8. The Department's 2015 letter did not provide a "score" for Dewar's application. Rather, it simply stated that Dewar was not the highest scoring applicant and that its application was denied.

9. In fact, as will be discussed later in this petition, the Department did not "score" Dewar's application at all. No quantitative score (such as 100 or 10 for a perfect application, depending on the scale used) was assigned to any of the applications reviewed. Rather, each evaluator simply assigned a qualitative ranking to the applicants in a number of categories³. The

³ In a region with five applicants, the regional ranking of five would go to the highest scoring applicant and the ranking of one would go to the lowest scored applicant. The Central region had seven applicants.

Department averaged the ordinal numbers representing those rankings to achieve the evaluator's ranking, and then averaged the three evaluator's rankings to create the aggregate "score."

10. Knox was the highest ranked applicant in the Central region and was licensed as a DO by the Department.

11. During a special legislative session in 2017, the Florida Legislature amended section 381.986 and required that the Department license 10 new MMTC by October 3, 2017⁴. The Department was directed to award some of those licenses to prior applicants who met certain statutory criteria. The relevant language of the new statute states:

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 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.

§ 381.986(8)(a).2.a., Fla. Stat. (2017) ("MMTC Statute")

12. Pursuant to the MMTC Statute, there are four requirements for prior applicants to be licensed as a MMTC: (1) a prior complete application that was evaluated; (2) litigation or a final ranking "within one point" of the regional licensee; (3) compliance with section 381.986; and (4) ability to cultivate within 30 days.

13. Dewar meets all four of those requirements. Its 2015 application was evaluated, it is in compliance with section 381.986, Florida Statutes, and it remains ready and able to cultivate

⁴ The license designation was changed from DO to MMTC through this legislation.

within 30 days. As will be detailed throughout this petition, Dewar also meets the “within one point” requirement.

14. As of the date of this petition, the Department has yet to issue all 10 of the new statutorily-required MMTC licenses.

15. On September 28, 2017, the Department adopted rule 64ER17-3 in an effort to implement the MMTC Statute . Rule 64ER17-3 incorporated by reference a summary of the aggregate scores and regional rankings of the applicants that applied for DO licenses in 2015 (“Aggregate Scorecard”). This rule deems the aggregate scores to be “final ranks,” reflecting the statutory language and the Department’s conclusion that an applicant would have to be “within one point” of that aggregate score to fit that statutory requirement.

16. Rule 64ER17-3 also detailed the method by which the Department would determine which of the 2015 DO applicants had final ranks that were “within one point” of the licensee in their region. Rule 64ER17-3(1)(d) defined "one point" to mean

one integer (i.e., whole, non-rounded number) carried out to four decimal points (i.e., 1.0000) by subtracting an applicant's final ranking from the highest final ranking in the region for which the applicant applied.

17. The Aggregate Scorecard showed that Knox received a final rank of 5.5458 and Dewar received a final rank of 3.9542, a difference of 1.5916 “points” per Rule 64ER17-3.

18. Nature’s Way Nursery of Miami, Inc. (“Nature’s Way”) filed an application for a MMTC license in the southeast region on October 19, 2017, asserting that it fit the “within one point” criteria. Nature’s Way received a denial letter from the Department, and Nature’s Way filed a petition challenging that action. According to the Aggregate Scorecard, the difference in final rank between Costa (the DO licensee from the southeast region) and Nature’s Way was 1.5167 “points.” Nature’s Way also filed a petition challenging the validity of (amongst other sections) Rule 64ER17-3(1)(d).

19. Subsequent to the filing of the Nature's Way petitions, the Department adopted a new emergency rule that provided a new and expanded interpretation of the "within one point" analysis. Emergency rule 64ER17-7, F.A.C. amended that definition to the following:

For the aggregate score under the column "Final Rank" one integer (i.e., whole, non-rounded number) carried out to four decimal points (i.e., 1.0000) **or for the regional rank under the column "Regional Rank" on whole number difference**, by subtracting an applicant's final ranking from the highest final ranking in the region for which the applicant applied (emphasis added).

20. Thus, an applicant could now meet the "within one point criteria" through either (a) its final rank (as was the case previously) or (2) its regional ranking under this new rule. If, for example, an applicant was 1.5000 "points" below the awardee in its region but finished with a regional rank of four out of five, that applicant would fit the criteria under 64ER17-7.

21. On November 2, 2017, Nature's Way amended its rule challenge petition to include a challenge to the validity of 64ER17-7.

22. On June 15, 2018, ALJ John Van Laningham issued a recommended order concluding that Nature's Way was entitled to receive a MMTC license because its aggregate score was "within one point" of Costa's final rank. Nature's Way Nursey of Miami, Inc. v. Fla. Dept. of Health, DOAH Case No. 18-0721 (June 15, 2018). Although the Aggregate Scorecard does not bear that out, ALJ Van Laningham concluded that the Department's use of rankings instead of quantitative scores for the applicants was invalid and constituted an unadopted rule. He stated that the legislature's goal with the "within one point" section could not be effectuated unless "the quality of [applicants] is expressed in interval data, using numbers that hold quantitative content."

