STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

NATURE'S WAY NURSERY OF MIAMI, INC.,

Petitioner,

vs. Case Nos. 17-5801RE
18-0720RU

FLORIDA DEPARTMENT OF HEALTH, AN EXECUTIVE BRANCH AGENCY OF THE STATE OF FLORIDA,

Respondent.
_____/

FINAL ORDER

These cases came before Administrative Law Judge ("ALJ") John G. Van Laningham for final hearing on March 28, 2018, in Tallahassee, Florida.

APPEARANCES

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STATEMENT OF THE ISSUES

The issues to be decided are (i) whether Emergency Rule 64ER17-7(1)(b)-(d) constitutes an invalid exercise of

delegated legislative authority, and (ii) whether Respondent's scoring methodology, which comprises several policies and procedures for determining the aggregate scores of the nurseries that applied for Dispensing Organization licenses in 2015, constitutes an unadopted rule.

PRELIMINARY STATEMENT

On October 19, 2017, Petitioner Nature's Way Nursery of Miami, Inc., filed a petition with the Division of Administrative Hearings ("DOAH") challenging the validity of Respondent Florida Department of Health's Emergency Rule 64ER17-7(1)(b)-(d). This rule challenge was originally consolidated with related matters, but these other cases were resolved by agreement before final hearing, which prompted the entry, on October 31, 2017, of an Order Severing Cases that allowed this rule challenge to go forward alone.

On February 12, 2018, Petitioner filed a petition seeking a determination that Respondent has been applying unadopted rules in violation of section 120.54(1)(a), Florida Statutes. The section 120.56(4) petition was consolidated with the rule challenge (and a related section 120.57(1) proceeding).

The final hearing of the consolidated proceedings was held on March 28, 2018.

At the final hearing, Petitioner called as witnesses: (i) its employee, Beatriz Garces; (ii) the director of

Respondent's Office of Medical Marijuana Use, Christian Bax; and (iii) an expert in mathematics and statistics, Dr. Ronald W. Cornew. Respondent did not present any witnesses. The parties' Joint Exhibits 1 through 5 were admitted into evidence without objection. Petitioner's Exhibits 1 through 15 and 21 through 29 were received in evidence, as were Respondent's Exhibits 1 through 6. Official recognition was taken of Petitioner's Exhibits 16 through 20.

The final hearing transcript was filed on April 9, 2018. Both parties timely submitted proposed final orders, which were due on May 4, 2018, and these were considered in preparing this Final Order.

Unless otherwise indicated, citations to the official statute law of the state of Florida refer to Florida Statutes 2018.

FINDINGS OF FACT

I. BACKGROUND AND PARTIES

1. Respondent Florida Department of Health (the "Department" or "DOH") is the agency responsible for administering and enforcing laws that relate to the general health of the people of the state. The Department's jurisdiction includes the state's medical marijuana program, which the Department oversees. Art. X, § 29, Fla. Const.; § 381.986, Fla. Stat.

2. Enacted in 2014, section 381.986, Florida Statutes (2015) (the "Noneuphoric Cannabis Law"), legalized the use of low-THC cannabis by qualified patients having specified illnesses, such as cancer and debilitating conditions that produce severe and persistent seizures and muscle spasms. The Noneuphoric Cannabis Law directed the Department to select one dispensing organization ("DO") for each of five geographic areas referred to as the northwest, northeast, central, southwest, and southeast regions of Florida. Once licensed, a regional DO would be authorized to cultivate, process, and sell medical marijuana, statewide, to qualified patients.

3. Section 381.986(5)(b), Florida Statutes (2015), prescribed various conditions that an applicant would need to meet to be licensed as a DO, and it required the Department to "develop an application form and impose an initial application and biennial renewal fee." DOH was, further, granted authority to "adopt rules necessary to implement" the Noneuphoric Cannabis Law. § 381.986(5)(d), Fla. Stat. (2015).

4. Accordingly, the Department's Office of Compassionate Use ("OCU"), which is now known as the Office of Medical Marijuana Use, adopted rules under which a nursery could apply for a DO license. Incorporated by reference in these rules is a form of an Application for Low-THC Cannabis Dispensing

Organization Approval ("Application"). See Fla. Admin. Code R. 64-4.002 (incorporating Form DH9008-OCU-2/2015).

5. To apply for one of the initial DO licenses, a nursery needed to submit a completed Application, including the $60,063.00 application fee, no later than July 8, 2015.[1/] See Fla. Admin. Code R. 64-4.002(5).

6. Petitioner Nature's Way of Miami, Inc. ("Nature's Way"), is a nursery located in Miami, Florida, which grows and sells tropical plants to big box retailers throughout the nation. Nature's Way timely applied to the Department in 2015 for licensure as a DO in the southeast region.

II. THE 2015 DO APPLICATION CYCLE

7. These rule challenges arise from the Department's intended denial of Nature's Way's October 19, 2017, application for registration as a medical marijuana treatment center ("MMTC"), which is the name by which DOs are now known. Nature's Way asserts that it qualifies for licensure as an MMTC because it meets the newly created "One Point Condition," which can be satisfied only by a nursery, such as Nature's Way, whose 2015 application for licensure as a DO was evaluated, scored, and not approved as of the enactment, in 2017, of legislation that substantially overhauled the Noneuphoric Cannabis Law. See Ch. 2017-232, Laws of Fla. The current iteration of section

381.986, in effect as of this writing, will be called the "Medical Marijuana Law."

8. The One Point Condition operates retroactively in that it establishes a previously nonexistent basis for licensure that depends upon pre-enactment events. This is analogous to the legislative creation of a new cause of action, involving as it does the imposition of a new duty (to issue licenses) on the Department and the bestowal of a new right (to become licensed) on former applicants based on their past actions. Facts surrounding the inaugural competition under the Noneuphoric Cannabis Law for regional DO licenses are material, therefore, to the determination not only of whether an applicant for licensure as an MMTC under the Medical Marijuana Law meets the One Point Condition, but also of the (in)validity of the emergency rule at issue, and the (il)legality of the agency statements alleged to be rules by definition, upon which the Department relies in applying the One Point Condition. To understand the issues at hand, it is essential first to become familiar with the evaluation and scoring of, and the agency actions with respect to, the applications submitted during the 2015 DO application cycle.

A. The Competitive, Comparative Evaluation

9. As stated in the Application, OCU viewed its duty to select five regional DOs as requiring OCU to choose "the most

dependable, most qualified" applicant in each region "that can consistently deliver high-quality" medical marijuana. For ease of reference, such an applicant will be referred to as the "Best" applicant for short. Conversely, an applicant not chosen by OCU as "the most dependable, most qualified" applicant in a given region will be called, simply, "Not Best."

10. Given the limited number of available DO licenses under the Noneuphoric Cannabis Law, the 2015 application process necessarily entailed a competition. As the Application explained, applicants were not required to meet any "mandatory minimum criteria set by the OCU," but would be evaluated comparatively in relation to the "other Applicants" for the same regional license, using criteria "drawn directly from the Statute."

11. Clearly, the comparative evaluation would require the item-by-item comparison of competing applicants, where the "items" being compared would be identifiable factors drawn from the statute and established in advance. Contrary to the Department's current litigating position, however, it is not an intrinsic characteristic of a comparative evaluation that observations made in the course thereof must be recorded using only comparative or superlative adjectives (e.g., least qualified, qualified, more qualified, most qualified).[2/] Moreover, nothing in the Noneuphoric Cannabis Law, the

Application, or Florida Administrative Code Rule 64-4.002 stated expressly, or necessarily implied, that in conducting the comparative evaluation, OCU would not *quantify* (express numerically an amount denoting) the perceived margins of difference between competing applications. Quite the opposite is true, in fact, because, as will be seen, rule 64-4.002 necessarily implied, if it did not explicitly require, that the applicants would receive scores which expressed their relative merit in interpretable intervals.

12. Specifically, the Department was required to "substantively review, evaluate, and score" all timely submitted and complete applications. Fla. Admin. Code R. 64-4.002(5)(a). This evaluation was to be conducted by a three-person committee (the "Reviewers"), each member of which had the duty to independently review and score each application. See Fla. Admin. Code R. 64-4.002(5)(b). The applicant with the "highest aggregate score" in each region would be selected as the Department's intended licensee for that region.

13. A "score" is commonly understood to be "a number that expresses accomplishment (as in a game or test) or excellence (as in quality) either absolutely in points gained or by comparison to a standard." See "Score," Merriam-Webster.com, http://www.merriam-webster.com (last visited May 30, 2018). Scores are expressed in cardinal numbers, which show quantity,

e.g., how many or how much. When used as a verb in this context, the word "score" plainly means "to determine the merit of," or to "grade," id., so that the assigned score should be a cardinal number that tells how much quality the graded application has as compared to the competing applications. The language of the rule leaves little or no doubt that the Reviewers were supposed to score the applicants in a way that quantified the differences between them, rather than with superlatives such as "more qualified" and "most qualified" (or numbers that merely represented superlative adjectives).

14. By rule, the Department had identified the specific items that the Reviewers would consider during the evaluation. These items were organized around five subjects, which the undersigned will refer to as Topics. The five Topics were Cultivation, Processing, Dispensing, Medical Director, and Financials. Under the Topics of Cultivation, Processing, and Dispensing were four Subtopics (the undersigned's term): Technical Ability; Infrastructure; Premises, Resources, Personnel; and Accountability.

15. In the event, the 12 Topic-Subtopic combinations (e.g., Cultivation-Technical Ability, Cultivation-Infrastructure), together with the two undivided Topics (i.e., Medical Director and Financials), operated as 14 separate

evaluation categories. The undersigned refers to these 14 categories as Domains.

16. The Department assigned a weight (by rule) to each Topic, denoting the relative importance of each in assessing an applicant's overall merit. The Subtopics, in turn, were worth 25% of their respective Topics' scores, so that a Topic's raw or unadjusted score would be the average of its four Subtopics' scores, if it had them. The 14 Domains and their associated weights are shown in the following table:

CULTIVATION	**30%**
1. Cultivation – Technical Ability	25% out of 30%
2. Cultivation – Infrastructure	25% out of 30%
3. Cultivation – Premises, Resources, Personnel	25% out of 30%
4. Cultivation – Accountability	25% out of 30%
PROCESSING	**30%**
5. Processing – Technical Ability	25% out of 30%
6. Processing – Infrastructure	25% out of 30%
7. Processing: Premises, Resources, Personnel	25% out of 30%
8. Processing: Accountability	25% out of 30%
DISPENSING	**15%**
9. Dispensing: Technical Ability	25% out of 15%
10. Dispensing: Infrastructure	25% out of 15%
11. Dispensing: Premises, Resources, Personnel	25% out of 15%

12. Dispensing: Accountability	25% out of 15%
13. MEDICAL DIRECTOR	**5%**
14. FINANCIALS	**20%**

17. If there were any ambiguity in the meaning of the word "score" as used in rule 64-4.002(5)(b), the fact of the weighting scheme removes all uncertainty, because in order to take a meaningful percentage (or fraction) of a number, the number must signify a divisible quantity, or else the reduction of the number, *x*, to say, 20% of *x*, will not be interpretable. Some additional explanation here might be helpful.

18. If the number 5 is used to express how much of something we have, e.g., 5 pounds of flour, we can comprehend the meaning of 20% of that value (1 pound of flour). On the other hand, if we have coded the rank of "first place" with the number 5 (rather than, e.g., the letter A, which would be equally functional as a symbol), the meaning of 20% of *that* value is incomprehensible (no different, in fact, than the meaning of 20% of A). To be sure, we could multiply the number 5 by 0.20 and get 1, but the product of this operation, despite being mathematically correct (i.e., true in the abstract, as a computational result), would have no contextual meaning. This is because 20% of first place makes no sense. Coding the rank of first place with the misleading symbol of

"5 points" would not help, either, because the underlying referent——still a *position*, not a quantity——is indivisible no matter what symbol it is given.[3/]

19. We can take this analysis further. The weighting scheme clearly required that the points awarded to an applicant for each Topic must contribute a prescribed proportionate share both to the applicant's final score per Reviewer, as well as to its aggregate score. For example, an applicant's score for Financials had to be 20% of its final Reviewer scores and 20% of its aggregate score, fixing the ratio of unweighted Financials points to final points (both Reviewer and aggregate) at 5:1. For this to work, a point scale having fixed boundaries had to be used, and the maximum number of points available for the final scores needed to be equal to the maximum number of points available for the raw (unweighted) scores at the Topic level. In other words, to preserve proportionality, if the applicants were scored on a 100-point scale, the maximum final score had to be 100, and the maximum raw score for each of the five Topics needed to be 100, too.

20. The reasons for this are as follows. If there were no limit to the number of points an applicant could earn at the Topic level (like a baseball game), the proportionality of the weighting scheme could not be maintained; an applicant might run up huge scores in lower-weighted Topics, for example, making

them proportionately more important to its final score than higher-weighted Topics. Similarly, if the maximum number of points available at the Topic level differed from the maximum number of points available as a final score, the proportionality of the weighting scheme (the prescribed ratios) would be upset, obviously, because, needless to say, 30% of, e.g., 75 points is not equal to 30% of 100 points.

21. If a point scale is required to preserve proportionality, and it is, then so, too, must the intervals between points be the same, for all scores, in all categories, or else the proportionality of the weighting scheme will fail. For a scale to be uniform and meaningful, which is necessary to maintain the required proportionality, the points in it must be equidistant from each other; that is, the interval between 4 and 5, for example, needs to be the same as the interval between 2 and 3, and the distance between 85 and 95 (if the scale goes that high) has to equal that between 25 and 35.[4/] When the distances between values are known, the numbers are said to express *interval data*.[5/]

22. Unless the distances between points are certain and identical, the prescribed proportions of the weighting scheme established in rule 64-4.002 will be without meaning. Simply stated, there can be no sense of proportion without interpretable intervals. We cannot say that a 5:1 relationship

exists between two point totals (scores) if we have no idea what the distance is between 5 points and 1 point.

23. The weighting system thus necessarily implied that the "scores" assigned by the Reviewers during the comparative evaluation would be numerical values (points) that (i) expressed quantity; (ii) bore some rational relationship to the amount of quality the Reviewer perceived in an applicant in relation to the other applicants; and (iii) constituted interval data. In other words, the rule unambiguously required that relative quality be counted (quantified), not merely coded.

