IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

Case No. 1D19-1783
Lower Tribunal Case Nos.: DOAH 18-4472; DOH 18-0190

LOUIS DEL FAVERO ORCHIDS, INC.,

Appellant,

v.

FLORIDA DEPARTMENT OF HEALTH, and TREE KING-TREE FARM, INC.,

Appellees.

APPELLEE FLORIDA DEPARTMENT OF HEALTH'S ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS

Appellee Florida Department of Health adopts and incorporates by reference the Statement of the Case and Facts provided in the Answer Brief filed by co-Appellee Tree King-Tree Farm, Inc. (Tree King).[1]

SUMMARY OF THE ARGUMENT

The Department's Final Order adopting the Joint Settlement Agreement must be affirmed because the Department had available and statutorily-authorized medical marijuana treatment center (MMTC) licenses to issue to the Co-Appellees in these consolidated appeals. As explained below, section 381.986(8)(a) must be construed as providing a single, unified authorization for the issuance of MMTC licenses that automatically increases in number as qualified patients are added to the medical marijuana use registry. Given the automatic increase in the number of available MMTC licenses pursuant to section 381.986(8)(a)4., the Department had available and statutorily-authorized licenses to issue to the Appellees that were necessarily given to the Co-Appellees once the Department exercised its discretion to settle the underlying actions, and the issuance of MMTC licenses to Appellees does not impact the availability of the citrus preference provided in section 381.986(8)(a)3. As a result, Del Favero lacks standing, the Joint Settlement

[1] Pursuant to this Court's July 10, 2019 Order, the instant appeal (Case No. 1D19-1783) has been consolidated with the following cases: 1D19-1772, 1D19-1777 1D19-1778, 1D19-1780, 1D19-1781, 1D19-1782, and 1D19-1784.

Agreement was a permissible exercise of the Department's discretion, and the Department's Final Order must be affirmed.

Even if this Court rejects this reading of section 381.986(8)(a), the Final Order must nonetheless be affirmed because Del Favero was not a party below and is not adversely affected by the Final Order. Therefore, Del Favero lacks standing to maintain this appeal.

STANDARD OF REVIEW

The Department's Final Order is presumed correct. *See* 120.68(8), Fla. Stat.; *Lazzari v. Lin*, 884 So. 2d 393 (Fla. 2d DCA 2004). This Court must affirm unless Del Favero proves that the Department has erroneously interpreted a provision of law and a correct interpretation compels a particular action. § 120.68(7)(d), Fla. Stat. To the extent Del Favero is challenging the Department's discretionary decision to enter the Joint Settlement Agreement, the Court must also affirm unless Del Favero establishes that the Department's exercise of discretion violated a statutory provision. *See* § 120.68(7)(e)(4), Fla. Stat. Finally, matters of statutory construction are reviewed *de novo*. *See CBS Outdoor v. Fla. Dep't of Transp*., 124 So. 3d 383, 385 (Fla. 1st DCA 2013) (citing *Dep't of Rev. v. Lockheed Martin Corp.*, 905 So. 2d 1017, 1020 (Fla. 1st DCA 2005)).

ARGUMENT

I. THE DEPARTMENT DID NOT EXCEED ITS STATUTORY AUTHORITY BY ADOPTING THE JOINT SETTLEMENT AGREEMENT.

A. Overview of the Department's statutory authority to issue MMTC licenses under section 381.986(8)(a)

These consolidated appeals arise from Del Favero's misconstruction of subsection (8)(a) of section 381.986, Florida Statutes. Del Favero wrongly asserts that section 381.986(8)(a) creates different and closed classes of MMTC licenses. Under Del Favero's reading of the statute, section 381.986(8)(a)2.a. creates a class, or bucket, of MMTC licenses separate and distinct from the MMTC licenses that the Department is authorized to issue under section 381.986(8)(a)4. Del Favero's reading of the statute is flawed and should be rejected by this Court.

Subsection 381.986(8)(a) provides a unified authorization for the issuance of MMTC licenses by the Department "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." Although subsection (8)(a) contains 4 subparagraphs listing *qualifications* for certain persons to receive licensure, altogether they establish a single bucket of

MMTC licenses which automatically increases in number as qualified patients are added to the medical marijuana use registry.[2]

Specifically, subparagraph (8)(a)1. requires the Department to license as MMTCs those entities who held a dispensing organization (DO) license as of July 1, 2017 pursuant to section 381.986, Florida Statutes (2016). Stated differently, in this subparagraph, the legislature converted then-existing DO licenses to MMTC licenses to promote the transition between the pre- and post-Amendment 2 regulatory schemes and ensure efficient implementation of the Constitutional Amendment.

