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Rule Challenges Sprout from the Growing Florida Medical Marijuana Industry

by Paula Savchenko

The stigma attached to marijuana has drastically shifted over the past few years from a space that was once for "stoners" to a space that now patients and professionals have entered. As administrative law practitioners, I think we can all agree that it came as a big surprise to hear the words marijuana and rule challenge being spoken in the same sentence. Today, among both administrative law attorneys as well as most Medical Marijuana Treatment Center ("MMTC," formerly called Dispensing Organization "DO") owners, the two words go hand in hand. In fact, very few MMTCs were fortunate enough to be granted their license without going through the long road from filing a chapter 120 petition to patiently awaiting a recommended order from the administrative law judge (ALJ) and a final order from the Department of Health ("DOH").

Tightly woven throughout the lawsuits challenging DOH's actions in relation to the licensure of MMTCs are a variety of rule challenges. There are several different reasons a rule can be challenged pursuant to the Administrative Procedure Act. A proposed rule can be challenged under section 120.56(2)(a), Florida Statutes, an existing rule can be challenged under section 120.56(3), and an unadopted rule can be challenged under section 120.56(4).

Before diving into the lawsuits revolving around the licensure of MMTCs, it is important to first give a brief background on the laws and rules passed by the Florida Legislature and DOH. In 2014, the Legislature passed the Compassionate

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From the Chair

By Judge Gar Chisenhall

Since becoming involved with the Administrative Law Section in 2011, it has been a great privilege to work with many individuals who have devoted countless hours to furthering the practice of administrative law, and I am very honored to serve as the Section's chair for the next year. I would like to devote my first "From the Chair" column to recognizing a few of the Section's long-standing members and their exceptional service to the Section. I would also like to recognize the work being done by some of our newer members.

During the June 2018 executive council meeting, held in conjunction with The Florida Bar Convention, the Section honored Larry Sellers as the first recipient of the S. Curtis Kiser Administrative Lawyer of the Year Award and Administrative Law Judge Elizabeth McArthur as the first recipient of the Administrative Law Section Outstanding Service Award. Those in attendance were able to watch Senator Kiser, one of the founding fathers of the modern APA, present Larry with his award.

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Medical Cannabis Act, creating section 381.986, Florida Statutes. The law granted DOH the power to adopt rules necessary to implement the law. *See* § 381.986(5)(d), Fla. Stat. (2014). Further, DOH was required to grant five nurseries licenses to dispense medical marijuana, one for each region in the state. *See* § 381.986(5)(b), Fla. Stat. (2014). The Office of Compassionate Use ("OCU"), now referred to as the Office of Medical Marijuana Use ("OMMU"), came into existence as the entity within DOH that would oversee the licensing and other portions of the implementation of the statute. DOH then promulgated rules under which a nursery could apply for a DO license, now referred to as MMTC license.[1] Together, these laws and rules laid out the medical marijuana licensing scheme. In the 2015 application cycle, DOH received a total of 28 and scored 26 applications for DO licenses.[2] Then, in 2016, a proposed constitutional amendment passed by 71.3%, which broadened the scope and use of medical marijuana in Florida, and granted DOH rulemaking authority under the Florida Constitution.[3]

This article will zero in on the administrative law experiences of four applicants in their fight to attain the coveted MMTC licenses, with a focus on the rule challenge issues in each case.

2015 Application Cycle - *Plants of Ruskin, Inc. and Tornello Landscape Corp d/b/a 3 Boys Farm v. Department of Health*

Before DOH even began accepting applications, several nurseries challenged DOH's proposed rules, under section 120.56(2)(a). *See Plants of Ruskin, Inc., v. Dep't of Health*, Case No. 14-4299RP (Fla. DOAH Mar. 26, 2015).[4] The petitioners challenged DOH's proposed rule regarding the selection of DOs by a lottery system, along with other portions of the proposed rule. The petitioners claimed the proposed rule was an invalid exercise of delegated legislative authority. Ultimately, the petitioners voluntarily dismissed their challenges before proposed final orders were filed, as DOH withdrew the proposed rule.

In the 2015 application cycle, to apply for one of the initial DO licenses, a nursery was required to submit its application on or before July 8, 2015.[5] Five months later, each applicant received a letter notifying them that they either were the highest scoring applicant in the region, and as a result would receive one of the coveted DO licenses, or that they were not the highest scoring applicant and as a result, were denied a license. From here, lawsuits erupted as each applicant believed it was best qualified to serve the growing Florida medical marijuana market.