B. The Scoring Methodology: Interval Coding

24. In performing the comparative evaluation of the initial applications filed in 2015, the Reviewers were required to use Form DH8007-OCU-2/2015, "Scorecard for Low-THC Cannabis Dispensing Organization Selection" (the "Scorecard"), which is incorporated by reference in rule 64-4.002(5)(a). There are no instructions on the Scorecard. The Department's rules are silent to how the Reviewers were supposed to score applications using the Scorecard, and they provide no process for generating aggregate scores from Reviewer scores.

25. To fill these gaps, the Department devised several policies that governed its free-form decision-making in the run-up to taking preliminary agency action on the applications. Regarding raw scores, the Department decided that the Reviewers

would sort the applications by region and then rank the applications, from best to worst, on a per-Domain basis, so that each Reviewer would rank each applicant 14 times (the "Ranking Policy").

26. An applicant's raw Domanial score would be its position in the ranking, from 1 to *x*, where *x* was both (i) equal to the number of applicants within the region under review and (ii) the number assigned to the rank of first place (or Best). In other words, the Reviewer's judgments as to the descending order of suitability of the competing applicants, per Domain, were symbolized or coded with numbers that the Department called "rank scores," and which were thereafter used as the applicants' raw Domanial scores.

27. To be more specific, in a five-applicant field such as the southeast region, the evaluative judgments of the Reviewers were coded as follows:

Evaluative Judgment	**Symbol ("Rank Score")**
Best qualified applicant ("Best")	5 points
Less qualified than the best qualified applicant, but better qualified than all other applicants ("Second Best")	4 points
Less qualified than two better qualified applicants, but better qualified than all other applicants ("Third Best")	3 points
Less qualified than three better qualified applicants, but better qualified than all other applicants ("Fourth Best")	2 points
Less qualified than four better qualified applicants ("Fifth Best")	1 point

28. The Department's unfortunate decision to code the Reviewers' *qualitative* judgments regarding *positions* in rank orders with symbols that look like *quantitative* judgments regarding *amounts of quality* led inexorably to extremely misleading results. The so-called "rank scores" give the false impression of interval data, tricking the consumer (and evidently the Department, too) into believing that the distance between scores is certain and the same; that, in other words, an applicant with a "rank score" of 4 is 2 points better than an applicant with a "rank score" of 2. If this deception had been intentional (and, to be clear, there is no evidence it was), we could fairly call it fraud. Even without bad intent, the decision to code positions in ranked series with "scores" expressed as "points" was a colossal blunder that turned the scoring process into a dumpster fire.

29. Before proceeding, it must be made clear that an applicant's being ranked Best in a Domain meant *only* that, as the highest-ranked applicant, it was deemed more suitable, *by some unknown margin,* than all the others within the group. By the same token, to be named Second Best meant only that this applicant was less good, *in some unknown degree*, than the Best applicant, and better, *in some unknown degree*, than the Third Best and remaining, lower-ranked applicants. The degree of difference in suitability between any two applicants in any

Domanial ranking might have been a tiny sliver or a wide gap, even if they occupied adjacent positions, e.g., Second Best and Third Best. The Reviewers made no findings with respect to degrees of difference. Moreover, it cannot truthfully be claimed that the interval between, say, Second Best and Third Best is the same as that between Third Best and Fourth Best, for there exists no basis in fact for such a claim.

30. In sum, the Department's Domanial "rank scores" merely symbolized the applicants' positions in sets of ordered applications. Numbers which designate the respective places (ranks) occupied by items in an ordered list are called ordinal numbers. The type of non-metric data that the "rank scores" symbolize is known as *ordinal data*, meaning that although the information can be arranged in a meaningful order, there is no unit or meter by which the intervals between places in the ranking can be measured.

31. Because it is grossly misleading to refer to positions in a ranking as "scores" counted in "points," the so-called "rank scores" will hereafter be referred to as "Ordinals"——a constant reminder that we are working with ordinal data. This is important to keep in mind because, as will be seen, there are limits on the kinds of mathematical manipulation that can appropriately be carried out with ordinal data.

32. The Department's policy of coding positions in a rank order with "rank scores" expressed as "points" will be called the "Interval Coding Policy." In conducting the evaluation, the Reviewers followed the Ranking Policy and Interval Coding Policy (collectively, the "Rank Scores Policies").

C. The Computational Methodology: Interval Statements and More

33. Once the Reviewers finished evaluating and coding the applications, the evaluative phase of the Department's free-form process was concluded. The Reviewers had produced a dataset of Domanial Ordinals——42 Domanial Ordinals for each applicant to be exact——that collectively comprised a compilation of information, stored in the scorecards. This universe of Domanial Ordinals will be called herein the "Evaluation Data." The Department would use the Evaluation Data in the next phase of its free-form process as grounds for computing the applicants' aggregate scores.

34. Rule 64-4.002(5)(b) provides that "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." Notice that the rule here switches to the passive voice. The tasks of (i) "combin[ing]" scorecards to "generate" aggregate scores and of

(ii) "select[ing]" regional DOs were not assigned to the Reviewers, whose work was done upon submission of the scorecards.

35. As mentioned previously, the rule does not specify how the Evaluation Data will be used to generate aggregate scores. The Department formulated extralegal policies[6/] for this purpose, which can be stated as follows: (i) the Ordinals, which in actuality are numeric code for uncountable information content, shall be deemed real (counted) points, i.e., equidistant units of measurement on a 5-point interval scale (the "Deemed Points Policy"); (ii) in determining aggregate scores, the three Reviewer scores will be averaged instead of added together, so that "aggregate score" means "average Reviewer score" (the "Aggregate Definition"); and (iii) the results of mathematical computations used to determine weighted scores at the Reviewer level and, ultimately, the aggregate scores themselves will be carried out to the fourth decimal place (the "Four Decimal Policy"). Collectively, these three policies will be referred to as the "Generation Policies." The Department's "Scoring Methodology" comprises the Rank Scores Policies and the Generation Policies.

36. The Department's computational process for generating aggregate scores operated like this. For each applicant, a Reviewer final score was derived from each Reviewer, using that

Reviewer's 14 Domanial Ordinals for the applicant. For each of the subdivided Topics (Cultivation, Processing, and Dispensing), the mean of the Reviewer's four Domanial Ordinals for the applicant (one Domanial Ordinal for each Subtopic) was determined by adding the four numbers (which, remember, were whole numbers as discussed above) and dividing the sum by 4. The results of these mathematical operations were reported to the second decimal place. (The Reviewer raw score for each of the subdivided Topics was, in other words, the Reviewer's average Subtopic Domanial Ordinal.) For the undivided Topics of Medical Director and Financials, the Reviewer raw score was simply the Domanial Ordinal, as there was only one Domanial Ordinal per undivided Topic. The five Reviewer raw Topic scores (per Reviewer) were then adjusted to account for the applicable weight factor. So, the Reviewer raw scores for Cultivation and Processing were each multiplied by 0.30; raw scores for Dispensing were multiplied by 0.15; raw scores (Domanial Ordinals) for Medical Director were multiplied by 0.05; and raw scores (Domanial Ordinals) for Financials were multiplied by 0.20. These operations produced five Reviewer weighted-Topic scores (per Reviewer), carried out (eventually) to the fourth decimal place. The Reviewer final score was computed by adding the five Reviewer weighted-Topic scores. Thus, each applicant

wound up with three Reviewer final scores, each reported to the fourth decimal place pursuant to the Four Decimal Policy.

37. The computations by which the Department determined the three Reviewer final scores are reflected (but not shown) in a "Master Spreadsheet"[7/] that the Department prepared. Comprising three pages (one for each Reviewer), the Master Spreadsheet shows all of the Evaluation Data, plus the 15 Reviewer raw Topic scores per applicant, and the three Reviewer final scores for each applicant. Therein, the Reviewer final scores of Reviewer 2 and Reviewer 3 were not reported as numbers having five significant digits, but were rounded to the nearest hundredth.

38. To generate an applicant's aggregate score, the Department, following the Aggregate Definition, computed the average Reviewer final score by adding the three Reviewer final scores and dividing the sum by 3. The result, under the Four Decimal Policy, was carried out the ten-thousandth decimal point. The Department referred to the aggregate score as the "final rank" in its internal worksheets. The Department further assigned a "regional rank" to each applicant, which ordered the applicants, from best to worst, based on their aggregate scores. Put another way, the regional rank was an applicant's Ultimate Ordinal.

39. The Reviewer final scores and the "final ranks" (all carried out to the fourth decimal place), together with the "regional ranks," are set forth in a table the Department has labeled its November 2015 Aggregated Score Card (the "Score Card"). The Score Card does not contain the Evaluation Data.

D. Preliminary Agency Actions

40. Once the aggregate scores had been computed, the Department was ready to take preliminary agency action on the applications. As to each application, the Department made a binary decision: Best or Not Best. The intended action on the applications of the five Best applicants (one per region), which were identified by their aggregate scores (highest per region), would be to grant them. Each of the Not Best applicants, so deemed due to their not having been among the highest scored applicants, would be notified that the Department intended to deny its application. The ultimate factual determination that the Department made for each application was whether the applicant was, or was not, the most dependable, most qualified nursery as compared to the alternatives available in a particular region.

E. Clear Points of Entry

41. Letters dated November 23, 2015, were sent to the applicants informing them either that "your application received the highest score" and thus is granted, or that because "[you

were] not the highest scored applicant in [your] region, your application . . . is denied," whichever was the case. The letters contained a clear point of entry, which concluded with the usual warning that the "[f]ailure to file a petition within 21 days shall constitute a waiver of the right to a hearing on this agency action." [8/] (Emphasis added).

42. Nature's Way decided not to request a hearing in 2015, and therefore it is undisputed that the Department's proposed action, i.e., the denial of Nature's Way's application because the applicant was not deemed to be the most dependable, most qualified nursery for purposes of selecting a DO for the southeast region, became final agency action without a formal hearing, the right to which Nature's Way elected to waive.

43. The Department argues that Nature's Way thereby waived, forever and for all purposes, the right to a hearing on the question of whether its aggregate score of 2.8833 and Costa's aggregate score of 4.4000 (highest in the southeast region)——which the Department generated using the Scoring Methodology——are, in fact, true as interval statements of quantity. (Note that if these scores are false as interval data, as Nature's Way contends, then the statement that Costa's score exceeds Nature's Way's score by 1.5167 points is false, also, because it is impossible to calculate a true, interpretable difference (interval) between two values unless

those values are expressions of quantified data. Simply put, you cannot subtract Fourth Best from Best.)

44. The Department's waiver argument, properly understood, asserts that Nature's Way is barred by administrative finality from "relitigating" matters, such as the *truth* of the aggregate scores as *quantifiable facts*, which were supposedly decided conclusively in the final agency action on its DO application in 2015. To successfully check Nature's Way with the affirmative defense of administrative finality, the Department needed to prove that the truth of the aggregate scores, as measurable quantities, was actually adjudicated (or at least judicable) in 2015, so that the numbers 2.8833 and 4.4000 are now incontestably true interval data, such that one figure can meaningfully be subtracted from the other for purposes of applying the One Point Condition.

45. The Department's affirmative defense of collateral estoppel/issue preclusion was rejected in the related disputed-fact proceeding, which is the companion to this litigation, based on the undersigned's determination that the truth of the aggregate scores as statements of fact expressing interval data had never been previously adjudicated as between the Department and Nature's Way. See Nature's Way Nursery of Miami, Inc. v. Dep't of Health, Case No. 18-0721 (Fla. DOAH June 15, 2018).

F. The Ambiguity of the Aggregate Scores

46. There is a strong tendency to look at a number such as 2.8833 and assume that it is unambiguous——and, indeed, the Department is unquestionably attempting to capitalize on that tendency. But numbers *can* be ambiguous.[9/] The aggregate scores are, clearly, open to interpretation.

47. To begin, however, it must be stated up front that there is no dispute about the *existence* of the aggregate scores. It is an undisputed historical fact, for example, that Nature's Way had a final ranking (aggregate score) of 2.8833 as computed by the Department in November 2015. There is likewise no dispute that Costa's Department-computed aggregate score was 4.4000. In this sense, the scores are historical facts—— relevant ones, too, since an applicant needed to have had an aggregate score in 2015 to take advantage of the One Point Condition enacted in 2017.

48. The existence of the scores, however, is a separate property from their meaning. Clearly, the aggregate scores that exist from history purport to convey information about the applicants; in effect, they are statements. The ambiguity arises from the fact that each score could be interpreted as having either of two different meanings. On the one hand, an aggregate score could be understood as a numerically coded non-quantity, namely a rank. In other words, the aggregate scores

could be interpreted reasonably as ordinal data. On the other hand, an aggregate score could be understood as a quantified measurement taken in units of equal value, i.e., interval data.

49. In 2015, the Department insisted (when it suited its purposes) that the aggregate scores were numeric shorthand for its discretionary value judgments about which applicants were best suited, by region, to be DOs, reflecting where the applicants, by region, stood in relation to the best suited applicants and to each other. The Department took this position because it wanted to limit the scope of the formal hearings requested by disappointed applicants to reviewing its decisions for abuse of discretion.

50. Yet, even then, the Department wanted the aggregate scores to be seen as something more rigorously determined than a discretionary ranking. Scores such as 2.8833 and 3.2125 plainly connote a much greater degree of precision than "these applicants are less qualified than others." Indeed, in one formal hearing, the Department strongly implied that the aggregate scores expressed interval data, arguing that they showed "the [Department's position regarding the] order *of magnitude*" of the differences in "qualitative value" between the applicants, so that a Fourth Best applicant having a score of 2.6458 was asserted to be "far behind" the highest-scored applicant whose final ranking was 4.1042.[10/] A ranking, of

course, expresses *order* but not *magnitude*; interval data, in contrast, expresses both order *and* magnitude, and it is factual in nature, capable of being true or false.

51. In short, as far as the meaning of the aggregate scores is concerned, the Department has wanted to have it both ways.

52. Currently, the Department is all-in on the notion that the aggregate scores constitute precise interval data, i.e., quantified facts. In its Proposed Recommended Order in Case No. 18-0721,[11/] on page 11, the Department argues that "Nature's Way does not meet the within-one-point requirement" because "Nature's Way's Final Rank [aggregate score of 2.8833] is 1.5167 points less than the highest Final Rank [Cost's aggregate score, 4.4000] in its region." This is a straight-up statement of fact, not a value judgment or policy preference. Moreover, it is a statement of fact which is true only if the two aggregate scores being compared (2.8833 and 4.4000), themselves, are true statements of quantifiable fact about the respective applicants.