In subparagraph (8)(a)2., the legislature has required the Department to issue MMTC licenses to persons or entities meeting certain requirements: qualifying 2015 DO applicants that satisfy certain statutory criteria[3]; and one applicant that is a

[2] Only subparagraphs 1-4 are relevant to the instant appeal. Subparagraph 5. establishes a limit on the number and location of dispensing facilities that a licensed MMTC may operate and has no bearing on the number of MMTC licenses that the Department is authorized to issue.

[3] The threshold requirement for MMTC licensure pursuant to section 381.986(8)(a)2.a. is that an entity's 2015 DO application "was reviewed, evaluated and scored by the Department" and that the entity was denied licensure under former section 381.986, Florida Statutes (2014). Once an entity satisfies this threshold requirement, the entity is eligible for MMTC licensure upon a showing that it either (i) had one or more judicial challenges pending as of January 1, 2017, or (ii) had a final ranking within one point of the highest final ranking in its region. Assuming one of these two criteria is satisfied, the applicant must also provide documentation to the Department demonstrating that it has infrastructure and technical and

recognized class member of *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999), or *In Re Black Farmers Litig.*, 856 F. Supp. 2d 1 (D.D.C. 2011). Subparagraph (8)(a)3. provides that, with respect to the licenses issued under subsection (8)(a), the Department shall "give preference" to up to two of the applicants who "own[ed] one or more facilities that are, or were, used for the canning, concentrating, or otherwise processing of citrus . . . ." § 381.986(8)(a)3., Fla. Stat.

Finally, in subparagraph (8)(a)4., the legislature has established a rolling expansion on the *number* of MMTC licenses that the Department is authorized to issue. This provision states:

> Within 6 months after the registration of 100,000 active qualified patients in the medical marijuana use registry, the department shall license four additional medical marijuana treatment centers *that meet the requirements of this section*. Thereafter, the department shall license four medical marijuana treatment centers within 6 months after the registration of each additional 100,000 active qualified patients in the medical marijuana use registry *that meet the requirements of this section*.

(Emphasis added). The additional MMTC licenses generated pursuant to this provision increases the overall number of MMTC licenses that the Department is directed to issue under subsection (8)(a). Stated differently, subparagraph (8)(a)4. does not create an independent class of MMTC licenses separate and apart from the licenses that the Department is authorized to issue under subparagraph (8)(a)2.;

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technological ability to begin cultivating marijuana within 30 days after registration as an MMTC. *Id*.

rather, subparagraph (8)(a)4. adds to the available licenses under (8)(a), including those that may be issued pursuant to sub-subparagraph (8)(a)2.a., of the statute. This is clear given the text of (8)(a)4., which specifically provides "the department shall license four additional medical marijuana treatment centers that meet the requirements of ***this section***." (emphasis added). "This section" means the whole of section 381.986, including the one-point provision and all other provisions therein.

Accordingly, the number "10" specified in subparagraph (8)(a)2. is a moving number, as it automatically increases by virtue of subparagraph (8)(a)4. When the statute went into effect on June 23, 2017, the "bucket" of authorized MMTC licenses was limited to 10 (in addition to the unspecified number of licenses authorized via the conversion of DOs that existed as of July 3, 2017, as provided in subparagraph (8)(a)1.). The legislature directed, however, that the number automatically increase in increments of 4 (*e.g.*, to 14, 18, 22, 26, etc.) as qualified patients are added to the medical marijuana use registry. The Department is directed to issue licenses from its "bucket" of authorized licenses to any person or entity that meets the requirements of section 381.986, regardless of whether they meet the requirements for licensure via the one-point provision or otherwise.

