

**STATE OF FLORIDA
DEPARTMENT OF HEALTH**

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DEPARTMENT OF HEALTH
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TROPIFLORA, LLC,
Petitioner,

v.

DOH Case No. 2018-0195
DOAH Case No. 18-4697

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

Respondent.

FINAL ORDER OF DISMISSAL

THIS MATTER comes before the Department of Health upon Petitioner's Petition for Formal Administrative Hearing filed with the Department on August 28, 2018, and an "Order Closing File and Relinquishing Jurisdiction to the Department of Health Pending Resolution of Issue Regarding the Constitutionality of Section 381.986, Florida Statutes," entered by Administrative Law Judge Garnett Chisenhall ("ALJ") on October 18, 2018. After careful review of the entire file, the Department enters this Final Order Dismissing Petition for Formal Administrative Hearing.

PRELIMINARY STATEMENT

On August 28, 2018, Tropiflora, LLC ("Tropiflora" or "Petitioner"), filed a Petition for Formal Administrative Hearing ("Petition") contesting the Department's decision to deny Tropiflora's August 3, 2018, request for licensure as a Medical Marijuana Treatment Center ("MMTC"). Tropiflora claims entitlement to MMTC licensure pursuant to section 381.986(8)(a)2.a., Florida Statutes (2018). This provision directs the Department to

license qualifying 2015 dispensing organization applicants that satisfy certain statutory criteria.

On September 7, 2018, the Department referred Tropiflora's Petition to DOAH for formal administrative proceedings pursuant to section 120.57(1), Florida Statutes, along with five other petitions seeking licenses from a limited statutory pool of licenses. Tropiflora's Petition (assigned DOAH Case No. 18-4697) was consolidated with DOAH Case Nos. 18-4463, 18-4471, 18-4472, 18-4473, and 18-4474 and assigned to ALJ Chisenhall for a fact-finding hearing. Similar to Tropiflora, the petitioner in each of those cases claims entitlement to MMTC licensure pursuant to section 381.986(8)(a)2.a., Florida Statutes (2018). Unlike Tropiflora, however, the petitioners in those cases seek licensure pursuant to the "one-point" condition provided in section 381.986(8)(a)2.a.—specifically, the petitioners contend that they had a "final ranking within one point of the highest final ranking in [their] region." § 381.986(8)(a)2.a., Fla. Stat. (2018) *See* Tropiflora's Response to Order to Show Cause, ¶¶ 1-2.

On September 28, 2018, the ALJ issued an Order to Show Cause Why Jurisdiction Should Not Be Relinquished to the Department of Health ("Show Cause Order"). In the Show Cause Order, the ALJ questioned "whether there are any material facts in dispute in the instant case." *See* Show Cause Order, p. 1. Tropiflora filed its Response to the Show Cause Order on October 9, 2018. On October 18, 2018, the ALJ issued an Order Closing File and Relinquishing Jurisdiction to the Department.¹

¹ The ALJ relinquished jurisdiction to the Department based upon an October 5, 2018 order issued by the Leon County Circuit Court temporarily enjoining the Department from registering or licensing any MMTCs pursuant to section 381.986, Florida Statutes.

For the reasons that follow and consistent with the ALJ's analysis, the undisputed material facts demonstrate that Tropiflora cannot—under any circumstance—satisfy the requisite statutory criteria for licensure under section 381.986(8)(a)2.a., Florida Statutes. As a result, Tropiflora's Petition is dismissed with prejudice, and its August 28, 2018 request for MMTC licensure is denied.

BACKGROUND AND TROPIFLORA'S ALLEGATIONS

1. Through the Compassionate Medical Cannabis Act of 2014, the legislature legalized the licensed cultivation, processing and dispensing of low-TCH cannabis for qualified patients who suffer from certain debilitating illnesses and conditions. *See* ch. 2014-157, Laws of Fla. The Act, codified as amended at section 381.986, Florida Statutes (2014), directed the Department to authorize five “dispensing organizations” (“DOs”)—one in each of five regions: Northwest, Northeast, Central, Southeast, and Southwest Florida. § 381.986(5)(b), Fla. Stat. (2014); Petition, ¶ 5.