53. The Department now even goes so far as to claim that the aggregate score is the precise and true number (quantity) of points that an applicant *earned* as a matter of fact. On page 6 of its Proposed Final Order, the Department states that Costa "earned a Final Rank of 4.4000" and that Nature's Way had an

"earned Final Rank of 2.8833." In this view, the scores tell us not that, in the Department's discretionary assignment of value, Costa was better suited to be the DO for the southeast region, but rather that (in a contest, it is insinuated, the Department merely refereed) Costa outscored Nature's Way by exactly 1.5167 points——and that the points have meaning as equidistant units of measurement.

54. The Department is plainly using the aggregate scores, today, as interval statements of quantifiable fact, claiming that Nature's Way "earned" exactly 2.8833 points on a 5-point scale where each point represents a standard unit of measurement, while Costa "earned" 4.4000 points; this, again, is the only way it would be correct to say that Costa was 1.5167 points better than Nature's Way. Indeed, Emergency Rule 64ER17-7 (the "Emergency Rule") purports to codify this *interpretation* of the aggregate scores——and to declare that the 2015 aggregate scores are *true* as interval data.

III. ENACTMENT OF THE MEDICAL MARIJUANA LAW

55. Effective January 3, 2017, Article X of the Florida Constitution was amended to include a new section 29, which addresses medical marijuana production, possession, dispensing, and use. Generally speaking, section 29 expands access to medical marijuana beyond the framework created by the Florida Legislature in 2014.

56. To implement the newly adopted constitutional provisions and "create a unified regulatory structure," the legislature enacted the Medical Marijuana Law, which substantially revised section 381.986 during the 2017 Special Session. Ch. 2017-232, § 1, Laws of Fla. Among other things, the Medical Marijuana Law establishes a licensing protocol for ten new MMTCs. The relevant language of the new statute states:

> (8) MEDICAL MARIJUANA TREATMENT CENTERS.—
>
> (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.
>
> * * *
>
> 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.

§ 381.986, Fla. Stat. (Emphasis added: The underscored provision is the One Point Condition).

57. The legislature granted the Department rulemaking authority, as needed, to implement the provisions of section 381.986(8). § 381.986(8)(k), Fla. Stat. In addition, the legislature authorized the Department to adopt emergency rules pursuant to section 120.54(4), as necessary to implement section 381.986, without having to find an actual emergency, as otherwise required by section 120.54(4)(a). Ch. 2017-232, § 14, at 45, Laws of Fla.

IV. IMPLEMENTATION OF THE ONE POINT CONDITION AND ADOPTION OF THE EMERGENCY RULE

58. The One Point Condition went into effect on June 23, 2017. Ch. 2017-232, § 20, Laws of Fla. Thereafter, the Department issued a license to Sun Bulb Nursery (a 2015 DO applicant in the southwest region), because the Department concluded that Sun Bulb's final ranking was within one point of the highest final ranking in the southwest region.[12/]

59. Keith St. Germain Nursery Farms ("KSG"), like Nature's Way a 2015 DO applicant for the southeast region, requested MMTC registration pursuant to the One Point Condition in June 2017. In its request for registration, KSG asserted that the One Point

Condition is ambiguous and proposed that the Department either calculate the one-point difference based on the regional ranks set forth in the Score Card (KSG was the regional Second Best, coded as Ultimate Ordinal 4) or round off the spurious decimal points in the aggregate scores when determining the one-point difference.

60. The Department preliminarily denied KSG's request for MMTC registration in August 2017. In its notice of intent, the Department stated in part:

> The highest-scoring entity in the Southeast Region, Costa Nursery Farms, LLC, received a final aggregate score of 4.4000. KSG received a final aggregate score of 3.2125. Therefore, KSG was not within one point of Costa Farms.

KSG requested a disputed-fact hearing on this proposed agency action and also filed with DOAH a Petition for Formal Administrative Hearing and Administrative Determination Concerning Unadopted Rules, initiating Keith St. Germain Nursery Farms v. Florida Department of Health, DOAH Case No. 17-5011RU ("KSG's Section 120.56(4) Proceeding"). KSG's Section 120.56(4) Proceeding, which Nature's Way joined as a party by intervention, challenged the legality of the Department's alleged unadopted rules for determining which of the 2015 DO applicants were qualified for licensure pursuant to the One Point Condition.

61. Faced with the KSG litigation, the Department adopted Emergency Rule 64ER17-3, which stated in relevant part:

> (1) For the purposes of implementing s. 381.986(8)(a)2.a., F.S., the following words and phrases shall have the meanings indicated:
>
> (a) Application – an application to be a dispensing organization under former s. 381.986, F.S. (2014), that was timely submitted in accordance with Rule 64-4.002(5) of the Florida Administrative Code (2015).
>
> (b) Final Ranking – an applicant's aggregate score for a given region as provided in the column titled "Final Rank" within the November 2015 Aggregated Score Card, incorporated by reference and available at [hyperlink omitted], as the final rank existed on November 23, 2015.
>
> (c) Highest Final Ranking – the final rank with the highest point value for a given region, consisting of an applicant's aggregate score as provided in the column titled "Final Rank" within the November 2015 Aggregated Score Card, as the final rank existed on November 23, 2015.
>
> (d) Within One Point – 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.
>
> (e) Qualified 2015 Applicant – an individual or entity whose application was reviewed, evaluated, and scored by the department and that was denied a dispensing organization license under former s. 381.986, F.S. (2014) and either: (1) had one or more administrative or judicial challenges pending as of January 1, 2017; or

> (2) had a final ranking within one point of the highest final ranking in the region for which it applied, in accordance with Rule 64-4.002(5) of the Florida Administrative Code (2015).

The Department admits that not much analysis or thought was given to the development of this rule, which reflected the Department's knee-jerk conclusion that the One Point Condition's use of the term "final ranking" clearly and unambiguously incorporated the applicants' "aggregate scores" (i.e., "final rank" positions), as stated in the Score Card, into the statute. In any event, the rule's transparent purpose was to adjudicate the pending licensing dispute with KSG and shore up the Department's ongoing refusal (in Department of Health Case No. 2017-0232) to grant KSG a formal disputed-fact hearing on the proposed denial of its application. Naturally, the Department took the position that rule 64ER17-3 had settled all possible disputes of material fact, once and for all, as a matter of law.

62. In a surprising about-face, however, on October 26, 2017, the Department entered into a settlement agreement with KSG pursuant to which the Department agreed to register KSG as an MMTC. The Department issued a Final Order Adopting Settlement Agreement with KSG on October 30, 2017. That same day (and in order to effectuate the settlement with KSG), the Department issued the Emergency Rule. The Emergency Rule amends

former rule 64ER17-3 to expand the pool of Qualified 2015 Applicants by exactly one, adding KSG——not by name, of course, but by deeming all the regional Second Best applicants to be Within One Point. Because KSG was the only 2015 applicant ranked Second Best in its region that did not have an aggregate score within one point of its region's Best applicant in accordance with rule 64ER17-3, KSG was the only nursery that could take advantage of the newly adopted provisions.

63. As relevant, the Emergency Rule provides as follows:

> This emergency rule supersedes the emergency rule 64ER17-3 which was filed and effective on September 28, 2017.
>
> (1) For the purposes of implementing s. 381.986(8)(a)2.a., F.S., the following words and phrases shall have the meanings indicated:
>
> (a) Application – an application to be a dispensing organization under former s. 381.986, F.S. (2014), that was timely submitted in accordance with Rule 64-4.002(5) of the Florida Administrative Code (2015).
>
> (b) Final Ranking – an applicant's aggregate score for a given region as provided in the column titled "Final Rank" or the applicant's regional rank as provided in the column titled "Regional Rank" within the November 2015 Aggregated Score Card, incorporated by reference and available at [hyperlink omitted], as the final rank existed on November 23, 2015.
>
> (c) Highest Final Ranking – the final rank with the highest point value for a given region, consisting of an applicant's

> aggregate score as provided in the column titled "Final Rank" or the applicant's regional rank as provided in the column titled "Regional Rank" within the November 2015 Aggregated Score Card, as the final rank existed on November 23, 2015.
>
> (d) Within One Point – 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" one whole number difference, by subtracting an applicant's final ranking from the highest final ranking in the region for which the applicant applied.
>
> (e) Qualified 2015 Applicant – an individual or entity whose application was reviewed, evaluated, and scored by the department and that was denied a dispensing organization license under former s. 381.986, F.S. (2014) and either: (1) had one or more administrative or judicial challenges pending as of January 1, 2017; or (2) had a final ranking within one point of the highest final ranking in the region for which it applied, in accordance with Rule 64-4.002(5) of the Florida Administrative Code (2015).

(Emphasis added).

64. In a nutshell, the Emergency Rule provides that an applicant meets the One Point Condition if either (i) the difference between its aggregate score and the highest regional aggregate score, as those scores were determined by the Department effective November 23, 2015, is less than or equal to 1.0000; *or* (ii) its regional rank, as determined by the Department effective November 23, 2015, is Second Best.

A number of applicants satisfy both criteria, e.g., 3 Boys, McCrory's, Chestnut Hill, and Alpha (northwest region). Some, in contrast, meet only one or the other. Sun Bulb, Treadwell, and Loop's, for example, meet (i) but not (ii). KSG, alone, meets (ii) but not (i).

65. The Department has been unable to come up with a credible, legally cohesive explanation for the amendments that distinguish the Emergency Rule from its predecessor. On the one hand, Christian Bax testified that KSG had persuaded the Department that "within one point" meant, for purposes of the One Point Condition, Second Best (or "second place"), and that this reading represented a reasonable interpretation of a "poorly crafted sentence" using an "unartfully crafted term," i.e., "final ranking." On the other hand, the Department argues in its Proposed Final Order (on page 17) that the One Point Condition's "plain language reflects the legislature's intent that the 'second-best' applicant in each region (if otherwise qualified) be licensed as an MMTC." (Emphasis added). Logically, of course, the One Point Condition cannot be both "poorly crafted" (i.e., ambiguous) and written in "plain language" (i.e., unambiguous); legally, it must be one or the other. Put another way, the One Point Condition either must be *construed*, which entails a legal analysis known as statutory interpretation that is governed by well-known canons of

construction and results in a legal ruling declaring the meaning of the ambiguous terms, or it must be *applied according to its plain language*, if (as a matter of law) it is found to be unambiguous.

66. Obviously, as well, the One Point Condition, whether straightforward or ambiguous, cannot mean both within one *point* and within one *place*, since these are completely different statuses. If the statute is clear and unambiguous, only one of the alternatives can be correct; if ambiguous, either might be permissible, but not both simultaneously.

67. By adopting the Emergency Rule, the Department took a position in direct conflict with the notion that the One Point Condition is clear and unambiguous; its reinterpretation of the statute is consistent only with the notion that the statute is ambiguous, and its present attempt to disown that necessarily implicit conclusion is rejected. The irony is that the Department surrendered the high ground of statutory unambiguity, which it initially occupied and stoutly defended, to take up an indefensible position, where, instead of choosing between two arguably permissible, but mutually exclusive, interpretations, as required, it would adopt both interpretations. The only reasonable inference the undersigned can draw from the Department's bizarre maneuver is that the Emergency Rule is not the product of high-minded policy making but rather a litigation

tactic, which the Department employed as a necessary step to resolve the multiple disputes then pending between it and KSG. The Emergency Rule was adopted to adjudicate the KSG disputes in KSG's favor, supplanting the original rule that was adopted to adjudicate the same disputes in the Department's favor.

V. THE IRRATIONALITY OF THE SCORING METHODOLOGY

68. The Department committed a gross conceptual error when it decided to treat ordinal data as interval data under its Interval Coding and Deemed Points Policies. Sadly, there is no way to fix this problem retroactively; no formula exists for converting or translating non-metric data such as rankings (which, for the most part, cannot meaningfully be manipulated mathematically) into quantitative data. Further, the defect in the Department's "scoring" process has deprived us of essential information, namely, actual measurements.

A. A Second Look at the Department's Scoring Methodology

69. The Department's Scoring Methodology was described above. Nevertheless, for purposes of explicating just how arbitrary and capricious were the results of this process, and to shed more light on the issues of fact which the Department hopes the Emergency Rule has resolved before they can ever become grounds for a disputed-fact hearing, the undersigned proposes that the way the Department arrived at its aggregate scores be reexamined.

70. It will be recalled that each applicant received 14 Ordinals from each reviewer, i.e., one Ordinal per Domain. These will be referred to as Domanial Ordinals. Thus, each applicant received, collectively, 12 Domanial Ordinals apiece for the Main Topics of Cultivation, Processing, and Dispensing; and three Domanial Ordinals apiece for the Main Topics of Medical Director and Financials, for a total of 42 Domanial Ordinals. These five sets of Domanial Ordinals will be referred to generally as Arrays, and specifically as the Cultivation Array, the Processing Array, the Dispensing Array, the MD Array, and the Financials Array. Domanial Ordinals that have been sorted by Array will be referred to, hereafter, as Topical Ordinals. So, for example, the Cultivation Array comprises 12 Topical Ordinals per applicant. A table showing the Arrays of the southeast region applicants is attached as Appendix A.

71. Keeping our attention on the Cultivation Array, observe that if we divide the sum of the 12 Topical Ordinals therein by 12, we will have calculated the mean (or average) of these Topical Ordinals. This value will be referred to as the Mean Topical Ordinal or "MTO." For each applicant, we can find five MTOs, one apiece for the five Main Topics. So, each applicant has a Cultivation MTO, a Processing MTO, and so forth.

72. As discussed, each Main Topic was assigned a weight, e.g., 30% for Cultivation, 20% for Financials. These five

weights will be referred to generally as Topical Weights, and specifically as the Cultivation Topical Weight, the Processing Topical Weight, etc.

73. If we reduce, say, the Cultivation MTO to its associated Cultivation Topical Weight (in other words, take 30% of the Cultivation MTO), we will have produced the weighted MTO for the Main Topic of Cultivation. For each applicant, we can find five weighted MTOs ("WMTO"), which will be called specifically the Cultivation WMTO, the Processing WMTO, etc.

74. The sum of each applicant's five WMTOs equals what the Department calls the applicant's aggregate score or final rank. In other words, in the Department's scoring methodology, an MTO is functionally a "Topical raw score" and a WMTO is an "adjusted Topical score" or, more simply, a "Topical subtotal." Thus, we can say, alternatively, that the sum of an applicant's five Topical subtotals equals its DOH-assigned aggregate score.