Del Favero advocates instead an improper chronological reading of subsection (8)(a) under which each subparagraph (and sub-subparagraph) is viewed in isolation. Under Del Favero's view, the Department is required to issue MMTC licenses in the

chronological order of the statute—specifically, the "10" licenses authorized by subparagraph (8)(a)2., must be issued *before* the licenses authorized under subparagraph (8)(a)4. When the statutory provisions are read as a whole, however, it is clear that subsection (8)(a) provides a single, unified authorization for the Department's issuance of MMTC licenses which incrementally increases by 4 as qualified patients are added to the registry and does not require the issuance of licenses in any specified order. *See Fla. Dep't of Environmental Protection v. ContractPoint Fla. Parks, LLC*, 986 So. 2d 1260, 1265 (Fla. 2008) (holding that a statute should be interpreted to "accord meaning and harmony to all of its parts" and "is not to be read in isolation, but in the context of the entire section") (citing *Jones v. ETS of New Orleans, Inc.*, 793 So. 2d 912, 914-15 (Fla. 2001).[4]

Significantly, this plain reading of subsection (8)(a) is necessary to avoid interpreting portions of subsection (8)(a) as constituting an impermissible special law. As this Court is undoubtedly aware, section 381.986(8)(a) has been challenged, in part, as an unconstitutional special law that provides a benefit to certain private corporations that others do not or cannot receive. *See Fla. Dep't of Health v.*

[4] The Department construes the dates contained within subparagraph (8)(a)1. and sub-subparagraph (8)(a)2.a. as directing the Department to move expeditiously in issuing the specified MMTC licenses. The timing of when licenses are actually issued, however, is plainly tied to the date upon which an applicant successfully demonstrates its qualifications for licensure under the statute which, as is often the case, is delayed by litigation concerning issuance of the license.

Florigrown, LLC, 2019 WL 2943329 (Fla. 1st DCA Jul. 9, 2019). To the extent that subsection (8)(a)—and, specifically, sub-subparagraph (8)(a)2.a.—can be read to establish classes, those classes can remain open by virtue of the rolling expansion of MMTC licenses provided in subparagraph (8)(a)4. In other words, because subsection (8)(a) creates a single, open class or "bucket" of authorized MMTC licenses that is automatically replenished with additional licenses as qualified patients are added to the registry, the statute constitutes a constitutional general law.[5] *See Dep't of Legal Affairs v. Sanford-Orlando Kennel Club, Inc.*, 434 So. 2d 879, 882 (Fla. 1983) (it did not matter that, at the time of passage, the statute only benefited one facility; rather, "the controlling point" was whether the statute had the potential to apply to other facilities in the future); *R.J. Reynolds Tobacco Co. v. Hall*, 67 So. 3d 1084, 1091 (Fla. 1st DCA 2011) (that a statute benefits a small number of persons or entities is not alone sufficient to deem the statute a special law; what

[5] Sub-subparagraph (8)(a)2.a. is still limited in its application, as it applies only to those 2015 DO applicants who satisfy the "prior litigation" or "one-point" requirement specified in the statute. Under the Department's interpretation, however, this constitutes an open class, as it applies to *any* DO applicant who proves that it was "within one-point" of the highest final ranking within in its region, and not any specific DO applicants identified in the statute. Indeed, under Del Favero's proffered interpretation of (8)(a)2.a., the statute would grant the benefit of licensure under the one-point provision to *specific* 2015 DO applicants effectively identified in the law by name, thus arguably resembling an unconstitutional special law. *See City of Miami v. McGrath*, 824 So. 2d 143, 149-50 (Fla. 2002).

matters is "whether the statute ha[s] the potential to apply to other [persons or entities] in the future").

B. The Department's issuance of MMTC licenses to Appellees does not impact the availability of the citrus preference, as 8 additional MMTC licenses have been added to the "bucket" of available licenses under (8)(a).

The Appellees in these consolidated appeals requested MMTC licensure from the Department pursuant to the "one-point provision" contained within section 381.986(8)(a)2.a. During the course of the litigation under the Administrative Procedure Act, Appellees asserted a colorable claim for MMTC licensure under the statute, and the Department resolved the litigation via settlement agreement. *See* § 120.57(4), Fla. Stat. ("Informal disposition.--Unless precluded by law, informal disposition may be made of any proceeding by stipulation, agreed settlement, or consent order.").[6]

