

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

FLORIDA MEDICAL CANNABIS
ASSOCIATION,

Petitioner,

v.

CASE NO. _____

STATE OF FLORIDA, DEPARTMENT
OF HEALTH,

Respondent.

**PETITION FOR ADMINISTRATIVE HEARING
CHALLENGING PROPOSED CHAPTER 64-4**

Petitioner, Florida Medical Cannabis Association, Inc., by and through its undersigned attorneys and pursuant to Sections 120.536, 120.56, and 120.569, Florida Statutes, and Rule 28.106.201, Florida Administrative Code, petitions for an administrative determination that proposed Rules 64-4.001 - .006, and .008, Florida Administrative Code, are invalid exercises of delegated legislative authority. In support thereof, the Petitioner states:

Parties

1. The affected agency is the Department of Health (“Department”), 4052 Bald Cypress Way, Bin A-02, Tallahassee, Florida 32399-1703.
2. Petitioner, Florida Medical Cannabis Association, Inc., is a Florida corporation whose business address is 1299 W. Fairbanks Avenue, Suite A, Winter

Park, FL 32789 and whose telephone number is (407) 629-5050. Petitioner's representative for purposes of service of process in this matter is the firm of MansonBolves, P.A., 1101 W. Swann Ave., Tampa, FL 33606, with telephone number (813) 514-4700.

Petitioner's Substantial Interest

3. Petitioner is a trade association comprised of a majority of members who are nurserymen that possess a valid certificate of registration with the Department of Agriculture pursuant to Section 581.131, Florida Statutes. One of the Association's primary roles is to actively participate and protect its members in the setting of legislative and regulatory groundwork for Florida's medical cannabis industry, including the implementation of Chapter 381, Florida Statutes, the Compassionate Medical Cannabis Act of 2014. Pursuant to Section 381.986(5)(b), Florida Statutes, the Association's members are some of the few nurserymen in the State that are qualified to be an applicant for a "dispensing organization." Because the agency statements adopted by the Department at issue in this proceeding will regulate what entities may apply to be "dispensing organizations" and how such entities will operate after approval, the statement will have a substantial impact on the members of the Association.

4. On September 5, 2014, Petitioner participated in the rulemaking hearing and presented a number of issues with respect to the draft rules.

Jurisdiction

5. Pursuant to Section 120.56(2), Florida Statutes, a substantially affected person may seek an administrative determination of the invalidity of a proposed rule within twenty days after the Notice of Change.

6. The Division of Administrative Hearings has jurisdiction to determine whether the proposed rules are invalid pursuant to Section 120.56, Florida Statutes.

7. There are currently two related cases to this action: Case Nos.: 14-004299RP and 14-004296RP.

Notice

8. On August 14, 2014 the Department published in the Florida Administrative Register, a Notice of Proposed Rule for Chapter 64-4, Florida Administrative Code, which included proposed Rules 64-4.001 - .009, Florida Administrative Code. A copy of the Notice is attached as Exhibit A.

9. On September 5, 2014, the Department conducted a public hearing on proposed Chapter 64-4, Florida Administrative Code, in Tallahassee, FL.

10. On September 9, 2014, the Department published a Notice of Change for portions, but not all, of the proposed rules. A copy of the Notice is attached as Exhibit B.

11. Therefore, this petition is timely filed as required by Section 120.56(2), Florida Statutes.

Proposed Rules Challenged

12. Proposed Chapter 64-4, Florida Administrative Code, is intended to establish the regulatory structure supporting the Compassionate Medical Cannabis Act of 2014 (the “Act”), including creation of dispensing regions and application procedures for dispensing organizations.

13. As is discussed in more detail below, proposed Rules 64-4.001 - .006 and .008, Florida Administrative Code, (hereinafter “Proposed Rules”) fail to establish even minimum criteria to evaluate an applicant’s financial, technical and technological ability to securely cultivate and produce low-THC cannabis. As proposed, the rules constitute invalid exercises of delegated legislative authority and Chapter 64-4 is internally inconsistent. In addition, a number of proposed rules are without sufficient legislative authority for adoption and/or grant the Department unfettered discretion in implementing the Act.