Plants of Ruskin ("Ruskin") and Tornello Landscape Corp., d/b/a 3 Boys Farm ("Tornello"), were among the many applicants that were denied licenses in the 2015 application cycle. In response, Ruskin and Tornello filed separate chapter 120 petitions as they both took issue with the method by which DOH scored their applications. *See Plants of Ruskin, Inc. v. Dep't of Health,* Case Nos. 15-7270, 17-0116 (Fla. DOAH May 23, 2017); *Tornello Landscape Corp., d/b/a 3 Boys Farm v. Dep't of Health*, Case Nos. 15-007272, 17-00117 (Fla. DOAH May 23, 2017). The applicants claimed that DOH's scoring method was arbitrary and capricious because its scoring procedures did not mirror the applicable rules and law, as it appeared DOH ranked as opposed to scored their applications. The nurseries claimed they should have received a much higher score and would have received a license if the scoring was done properly. The two cases were consolidated at the Division of Administrative Hearings ("DOAH").

After the applicants filed proposed recommended orders but before the ALJ issued a Recommended Order, the parties filed a Joint Request for Relinquishment of Jurisdiction, "due to settlement."[6] The following day, an order was entered closing the files and returning the cases to DOH. Then, DOH attempted to settle the case by offering a license to only one of the parties involved.[7] As the parties had both already fought for months over the coveted license spots, neither was willing to give up. Once DOH realized that the parties could not come to an agreement, it sent the case back to DOAH, with a Notice explaining "[a]lthough the Department was willing to issue one additional license in hopes of settling the matter, the parties were unable to come to an agreement."[8] Ultimately, the ALJ issued a Recommended Order finding that both nurseries should be granted licenses.[9] The ALJ also found that if it was not possible to grant both applicants licenses, then the license should be granted to Tornello because it scored slightly higher under his scoring method.

In the Recommended Order, the ALJ found that DOH's scoring method was arbitrary, capricious, and an abuse of discretion because it did not give points to specific criteria, did not use an external benchmark for scoring, and compared nurseries instead of scoring individually, making the scoring method inconsistent with the applicable rules and law.[10] More specifically, the ALJ agreed with the petitioners that DOH's rules provided that the reviewers were to score the applications but the reviewers instead ranked the applications within each region as they were instructed to do by a memorandum dated September 15, 2015, which was directly inconsistent with the rules and law, and was not incorporated by reference into the rules.[11] In the memorandum, DOH informed the reviewers that the scoring of the applications was to be comparative and instructed the reviewers to compare each application to the others within the same region, and assign a number value, highest to lowest, for the best to worst responses to each subsection.[12]

Subsequently, the cases settled and both nurseries received MMTC licenses. The nurseries submitted affidavits documenting their compliance with the applicable rules and law and in exchange, DOH agreed to grant each nursery a license to operate as a DO.[13] Even though the cases settled, DOH still felt compelled to issue a Final Order.[14] In its Final

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Order, DOH rejected parts of the Recommended Order, specifically those relating to DOH's scoring method.[15]

2017 Application Cycle - *Keith St. Germain Nursery Farms and Nature's Way Nursery of Miami, Inc. v. Department of Health*

During the 2017 special legislative session, section 381.986 was significantly amended to establish a licensing protocol for 10 new MMTCs by October 3, 2017.[16] This amendment instructed DOH to issue licenses to 10 MMTC applicants that met the following four criteria: (1) prior application; (2) litigation or ranking within one point of the regional licensee; (3) compliance with the law; and (4) documentation of operational capacity within 30 days.[17]

Under the 2017 amendment, the applicants' individual scores became relevant. The floodgates opened to not only additional licenses, but also, lawsuits that challenged DOH's scoring method again. This time, the lawsuits came in a hybrid form of challenges to agency action, unadopted rule challenges, and emergency rule challenges. Under the amendment, a spotlight was placed on DOH's decision to carry out the scores to the fourth decimal place, as opposed to rounding.

After the statutory amendment, several nurseries informed DOH that they met the criteria listed above; however, DOH again denied several of these nurseries' requests for licenses. Again, DOH was caught in the crossfire from applicants that believed their scores were incorrect to begin with and now were again denied licenses they believed they should have been granted. From here, additional issues came to light regarding DOH's scoring method.