[6] Del Favero makes much of the fact that the Department initially opposed the issuance of MMTC licenses to Appellees. Del Favero's argument in this regard completely ignores that the underlying function and purpose of the APA is "to give affected parties an opportunity to *change the agency's mind*." *Capeletti Bros., Inc. v. Dep't of Gen. Servs.*, 432 So. 2d 1359, 1363 (Fla. 1st DCA 1983) (emphasis added); *see also Edgar v. School Bd. of Calhoun Cnty.*, 549 So. 2d 726, 728 (Fla. 1st DCA 1989) (explaining that APA hearing requirements are "designed to give affected parties an opportunity to change the agency's mind" and "[s]uch hearings are intended to formulate final agency action, not review action already taken"); *Boca Raton Artificial Kidney Ctr., Inc. v. Fla. Dep't of Health & Rehab. Servs.*, 475 So. 2d 260, 262 (Fla. 1st DCA 1985) (explaining that the proper role of a section 120.57 hearing is "to aid in the formulation of final agency action").

It is undisputed that, at the time the Joint Settlement Agreement was entered, the number of qualified patients in medical marijuana use registry increased to over 200,000.[7] Accordingly, pursuant to section 381.986(8)(a)4., the number of available MMTC licenses automatically increased by eight (8), thus making a total of eleven (11) MMTC licenses available for issuance under subsection (8)(a). § 381.986(8)(a)4, Fla. Stat.

Given the automatic increase in the number of available MMTC licenses pursuant to section 381.986(8)(a)4., the Department had available and statutorily-authorized licenses to issue to the Appellees. Additionally, having resolved the legal question posed in the underlying administrative action, the Department had a statutory obligation to issue the licenses. *See* § 381.986(8)(a)2.a., Fla. Stat. Further, the issuance of MMTC licenses to Appellees does not impact the availability of a *Pigford* license authorized under section 381.986(8)(a)2.b. or the citrus preference provided in section 381.986(8)(a)3. Indeed, (3) MMTC licenses are presently available, although this number will automatically increase again upon the registration of 300,000 active qualified patients in the medical marijuana use

[7] *See* OMMU Update dated April 12, 2019, reflecting 207,869 qualified patients: https://s27415.pcdn.co/wp-content/uploads/ommu_updates/2019/041219-Update.pdf. The Department is charged with establishing and maintaining the medical marijuana use registry. § 381.986(5)(a), Fla. Stat. This Court may take judicial notice of these numbers because they are "[f]acts not subject to dispute because are capable and ready determination by resort to resources whose accuracy cannot be questioned." § 90.202(12), Fla. Stat.

registry. As a result, Del Favero's argument that there are no additional MMTC licenses available for issuance—or that the Department is somehow precluded from providing the citrus preference as a result of its issuance of licenses to Appellees—is inaccurate and based on misinterpretation of the statute.

In fact, the Department is *required* to comply with the citrus preference when a comparative application process opens. The question is not one of "if," but when. This is what makes Del Favero's argument so odd. One would imagine that if Del Favero actually wanted to ensure that the Department complied with the citrus preference provision, then Del Favero would be advocating for a reading of the statute that leaves that citrus preference intact and applicable to at least one of the licenses that remain available (which is precisely what the Department advocates here). Instead, Del Favero's argument seems to be that the Department can avoid the citrus provision by contract, which the Department recognizes it cannot. The legislative mandate to give a preference for up to two licenses remains intact and the Department intends to implement that mandate when the plethora of litigation regarding the statute is resolved and the Department is able to move forward with a comparative application process. *See, e.g.*, *Florigrown, LLC*, 2019 WL 2943329; *KNY Medical Care, LLC v. Fla. Dep't of Health, et al.*, Case No. 2018-CA-002372 (Fla. 2d Jud. Cir.); *Liner Source, Inc. v. Fla. Dep't of Health*, Case No. 2018-CA-1932 (Fla. 2d Jud. Cir); *El Conuco Nursery, Inc. v. Fla. Dep't of Health*, et al., Case