Laws Implemented

14. The Proposed Rules purport to implement Sections 381.986 and 837.06, Florida Statutes.

Disputed Issues of Fact and Law

15. The Proposed Rules exceed the Department’s grant of rulemaking authority and constitute an invalid exercise of delegated legislative authority

pursuant to Section 120.52(8), Florida Statutes, for one or more of the following reasons:

- (a) The Proposed Rules exceed the grant of rulemaking authority.
- (b) The Proposed Rules enlarge, modify or contravene the specific provisions of law implemented.
- (c) The Proposed Rules are vague or fail to establish adequate standards for agency decisions, or vest unbridled discretion in the Department.
- (d) The Proposed Rules impose regulatory costs that could be reduced by the adoption of less costly alternatives that would substantially accomplish the statutory objectives.
- (e) The Proposed Rules are arbitrary and/or capricious.

16. Section 381.986, Florida Statutes, contains the enabling language for the Department to regulate and authorize dispensing organizations for the compassionate use of low-THC cannabis. Section 381.986(5), Florida Statutes, outlines the duties of the Department and lists the criteria an applicant must meet to be approved as a dispensing organization. A “dispensing organization” is “an organization approved by the department to cultivate, process, and dispense low-THC cannabis.” Section 381.986(5), Florida Statutes, specifically states that **an applicant** that applies to be a dispensing organization **must**: (1) **possess** a valid certificate of registration issued by the Department of Agriculture and Consumer Services; (2) be operated by a nurseryman as defined in s. 581.011; and, (3) have been operated as a registered nursery for at least 30 continuous years. Amended Rule 64-4.001(1), Florida Administrative Code, states that an “applicant” is “an

organization **with at least 25% ownership** by **either** a nursery that meets the requirements of Section 381.986(5)(b)1., F.S., **or** 100% of the owners of a nursery that meets the requirements of Section 381.986(5)(b)1., F.S., that applies for approval as a dispensing organization and identifies a nurseryman as defined in Section 581.011, F.S., who will serve as the operator.” (emphasis added). The 25% ownership criteria is in direct conflict with the express statutory language requiring that the applicant meet the requirements of Section 381.986(5)(b)1., Florida Statutes, i.e., possess a valid certificate of registration.¹ See Sections 120.52(8)(b), (c) and (e), Florida Statutes.

17. Further, the definition of “applicant” in Rule 64-4.001(1), Florida Administrative Code, is inconsistent with the requirements of Rules 64-4.002(4)(a) and 64-4.005(3), Florida Administrative Code. Pursuant to the Department’s definition of “applicant”, those who do not possess a nurseryman certificate may apply. However, as the Department is then required to determine that those applicants are qualified or those dispensing organizations remain qualified “by meeting the requirements of Section 381.986(5)(b), F.S.” (requiring possession of

¹ As the reference to 100% of owners of a nursery only modifies the 25% ownership requirement, it also directly conflicts with Section 381.986(5)(b)1., Florida Statutes. Even if the 100% of owners language was intended to modify the ownership criteria for an applicant, it would still fail to comply with Section 381.986(5)(b)1., Florida Statutes.

such a certificate), such application is pointless. See Section 120.52(8)(e), Florida Statutes.

18. Rule 64-4.002(1), Florida Administrative Code, limits “each nursery that meets the requirements of Section 381.986(5)(b)1., F.S.” to ownership in only one application. However, there is no authority for this limitation contained within the enabling legislation.² Further, there is no basis for such a limitation. See Section 120.52(8)(b) and (e), Florida Statutes.

19. Rule 64-4.002(2)(a), Florida Administrative Code, has been amended to require written documentation demonstrating the applicant “meets the nursery requirements of Section 381.986(5)(b)1., F.S.” There is no definition of “nursery requirements.” Therefore, to the extent this language is intended to support the 25% provision above or to suggest that an applicant need not be a nursery as required by Section 381.985(5)(b)1., Florida Statutes, it is not supported by and is inconsistent with the enabling legislation. See Sections 120.52(8)(b), (c) and (d), Florida Statutes.

20. Rules 64-4.002(2)(c), (e) and (g), 64-4.006(2) and 64-4.008(6), Florida Administrative Code, contain the phrases “at least the following” and “at a minimum.” Such language leaves an applicant and dispensing organization guessing as to what additional information may be required and, therefore,

² While this issue will become moot with a correct definition of “applicant,” as currently defined, it is possible for a single nursery to file multiple applications.

improperly grants the Department unbridled discretion in the requirements for application and compliance. See Sections 120.52(8)(d), (e) and (f), Florida Statutes.