75. For those in a hurry, an applicant's WMTOs (or Topical subtotals) can be computed quickly by dividing the sum of the Topical Ordinals in each Array by the respective divisors shown in the following table:

Dividend	Divisor	Quotient
Sum of the Topical Ordinals in the CULTIVATION Array	÷ 40	= Cultivation WMTO
Sum of the Topical Ordinals in the PROCESSING Array	÷ 40	= Processing WMTO

Dividend	Divisor	Quotient
Sum of the Topical Ordinals in the DISPENSING Array	÷ 80	= Dispensing WMTO
Sum of the Topical Ordinals in the MD Array	÷ 60	= MD WMTO
Sum of the Topical Ordinals in the FINANCIALS Array	÷ 15	= Financials WMTO

76. To advance the discussion, it is necessary to introduce some additional concepts. We have become familiar with the Ordinal, i.e., a number that the Department assigned to code a particular rank (5, 4, 3, 2, or 1).[13/] From now on, the symbol *O* will be used to represent the value of an Ordinal as a variable.

77. There is another value, which we can imagine as a concept, namely the actual *measurement* or *observation*, which, as a variable, we will call *x*. For our purposes, *x* is the value that a Reviewer would have reported if he or she had been asked to quantify (to the fourth decimal place) the amount of an applicant's suitability vis-à-vis the attribute in view on a scale of 1.0000 to 5.0000, with 5.0000 being "ideal" and 1.0000 meaning, roughly, "serviceable." This value, *x*, is a theoretical construct only because no Reviewer actually made any such measurements; such measurements, however, could have been made, had the Reviewers been required to do so. Indeed, some vague idea, at least, of *x* must have been in each Reviewer's mind every time he or she ranked the applicants, or else there

would have been no grounds for the rankings. Simply put, a particular value *x* can be supposed to stand behind every Topical Ordinal because every Topical Ordinal is a function of *x*. Unfortunately, we do not know *x* for any Topical Ordinal.

78. Next, there is the *true value* of *x*, for which we will give the symbol μ. This is a purely theoretical notion because it represents the value that would be obtained by a perfect measurement, and there is no perfect measurement of anything, certainly not of relative suitability to serve as an MMTC.[14/]

79. Finally, measurements are subject to *uncertainty*, which can be expressed in absolute or relative terms. The *absolute uncertainty* expresses the size of the range of values in which the true value is highly likely to lie. A measurement given as 150 ± 0.5 pounds tells us that the absolute uncertainty is 0.5 pounds, and that the true value is probably between 149.5 and 150.5 pounds (150 – 0.5 and 150 + 0.5). This uncertainty can be expressed as a percentage of the measured value, i.e., 150 pounds ± .33%, because 0.5 is .33% of 150.

80. With that background out of the way, let's return to concept of the *mean*. The arithmetic mean is probably the most commonly used operation for determining the central tendency (i.e., the average or typical value) of a dataset. No doubt everyone reading this Order, on many occasions, has found the average of, say, four numbers by adding them together and

dividing by 4. When dealing with interval data, the mean is interpretable because the interval is interpretable. Where the distance between 4 and 5, for example, is the same as that between 5 and 6, everyone understands that 4.5 is halfway between 4 and 5. As long as we know that 4.5 is exactly halfway between 4 and 5, the arithmetic mean of 4 and 5 (i.e., 4.5) is interpretable.

81. The mean of a set of measurement results gives an estimate of the true value of the measurement, assuming there is no systematic error in the data. The greater the number of measurements, the better the estimate. Therefore, if, for example, we had in this case an Array of *x*s, then the mean of that dataset ($\bar{x}$) would approximate μ, especially for the Cultivation, Processing, and Dispensing Arrays, which have 12 observations apiece. If the Department had used $\bar{x}$ as the Topical raw score instead of the MTO, then its scoring methodology would have been free of systematic error.

82. But the Department did not use $\bar{x}$ as the Topical raw score. In the event, it had only Arrays of *O*s to work with, so when the Department calculated the mean of an Array, it got the average of a set of Ordinals ($\bar{o}$), not $\bar{x}$.

83. Using the mean as a measure of the central tendency of ordinal data is highly problematic, if not impermissible, because the information is not quantifiable. In this case, the

Department coded the rankings with numbers, but the numbers (i.e., the Ordinals), not being units of measurement, were just shorthand for content that must be expressed *verbally*, not *quantifiably*. The Ordinals, that is, translate meaningfully only as words, not as numbers, as can be seen in the table at paragraph 27, supra.

84. Because these numbers merely signify order, the distances between them have no meaning; the interval, it follows, is not interpretable. In such a situation, 4.5 does *not* signify a halfway point between 4 and 5. Put another way, the average of Best and Second Best is not "Second-Best-and-a-half," for the obvious reason that the notion is nonsensical. To give a real-life example, the three Topical Ordinals in Nature's Way's MD Array are 5, 3, and 2. The average of Best, Third Best, and Fourth Best is plainly not "Third-Best-and-a-third," any more than the average of Friday, Wednesday, and Tuesday is Wednesday-and-a-third.

85. For these reasons, statisticians and scientists ordinarily use the median or the mode to measure the central tendency of ordinal data, generally regarding the mean of such data to be invalid or uninterpretable. The *median* is the middle number, which is determined by arranging the data points from lowest to highest, and identifying the one having the same number of data points on either side (if the dataset contains an

odd number of data points) or taking the average of the two data points in the middle (if the dataset contains an even number of data points). The *mode* is the most frequently occurring number. (If no number repeats, then there is no mode, and if two or more numbers recur with the same frequency, then there are multiple modes.)

86. We can easily compute the medians, modes, and means of the Topical Ordinals in each of the applicants' Arrays. They are set forth in the following table.

	Cultivation 30%	Processing 30%	Dispensing 15%	Medical Director 5%	Financials 20%
Bill's	Median 1 Mode 1 Mean 1.8333	Median 2 Mode 2 Mean 1.7500	Median 1 Mode 1 Mean 1.1667	Median 2 Mode NA Mean 2.0000	Median 1 Mode 1 Mean 1.0000
Costa	Median 5 Mode 5 Mean 4.6667	Median 4.5 Mode 5 Mean 4.1667	Median 4 Mode 4 Mean 4.0000	Median 4 Mode 4 Mean 4.3333	Median 5 Mode 5 Mean 4.6667
Keith St. Germain	Median 4 Mode 4 Mean 3.4167	Median 4 Mode 4 Mean 3.2500	Median 2 Mode 2 Mean 2.4167	Median 4 Mode NA Mean 3.6667	Median 3 Mode 3 Mean 3.3333
Nature's Way	Median 3 Mode 4 Mean 3.0833	Median 3 Mode 3 Mean 2.5833	Median 3.5 Mode 3 Mean 3.6667	Median 3 Mode NA Mean 3.3333	Median 2 Mode 2 Mean 2.3333
Redland	Median 2 Mode 2 Mean 2.2500	Median 3.5 Modes 3, 4, 5 Mean 3.4167	Median 5 Mode 5 Mean 4.1667	Median 2 Mode NA Mean 2.3333	Median 4 Mode NA Mean 3.6667

87. It so happens that the associated medians, modes, and means here are remarkably similar——and sometimes the same. The

point that must be understood, however, is that the respective means, despite their appearance of exactitude when drawn out to four decimal places, tell us *nothing* more (if, indeed, they tell us *anything*) than the medians and the modes, namely whether an applicant was typically ranked Best, Second Best, etc.

88. The median and mode of Costa's Cultivation Ordinals, for example, are both 5, the number which signifies "Best." This supports the conclusion that "Best" was Costa's average ranking under Cultivation. The mean of these same Ordinals, 4.6667, appears to say something more exact about Costa, but, in fact, it does not. At most, the mean of 4.6667 tells us *only* that Costa was typically rated "Best" in Cultivation. (Because there is no cognizable position of rank associated with the fraction 0.6667, the number 4.6667 must be rounded if it is to be interpreted.) To say that 4.6667 means that Costa outscored KSG by 1.2500 "points" in Cultivation, therefore, or that Costa was 37% more suitable than KSG, would be a serious and indefensible error, for these are, respectively, interval and ratio statements, which are never permissible to make when discussing ordinal data.

89. As should by now be clear, o^{-} is a value having limited usefulness, if any, which cannot *ever* be understood, properly, as an estimate of μ. The Department, regrettably, treated o^{-} as if it were the same as x^{-} and, thus, a reasonable

approximation of μ, making the grievous *conceptual* mistakes of using ordinal data to make interval-driven decisions, e.g., whom to select for licensure when the "difference" between applicants was as infinitesimal as 0.0041 "points," as well as interval representations about the differences between applicants, such as, "Costa's aggregate score is 1.5167 points greater than Nature's Way's aggregate score." Due to this flagrant defect in the Department's analytical process, the aggregate scores which the Department generated are hopelessly infected with systematic error, even though the mathematical calculations behind the flawed scores are computationally correct.

B. Dr. Cornew's Solution

90. Any attempt to translate the Ordinals into a reasonable approximation of interval data is bound to involve a tremendous amount of inherent uncertainty. If we want to ascertain the x behind a particular O, all we can say for sure is that: $[(O - n) + 0.000n] \leq x \leq [(O + a) - 0.000a]$, where n represents the number of places in rank below O, and a symbolizes the number of places in rank above O. The Ordinals of 1 and 5 are partial exceptions, because $1 \leq x \leq 5$. Thus, when $O = 5$, we can say $[(O - n) + 0.000n] \leq x \leq 5$, and when $O = 1$, we can say $1 \leq x \leq [(O + a) - 0.000a]$.

91. The table below should make this easier to see.

Lowest Possible Value of *x*	Ordinal *O*	Highest Possible Value of *x*
1.0004	5	5.0000
1.0003	4	4.9999
1.0002	3	4.9998
1.0001	2	4.9997
1.0000	1	4.9996

92. As will be immediately apparent, all this tells us is that *x* could be, effectively, any score from 1 to 5——which ultimately tells us nothing. Accordingly, to make any use of the Ordinals in determining an applicant's satisfaction of the One Point Condition, we must make some assumptions, to narrow the uncertainty.

93. Nature's Way's expert witness, Dr. Ronald W. Cornew,[15/] offers a solution that the undersigned finds to be credible. Dr. Cornew proposes (and the undersigned agrees) that, for purposes of extrapolating the scores (values of *x*) for a given applicant, we can assume that the Ordinals for every other applicant are true values (μ) of *x*, in other words, perfectly measured scores expressing interval data——a heroic assumption *in the Department's favor*. Under this assumption, if the subject applicant's Ordinal is the ranking of, say, 3, we shall assume that the adjacent Ordinals of the other applicants, 2 and 4, are true quantitative values. This, in turn, implies that the true

value of the subject applicant's Ordinal, as a quantified score, is anywhere between 2 and 4, since all we know about the subject applicant is that the Reviewer considered it to be, in terms of relative suitability, somewhere between the applicants ranked Fourth Best (2) and Second Best (4).

94. If we make the foregoing Department-friendly assumption that the other applicants' Ordinals are μ, then the following is true for the unseen *x* behind each of the subject applicant's *O*s: $[(O - 1) + 0.0001] \leq x \leq [(O + 1) - 0.0001]$. The Ordinals of 1 and 5 are, again, partial exceptions. Thus, when $O = 5$, we can say $4.0001 \leq x \leq 5$, and when $O = 1$, we can say $1 \leq x \leq 1.9999$. Dr. Cornew sensibly rounds off the insignificant ten-thousandths of points, simplifying what would otherwise be tedious mathematical calculations, so that:

Lowest Possible Value of *x*	Ordinal *O*	Highest Possible Value of *x*
4	5	5
3	4	5
2	3	4
1	2	3
1	1	2

95. We have now substantially, albeit artificially, reduced the uncertainty involved in translating *O*s to *x*s. Our assumption allows us to say that $x = O \pm 1$ except where only negative uncertainty exists (because *x* cannot exceed 5) and

where only positive uncertainty exists (because *x* cannot be less than 1). It is important to keep in mind, however, that (even with the very generous, pro-Department assumption about other applicants' "scores") the best we can do is identify the range of values within which *x* likely falls, meaning that the highest values and lowest values are not alternatives; rather, the extrapolated score comprises those two values and all values in between, at once.

96. In other words, if the narrowest statement we can reasonably make is that an applicant's score could be *any* value between *l* and *h* inclusive, where *l* and *h* represent the low and high endpoints of the range, then what we are actually saying is that the score is *all* values between *l* and *h* inclusive, because none of those values can be excluded. Thus, in consequence of the large uncertainty about the true values of *x* that arises from the low-information content of the data available for review, Ordinal 3, for example, translates, from ordinal data to interval data, not to a single point or value, but to a *score-set*, ranging from 2 to 4 inclusive.

97. Thus, to calculate Nature's Way's aggregate score-set using Dr. Cornew's method, as an example, it is necessary to determine both the applicant's highest possible aggregate score and its lowest possible aggregate score, for these are the endpoints of the range that constitutes the score-set. Finding

the high endpoint is accomplished by adding 1 to each Topical Ordinal other than 5, and then computing the aggregate score-set using the mathematical operations described in paragraphs 74 and 75. The following WMTOs (Topical subtotals) are obtained thereby: Cultivation, 1.2250; Processing, 1.0500; Dispensing, 0.6625; MD, 0.2000; and Financials, 0.6667. The high endpoint of Nature's Way's aggregate score-set is the sum of these numbers, or 3.8042.[16/]

98. Finding the low endpoint is accomplished roughly in reverse, by subtracting 1 from each Topical Ordinal other than 1, and then computing the aggregate score-set using the mathematical operations described in paragraphs 74 and 75. The low endpoint for Nature's Way works out to 1.9834. Nature's Way's aggregate score-set, thus, is 1.9834-3.8042.[17/] This could be written, alternatively, as 2.8938 ± 0.9104 points, or as 2.8938 ± 31.46%.

99. The low and high endpoints of Costa's aggregate score-set are found the same way, and they are, respectively, 3.4000 and 4.8375.[18/] Costa's aggregate score-set is 3.4000-4.8375, which could also be written as 4.1188 ± 0.7187 points or 4.1188 ± 17.45%.

100. We can now observe that a score of 2.4000 or more is necessary to satisfy the One Point Condition, and that any score between 2.4000 and 3.8375, inclusive, is both necessary and

sufficient to satisfy the One Point Condition. We will call this range (2.4000-3.8375) the Proximity Box. A score outside the Proximity Box on the high end, i.e., a score greater than 3.8375, meets the One Point Condition, of course; however, a score that high, being more than sufficient, is not necessary.

C. Rounding Off the Spurious Digits

101. Remember that the Ordinal 5 does not mean 5 *of something that has been counted* but the *position* of 5 in a list of five applicants *that have been put in order*——nothing more. Recall, too, that there is no interpretable interval between places in a ranking because the difference between 5 and 4 is not the same as that between 4 and 3, etc., and that there is no "second best-and-a-half," which means that taking the average of such numbers is a questionable operation that could easily be misleading if not properly explained.