No. 2018-CA-0275 (Fla. 2d Jud. Cir.); *Louis Del Favero Orchids, Inc. v. Scott Rivkees, Fla. Dep't of Health, et al.*, Case No. 4:19-cv-00284-RH-MJF (Fla. N.D.); *Louis Del Favero Orchids, Inc. v. Fla. Dep't of Health, et al.*, Case No. 2019-CA-001047 (Fla. 2d Jud. Cir.). Notably, the Department previously attempted to implement the citrus preference, but it was precluded from doing so because Del Favero challenged the validity of the Department's proposed rule. *See Louis Del Favero Orchids, Inc. v. Fla. Dep't of Health*, DOAH Case No. 18-2838RP (Div. of Admin. Hearings Aug. 6, 2018) (declaring proposed rule 64-4.002 is an invalid exercise of delegated legislative authority); *Mecca Farms, Inc. v. Fla. Dep't of Health, Office of Compassionate Use and Louise Del Favero Orchids, Inc.*, Case No. 1D18-3761 (Fla. 1st DCA).[8]

When the correct and plain reading of the statute is applied, Del Favero's entire appeal collapses: Del Favero lacks standing, and the Department was authorized to enter the Final Orders. Indeed, because the Department had available, *authorized* licenses to issue to Appellees, the Department's decision to settle the ongoing litigation with Appellees was a permissible exercise of the Department's discretion. *See* § 120.68(7)(e), Fla. Stat. (stating that the court shall affirm a final order unless it finds that the agency's exercise of discretion was "outside the range

[8] *See Gulf Coast Home Health Servs. of Fla. v. Dep't of Health and Rehab. Servs.*, 503 So. 2d 415 (Fla. 1st DCA 1987) (recognizing that an appellate court may take judicial notice of its own records).

of discretion delegated to the agency by law" or "otherwise in violation of a constitutional or statutory provision"). The Final Orders must therefore be affirmed. *See* §120.68(7)(e), Fla. Stat. (stating that this Court "shall not substitute its judgment for that of the agency on an issue of discretion").

C. Del Favero was not a party below and, at best, was subordinated to the Department's rights as the respondent below.

The Final Orders must nonetheless be affirmed because Del Favero never secured party status below and, therefore, lacks standing to initiate this appeal. *See* § 120.68(1), Fla. Stat. (limiting appellate standing under the APA to "[a] *party* who is adversely affected by final agency action") (emphasis added); *Norkunas v. State Bldg. Comm'n*, 982 So. 2d 1227, 1228 (Fla. 1st DCA 2008) (when an "appellant was not a party to the proceedings below, [it] is without standing to institute an appeal"). Del Favero attempted to intervene on *behalf* of the Department. Even if Del Favero's motion to intervene had been granted, its rights in these cases would have been subordinate to the rights of the Department. Thus, the Department would have been well within its authority to settle the pending litigation, especially given that the Final Orders are not adverse to Del Favero. *See Environmental Confederation of SW Fla., Inc. v. IMC Phosphates, Inc.*, 857 So. 2d 207, 210 (Fla. 1st DCA 2003) (holding that the rights of an intervenor are subordinate to the rights of the parties).

Finally, even assuming *arguendo* that section 381.986(8)(a) created separate license categories (it, of course, did not), Del Favero's arguments would still fail.

The Joint Settlement Agreement that was adopted in the Final Orders simply states that the licenses were issued pursuant to section 381.986(8)(a). There is absolutely no record evidence, or any interpretation thereof, that supports a reading that the Department issued all licenses that were "available" under subsection (8)(a)2. Rather, even if there were multiple categories, or buckets, of available licenses, the Department could have issued some licenses from each category, while still preserving the citrus preference about which Del Favero complains. Indeed, under the Department's view, the citrus preference is preserved.[9] Thus, the Final Orders do not, and cannot, constitute adverse action against Del Favero. Having suffered no harm, Del Favero's appeal of these Final Orders must be dismissed for lack of jurisdiction.

CONCLUSION

For all of the reasons stated herein, the Department's Final Order must be affirmed.

[9] *See Louis Del Favero Orchids, Inc. v. Fla. Dep't of Health*, DOH Case No. 2019-0098B (Fla. Dep't of Health Aug. 5, 2019) (final order rendered by the Department of Health stating that the citrus preference is preserved); *Louis Del Favero Orchids, Inc. v. Fla. Dep't of Health*, Case No. 1D19-2932 (Fla. 1st DCA).

CERTIFICATE OF SERVICE

I certify that on August 22, 2019, this document was filed through the Court's electronic filing system, which shall serve a copy by email to the following counsel of record, constituting compliance with the service requirements of Fla. R. Jud. Admin. 2.516(b)(1) and Fla. R. App. P. 9.420:

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CERTIFICATE OF TYPE AND FONT SIZE

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