2. The Act authorized the Department to adopt rules to implement the Act. *See* § 381.986(5)(d), Fla. Stat. (2014) The Department formally adopted rules implementing the application, selection and regulatory processes for DOs. Fla. Admin. Code Ch. 64-4; Petition, ¶¶ 6-9. The rules included an application form to be completed pursuant to the instructions in the rule text and in the application form itself “Form DH8007-OCU-2/2015.” *See* Fla. Admin. Code R. 64-4.002; Petition, ¶¶ 9-10. Pursuant to rule 64-4.002, the applicant whose application received the highest aggregate score in a given region would be selected as that region's DO. Fla. Admin. Code R. 64-4.002(5)(b) (New 6-17-15).

3. Tropiflora applied for the exclusive DO license in the Southwest region. Petition, ¶ 4. Significantly, however, Tropiflora's application was not evaluated and

scored by the Department. Petition, ¶ 11. As alleged by Tropiflora, “the Department denied Tropiflora’s application prior to submitting it to scoring on the ground that Tropiflora failed to submit proper certified financial statements, therefore concluding that Tropiflora ‘failed to meet the mandatory requirements of section 381.986(5)(b), Florida Statutes.’” Petition, ¶ 11; Petition, Ex. C.

4. Indeed, by letter dated November 23, 2015, the Department notified Tropiflora that its DO application was denied. Petition, ¶ 11; Petition, Ex. C. The letter contained a notice advising Tropiflora of its right to challenge the Department’s denial: “A party whose substantial interests are affected by this agency action may petition for an administrative hearing pursuant to sections 120.569 and 120.57, Florida Statutes . . . Failure to file a petition within 21 days shall constitute a waiver of the right to a hearing on this agency action.” Petition, Ex. C.

5. In December 2015, Tropiflora filed a petition with the Department pursuant to chapter 120, Florida Statutes, challenging the denial of its DO license application (the “2015 Petition”). Petition, ¶ 13. The Department referred Tropiflora’s 2015 Petition to DOAH for chapter 120 proceedings, and a final hearing was scheduled for August 2016. *See In re Licensure of the Low-TCH Cannabis Dispensing Org. for the Sw. Region*, DOAH Case Nos. 15-7269, 15-7270, and 15-7272. However, in June 2016, and prior to the completion of the administrative process, Tropiflora voluntarily dismissed its 2015 Petition. *See Id.* As a result, the administrative process ceased, DOAH relinquished jurisdiction, and the Department entered an Order closing its file on Tropiflora’s 2015 Petition. *See* DOAH Case No. 15-7269; and DOH Order Closing File (July 29, 2016) (Attached as Exhibit A).

6. In a 2017 Special Session, the legislature rewrote section 381.986. *See* ch. 2017-232, § 3, Laws of Fla.; Petition, ¶ 14. The 2017 statute replaced the previous version of section 381.986 in its entirety and provided a comprehensive regulatory structure to implement the constitutional amendment adopted by voter referendum in late 2016, article X, section 29 of the Florida Constitution. *See Id.* However, the 2017 statute provided that former DO applicants could receive MMTC licenses upon meeting certain statutory requirements. § 381.986(8)(a)2.a., Fla. Stat. (2018); Petition, ¶ 14.

7. In particular, the Department was directed to issue MMTC licenses to applicants meeting the following conditions and requirements:

(8) MEDICAL MARIJUANA TREATMENT CENTERS.—

(a) . . .

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 not 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 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).

8. Thus, eligibility for MMTC licensure pursuant to section 381.986(8)(a)2.a. is expressly limited to those applicants whose applications were reviewed evaluated, *and scored by the department* and were denied licensure under former section 381.986,

Florida Statutes (2014). § 381.986(8)(a)2.a., Fla. Stat. (2017); Petition, ¶ 15. Put another way, the threshold requirement for licensure is that the entity’s application was reviewed, evaluated, and scored by the Department.

9. On or about August 3, 2018, Tropiflora submitted to the Department its request for MMTC licensure pursuant to section 381.986(8)(a)2.a., alleging, in relevant part, that it had a “prior application” and “one or more administrative judicial challenges pending as of January 1, 2017.” See Petition, ¶ 16; Petition, Ex. E.