102. Therefore, as discussed earlier, if the mean of ordinal data is taken, the result must be reported using only as many significant figures as are consistent with the least accurate number, which in this case is *one* significant figure (whose meaning is *only* Best, Second Best, Third Best, and so forth). The Department egregiously violated the rule against reliance upon spurious digits, i.e., numbers that lack credible meaning and impart a false sense of accuracy. The Department took advantage of meaningless fractions obtained not by

measurement but by mathematical operations, thereby compounding its original error of treating ordinal data as interval data.

103. When the Department says that Nature's Way's aggregate score is 2.8833, it is reporting a number with *five* significant figures. This number implies that all five figures make sense as increments of a measurement; it implies that the Department's uncertainty about the value is around 0.0001 points——an astonishing degree of accuracy. The trouble is that the aggregate scores, as reported without explanation, are false *and deceptive*. There is no other way to put it.

104. The Department's reported aggregate scores cannot be rationalized or defended, either, as matters of policy or opinion. This point would be obvious if the Department were saying something more transparent, e.g., that 1 + 1 + 1 + 0 + 0 = 2.8833, for everyone would see the mistake and understand immediately that no policy can change the reality that the sum of three 1s is 3.

105. The falsity at issue is hidden, however, because, to generate each applicant's "aggregate score," the Department started with 42 whole numbers (of ordinal data), each of which is a value from 1 to 5. It then ran the applicant's 42 single-digit, whole number "scores" through a labyrinth of mathematical operations (addition, division, multiplication), none of which improved the accuracy or information content of the original

42 numbers, to produce "aggregate scores" such as 2.8833. This process lent itself nicely to the creation of spreadsheets and tables chocked full of seemingly precise numbers guaranteed to impress.[19/]

106. Lacking detailed knowledge (which few people have) about how the numbers were generated, a reasonable person seeing "scores" like 2.8833 points naturally regards them as having substantive value at the microscopic level of ten-thousandths of a point——that's what numbers like that naturally *say*. He likely believes that these seemingly carefully calibrated measurements are very accurate; after all, results as finely-tuned as 2.8833 are powerful and persuasive when reported with authority.

107. But he has been fooled. The only "measurement" the Department ever took of any applicant was to rank it Best, Second Best, etc.——a "measurement" that was not, and could not have been, fractional. The reported aggregate scores are nothing but weighted averages of ordinal data, dressed up to appear to be something they are not. Remember, the smallest division on the Reviewers' "scale" (using that word loosely here) was 1 rank. No Reviewer used decimal places to evaluate any portion of any application. The aggregate scores implying precision to the ten-thousandth place were all derived from calculations using whole numbers that were code for a value

judgment (Best, Second Best, etc.), *not* quantifiable information.

108. Therefore, in the reported "aggregate scores," none of the digits to the right of first (tenth place) decimal point has any meaning whatsoever; they are nothing but spurious digits introduced by calculations carried out to greater precision than the original data. The first decimal point, moreover, being immediately to the right of the one (and only) significant figure in the aggregate score, is meaningful (assuming that the arithmetic mean of ordinal data even has interpretable meaning, which is controversial) *only* as an approximation of 1 (whole) rank. Because there is no meaningful fractional rank, the first decimal must be rounded off to avoid a misrepresentation of the data.

109. Ultimately, the only meaning that can be gleaned from the "aggregate score" of 2.8833 is that Nature's Way's typical (or mean) weighted *ranking* is 2.8833. Because there is no ranking equivalent to 2.8833, this number, if sense is to be made of it, must be rounded to the nearest ranking, which is 3 (because $2.8 \approx 3$), or Third Best. To report this number as if it means something more than that is to mislead. To make decisions based on the premise that 0.8833 means something other than "approximately one whole place in the ranking" is, literally, irrational——indeed, the Department's insistence that

its aggregate scores represent true and meaningful quantities of interval data is equivalent, as a statement of logic, to proclaiming that 1 + 1 = 3, the only difference being that the latter statement is immediately recognizable as a delusion. An applicant could only be ranked 1, 2, 3, 4, or 5——not 2.8833 or 4.4000.

110. Likewise, the only meaning that can be taken from the "aggregate score" of 4.4000 is that Costa's average weighted ranking is 4.4000, a number which, for reasons discussed, to be properly understood, must be rounded to the nearest ranking, i.e., 4. The fraction, four-tenths, representing less than half of a position in the ranking, cannot be counted as approximately one whole (additional) place (because 4.4 ≉ 5). And to treat 0.4000 as meaning four-tenths of a place better than Second Best is absurd. There is no mathematical operation in existence that can turn a number which signifies *where* in order something is, into one that counts *how much* of that thing we have.

111. To eliminate the false precision, the spurious digits must be rounded off, which is the established mathematical approach to dealing with numbers that contain uncertainty, as Dr. Cornew credibly confirmed. Rounding to the nearest integer value removes the meaningless figures and eliminates the overprecision manifested by those digits.

CONCLUSIONS OF LAW

112. DOAH has personal and subject matter jurisdiction in these proceedings pursuant to sections 120.56, 120.569, and 120.57(1).

VI. STANDING

113. Nature's Way is obviously substantially affected by the Emergency Rule and the Scoring Methodology. Despite that, the Department contends that Nature's Way lacks standing to challenge the Scoring Methodology. As the Department's position in this regard is borderline frivolous, it need not detain us long.

114. The Department argues that (i) because the denial of Nature's Way's DO license application necessarily determined the truth of the aggregate scores as interval statements of fact, and (ii) because the One Point Condition "mandates" the use, as interval data, of the applicant-specific aggregate scores as calculated to the ten-thousandth decimal place in 2015 based on the Scoring Methodology, no determination under section 120.56(4) can change the "fact"——which has been conclusively adjudicated as a matter of law——that Costa outscored Nature's Way by 1.5167 points. Both arguments beg the question and thus are fallacious.

115. The premise of argument (i), namely that administrative finality precludes Nature's Way from disputing

the truth of the aggregate scores as interval statements of quantifiable fact, is also its conclusion, so the Department's reasoning is circular. The Department simply presupposes that the truth of the aggregate scores as quantifiable facts has been previously adjudicated without proving this to be so. As it happens, moreover, the Department failed to prove the elements of the affirmative defense of collateral estoppel/issue preclusion, which was rejected in DOAH Case No. 18-0721, the companion disputed-fact proceeding.

116. The premise of argument (ii) is that the Department's interpretation of the One Point Condition (per the Emergency Rule), i.e., as having implicitly incorporated the aggregate scores and validated them as true quantities, is correct. This, of course, is the argument's conclusion as well, so the reasoning, once again, is circular. As will be shown, moreover, the Department's interpretation of section 381.986(8)(a)2.a. is clearly erroneous, and the Emergency Rule is invalid in pertinent part.

117. Nature's Way has standing to challenge the Emergency Rule and the Scoring Methodology.

VII. CHALLENGING AN EXISTING RULE

118. In a challenge to an existing rule, the "petitioner has [the] burden of proving by a preponderance of the evidence that the existing rule is an invalid exercise of delegated

legislative authority as to the objections raised." See § 120.56(3)(a), Fla. Stat.

119. The starting point for determining whether a rule is invalid is section 120.52(8), in which the legislature defined the term "invalid exercise of delegated legislative authority." Pertinent to this case are the following provisions:

> A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:
>
> * * *
>
> (b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;
>
> (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.; [or]
>
> (e) The rule is arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational.

§ 120.52(8), Fla. Stat.

120. As used in section 120.52(8), the term "rulemaking authority" "means statutory language that explicitly authorizes or requires an agency to adopt, develop, establish, or otherwise create any statement coming within the definition of the term 'rule.'" § 120.52(17), Fla. Stat. The term "law implemented" is defined to mean "the language of the enabling statute being

carried out or interpreted by an agency through rulemaking." § 120.52(9), Fla. Stat.

121. Also included in Section 120.52(8) is a concluding paragraph——commonly called the "flush-left paragraph"——in which the legislature expressed a clear intent to curb agency rulemaking authority:

> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the enabling statute.

The legislature enacted the very same restrictions on rulemaking authority in section 120.536(1).

122. The Department cited section 381.986(8)(k) as its authority to promulgate the Emergency Rule. This paragraph grants the Department the authority to "adopt rules pursuant to ss. 120.536(1) and 120.54 to implement this subsection," that is

subsection (8). The "law implemented" in the Emergency Rule is the One Point Condition of section 381.986(8)(a)2.a.

VIII. STATUTORY INTERPRETATION AND THE RULE'S INVALIDITY

123. Whether the Emergency Rule is invalid, as Nature's Way contends, under paragraph (b) or (c) of section 120.52(8), or both, depends on the meaning of the One Point Condition, which the subject rule purports to implement. The first order of business, therefore, is to examine section 381.986(8)(a)2.a., whose relevant language, again, is: "or had a final ranking within one point of the highest final ranking in its region under former s. 381.986, Florida Statutes 2014."

124. The general principles relating to the interpretation of statutes are well-known and ably summarized as follows:

> It is well established that the construction of a statute is a question of law reviewable de novo. Dixon v. City of Jacksonville, 774 So. 2d 763, 765 (Fla. 1st DCA 2000). Legislative intent is the polestar that guides this Court's statutory construction analysis. See State v. J.M., 824 So. 2d 105, 110 (Fla. 2002) (citation omitted). In construing a statute, th[e] Court must look to the statute's plain language. See Fla. Dep't of Educ. v. Cooper, 858 So. 2d 394, 395 (Fla. 1st DCA 2003); Jackson County Hosp. Corp. v. Aldrich, 835 So. 2d 318, 328-29 (Fla. 1st DCA 2002); see also State v. Rife, 789 So. 2d 288, 292 (Fla. 2001)(noting that legislative intent is determined primarily from the language of a statute). Where the language of a statute is clear and unambiguous, it must be given its plain and ordinary meaning. Cooper, 858 So. 2d at 395 (citations omitted). Where a

> statute is ambiguous, courts may then resort to the rules of statutory construction. BellSouth Telecomms., Inc. v. Meeks, 863 So. 2d 287, 289 (Fla. 2003).

Bruner v. GC-GW, Inc., 880 So. 2d 1244, 1246-47 (Fla. 1st DCA 2004).

125. Florida courts tend to defer to agency interpretations of statutes they administer, and of rules they have adopted, pursuant to the doctrine of judicial deference. This court-made doctrine does not apply to ALJs, and there is no statutory equivalent in the APA, which——quite the opposite—— requires ALJs to conduct de novo hearings. See § 120.57(1)(k), Fla. Stat. Therefore, in using his own best judgment to interpret the statute independently and impartially as a neutral decision-maker should, the undersigned considers only the logical persuasive force of the parties' legal arguments about the meaning of section 381.986(8), without regard for the source thereof, so that neither side enjoys a special advantage in this forum. See generally, John G. Van Laningham, When Courts Bow to Bureaucrats: How Florida's Deference Doctrine Lets Agencies Say What the Law Is, 45 Fla. St. U. L. Rev. Online 1, 26-30 (2018)(available at http://www.fsulawreview.com/online/).

126. The first step in the analysis of a statute is to determine whether, as a matter of law, the statute at issue is ambiguous. If it is *not*, that is, if the relevant provisions

are "susceptible to only one reasonable interpretation, the[n the] plain language of the statute controls," and no statutory construction is necessary. Fla. Dep't of High. Saf. & Motor Veh. v. Hernandez, 74 So. 3d 1070, 1074 (Fla. 5th DCA 2011). Furthermore, if the statute is clear and unambiguous, then an interpretive rule which does anything but reiterate or accurately paraphrase the plain meaning of the statute is an invalid exercise of delegated legislative authority pursuant to section 120.57(8)(c).

127. If, and only when "the plain language of a statute is ambiguous——where a reasonable person could find two different meanings leading to two different outcomes——will th[e] Court resort to the tools of statutory construction." Fla. Dep't of Transp. v. Clipper Bay Invs., LLC, 160 So. 3d 858, 862 (Fla. 2015). Where a rule adopts a permissible——that is, not clearly erroneous——interpretation of an ambiguous statute, it should survive scrutiny under section 120.52(8)(c), even if the ALJ or the reviewing court, using its best judgment, would have construed the statute differently.

128. The One Point Condition is ambiguous because it confuses the concepts of ranking and scoring or, more precisely, makes an interval statement ("within one point") involving a comparison between two pieces of ordinal data, namely "rankings," which literally makes no sense. This ambiguity

would be immediately apparent if the subject matter were more familiar. In ordinary discourse, for example, if someone told us that the silver medalist in women's figure skating had a final ranking within one point of the gold medalist's ranking, we would be uncertain about the speaker's meaning because we know that the fact of a skater's placing second in rank behind the skater with the highest final score (and winning the silver medal) tells us nothing about how many points either competitor scored, much less reveals the difference between the competitors' point totals. Was the speaker referring to a one-point difference in the athletes' scores, we therefore would wonder, or a one-place difference in their rankings? This is the semantic problem with the One Point Condition.

129. This ambiguity raises the immediate question of whether the proximity comparison should be between highest rank/next highest rank *or* the highest score/closest scores. This is an either/or question. The One Point Condition is clear that whichever comparison is intended, only one of the two potential pairings is authorized. Either a second-place finish or a quantifiable score of within one point of the highest quantifiable score might meet the condition, depending on how the statute's ambiguity in this regard is construed, but not both.

A. Invalidity under Section 120.52(8)(c)

130. The Department's construction of the statute, as reflected in the Emergency Rule, puts in place two pathways to licensure (i.e., score *and* rank, either will suffice) where the legislature had approved only one. The Department's clearly erroneous interpretation enlarges and modifies the One Point Condition.[20/]

131. The Department contends that the legislature, in its use of the term "final ranking," intended not only to denote the *concepts* of the "aggregate score" and "regional rank" as historical realities, but also to "incorporate" and "validate" the applicant-specific numerical values listed in the "final rank" and "regional rank" columns of the Score Card. In other words, the Department takes the position that the legislature enacted into law the Department's version of history, so that no applicant is entitled to dispute whether, in fact, it had an aggregate score within one point of the highest aggregate score. This interpretation, which uses the statute's retroactive nature to blur the distinction between legislating and adjudicating, is superficially persuasive, not deeply rooted. Like many plausible but incorrect positions, however, this one requires some effortful thought to untangle.