21. Rule 64-4.002(2)(g), Florida Administrative Code, requires “[w]ritten documentation that the applicant possesses an infrastructure reasonably located to dispense low-THC cannabis derivative products to registered patients in the state.” The rule was modified to require the documentation to include “the physical address of the ~~dispensing organization’s~~ dispensing location facility and photographs or drawings showing the proposed ~~public access~~, (sic) driveway, parking and public access to the dispensary location and a transportation plan, if applicable....” The removal of “dispensing organization’s facility” and replacement of “dispensing location” suggests that dispensing may take place at a different location than the dispensing organization facility. While this interpretation is supported by the enabling legislation, the definition of “Dispensing Organization Facility” in Rule 64-4.001(10), Florida Administrative Code, maintains that the facility includes one or more structures that are used by the organization for the “preparation, cultivation, storage, processing or dispensing of low-THC cannabis.” See also, Rule 64-4.002(1), Florida Administrative Code (requiring processing and dispensing to occur on the same, or contiguous, property where cultivation occurs.) Further this provision lacks specific criteria for

determining whether the suggested infrastructure is “reasonably located” as required by the statute. See Sections 120.52(8)(c), (d) and (e), Florida Statutes.

22. Rule 64-4.002(4), Florida Administrative Code, states that “the department will substantively review and evaluate all timely received applications.” Rule 64-4.008(8), Florida Administrative Code, authorizes dispensing organizations, with Department approval, to “alter, expand or consolidate their infrastructure, operations or staffing structure in order to better serve patients, provided the changes comply with the requirements of Section 381.986(5)(b), F.S., and this chapter.” However, neither these rules, nor Rule 64-4.002(2), Florida Administrative Code, provide any minimum standards or criteria for performing the review and evaluation for approval. See Section 120.52(8)(d), Florida Statutes.

23. Rules 64-4.004(1)(a) and (b), Florida Administrative Code, include numerous restrictions on the dispensing organization including the location. However, these restrictions are not included within the enabling legislation and conflict with existing zoning regulations and zoning decisions which are delegated to local governments. See Sections 120.52(8)(b) and (c), Florida Statutes.

24. Rule 64-4.005(1), Florida Administrative Code, states that submission of an application “constitutes permission for entry by ... the Department of Agriculture and Consumer Services or law enforcement officials and agents ... to

inspect any portion of the facility, review the records required pursuant to Section 381.986, F.S., or this chapter, and collect samples of any low-THC cannabis for laboratory examination at any reasonable time.”³ The rule then purports to direct how those Department of Agriculture and Consumer Services or law enforcement officials and agents are to conduct any inspection. While clearly the Department has the authority to inspect one of its licensed entities, and restrict how that inspection may occur, the enabling legislation does not grant the Department the authority to authorize access by or regulate the activity of any other law enforcement agency. See Sections 120.52(8)(b) and (c), Florida Statutes.

Ultimate Fact and Law

25. The Proposed Rules are invalid exercises of delegated legislative authority as that term is defined in Section 120.52(8), Florida Statutes.

Rules and Statutes Entitling Petitioner to Relief

26. The rules and statutes entitling Petitioner to relief include, but are not necessarily limited to, Chapter 28-106, Florida Administrative Code, and Chapter 381, and Sections 120.536, 120.54, 120.56, and 120.569, Florida Statutes.

Attorney’s Fees and Costs

³ Rule 64-4.003(2)(b), Florida Administrative Code, requires “written documentation that any violations noted during any inspections or investigations [pursuant to Rule 64-4.005(1), Florida Administrative Code,] have been corrected.” As such this rule is similarly without statutory support. A correction to Rule 64-4.005(1), Florida Administrative Code, will render this issue moot.

27. Petitioner has retained the undersigned counsel and is obligated to pay those attorneys a reasonable fee for their services.

28. Petitioner is, or will be entitled to, the recovery of its attorney's fees under Section 120.595(2), Florida Statutes.

WHEREFORE, Petitioner respectfully requests that the Division of Administrative Hearings:

- 1) Conduct a formal hearing on this petition pursuant to Sections 120.56, 120.569 and 120.57, Florida Statutes;
- 2) Issue a final order finding the Proposed Rules are invalid exercises of delegated legislative authority;
- 3) Award the Petitioner its costs and attorney's fees incurred in this action; and,
- 4) Provide the Petitioner such other relief the Administrative Law Judge deems appropriate.

Respectfully submitted this 16th day of September, 2014.

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