

STATE OF FLORIDA  
DEPARTMENT OF HEALTH

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**PERKINS NURSERY, INC.,**  
a Florida corporation,

**Petitioner,**

vs.

CASE NO.: \_\_\_\_\_

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

**Respondent.**

\_\_\_\_\_ /

**PETITION FOR FORMAL ADMINISTRATIVE HEARING**

Pursuant to sections 120.569 and 120.57, Florida Statutes, and Rule 28-106.201, Florida Administrative Code, Perkins Nursery, Inc. (“Perkins” or “Petitioner”) petitions the State of Florida, Department of Health (“Department”) for a formal administrative hearing to challenge the Department’s July 13, 2018, denial of its request for medical marijuana treatment center (“MMTC”) registration, a copy of which is attached to this Petition as **Exhibit A**. In support, Petitioner states:

**THE PARTIES**

1. Petitioner, Perkins Nursery, has been a licensed Florida nursery since April 4, 1977, and has been in continuous operation on its farm in Labelle, Florida for the last thirty-eight years. Perkins submitted a timely application to the Department in 2015 to serve as a dispensing organization for the Southwest Region, and met all requirements for such approval. As detailed below, Perkins is entitled to be registered as an MMTC pursuant to section 381.986(8)(a)2.a., Florida Statutes (2017). Perkins is located at 2575 Case Road, Labelle, Florida 33975. For

purposes of this proceeding, Perkins' contact information shall be that of its undersigned counsel.

2. The affected agency is the Florida Department of Health, 4052 Bald Cypress Way, Tallahassee, Florida 32399. The Department is the agency with authority to license medical marijuana treatment centers pursuant to section 381.986, Florida Statutes, and article 10, section 29 of Florida's Constitution.

### **NOTICE OF AGENCY ACTION**

3. The Department's Agency Action, denial of Perkins' request for registration as a MMTC, that is the subject of this Petition, was received via electronic mail and dated July 13, 2018, and is attached as **Exhibit A**. Pursuant to the attached notice of rights and section 120.569, Florida Statutes, Perkins has 21 days, or until August 3, 2018, to file a petition challenging the Agency Action. This Petition is timely filed.

### **FACTUAL BACKGROUND**

4. Petitioner timely filed an application with the Department to become a dispensing organization pursuant to section 381.986, Florida Statutes (2014). Perkins' application was deemed complete by the Department and reviewed, evaluated and scored pursuant to the provisions of Florida Administrative Code Rule 64-4.002, by an evaluation panel consisting of three evaluators and utilizing the scorecard incorporated by reference in Rule 64-4.002.

5. Perkins' application was scored in the Southwest Region, which consisted of five applications.

6. Perkins was not selected for licensure. A copy of the Department's 2015 letter denying Perkins' application is attached as **Exhibit B**.

7. The Department's 2015 letter denying Perkins' application did not advise Perkins of the score it received for its application, and reflected only that Alpha Foliage, Inc. ("Alpha") had the best score in Southwest Region, and Perkins did not. Alpha was approved as a dispensing organization on November 23, 2015.

8. During the 2017 Special Session, the Florida Legislature significantly amended section 381.986, Florida Statutes, and established 10 new MMTC licenses, some of which were to be awarded to prior applicants who meet certain statutory criteria. The pertinent language of the new statutory provision 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 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. (2017) (emphasis added).

9. Pursuant to the above-referenced language, four requirements must be met for an entity to receive MMTC registration pursuant to the 2017 law: (1) submission of an application that was reviewed, evaluated, and scored by the Department during the 2015 application process; (2) pending litigation as of January 1, 2017, or a final ranking within 1 point of the highest ranked applicant in its region; (3) compliance with the provisions of section 381.986; and (4) documentation that the entity could begin cultivation within 30 days.

10. On November 1, 2017, the Department promulgated Emergency Rule 64ER17-7, which attempted to define the several statutory terms relevant to determining which 2015 applicants were properly considered to be “within one point” of the highest ranked regional applicant. On June 15, 2018, Administrative Law Judge Van Laningham, by way of a Final Order, ruled that the Emergency Rule 64ER17-7 constituted an invalid exercise of delegated legislative authority. *Nature’s Way Nursery of Miami, Inc. v. Florida Department of Health*, DOAH Case Number 17-5801RE.

11. On June 15, 2018, ALJ Van Laningham, by way of a Final Order, also ruled that the Scoring Methodology used by the Department to score the 2015 applications constituted an unadopted rule in violation of section 120.54(1)(a), Florida Statutes. *Nature’s Way Nursery of Miami, Inc. v. Florida Department of Health*, DOAH Case Number 18-0720RU.