132. The Medical Marijuana Law has components such as the One Point Condition that have retroactive effect, in that they

apply to pre-enactment events. This is atypical but not unheard of. Subject to constitutional restrictions that are not currently at issue, the legislature may enact retroactive statutes. What is a tad unusual about *this* statute is that the One Point Condition operates entirely on a discrete and nonrecurring set of historical circumstances involving a small number of identifiable parties, which means that the Medical Marijuana Law was, at least in parts, more narrowly focused than most general laws. This creates a temptation to infer that the legislature specifically picked identifiable winners and losers.

133. There is a difference, however, between enacting a statute or rule that operates retroactively on known past events (a legislative or quasi-legislative power), and resolving disputes of fact about those events for purposes of applying the law to determine particular parties' personal rights, liabilities, and interests thereunder (a judicial or quasi-judicial power). The Department's mistake is to conflate these distinct powers, which leads it to believe, incorrectly, that the legislature not only adopted a law that applies to pre-enactment events, but also adjudicated the past events to conform to the Department's interpretation of the relevant facts. This latter is not what the legislature does, nor is it within the legislature's power to accomplish.

134. To satisfy the One Point Condition, an applicant had to have applied in 2015 for a DO license and received a final ranking (aggregate score) and regional rank from the Department. To have had an aggregate score, it was necessary that an applicant's application have been reviewed, evaluated, and scored[21/] by the three Reviewers, which must have occurred, if at all, before the enactment of the Medical Marijuana Law. To the extent that fulfillment of the One Point Condition depends upon the work of the Reviewers, the statute operates retroactively, in that it imposes new legal significance on the Reviewers' completed work.

135. Consequently, an applicant seeking licensure under the One Point Condition is not entitled to a de novo hearing in which its DO application could be re-reviewed, re-evaluated, and re-scored. Such relief, upon timely request, should have been available to disappointed applicants who received a notice of intent to deny in November 2015. The statute is clear that the reviewing, evaluating, and scoring (i.e., the Reviewers' work) is history, and it does not contemplate or authorize a repeat of this work.

136. The One Point Condition is not self-executing, however. It clearly envisions that a nursery seeking licensure thereunder must apply to the Department, where a determination will be made concerning whether, under the present

circumstances, the applicant satisfies the relevant criteria for licensure as an MMTC. Whether the applicant, in fact, *had* an aggregate score is unlikely ever to be disputed. Whether the aggregate score it had, according to the Department, means that the nursery was within one point of the highest scored applicant (or, alternatively, second place in the regional rank) is a question that, if raised, must be determined through the process of adjudication. The statute *frames* the issues for the parties, but it does not *determine* the issues as between them.

137. The Department imagines that, by virtue of the Medical Marijuana Law, the aggregate scores, which it calculated in 2015, are now true under any interpretation and, therefore, can be used for any purpose in implementing the One Point Condition. In this regard, the Department conflates existence, meaning, and truth, which are actually separate and distinct properties. What the Department fails to grasp is that the historical, Department-assigned aggregate scores (whose existence is undisputed) are statements about the applicants, which (i) are ambiguous and (ii) make assertions, the truth of which may be disputed. Nothing in the Medical Marijuana Law purports to interpret the historical aggregates scores or deem truthful any matter asserted in them; it merely acknowledges their existence.

138. As has been discussed above at length, there can be no dispute that the scores of 2.8833 and 4.4000, for example, exist in fact as values the Department assigned to Nature's Way and Costa, respectively, in 2015. But these scores, to review, are ambiguous inasmuch as they can be construed to state either that (i) in the Department's opinion, Costa is more qualified than Nature's Way to be the southeast region's DO or (ii) Costa is 1.5167 points better than Nature's Way. The first statement is not currently contestable, having been decided by final agency action in 2015. It is the second meaning, however, which the Department asserts has been enacted into law through the One Point Condition.

139. As we have seen, the statement that Costa is 1.5167 (or any number) of points better than Nature's Way is a statement of fact, not opinion, and more precisely is an interval statement of fact, which is true only if the two numerical values being compared (4.4000 and 2.8833) constitute true (i.e., accurate) quantifiable information. Nothing in the Medical Marijuana Law purports to declare the historical, Department-assigned aggregate scores to be interval data, much less to adjudge the data to be true and accurate. These are matters the statute rightly and necessarily leaves for adjudication.

140. No statute, even one having retroactive operation such as the Medical Marijuana Law, should be construed as having *adjudicated*, as between identifiable parties, the truth of material historical facts, unless such an interpretation is unavoidable. This is because, first, whenever possible, a statute must be given an interpretation that avoids calling into question its constitutionality. See, e.g., Tyne v. Time Warner Entm't Co., 901 So. 2d 802, 810 (Fla. 2001); Del Valle v. State, 80 So. 3d 999, 1012 (Fla. 2011)(statute should not be given a meaning that would undermine its constitutional validity, where another reading is possible).

141. Second, the authoritative resolution of genuine disputes of material fact between parties to a case or controversy is not a legislative power vested in the legislature, but a judicial or quasi-judicial power, which appertains to the judicial or executive branch pursuant to article V, section 1, of the Florida Constitution.[22/] There are four characteristics of a quasi-judicial decision, which distinguish the adjudicative power from the legislative power:

> (1) [Q]uasi-judicial action results in the application of a general rule of policy, whereas legislative action formulates policy; (2) a quasi-judicial decision has an impact on a limited number of persons or property owners and on identifiable parties and interests, while a legislative action is open-ended and affects a broad class of individuals or situations; (3) a quasi-

> judicial decision is contingent on facts arrived at from distinct alternatives presented at a hearing, while a legislative action requires no basis in fact finding at a hearing; and (4) a "quasi-judicial act determines the rules of law applicable, and the rights affected by them, in relation to past transactions," while a legislative act prescribes what the rule or requirement shall be with respect to future acts.

D.R. Horton, Inc. v. Peyton, 959 So. 2d 390, 398-99 (Fla. 1st DCA 2007)(quoting Bd. of Cnty. Comm'rs v. Snyder, 627 So. 2d 469, 474 (Fla. 1993)). As the foregoing compare-and-contrast analysis makes clear, the question of whether the aggregate score that Nature's Way (or any 2015 applicant) had is a truthful assertion of quantifiable fact, which signifies that the nursery was or was not within one point of the highest scored applicant, cannot be decided by *legislative action*; it clearly requires *quasi-judicial* decision-making.

142. Third, "although the legislature has the power to create administrative agencies with quasi-judicial power," Broward Cnty. v. La Rosa, 505 So. 2d 422, 423 (Fla. 1987), it "cannot take actions that would undermine the independence of Florida's judicial and quasi-judicial offices" without "violat[ing] the doctrine of separation of powers." Off. of State Atty. v. Parrotino, 628 So. 2d 1097, 1099 (Fla. 1993). There is no question that the legislature has granted ALJs and agency heads in the executive branch "quasi-judicial power in

matters connected with the functions of their offices," making them "administrative officers" within the meaning of Article V, section 1, of the Florida Constitution. See Ring Power Corp. v. Campbell, 697 So. 2d 203, 206 (Fla. 1st DCA 1997). Thus, if the legislature were to enact a statute that decided adjudicative facts and thereby determined the substantial interests of identifiable parties, the action would undermine the independence of the state's administrative officers holding the quasi-judicial power to make such decisions, in violation of the separation of powers provision in Article II, section 3, of the Florida Constitution.

143. Fourth, and finally, to keep the Medical Marijuana Law as far from constitutional infirmity as reasonably possible, the One Point Provision should not be given an interpretation that would raise a genuine separation-of-powers concern.

144. The Emergency Rule reflects the Department's interpretation of the One Point Condition as having incorporated and validated the historical, Department-assigned aggregate scores, thereby at once prejudging and foreclosing disputes about whether the scores are true statements of quantifiable fact respecting the 2015 DO applicants. This interpretation is clearly erroneous and contravenes the law implemented, which must be understood as having left to the branches of government possessing judicial and quasi-judicial power the duty to resolve

disputes about whether the Department-assigned aggregate scores are true statements of quantifiable fact respecting the 2015 DO applicants.

145. The duty to avoid statutory interpretations that might render the statute unconstitutional requires that the Department's "legislative validation" interpretation be rejected for an additional, independent reason, i.e., to steer clear of Article III, section 10, of the Florida Constitution, which forbids the enactment of a special law as if it were a general law.

146. As the Department reads section 381.986(8)(a)2.a., the legislature effectively adopted and validated the Score Card (by implicit reference), making it law. If this were true, then the legislature would have granted the benefit of licensure under the One Point Provision to *specific nurseries identified in the law by name*. The statute might as well have directed the Department to license as an MMTC any nursery named 3 Boys, McCrory's, Chestnut Hill, Alpha, Sun Bulb, Treadwell, or Loop's, which meets the requirements of section 381.986 and which is cultivation ready. Under the Department's interpretation, in other words, the statute does not generically *classify* as potentially licensable a subset of the 2015 applicants, whose number (though small) has future growth potential, but *singles out* several nurseries, and *only* those nurseries, as *ever* being

eligible for immediate licensure pursuant to the One Point Condition.

147. Under the Department's interpretation, therefore, the statute bears a suspicious resemblance to a special law. A "special law is one relating to, or designed to operate upon, particular persons or things . . . , or one that purports to operate upon classified persons or things when classification is not permissible or the classification adopted is illegal." State ex. rel. Landis v. Harris, 163 So. 2d 237, 240 (Fla. 1935). This is in contrast to a general law, which "operates uniformly throughout the State, or uniformly upon subjects as they may exist throughout the State, or uniformly within permissible classifications by population of counties or otherwise, or is a law relating to a State function or instrumentality." Id.

148. That a statute benefits a small number of persons or entities is not sufficient, without more, to deem it a special law; what matters is "whether the statute ha[s] the potential to apply to other [person or entities] in the future." R.J. Reynolds Tobacco Co. v. Hall, 67 So. 3d 1084, 1091 (Fla. 1st DCA 2011). A statutory classification that is drawn so tightly around its original members that no one else will be able to satisfy the conditions of inclusion within the classification at some future point in time is in danger of being found arbitrary

and impermissible. City of Miami v. McGrath, 824 So. 2d 143, 150 (Fla. 2002). Statutory language that *identifies* the objects upon which the law operates, instead of *classifying* them, constitutes an impermissible "descriptive technique," which renders the statute invalid. Id.

149. In sum, if the One Point Condition were construed, as the Department urges, as having adopted the Score Card as a means of identifying the *only* nurseries that can satisfy the "within-one-point" criterion, then this portion of the statute would be in serious jeopardy of being declared a special law. Because Senate Bill 8-A was passed as a general law, see chapter 2017-232, Laws of Florida, a declaration that the One Point Condition amounts to a special law would spell constitutional doom for section 381.986(8)(a)2.a. Art. III, § 10, Fla. Const. (prohibiting enactment of a special law unless notice of intent to pass the law was published in advance or, alternatively, the law would take effect only upon approval by the affected voters in a referendum).

150. To avoid undermining the constitutionality of section 381.986(8)(a)2.a., therefore, the statute cannot be construed as having enacted into law the Score Card and "validated" the Department-assigned aggregate scores therein, thereby establishing, as a matter of law, their truth as quantifiable facts.

151. The Department's interpretation of the One Point Condition as having implicitly incorporated the Score Card and validated the truth of the matters the Department contends were asserted therein, in particular that the aggregate scores constitute accurate interval data, is clearly erroneous and contravenes the law implemented.

152. It is concluded, therefore, that paragraphs (1)(b), (1)(c), and (1)(d) of the Emergency Rule are invalid pursuant to section 120.52(8)(c).

B. Invalidity under Section 120.52(8)(b)

153. The "two fundamental prohibitions" of the separation of powers doctrine mandate that no branch of government may either encroach upon the powers of, or delegate its constitutionally assigned power to, another branch. Whiley v. Scott, 79 So. 3d 702, 708 (Fla. 2011). To the extent allowable under the nondelegation doctrine (which is not at issue here), however, "the Legislature may specifically delegate . . . its rulemaking authority to the executive branch" without violating the separation of powers. Id. at 711.

154. Thus, rulemaking "is a derivative of lawmaking," such that when an agency adopts "'a rule having the force of law, it acts in place of the legislature.'" Id. at 710 (quoting Dep't of Rev. v. Novoa, 745 So. 2d 378, 380 (Fla. 1st DCA 1999)). Section 120.52(8) could not be clearer about this: rulemaking

involves the exercise of delegated *legislative* authority, i.e., a power that derives from "the Legislature's lawmaking authority under article III, section 1 of the Florida Constitution." Id. at 716.

155. As a grant of *rulemaking* authority, then, section 381.986(8)(k) must be understood as a delegation to the Department of the *legislative power* of the state. Although, to be sure, the legislature could empower the Department to exercise quasi-judicial power (and has done so), section 381.986(8)(k) is *not* a grant of quasi-judicial authority, which latter is a derivative of the judicial power under Article V, section 1, of the Florida Constitution.

156. So, it is of great significance that the Emergency Rule does more than merely define the terms "Final Ranking," "Highest Final Ranking," and "Within One Point" in a generally applicable manner.[23/] Instead, reflecting the Department's misguided interpretation of the One Point Provision, the Emergency Rule explicitly incorporates and validates the Score Card, which has the effect of defining the terms in question so narrowly that each nursery within the rule's field of operation is actually given its own bespoke definitions.

157. To be specific, the term Final Ranking means, for Nature's Way, "2.8833 or 2." For Costa, the same term means "4.4000 or 5." The term Final Ranking is defined as a unique

pair of numbers for each nursery, for a total of 26 different, custom-made definitions.

158. There are fewer definitions of Highest Final Rank——a separate one for each of the five regions. For the southwest region, e.g., Highest Final Rank means "4.1042 or 5," whereas for the southeast region, the same term means "4.4000 or 5."

159. The definition of Within One Point actually comprises 21 definitions, one for each nursery that potentially might be eligible for licensure under the One Point Condition. (The five highest scored applicants, which are already licensed, are the points of reference.) The definition specifies the applicable "difference," which must be 1.0000 or less to be Within One Point, not simply by describing the mathematical formula, but by prescribing for each nursery the very numbers that must be subtracted from one another. In this way, the definition *decides* which applicants, *by name*, are Within One Point, and which are not.

160. For Nature's Way, for example, the rule-prescribed Within One Point "difference" is 1.5167 (under the aggregate score formula) or 3 (under the regional rank formula). Because both rule-determined numbers are greater than 1.0000, the rule *rules* that Nature's Way is ineligible for licensure under the One Point Condition. For KSG, the "difference" is 1.1875 (aggregate score comparison) or 1 (regional rank comparison).