Keith St. Germain Nursery Farms ("KSG") and Nature's Way Nursery of Miami, Inc. ("Nature's Way"), challenged DOH's actions claiming that the "ranking" as opposed to "scoring" method previously used in the 2015 application cycle amounted to an unadopted rule. *See Keith St. Germaine Nursery Farms v. Dep't of Health*, Case No. 17-5011RU (Fla. DOAH Oct. 31, 2017). Additionally, the petitioners also claimed that DOH operated under an unadopted rule in carrying out the scores to the fourth decimal place (as opposed to rounding), as nothing in the rules or law gave DOH the authority to do so. KSG also filed a petition and began its fight for licensure before Nature's Way intervened in the case.

During the pendency of KSG's unadopted rule challenge, DOH adopted emergency rule 64ER17-3. This emergency rule attempted to outline the method by which DOH "ranked" as opposed to "scored" the applications in the 2015 application cycle. Further, DOH attempted to codify for the first time its scoring method in carrying out the scores to the fourth decimal point and apply it retroactively. After adopting emergency rule 64ER17-3, DOH's agency clerk entered an order purporting to determine that the unadopted rule challenge was moot and suggested that DOAH had no jurisdiction over the case. DOH then filed notice of its Order Clarifying Jurisdiction and renewed its Motion to Dismiss. DOH also filed a Motion to Dismiss for Mootness. The ALJ denied both motions.

The emergency rule shifted KSG's unadopted rule challenge to an emergency rule challenge. KSG filed a petition claiming that emergency rule 64ER17-3 enlarged, modified, or contravened the statute implemented, in that it attempted to define "one point" as consisting of a number carried out to four decimal points. *See Keith St. Germaine Nursery Farms v. Dep't of Health*, Case Nos. 17-5447RE (Fla. DOAH Oct. 31, 2017).

Soon after, KSG was granted its license through a settlement agreement and Nature's Way went on in its fight for licensure. Nature's Way filed three separate challenges to DOH's actions/rules: (1) a challenge to DOH's denial of licensure; (2) an unadopted rule challenge; and (3) an emergency rule challenge. *See Nature's Way Nursery of Miami, Inc. v. Dep't of Health*, Case Nos. 17-5801RE, 18-0720RU, 18-0721 (Fla. DOAH June 15, 2018). DOH later adopted emergency rule 64ER17-7, which superseded 64ER17-3. Nature's Way successfully challenged the validity of this emergency rule as the ALJ issued a Final Order determining the rule was invalid. The ALJ found that emergency rule 64ER17-7(1)(b)-(d) constitutes an invalid exercise of delegated legislative authority, and the policies upon which DOH based its scoring of applicants in the 2015 application cycle constituted unadopted rules. DOH has appealed the ALJ's decision to the First District Court of Appeal.[18]

Although the three aforementioned cases were consolidated, an order was entered severing Case No. 18-721 before the ALJ issued Recommended and Final Orders. The ALJ issued a Recommended Order determining that Nature's Way met the "within one point" condition of eligibility for licensure and as a result, recommended that the nursery should be granted an MMTC license. On July 13, 2018, DOH issued a Final Order coupled with a settlement agreement indicating that Nature's Way was granted an MMTC license, but also rejecting all of the findings in the ALJ's Recommended Order. Further, in the settlement agreement, incorporated by reference in the Final Order, Nature's Way gave up its right to appeal the Final Order.

The KSG and Nature's Way cases were very interesting for many reasons. One point of interest was DOH's attempt to disqualify the ALJ assigned to the case based on what he had said or done in other cases.[19] Specifically, DOH attacked the ALJ's analysis in the *Plants of Ruskin* case where the ALJ stated that DOH fundamentally erred in ranking as opposed to scoring applications.[20] In determining whether a judge should be disqualified, it is the duty of the judge against whom an initial motion to disqualify is made to determine such motion.[21] Ultimately, the ALJ did not disqualify himself.

2018 Application Cycle

As DOH is currently gearing up for the next application cycle, its proposed rules have already been

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challenged. One challenge is directed to DOH's proposed rule for a supplemental licensing fee for MMTCs in the amount of $174,844.08. DFMMJ Investments, LLC (also known as "Liberty Health Sciences"), challenged this rule and a proposed rule regarding variance procedures for MMTCs. Soon after, DOH withdrew both proposed rules before proposed final orders were filed. As a result, the proposed rule challenges were voluntarily dismissed. *See DFMMJ Investments, LLC v. Dep't of Health,* Case Nos. 18-3247RP and 18-3246RP (Fla. DOAH July 20, 2018).