12. Via letter dated April 26, 2018, attached as **Exhibit C**, Perkins demonstrated to the Department it met all statutory criteria to be registered as an MMTC pursuant to the 2017 Law, and requested issuance of such registration.

13. On July 13, 2018, the Department issued its denial of Perkins’ request for medical marijuana treatment center registration, concluding that Perkins was not within one point of the highest ranked applicant in the Southwest Region. The Department’s denial fails to explain how

it came to the conclusion that Perkins was not within one point of the highest scoring applicant in the Southwest region. Despite the lack of explanation, the determination must have been based on the invalid emergency rule, 64ER17-7; the Scoring Methodology that is an impermissible unadopted rule; a new unadopted rule that has yet to be made public; or some combination of the three. It is improper for an agency to base agency action on invalid rule or an unadopted rule. In addition, the Department's denial contradicts the rulings made in *Nature's Way Nursery of Miami, Inc. v. Florida Department of Health*, DOAH Case No. 18-000721.

### **SUBSTANTIAL INTERESTS**

14. Petitioner meets all requirements for registration as an MMTC pursuant to section 381.986(8)(a)2.a., Florida Statutes (2017), and is entitled to MMTC registration. The Department's denial of Perkins' request for MMTC registration adversely impacts its substantial interests because it denies Perkins the opportunity to operate as an MMTC pursuant to section 381.986(8)(a)2.a., Florida Statutes (2017).

15. Petitioner is likewise substantially affected by the Department's reliance on invalid and unadopted rules to determine the agency action in this case.

### **DISPUTED ISSUES OF MATERIAL FACT**

16. Whether the Department properly calculated the final reported ranks/scores awarded to applicants during the 2015 dispensing organization evaluation process for the Southwest Region.

17. Whether the Department should have evaluated and scored Alpha's application in light of the fact it did not meet the 30-year continuity of operation requirement in section 381.986(5)(b)1., Florida Statutes (2014).

18. Whether, the Department correctly calculated Perkins' score as not being within "one point" of the highest final ranking in the Southwest Region as required by section 381.986(8)(a)2.a., Florida Statutes (2017).

19. Whether the Department improperly relied on an invalid rule in determining that Perkins was not entitled to registration as an MMTC.

20. Whether the Department improperly relied on an unadopted rule in determining that Perkins was not entitled to registration as an MMTC.

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

#### STATEMENT OF ULTIMATE FACTS

22. The following facts and law support issuance of MMTC registration to Petitioner.

23. The Department's denial of Petitioner's request for an MMTC registration is founded solely on the Department's calculation of Petitioner's score relative to other applicants in the Southwest Region. More specifically, the Department erroneously calculated Perkins' rank as not being within "one point" of the highest ranking applicant. § 381.986(8)(a)2.a., Fla. Stat. (2017). The Department's calculation is unreasonable, arbitrary, and capricious, and otherwise erroneous for the following reasons:

- a. **Alpha's application should not have been scored.** Alpha did not comply with the 30-year operational requirement in section 381.986(5)(b)1., Florida Statutes (2014), and should not have been scored. In fact, ALJ Van Laningham stated in 2016 litigation involving the scoring of the Southwest Region, "Because an applicant can operate or be operated only if it actually exists to act or be managed, and because

[Alpha] has not been in existence for 30 years, [Alpha] does not meet the [continuity of operations requirement].” *In re: Licensure of the Low-THC Cannabis Dispensing Organization for the Southwest Region*, DOAH Case No. 15-7259, (“Order Granting Ruskin’s Motion in Limine” at 10, September 12, 2016). This Order concluded by saying, “[Alpha] is not a bona fide applicant whose merits can be considered in the comparative review of competing qualified applicants . . . .” *Id.* at 14. Accordingly, Alpha’s application should not have been evaluated and scored by the Department in 2015, and its final rank/score should be disregarded for purposes of determining whether Perkins’ final rank/score is within one point of the highest regional applicant. Accordingly, the “highest final ranking” in the Southwest Region for purposes of section 381.986(8)(a)2.a., Florida Statutes, is 3 Boys Farms, with a final rank/score of 3.4667.