Since the smaller "difference" of 1 equals 1.0000, the rule *orders* that KSG meets the Once Point Condition. The rule likewise *adjudicates* the substantial interests of the other 19 potentially eligible applicants.

161. Although it purports to be an exercise of delegated legislative authority and was published in the guise of a rule, the Emergency Rule is, in substance and effect, an *order* (or a compilation of orders) determining the substantial interests of the 21 applicants that populate the universe of potentially licensable nurseries under the One Point Condition. The Emergency Rule does not formulate policy at a level of generality that could possibly be considered categorical; rather, it *finds* adjudicative facts material to the substantial interests of identifiable——indeed identified——parties. The Emergency Rule reflects an exercise of quasi-judicial, not quasi-legislative, authority. It is an order masquerading as a rule.

162. As such, the Emergency Rule is not authorized by section 381.986(8)(k), which to repeat is not a warrant to exercise quasi-judicial authority. To be sure, the Department possesses the quasi-judicial power to determine the substantial interests of the nurseries, but it may exercise that power only through sections 120.569 and 120.57. Rulemaking under section 120.54 is not a bypass around DOAH that an agency can use to cut

off a party's right to dispute material facts and present its case to a neutral and independent ALJ.

163. It is concluded, therefore, that paragraphs (1)(b), (1)(c), and (1)(d) of the Emergency Rule are invalid pursuant to section 120.52(8)(b).

IX. INVALIDITY UNDER SECTION 120.52(8)(e)

164. There really can be no serious disagreement with the proposition that the Department's aggregate scores (and the regional ranks that are derivative of those aggregate scores) are not supported by logic, reason, or the necessary facts. As explained at length above, the aggregate scores are nothing but the weighted averages of ordinal data, i.e., the applicants' numerically coded positions in the Domanial rankings (1-5), carried out, preposterously, to the ten-thousandth decimal place. As explained above, these aggregate scores simply do not have the meaning the Department wants them have; they cannot possibly have such meaning because *no quantifiable information about the applicants' relative suitability was ever recorded*.

165. The upshot is that the Emergency Rule, not to put too fine a point on it, is based on a delusion, the delusion that the aggregate scores truly are interval data that tell us precisely *how much suitability* one applicant was found to have had in comparison to another. It is this delusion that allows the Department to declare (per the Emergency Rule) that Costa

was 1.5167 points better than Nature's Way——a statement that is patently irrational.

166. It is concluded, therefore, that paragraphs (1)(b), (1)(c), and (1)(d) of the Emergency Rule are invalid pursuant to section 120.52(8)(e).

X. THE UNADOPTED RULE

167. The term "rule" is defined in section 120.52(16) to mean "each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. The term also includes the amendment or repeal of a rule." As the First DCA explained:

> The breadth of the definition in Section 120.52(1[6]) indicates that the legislature intended the term to cover a great variety of agency statements regardless of how the agency designates them. Any agency statement is a rule if it "purports in and of itself to create certain rights and adversely affect others," [State, Dep't of Admin. v.] Stevens, 344 So. 2d [290,] 296 [(Fla. 1st DCA 1977)], or serves "by [its] own effect to create rights, or to require compliance, or otherwise to have the direct and consistent effect of law." McDonald v. Dep't of Banking & Fin., 346 So. 2d 569, 581 (Fla. 1st DCA 1977).

State Dep't of Admin. v. Harvey, 356 So. 2d 323, 325 (Fla. 1st DCA 1977); see also Jenkins v. State, 855 So. 2d 1219 (Fla. 1st

DCA 2003); Amos v. Dep't of HRS, 444 So. 2d 43, 46 (Fla. 1st DCA 1983). Accordingly, to be a rule,

> a statement of general applicability must operate in the manner of a law. Thus, if the statement's effect is to create stability and predictability within its field of operation; if it treats all those with like cases equally; if it requires affected persons to conform their behavior to a common standard; or if it creates or extinguishes rights, privileges, or entitlements, then the statement is a rule.

Fla. Quarter Horse Racing Ass'n, Inc. v. Dep't of Bus. & Prof'l Reg., Case No. 11-5796RU, 2013 Fla. Div. Admin. Hear. LEXIS 558, 37-38 (Fla. DOAH May 6, 2013), aff'd, Fla. Quarter Horse Track Ass'n v. Dep't of Bus. & Prof'l Reg., 133 So. 3d 1118 (Fla. 1st DCA 2014).

168. Because the definition of the term "rule" expressly includes statements of general applicability that implement or interpret law, an agency's interpretation of a statute that gives the statute a meaning not readily apparent from its literal reading and purports to create rights, require compliance, or otherwise have the direct and consistent effect of law, is a rule, but one which simply reiterates a statutory mandate is not. Id. at 39-40; see also State Bd. of Admin. v. Huberty, 46 So. 3d 1144, 1147 (Fla. 1st DCA 2010); Beverly Enters.-Fla., Inc. v. Dep't of HRS, 573 So. 2d 19, 22 (Fla. 1st

DCA 1990); St. Francis Hosp., Inc. v. Dep't of HRS, 553 So. 2d 1351, 1354 (Fla. 1st DCA 1989).

169. Agency rulemaking is not discretionary under the Administrative Procedure Act. See § 120.54(1)(a), Fla. Stat.; Dep't of High. Saf. & Motor Veh. v. Schluter, 705 So. 2d 81, 86 (Fla. 1st DCA 1997)(The "legislature's intention [was] to remove from agencies the discretion to decide whether or not to adopt rules."). Each agency statement meeting the definition of a rule under section 120.52(16) must be adopted "as soon as feasible and practicable." § 120.54(1)(a), Fla. Stat.

170. Section 120.56(4) authorizes any substantially affected person to seek an administrative determination that an agency statement which has not been adopted by the rulemaking procedure is nevertheless a "rule" as defined in section 120.52 and hence violates section 120.54(1)(a). The statutory term for such a rule-by-definition is "unadopted rule," which is defined in section 120.52(20).

171. If the petitioner proves at hearing that the agency statement is an unadopted rule, the agency then has the burden of overcoming the presumptions that rulemaking was both feasible and practicable. In this regard, section 120.54(1)(a)1. provides as follows:

> Rulemaking shall be presumed feasible unless the agency proves that:

> a. The agency has not had sufficient time to acquire the knowledge and experience reasonably necessary to address a statement by rulemaking; or
>
> b. Related matters are not sufficiently resolved to enable the agency to address a statement by rulemaking.

Section 120.54(1)(a)2. provides as follows:

> Rulemaking shall be presumed practicable to the extent necessary to provide fair notice to affected persons of relevant agency procedures and applicable principles, criteria, or standards for agency decisions unless the agency proves that:
>
> a. Detail or precision in the establishment of principles, criteria, or standards for agency decisions is not reasonable under the circumstances; or
>
> b. The particular questions addressed are of such a narrow scope that more specific resolution of the matter is impractical outside of an adjudication to determine the substantial interests of a party based on individual circumstances.

A. The Scoring Methodology Comprises Policies of General Applicability

172. To be generally applicable, a statement's level of generality must be such as to constitute an abstract principle, but it need not apply universally to every person or activity within the agency's jurisdiction. It is sufficient, rather, that the statement apply, not to just a single person or singular situations, but uniformly to a category or class of persons or activities over which the agency may properly

exercise authority. See Schluter, 705 So. 2d at 83 (policies that established procedures pertaining to police officers under investigation were said to apply uniformly to all police officers and thus to constitute statements of general applicability); see also, McCarthy v. Dep't of Ins., 479 So. 2d 135 (Fla. 2d DCA 1985)(letter prescribing "categoric requirements" for certification as a fire safety inspector was a rule).

173. The several policies that together constitute the Scoring Methodology were used to determine the substantial interests of every nursery that applied for a DO license in 2015. The Department cannot, and does not, dispute this. As the Department writes in its Proposed Final Order, at page 16, "[t]he 2015 Scoring Methodology allowed the Department to determine which applicants from a one-time batch were entitled to receive the five exclusive DO licenses in 2015." In other words, the Department based its determination of *all* the 2015 applicants' substantial interests on the Scoring Methodology.

174. Thus, the Scoring Methodology was applied uniformly to a class of persons, and its constituent policies are framed in general, not case- or party-specific terms.

175. The Department contends that the Scoring Methodology is not an unadopted rule because it "was used one time" in 2015 under a statute that did not authorize the issuance of

additional DO license in the future. These circumstances, the Department says, gave it "no reason . . . to expect the 2015 Scoring Methodology ever to be used in the future and no reason . . . to adopt the 2015 Scoring Methodology through chapter 120's rulemaking process." Dep't's PFO at 16. The undersigned interprets these assertions as an argument against general applicability.

176. It is an unpersuasive argument that is rejected for several reasons. First, while the 2015 application cycle might have been a one-time event, it entailed many agency actions, and these were *all* based on the Scoring Methodology. Thus, the Scoring Methodology was *not* used only once; rather, it was effectively used 26 times to determine the substantial interests of 26 applicants.

177. Second, section 120.52(16) does not contain an exception for agency statements of general applicability that might apply only to nonrecurring events. Indeed, under the Department's logic, there was no reason to adopt most (perhaps all) of rule 64-4.002, and certainly no reason to adopt paragraph (5) thereof, which prescribes procedures specifically tailored for the so-called "one-time" evaluation that the Department had "no reason . . . to expect [would] ever . . . be used in the future." The Department's reasoning, obviously, is flawed. What makes the Scoring Methodology generally applicable

is the fact that it was applied without exception to determine the substantial interests of every member of a class of nurseries, namely the 2015 applicants. It is no less generally applicable for having been formulated to govern a situation that, it was thought, would not be repeated.

178. Third, whether or not the Department had reason to think the Scoring Methodology would be used again someday, in fact it has been. The Emergency Rule purports to adjudicate, *today*, the "within-one-point" issue of fact for each potentially licensable applicant *based on the Scoring Methodology*.[24/] The Scoring Methodology is hardly the dead letter the Department makes it out to be.

B. The Scoring Methodology Purports to Interpret Rule 64-4.002 Authoritatively

179. An agency's interpretation of its own rule, no less than a statutory construction, is itself a rule-by-definition if the interpretation gives the rule a meaning not readily apparent from its literal reading and purports to create rights, require compliance, or otherwise have the force of law.

180. The Department freely acknowledges that the Scoring Methodology is based on an interpretation of rule 64-4.002. In a previous case, describing a category of proof relating to the ranking and scoring of the 2015 applicants (e.g., the completed

Scorecards and the Master Spreadsheet), which was being referred to as the "Scoring and Ranking Evidence," the Department wrote:

> [T]he Scoring and Ranking Evidence sets forth the Department's interpretation and applications of the pertinent statutes and rules over which the Department has substantive jurisdiction —— section 381.986, Florida Statutes, and chapter 64-4, Florida Administrative Code. Specifically, the Scoring and Ranking Evidence will reflect how the scorecard, which is found in rule 64-4.002, is to be applied under the Department's interpretation of its own rule.
>
> * * *
>
> The Scoring and Ranking Evidence helps present the Department's interpretation of section 381.986 and rule 64-4.002 and informs how DOAH in turn must apply the same statute and rule after DOAH resolves any disputed issues of fact.

Dep't of Health, Memorandum Opposing Ruskin's Motion in Limine Regarding the Department's Scoring and Ranking, at 4-5, DOAH Case No. 15-7270 (filed Aug. 5, 2016)(Emphasis added).

181. In the Final Order the Department entered in that same case, which arose from the denial of applications for the southwest regional DO license, the Department rejected the ALJ's scoring methodology as "contrary to Rule 64-4.002" and substituted its own Scoring Methodology, which it found was "as or more reasonable than that used by the ALJ." Plants of Ruskin v. Dep't of Health, DOH-17-0791-FOI-HO, at 9 (Fla. DOH Aug. 22, 2017). This is the "reasonableness" finding that an agency is

required to make under section 120.57(1)(*l*) when rejecting an ALJ's interpretation of an administrative rule in favor of its own interpretation of the rule. (Ironically, in the same Final Order, at 7, the Department wrote, disapprovingly, that the "ALJ's scoring method has never gone through the rulemaking process." Neither, of course, has the Department's Scoring Methodology.)

182. It practically goes without saying that the Scoring Methodology gives rule 64-4.002(5) meaning that is not apparent, readily or otherwise, from a literal reading of its provisions. While the undersigned has concluded, for reasons stated above, that the Scoring Methodology (with the exception of the Aggregate Definition) contravenes rule 64-4.002(5), it is irrelevant to the determination of whether the Scoring Methodology constitutes an unadopted rule that these interpretations might be permissible. That is to say, an interpretation that otherwise meets the definition of a rule is not saved from being declared an unadopted rule merely because it is a reasonable interpretation.

183. There is nothing in rule 64-4.002 that even hints at the ranking of applicants; the coding of positions in rankings with ordinal "rank scores"; the use of ordinal data as if it were interval data; or the reliance upon spurious digits resulting from mathematical calculations carried out far beyond

the precision of the original data. The Scoring Methodology clearly puts several layers of interpretive gloss on the rule, to say the least.

184. There can be no doubt that the Scoring Methodology has the force of law in the Department's eyes. That much is clear from the memorandum and Final Order quoted above. As can be seen, the Department expected DOAH to follow the Scoring Methodology as binding law, and if an ALJ declined to do so, the Department would simply override the ALJ and apply the Scoring Methodology when taking final agency action. A better example of "authoritative" would be hard to find.

C. Rulemaking Was Feasible and Practicable

185. The Department has made no attempt to prove (or even to argue) that it would have been infeasible or impracticable to adopt the Scoring Methodology as a rule. Thus, feasibility and practicability are presumed.

D. The Scoring Methodology Is an Unadopted Rule

186. Based on the foregoing, it is concluded that the Scoring Methodology, which comprises several polices having general applicability as described above, is an unadopted rule.

XI. ATTORNEY'S FEES

187. Having determined that a portion of the Emergency Rule is invalid, the undersigned is required, pursuant to section 120.595(3), to award Nature's Way reasonable costs and

reasonable attorney's fees (up to $50,000), unless the Department "demonstrates that its actions were substantially justified or special circumstances exist which would make the award unjust." If Nature's Way timely requests such relief, the undersigned will conduct further proceedings to determine whether such an award must be made, and, if so, in what amount.

188. Having declared that the Scoring Methodology violates section 120.54(1)(a), an order must be entered against the Department, pursuant to section 120.595(4), for reasonable costs and reasonable attorney's fees, "unless the agency demonstrates that the statement is required by the Federal Government to implement or retain a delegated or approved program or to meet a condition to receipt of federal funds."