10. The Department denied Tropiflora’s request on August 8, 2018, concluding, in relevant part, that Tropiflora did not meet the “threshold criteria” for licensure. Petition, ¶ 18; Petition, Ex. A. Thereafter, Tropiflora filed the instant Petition challenging the Department’s August 8, 2018 agency action.

CONCLUSIONS OF LAW

11. Pursuant to section 120.569(1), Florida Statutes, section 120.57(1) applies “whenever the proceeding involves a disputed issue of material fact.” Not all facts are material, however. Rather, a material fact is one that is essential to resolution of the legal question in the case. See e.g., *Cont’l Concrete Ins. v. Lakes at La Paz III Ltd. P’ship*, 758 So. 2d 1214, 1217 (Fla. 4th DCA 2000).

12. In this case, the dispositive facts are undisputed: Tropiflora’s 2015 DO application was rejected and was never scored by the Department. Indeed, Tropiflora repeatedly asserts this fact throughout its Petition.

A. *Tropiflora Cannot Satisfy the Threshold Requirement for Licensure Under Section 381.986(8)(a)2.a., Florida Statutes.*

13. Pursuant to section 381.986(8)(a)2.a., Florida Statutes, the threshold requirement for MMTC licensure 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) (emphasis added). 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.²

14. Thus, only after an entity satisfies the initial threshold requirement (*i.e.*, an application that was reviewed, evaluated and scored by the Department) is it relevant for the Department to assess the remaining statutory criteria.

15. Tropiflora admits throughout its Petition that its 2015 DO application was never scored by the Department. *See* Petition, ¶¶ 4, 11, 16, 17, 21(c), 21(e), 24, 25. Despite this, Tropiflora nonetheless asserts entitlement to MMTC licensure because it “had a prior application” and “had one or more administrative or judicial challenges pending as of January 1, 2017.” Petition, ¶ 16; *see also* Tropiflora’s Response to Order to Show Cause, ¶ 2.

16. The fact that Tropiflora “had a prior application” is insufficient as a matter of law, as section 381.986(8)(a)2.a., Florida Statutes (2018) expressly conditions MMTC licensure on an application that was “reviewed, evaluated and scored.” Likewise, the existence of one or more administrative or judicial challenges pending as of January 1, 2017 is irrelevant given Tropiflora’s undisputed failure to satisfy the threshold statutory requirement.

² Assuming one of these two criteria is satisfied, the MMTC applicant must also “provide documentation to the department that it has existing infrastructure and technical and technological ability to begin cultivating marijuana within 30 days after registration as a [MMTC].” § 381.986(8)(a)2.a., Fla. Stat. (2018)

17. Because Tropiflora has not (and cannot) allege that its 2015 DO application “was reviewed, evaluated and scored by the Department,” Tropiflora is not entitled to MMTC licensure under section 381.986(8)(a)2.a., Florida Statutes.

18. Ordinarily, the Department would grant leave to file an amended petition. *See* § 120.569(2)(c), Fla. Stat. (2018). But here it appears from the face of Tropiflora’s Petition that it cannot cure the fatal defect to its Petition: Tropiflora’s application simply was not scored in 2015. *Id.* Thus, the Department need not provide leave to amend, as Tropiflora simply cannot make any allegations that could change the immutable fact that its 2015 application was not scored. *See id.* (authorizing an agency to dismiss a petition without leave to amend where “it conclusively appears from the face of the petition that the defect cannot be cured”); *see also* *See, e.g., Tuten v. Fariborzian*, 84 So. 3d 1063, 1069 (Fla. 1st DCA 2012).

19. Additionally, the ALJ issued a show cause order directing Tropiflora to explain “why the undersigned should not relinquish jurisdiction to the Department for entry of a final order.” Tropiflora filed a response, which has been considered by the Department. The motif of Tropiflora’s Petition and response to the show cause order is that, for a variety of reasons, the Department erroneously failed to score Tropiflora’s 2015 application. For the reasons explained below, those allegations fail as a matter of law.

B. Principles of Administrative Finality and Waiver Preclude Tropiflora from Challenging the Denial of its 2015 DO Application.

20. Proposed agency action generally becomes final 21 days after a substantially affected party receives notice of the agency decision, unless a petition challenging the proposed action is filed within that time. *See, e.g.,* Fla. Admin. Code R. 28-106.111(4); *Capeletti Bros., Inc. v. State, Dep’t of Transp.*, 362 So. 2d 346, 348-49 (Fla. 1st DCA 1978).