- b. **Mathematical rules require rounding the final ranks/scores to the nearest whole number.** In numerical analysis, there are significant figures and spurious digits. Significant figures are those that bring actual meaning to the analysis being performed. Spurious digits are numbers that exceed the precision of the underlying data and thereby create a falsity of precision. The significant figures in the number resulting from any calculation should not exceed the number of significant figures used in the calculation. To eliminate the false precision created by the spurious digits, the spurious digits should be rounded off to the nearest whole number.

- c. **The Department's evaluations used whole numbers.** When the Department performed its evaluation of the 2015 applications, all evaluators used whole numbers to determine the appropriate score given to any application for any category of evaluation. No evaluator used decimal places or identified numbers to the right of a decimal point to evaluate any portion of the applications. The ultimate posted scores suggesting accuracy to the ten thousandth place were all derived from calculations using whole numbers.
- d. **The Department must round scores and award Perkins a license.** Consistent with principles of numerical analysis, the Department must round the scores from the prior application period to the nearest whole number in order for its calculation of what constitutes "one point." Because the underlying data was only precise to a whole number, resulting calculations can similarly only be precise to the nearest whole number; numbers to the right of the decimal point are properly characterized as spurious. Any ultimate calculation of "one point" under the 2017 statute that utilizes decimal places relies upon spurious digits, which negate the validity and reasonableness of the analysis. Scores with decimal places identified when based upon data that used whole numbers creates a falsity of precision that is unreasonable to rely upon. Accordingly, the highest ranked, qualified applicant in the Southwest Region was 3 Boys Farms with a final rank/score of 3.4667, which should be rounded to 3. Perkins' final rank/score of 2.1167 should be rounded to 2 thereby making the



difference between the final ranks just one point and establishing Perkins' final ranking/score as being within one point of the highest ranked nursery in the region.

- e. **Precedent requires rounding to nearest whole number.** This factual analysis of how the Department should calculate a “one point” difference is consistent with longstanding prior precedent. In *Plants of Ruskin v. Department of Health*, DOAH Case No. 17-116, in deciding which of two Southwest Region MMTC applicants was more qualified, ALJ Van Laningham explained that “numbers to the right of the decimal point are spurious digits introduced by calculations carried out to a greater precision than the original data . . . which were awarded in whole numbers.” *Plants of Ruskin v. Department of Health*, DOAH Case No. 17-0116 (Recommended Order at ¶48, May 23, 2017). Similarly, in the recent case of *Nature’s Way Nursery of Miami, Inc. v. Florida Department of Health*, ALJ Van Laningham again found that “[r]ounding to the nearest integer value removes the meaningless figures and eliminates the overprecision manifested by those digits.” As a direct result, on July 13, 2018, the Department adopted a settlement agreement and registered Nature’s Way Nursery of Miami, Inc., as an MMTC. Consistent with these precedents, Perkins is entitled to be registered as an MMTC.
- f. **Precedent requires using Dr. Cornew’s Solution to calculate whether Perkins was within one point of the highest final ranking in the Southwest Region.** Using the assumptions and calculations contained in

Dr. Cornew's Solution, set out in the *Nature's Way* Recommended Order to establish Score Sets and a Proximity Box, it becomes clear that Perkins meets the one point requirement. See *Nature's Way Nursery of Miami, Inc. v. Florida Department of Health*, DOAH Case No. 18-0721, (Recommended Order at ¶¶120-33, June 15, 2018).

#### **STATUTES AND RULES ENTITLING PETITIONER TO RELIEF**

24. The statutes and rules that support Perkins' Petition are chapter 120 and section 381.986, Florida Statutes. The application of the relevant facts to these statutes has been previously stated in this petition.

#### **RELIEF REQUESTED**

25. For the foregoing reasons, Petitioner respectfully requests that:

a. The Department refer this petition to the Division of Administrative Hearings for assignment of an Administrative Law Judge to conduct a formal administrative hearing;

b. Following the hearing, Recommended and Final Orders be entered finding that Petitioner had a final ranking within one point of the highest final ranking in its region and is otherwise qualified to be licensed as medical marijuana treatment center and granting Petitioner's request for registration as a medical marijuana treatment center pursuant to section 381.986(8)(a)2.a., Florida Statutes; and

c. Such other relief as may be necessary or appropriate.

Respectfully submitted this 2nd day of August, 2018.

/s/ James A. McKee

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*Counsel for Petitioner, Perkins Nursery, Inc.*

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was hand delivered to the Agency Clerk, Florida Department of Health, Office of the General Counsel, 2585 Merchants Row Boulevard, Suite 110, Tallahassee, FL 32399, this 2nd day of August, 2018.

/s/ James A. McKee