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

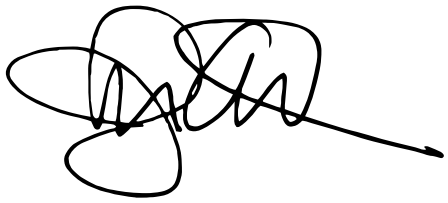
1. Emergency Rule 64ER17-7(1)(b)-(d) constitutes an invalid exercise of delegated legislative authority.

2. The Scoring Methodology comprising several statement of general applicability as described in detail hereinabove constitutes an unadopted rule in violation of section 120.54(1)(a).

3. Nature's Way shall have 30 days from the date of this Final Order within which to file a motion for attorney's fees

and costs, to which motion (if filed) Nature's Way shall attach appropriate affidavits (attesting, e.g., to the reasonableness of the fees and costs) and the essential documentation supporting the claim, such as time sheets, bills, and receipts.

DONE AND ORDERED this 15th day of June, 2018, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of June, 2018.

ENDNOTES

[1/] Florida Administrative Code Rule 64-4.002(5) provides that applications were due no later than 21 days after the effective date of the rule, which became effective June 17, 2015.

[2/] Note, for now, that assigning a number, e.g. 5, to a superlative adjective such as "most qualified" does not turn the adjective into a measurement signifying the quantity of five units or points.

[3/] To say that 20% of the symbol "5 points" is "1 point" would be, obviously, misleading, given the lack of a meaningful

referent for "1 point" and the fact that "1 point" is commonly understood to signify a quantity as opposed to a quality.

[4/] If this is a bit too abstract, perhaps it will help to imagine that, for some reason, instead of trying to quantify relative suitability, for which there is no commonly known unit of measurement, we were instead measuring length, for which there are commonly known standards. Clearly, for the weighting scheme to function, the same unit of measurement would need to be used in each weighted category. If inches were used in one category; yards in another; millimeters in the third; and feet and meters, respectively, in the remaining two, then the prescribed proportions would yield to the weight of the disparate standards, with the smaller units (millimeters) likely to generate much bigger numbers than the larger ones (meters).

[5/] If we can say, for example, that 10 is twice as large as 5, which is permissible when 0.0 means there is none of the measured variable (think weight, e.g., as opposed to temperature), then the quantified data are not only interval, but also ratio data.

[6/] The Florida Administrative Procedure Act does not have a good term of art for policies that an agency uses in conjunction with its free-form actions. The term "unadopted rule," as defined in section 120.52(20), is reserved for policies that meet the definition of a rule; it is technically not applicable to policies which merely guide free-form decisions but lack the force of law; in addition, in any event, the term "unadopted rule" reflects a judgment about the nature of the policy that would be premature to make until the agency began to enforce the policy as authoritative and necessary to substantial-interests determinations. The commonly used (but formally undefined) term "nonrule policy" is ambiguous because "nonrule" can mean either (i) not a rule *in effect* (i.e., a formally adopted, existing rule) or (ii) not a rule *by definition* (i.e., a statement that does not meet the definition of a rule). In the former, more limited sense, the nonrule policy might or might not also be an unadopted rule. In the latter sense, the term "nonrule policy" means "not an unadopted rule." The undersigned thus prefers a term like "extralegal" or "extra-rule" to refer to a free-form policy that is unregulated, but not necessarily unlawful. Such a policy might "harden" into an unadopted rule if the agency seeks to enforce the policy as an authoritative legal principle

that purports to bind parties and judges and determine outcomes——or it might not.

[7/] Dep't Ex. 1.

[8/] When an agency determines a party's substantial interests, the agency must provide a clear point of entry to challenge that decision. Capeletti v. Dep't of Transp., 362 So. 2d 346 (Fla. 1st DCA 1978). In Capeletti, the court instructed that "an agency must grant affected parties a clear point of entry, within a specified time after some recognizable event in . . . free-form proceedings, to formal . . . proceedings under section 120.57(1)." Id. at 348 (Emphasis added). For a notice to be legally sufficient as a clear point of entry, it must *clearly* state the nature of the agency's decision, as well as the process and time frame for challenging that decision. See Fla. Optometric Ass'n v. Bd. of Optometry, 567 So. 2d 928, 935 (Fla. 1st DCA 1990)(persons whose substantial interests may be affected by an agency decision "must be given a clear point of entry; i.e., *a clear* opportunity," to challenge the agency decision); see also Sterman v. Fla. State Univ. Bd. of Regents, 414 So. 2d 1102, 1103-04 (Fla. 1st DCA 1982)(notice that failed clearly to inform student he would not be awarded a specific degree was insufficient to provide a clear point of entry into formal proceedings to challenge that decision). Here, the only *recognizable* agency decision addressed in the 2015 notice of intent to deny Nature's Way's application was that Nature's Way's application would be denied. The notice did not inform Nature's Way that its aggregate score was determined to be 2.8833 or provide a clear opportunity to dispute the truth of the aggregate score of 2.8833 as a quantified fact.

[9/] To illustrate, imagine the jersey numbers of the players on your favorite football team. They are, in effect, a code for identifying the personnel on the field. The meaning of the number is the player's name. If the quarterback, for example, were given the number 12.8833 instead of 12, the number would have no greater or more precise meaning. Now, can we subtract the quarterback's number from the center's number? Sure. It's a simple mathematical operation. Is the result meaningful or interpretable? No. If the numbers symbolize names rather than quantities, the difference between them has no meaning, because you can't subtract a name from a name. Suppose I tell you that the running back is 19 and the punter is 21. Without additional information, the numbers in that statement are ambiguous. They

could be jersey numbers signifying identity (not quantifiable information), or they could be the players' ages signifying years of life (quantifiable information). If the latter, the two numbers can be meaningfully subtracted, because age difference is interpretable.

[10/] Dep't of Health, Memorandum Opposing Ruskin's Motion in Limine Regarding the Department's Scoring and Ranking, at 3, DOAH Case No. 15-7270 (filed Aug. 5, 2016)(Emphasis added).

[11/] The Department incorporated the Proposed Recommended Order from the companion case by reference into its Proposed Final Order in this case.

[12/] In addition to Sun Bulb Nursery, the following 2015 DO applicants received MMTC licenses pursuant to the Medical Marijuana Law: Loops Nursery, Treadwell Nursery, 3 Boys Nursery, and Plants of Ruskin. As of this writing, 13 of the 26 2015 DO applicants have been licensed as MMTCs.

[13/] By convention, numbers are assigned to ranks in ascending (or descending) whole numbers. But this is merely a matter of practice and convenience. It would not be incorrect to assign *any* set of ascending (or descending) numbers to indicate the direction of the ordered items. That is, in terms of the information conveyed, there is no difference between, say, {5, 4, 3, 2, 1} and {943, 29, 17, 11, and 3}, when all we know is that 5 (or 943) is greater than 4 (or 29), which in turn is greater than 3 (or 17), etc.

[14/] True value is useful, nevertheless, for quantifying error in determining the accuracy of a measurement. The formula is simple: error = $x - \mu$. Of course, because we can never know μ, we cannot determine the exact error. We can, however, use a reference value for μ, i.e., our best estimate of a true value, to calculate our best estimate of the error in our measurement.

[15/] Dr. Cornew is an expert in numerical and statistical analysis. He obtained his undergraduate and doctorate degrees from the Massachusetts Institute of Technology ("MIT"). After receiving his degrees, Dr. Cornew taught in the fields of computer science, statistical analysis, and numerical analysis at MIT, Simmons College, and Florida International University. In addition, Dr. Cornew has provided consulting services on statistical and mathematical issues related to investment and

market strategies. The Department offered no evidence to rebut Dr. Cornew's testimony.

[16/] Dr. Cornew reports this value as 2.8833 + 31.94%, to highlight the magnitude of upward uncertainty in the Department-generated aggregate score.

[17/] The WMTOs are: Cultivation, 0.6500; Processing, 0.5500; Dispensing, 0.4000; MD, 0.1167; and Financials, 0.2667. The low endpoint can be expressed alternatively as 2.8833 – 31.21% to show the substantial uncertainty inherent in the reported score, even after limiting the Department's error with a generous assumption about the other applicants' scores.

[18/] For the low endpoint, the Cultivation, Processing, Dispensing, MD, and Financials WMTOs, in that order, are: 1.1000, 0.9500, 0.4500, 0.1667, and 0.7333. For the high endpoint, these values are: 1.4750, 1.4000, 0.7125, 0.2500, and 1.0000. From the reported aggregate score of 4.4000, these endpoints demonstrate an upward uncertainty of 9.94% and a downward uncertainty of 22.73%. (Dr. Cornew calculates Costa's low endpoint to be 3.3942, reflecting a downward uncertainty of 22.86%. This minor discrepancy in our figures, which might be an artifact of rounding, is immaterial.)

[19/] The Department argues that it had a license to engage in the logical fallacy of overprecision and rely upon meaningless, spurious digits because rule 64-4.002 required weighting and averaging, which would necessarily produce fractional results. This argument is completely without merit. False precision results from *exactly* the kinds of mathematical operations the Department used, which is why the products of such equations *must* be corrected (rounded) to eliminate the otherwise deceptive digits. What the Department seems unable to understand (or, more likely, unwilling to concede) is that mathematical operations such as division and multiplication do not——cannot possibly——make the original measurements more precise. If you take several measurements to the nearest foot and then average them, you cannot *truthfully* report the result to the nearest thirty-second of an inch, even if the numbers can be run out that far, because nothing was actually measured with such precision.

[20/] As between the options, the undersigned considers the "second place" reading to be markedly inferior and has concluded

that the legislature intended the term "final ranking" to have the same meaning as "aggregate score," so that an applicant whose *aggregate score* is within one point of the highest *aggregate score* in its region meets the One Point Condition, regardless of whether that applicant was ranked Second, Third, Fourth, or Fifth Best. To be clear, however, this ground for invalidating the Emergency Rule under section 120.52(8)(c) results *not* from the Department's making a poor choice, but from its *failure to choose* between two alternatives where ambiguity demands a choice.

[21/] The verb "to score" here refers to the Reviewers' *assigning* of scores (Ordinals), not to *computing* aggregate scores from Ordinals assigned by the Reviewers.

[22/] The legislature may find "legislative facts" without violating the separation of powers, but such findings are properly limited to broad matters of policy or value choices, usually given as explanation of the grounds for enacting a law. Facts particular to a dispute between parties upon which the substantial interests of an individual or entity depend are adjudicative facts, not legislative facts.

[23/] Examples of a generally applicable definition of, e.g., "Final Ranking" are: *an applicant's "aggregate score" as generated pursuant to rule 64-4.002(5)(b);* or, alternatively, *an applicant's finish position (or "regional rank") in the order of finish of its region's applicants, ranked from highest to lowest "aggregate score" as generated pursuant to rule 64-4.002(5)(b).*

[24/] In this way, the Emergency Rule rather sneakily incorporates the Scoring Methodology and "adopts" it sub silentio. Such covert rule promulgation, needless to say, is not in accord with the procedure specified in section 120.54. Moreover, "[a]n agency may not adopt retroactive rules, including retroactive rules intended to clarify existing law, unless that power is expressly authorized by statute." § 120.54(1)(f), Fla. Stat. Thus, the Emergency Rule cannot be viewed as having ratified and validated the Scoring Methodology ex post facto.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of appeal with the Clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.

Applicant	Cultivation 30%	Processing 30%	Dispensing 15%	Med. Dir. 5%	Financials 20%
Bill's 1.5500	1 1 1 2 5 1 3 3 1 1 2 1 22 ÷ 12 = 1.8333 1.8333 × .3 = .5500	2 1 2 2 4 2 2 1 1 1 2 1 21 ÷ 12 = 1.7500 1.7500 × .3 = .5250	1 1 1 2 1 2 1 1 1 1 1 1 14 ÷ 12 = 1.1667 1.1667 × .15 = .1750	2 3 1 6 ÷ 3 = 2 2 × .05 = .1000	1 1 1 3 ÷ 3 = 1 1 × .2 = .2000
Costa 4.4000	5 5 5 5 4 5 5 5 5 3 5 4 56 ÷ 12 = 4.6667 4.6667 × .3 = 1.4000	3 5 5 5 3 5 4 5 5 3 4 3 50 ÷ 12 = 4.1667 4.1667 × .3 = 1.2500	3 5 5 4 4 3 3 4 5 4 4 4 48 ÷ 12 = 4.000 4.000 × .15 = .6000	4 5 4 13 ÷ 3 = 4.3333 4.3333 × .05 = .2167	5 4 5 14 ÷ 3 = 4.6667 4.6667 × .2 = .9333
Keith St. Germain 3.2125	4 5 4 1 2 4 2 2 4 5 3 5 41 ÷ 12 = 3.4167 3.4167 × .3 = 1.0250	4 4 4 1 2 1 3 2 4 5 5 4 39 ÷ 12 = 3.2500 3.2500 × .3 = .9750	4 2 2 2 2 1 2 2 4 2 3 3 29 ÷ 12 = 2.4167 2.4167 × .15 = .3625	2 4 5 11 ÷ 3 = 3.6667 3.6667 × .05 = .1833	3 3 4 10 ÷ 3 = 3.3333 3.3333 × .2 = .6667
Nature's Way 2.8833	2 3 4 3 1 2 4 4 3 4 4 3 37 ÷ 12 = 3.0833 3.0833 × .3 = .9250	2 3 1 3 1 3 1 3 2 4 3 5 31 ÷ 12 = 2.5833 2.5833 × .3 = .7750	3 3 3 4 3 4 4 3 2 5 5 5 44 ÷ 12 = 3.6667 3.6667 × .15 = .5500	5 2 3 10 ÷ 3 = 3.3333 3.3333 × .05 = .1667	2 2 3 7 ÷ 3 = 2.3333 2.3333 × .2 = .4667
Redland 3.1750	4 2 2 4 3 3 1 1 2 2 1 2 27 ÷ 12 = 2.2500 2.2500 × .3 = .6750	5 3 3 4 5 4 5 4 3 2 1 2 41 ÷ 12 = 3.4167 3.4167 × .3 = 1.0250	5 5 5 5 5 5 5 5 3 3 2 2 50 ÷ 12 = 4.1667 4.1667 × .15 = .6250	4 1 2 7 ÷ 3 = 2.3333 2.3333 × .05 = .1167	4 5 2 11 ÷ 3 = 3.6667 3.6667 × .2 = .7333