A party that fails to challenge final agency action within the 21-day window waives its opportunity to challenge the agency action. *See, e.g.*, Fla. Admin. Code R. 28-106.111(4); *St. Joseph Hosp. of Charlotte, Fla., Inc. v. Dep't of Health & Rehab. Servs.*, 559 So. 2d 595 (Fla. 1st DCA 1989); *S. Fla. Reg'l Planning Council v. State Land & Water Adjudicatory Comm'n*, 372 So. 2d 159, 166–67 (Fla. 3d DCA 1979).

21. Thus, if an agency provides a clear point of entry to challenge agency action—such as the Department’s November 2015 letter denying Tropiflora’s 2015 DO application and providing a notice of chapter 120 rights—those objections to the agency action that could have been asserted in an administrative proceeding are deemed waived. *See, e.g.*, *Klein v. Dep't of Educ.*, 908 So. 2d 1097 (Fla. 1st DCA 2005); *Gulf Coast Home Health Servs. of Fla. v. Dep't of Health and Rehab. Servs.*, 515 So. 2d 1009 (Fla. 1st DCA 1987); *Hubschman Associates, Ltd. v. Collier County*, Case No. 93-8-CIV-FTM-21D, 1993 WL 761342, at *1 (M.D. Fla. Dec. 13, 1993) (applying Florida law).

22. Here, Tropiflora initially filed a petition challenging the Department’s 2015 denial of Tropiflora’s DO application. But Tropiflora voluntarily dismissed its 2015 Petition in June 2016, thereby abandoning its administrative challenge. As a result, the Department entered an order closing its file on Tropiflora’s 2015 Petition, and the Department’s November 2015 denial of Tropiflora’s application became final agency action.

23. Notably, the very issues that Tropiflora complains of here – the Department’s 2015 decision not to score Tropiflora’s application – were raised by Tropiflora in its 2015 Petition. Had Tropiflora simply pursued the available remedy then, it would have had a comparative, formal administrative hearing as was conducted for the two other applicants in Tropiflora’s region. *See Plants of Ruskin, Inc. v. Dep't of Health,*


DOAH Case No. 17-0116, and *Tornello Landscape Corp. v. Dep't of Health*, DOAH Case No. 17-0117³. Perhaps that final hearing would have led to a recommended order and final order granting Tropiflora the relief it sought – a score and licensure. *See Id.* But Tropiflora chose to abandon that remedy then.

24. Thus, because Tropiflora voluntarily dismissed its 2015 Petition, the Department 2015 decision may not be challenged or attacked today regardless of whether the Department may have acted erroneously in 2015. *See, e.g., State, Dep't of Health & Rehab. Servs. v. Barr*, 359 So. 2d 503, 505 (Fla. 1st DCA 1978) (“Nothing in the [Administrative Procedure] Act gives hearing officers collateral review power over *final agency action* taken after regular proceedings under other provisions of the Act.”) (emphasis added). Indeed, the ALJ explained that even if the 2015 scoring decisions were erroneous, the agency action challenged here is the denial of licensure in 2018 based on the 2017 statutory provisions – not agency action in 2015. *See Show Cause Order*, p. 1. Thus, the question of whether Tropiflora is entitled to licensure pursuant to section 381.986(8)(a)2.a., Florida Statutes (2018) is easily answered as a matter of law: Tropiflora has not alleged and cannot allege that it satisfies the criteria for licensure under section 381.986(8)(a)2.a.

Based on the foregoing, the Petition for Formal Administrative Hearing under section 120.57(1), Florida Statutes, is dismissed with prejudice.

³ *In re Licensure of the Low-TCH Cannabis Dispensing Org. for the Sw. Region*, DOAH Case Nos. 15-7270, and 15-7272 were restyled and renumbered for administrative purposes by DOAH.

DONE AND ORDERED in Tallahassee, Leon County, Florida this 19 day of April
2019.