23. ALJ Van Laningham added that there was "no way to fix this problem retroactively," but that he had to find a way to adjudicate the question that Nature's Way raised using the "scores" that were issued. Based upon testimony provided by Dr. Ronald Cornew (an expert in mathematics and statistics) at the hearing, ALJ Van Laningham utilized a formula ("Dr. Cornew's method") that

created a range of possible scores for each applicant. That range constituted the applicant's potential low and high scores, meaning the actual score would be "all values" between those points, as "none of the values [in between] can be excluded." In order to be "within one point" of the highest ranked applicant in a region, a party's score range would have to fall within the range between the regional licensee's low possible score plus one point and its high possible score minus one point (which ALJ Van Laningham deemed the "proximity box"). ALJ Van Laningham used Dr. Cornew's method to calculate the possible score range for Nature's Way, and he determined that its range of scores were within the proximity box for its region. Therefore, he recommended that Nature's Way be granted a license.⁵

24. Utilizing Dr. Cornew's method, Dewar's aggregate score is "within one point" of the proximity box for the Central region. Further, factoring in all of the DO and MMTC licenses that the Department has issued to date, Dewar has the highest aggregate score of any applicant to not yet receive a license.

25. Also on June 15, 2018, ALJ Van Laningham issued a final order holding that several portions of rule 64ER17-7 constituted an invalid exercise of delegated legislative authority. Nature's Way Nursery of Miami, Inc. v. Fla. Dept. of Health, DOAH Case No. 17-5801RE & 18-720RU (June 15, 2018). That final order is currently on appeal at the First District Court of Appeal.

26. On July 19, 2018, Dewar sent a letter to the Department requesting registration as a MMTC in light of ALJ Van Laningham's orders. A copy of that letter is attached as Exhibit C.

27. In its July 26, 2018 letter denying this request, the Department conceded that Dewar's 2015 application had been scored and denied, as required by the MMTC statute. However, the Department stated further that Dewar "did not have a final score within one point of the highest

⁵ The Department ended up issuing Nature's Way a MMTC license via settlement agreement on July 16, 2018. That same day, it issued an agency final order rejecting ALJ Van Laningham's recommended order in total. Clearly, however, this action does not render the conclusions he reached incorrect.

scoring applicant in its region.” The July 26, 2018 letter did not specify what method the Department used to determine whether Dewar’s aggregate score was “within one point” of Knox’s.

IV. Substantial Interests

28. Dewar submitted an application in July 2018 that, pursuant to the MMTC statute, entitles it to registration as a MMTC. The Department's denial of Dewar’s request for registration adversely impacts Dewar’s substantial interests because it denies Dewar the opportunity to obtain a MMTC license.

29. Dewar is also substantially affected by the scoring methodology through which the Department continues to make the “within one point” determination. As stated in the Nature’s Way recommended order, the use of rankings instead of quantitative data contravenes statute and constitutes an unadopted rule. The Department has not promulgated a rule since either the Nature’s Way recommended order or the Nature’s Way final order were issued, and it has not otherwise described a quantitative methodology for making this determination. To the extent that the Department based its decision to deny Dewar’s 2018 request on an unadopted rule, such action was improper and it adversely impacted Dewar.

V. Disputed Issues of Material Fact

30. Disputed issues of material fact include but are not limited to the following:
- a. Whether Dewar’s 2018 request for a MMTC license should have been granted;
 - b. Whether Dewar is the most qualified applicant for a MMTC license that fits the criteria in the MMTC statute;
 - c. Whether Dewar’s final rank was “within one point” of Knox’s final rank.
 - d. Whether “Dr. Cornew’s method” should be utilized to determine whether a 2015 DO applicant was “within one point” of the highest ranked applicant in its region.

e. Whether the Department relied on an invalid rule in denying Dewar's request for registration as a MMTC;

f. Whether the Department relied on an unadopted rule in denying Dewar's request for registration as a MMTC;

g. Whether the Department's method for generating aggregate scores is an agency statement of general applicability that violates section 120.54(1)(a), Florida Statutes.

31. Dewar 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.

VI. Statement of Ultimate Facts

32. The Department's denial of Dewar's request for MMTC registration is founded solely on the Department's calculation of Dewar's final rank relative to Knox's. As stated in the Department's July 2018 letter, it concluded that Dewar did not meet the "within one point" criteria. However, the Department's failure to use quantitative scores in its evaluation of the DO applicants contravened statute and prevented the Department from truly measuring the difference between applicants. Based upon these "scores," the only just and legal way to measure the "within one point" criteria is to use Dr. Cornew's method. Using that measure, Dewar meets the statutory criteria and is the most qualified potential applicant for a MMTC license.

33. Further, the Department's decision to use ranks instead of true quantitative "scores" was an unadopted rule, and the Department may not continue to rely upon it. The rule that was used to arrive at this method (specifically 64ER17-7) is invalid. Although the final order finding it so is currently on appeal, this does not change the fact that the rule is an invalid exercise of delegated legislative authority.

VII. Statutes and Rules

34. The statutes that support the relief requested by Dewar in this proceeding are: sections 120.52, 120.54, 120.569, 120.57, and 381.986, Florida Statutes. The application of the relevant facts to these statutes has been discussed in previous sections of this Petition.

VIII. Relief Requested

35. For the reasons expressed, Dewar respectfully requests that its petition be granted and forwarded to DOAH for the assignment of an administrative law judge to conduct a formal hearing and that, following the hearing, a recommended and final order be entered granting Dewar's request for registration as a MMTC and granting such further relief as may be deemed appropriate or necessary.

Respectfully submitted this 15th day of August, 2018.

/s/William Dean Hall, III
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery on this 15th day of August, 2018, to:

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

/s/William Dean Hall, III