Another proposed rule challenge that has received a lot of attention is a challenge to DOH's proposed rule to implement the statutory preference for applicants that own facilities formerly used for processing citrus. *See* § 381.986(8)(a)3, Fla. Stat. (2018). Louis Del Favero Orchids, Inc. ("Del Favero"), challenged DOH's proposed rule under the following grounds: (1) the proposed rule enlarges, modifies, or contravenes the statute because the statute uses the word "facility" and the rule uses the word "property"; (2) the proposed rule's point system to evaluate MMTC applicants is arbitrary and capricious, and grants unbridled discretion to DOH; and (3) 35 points is an insufficient amount of points to give a citrus-preferred applicant to become preferred over a non-citrus-preferred applicant. Mecca Farms, Inc., intervened and agreed with Del Favero's second and third challenges to the rule, while siding with DOH on the first challenge to the rule. The ALJ issued a Final Order declaring the proposed rule to be an invalid exercise of delegated legislative authority. The ALJ upheld the portions of the rule relating to the second and third challenge, but declared the facility versus property language used to be invalid. *See Louis Del Favero Orchids, Inc., Dep't of Health*, Case No. 18-2838RP (Fla. DOAH Aug. 6, 2018).[22]

Conclusion

As the legalization of medical marijuana is fairly new to Florida, it has been a trial and error process for all parties involved. If the past is telling of the future, the fight for MMTC licenses is far from over when both sides are trying to tackle this new area of state law. It is imperative for applicants and their attorneys to determine their strategies from early on, far before the application cycle begins. Many believe it is best to litigate and challenge proposed rules before DOH even begins accepting applications. Others believe it is better to hold off, hope for the best, and only litigate in the event of a denial. When deciding which strategy works best for you and your client, it is important to keep in mind that each time the proposed rules are challenged, this pushes back DOH's ability to finalize these rules and ultimately begin taking applications for the next round.

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Endnotes:

1 *See* Fla. Admin. Code R. 64-4.002 (June 17, 2015).

2 *See* OMMU Dispensing Organization Applications Chart, OMMU November 2015 Aggregated Score Card; *Nature's Way Nursery of Miami, Inc., v. Dep't of Health*, Case Nos. 17-5801RE, 18-0720RU at ¶ 157 (Fla. DOAH June 15, 2018).

3 *See* Art. X § 29, Fla. Const.

4 There were a total of five petitioners in this case as several parties intervened: Plants of Ruskin, Inc.; Costa Farms, LLC; Florida Medical Cannabis Association, Inc.; Tree King-Tree Farm, Inc.; and Tornello Landscape Corp.

5 *See* Fla. Admin. Code R. 64-4.002(5).

6 *See Tornello Landscape Corp.,* Case No. 15-7272, Joint Request for Relinquishment of Jurisdiction (Dec. 6, 2016), and Order Closing Files and Relinquishing Jurisdiction (Dec. 7, 2017).

7 *See Tornello Landscape Corp.*, Case No. 15-7272, Notice (Jan. 6, 2017).

8 *Id.*

9 *See Plants of Ruskin, Inc.,* Case Nos. 17-0116, 17-0117 (Fla. DOAH May 23, 2017).

10 *See id.* at ¶¶ 19-43.

11 See *id.*

12 *See id.*

13 *See Plants of Ruskin,* Case Nos. 17-0116, 17-0117, Settlement Agreement (July 31, 2017).

14 *See Plants of Ruskin,* Case Nos. 17-0116, 17-0117 (DOH Final Order Aug. 22, 2017).

15 *See id.*

16 *See* Ch. 2017-232, Laws of Fla.

17 *See id.*

18 The case is proceeding at the First District Court of Appeal under Case No. 1D18-2929.

19 *Keith St. Germaine Nursery Farms*, Case No. 17-5011RU, The Department's Notice to Agency Clerk of Filing Request to Disqualify ALJ and to Reassign Case (Oct. 10, 2017).

20 *See id.*

21 *See* Fla. R. Jud. Admin. 2.330(f).

22 The decision may be inconsequential, if a circuit court's initial ruling in an order issued August 2, 2018, denying a motion for temporary injunction is sustained. In *Florigrown, LLC v. Department of Health*, Case No. 2017CA002549, Second Circuit Judge Charles W. Dodson found a substantial likelihood that the plaintiffs would prevail in the case to declare the citrus preference unconstitutional.