By: 
Michele Tallent
Deputy Secretary for Operations
Florida Department of Health

NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY ADVERSELY AFFECTED BY THIS ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. A REVIEW PROCEEDING IS INITIATED BY FILING A NOTICE OF APPEAL WITH THE CLERK OF THE DEPARTMENT OF HEALTH AND A COPY ACCOMPANIED BY THE FILING FEE WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES OR IN THE FIRST DISTRICT COURT OF APPEAL. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF THE FILING DATE OF THIS ORDER.

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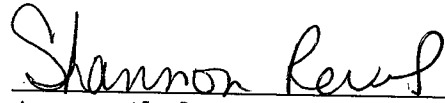
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been sent by electronic mail, regular U.S. mail, and/or by hand delivery to each of the above-named persons this 19th day of April 2019.



Agency Clerk
Department of Health
4052 Bald Cypress Way, BIN A-02
Tallahassee, Florida 32399-1703

STATE OF FLORIDA
DEPARTMENT OF HEALTH

IN RE: LICENSURE OF THE LOW-THC
CANNABIS DISPENSING ORGANIZATION
FOR THE SOUTHWEST REGION

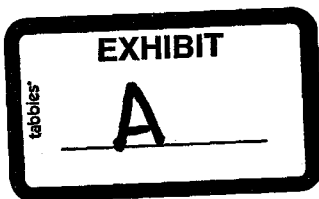
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Case No.: 2015-0671
DOAH Case No.: 15-7269

ORDER CLOSING FILE

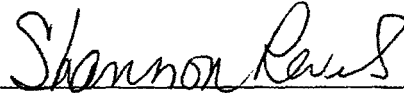
1. On December 10, 2015, the Agency Clerk's Office for the Department of Health received the Petitioner's request for Administrative Hearing.
2. On December 17, 2015, the Agency Clerk's Office for the Department of Health referred the request to the Division of Administrative Hearings.
3. On July 28, 2016 Petitioner filed a notice of withdrawal without prejudice with the Division of Administrative Hearings.
4. On July 28, 2016 the Division of Administrative Hearings issued an Order Severing Case No. 15-7269 from Consolidated Cases, Closing the File of DOAH Case No. 15-7269, and Relinquishing Jurisdiction. The order is attached hereto as Exhibit A.

Based on the foregoing, predicated by the Order Closing the of File DOAH Case No. 15-7269 and Relinquishing Jurisdiction filed by the Division of Administrative Hearings, this file is closed.



DONE and ORDERED this 29th day of July 2016, in
Tallahassee, Florida.

Celeste Philip, MD, MPH
State Surgeon General



Shannon Revels
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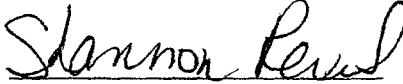
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order Closing File has been sent by regular U.S. mail, certified U.S. mail, hand delivery, and/or by inter-office mail to the above-named persons this 28th day of July 2016.


Shannon Revels

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

IN RE: LICENSURE OF THE LOW-THC
CANNABIS DISPENSING ORGANIZATION
FOR THE SOUTHWEST REGION

Case Nos. 15-7269
15-7270
15-7272

Respondent.

ORDER SEVERING CASE NO. 15-7269 FROM CONSOLIDATED CASES,
CLOSING THE FILE OF DOAH CASE NO. 15-7269,
AND RELINQUISHING JURISDICTION

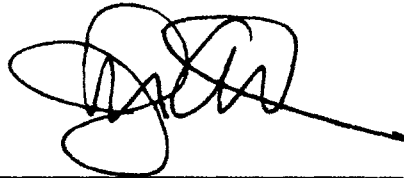
Before the undersigned is Petitioners TropiFlora, LLC and MariJ Agricultural, Inc.'s Notice of Withdrawal Without Prejudice, which was filed on July 28, 2016.

Upon consideration, it is

ORDERED that:

1. DOAH Case No. 15-7269 is hereby served from DOAH Case Nos. 15-7270 and 15-7272.
2. The file of DOAH Case No. 15-7269 is closed. Jurisdiction is relinquished to the Department of Health.

DONE AND ORDERED this 28th day of July, 2016, in Tallahassee, Leon County, Florida.



JOHN G. VAN LANINGHAM
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of July, 2016.

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(eServed)

Shannon Revels, Agency Clerk
Department of Health
4052 Bald Cypress Way, Bin A02
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