STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LOUIS DEL FAVERO ORCHIDS, INC.,

Petitioner,

vs. Case No. 19-1035F

FLORIDA DEPARTMENT OF HEALTH,
OFFICE OF COMPASSIONATE USE,

Respondent.
_____/

FINAL ORDER

This matter came before Administrative Law Judge Garnett W. Chisenhall of the Division of Administrative Hearings ("DOAH"). The parties stipulated to the material facts and agreed to submit written arguments in lieu of an evidentiary hearing.

STATEMENT OF THE ISSUE

Whether there is substantial justification or special circumstances to preclude Petitioner from receiving an award of attorneys' fees and costs pursuant to section 120.595(2), Florida Statutes (2017).[1/]

PRELIMINARY STATEMENT

Louis Del Favero Orchids, Inc. ("Del Favero") filed a "Petition Challenging Validity of Proposed Rule 64-4.002" on June 1, 2018, seeking a determination that the Florida Department of Health, Office of Compassionate Use's ("the

Department") Proposed Rule 64-4.002 ("the Proposed Rule") was an invalid exercise of delegated legislative authority.

During the July 2, 2018, final hearing, Administrative Law Judge ("ALJ") Bruce McKibben accepted the following exhibits into evidence: Joint Exhibit 1; Del Favero's Exhibits 2, 3, 5, 8, 9, 12, 13, and 19; Intervenor Mecca Farms, Inc.'s Exhibits 6 through 9; and the Department's Exhibits 9 through 12. Del Favero's Exhibits 9, 12, and 13 were admitted for the limited purpose of demonstrating that the Department received public comments criticizing the citrus-preference scoring framework.

Del Favero called the following witnesses: David Vukelja, Del Favero's secretary and treasurer; and Courtney Coppola, the director of the Department's Office of Medical Marijuana Use (formerly known as the Office of Compassionate Use). The Department called Shannon Shepp, the executive director of the Florida Department of Citrus ("the Citrus Department"), and Ms. Coppola as witnesses.

ALJ McKibben issued a Final Order on August 6, 2018, concluding that the Proposed Rule was an invalid exercise of delegated legislative authority.

Del Favero filed a "Motion for Section 120.595(2) Attorney's Fees," on September 5, 2018, which was assigned to ALJ McKibben. On February 13, 2019, the case was, upon the

retirement of ALJ McKibben, assigned to ALJ W. David Watkins. Afterwards, Del Favero and the Department submitted a joint pleading requesting that the fees dispute be resolved based solely on written submissions. That request was granted, and the Department filed the Transcript of the July 2, 2018, final hearing and the admitted exhibits on June 3, 2019. Both parties filed timely proposed final orders on June 24, 2019.

The Department stipulated that Del Favero incurred reasonable attorneys' fees of at least $50,000. The Department also stipulated that Del Favero incurred reasonable costs of $3,828.69.

The instant case was transferred to the undersigned on August 16, 2019. During the consideration of this matter, the undersigned considered ALJ McKibben's Final Order from the underlying proceeding, the record from the underlying proceeding, and all pleadings filed after ALJ McKibben's Final Order.

FINDINGS OF FACT

Based on the oral and documentary evidence, written submissions from the parties following issuance of ALJ McKibben's Final Order, and the entire record in this proceeding, the following Findings of Fact are made:

I. Section 381.986(8), Florida Statutes and the Proposed Rule

1. Section 381.986(8), Florida Statutes, establishes a mechanism for the licensing of medical marijuana treatment centers ("MMTC"). The statute was amended in 2017 to provide, in pertinent part, that:

> (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. [Previously denied applicants meeting certain requirements not relevant to the instant action.]
>
> b. [One applicant from a specific class pursuant to a federal lawsuit.]
>
> c. As soon as practicable, but no later than October 3, 2017, the department shall license applicants that meet the requirements of this section in sufficient numbers to result in 10 total licenses issued under this subparagraph, while accounting for the number of licenses issued under sub-subparagraphs a. and b.
>
> 3. **For up to two of the licenses issued under subparagraph 2., the department shall give preference to applicants that demonstrate in their applications that they**

> **own one or more facilities that are, or were, used for the canning, concentrating, or otherwise processing of citrus fruit or citrus molasses and will use or convert the facility or facilities for the processing of marijuana.** (emphasis added).

2. The Proposed Rule was intended to implement the changes to section 381.986; but, where section 381.986(8)(a)3., uses the term "facility," the Proposed Rule substitutes the term "property." For instance, the Proposed Rule provides, in pertinent part, that:

> (1)(f) For applicants seeking preference for registration as a medical marijuana treatment center pursuant to ss. 381.986(8)(a)3., F.S., the applicant must provide evidence that:
>
> 1. The property at issue currently is or was previously used for the canning, concentrating, or otherwise processing of citrus fruit or citrus molasses. In order to demonstrate the property meets this criteria, the applicant may provide documentation that the applicant currently holds or has held a registration certificate pursuant to section 601.40, F.S. A letter from the Department of Citrus certifying that the property currently is or was previously used for the canning, concentrating, or otherwise processing of citrus fruit or citrus molasses will be accepted as sufficient evidence;
>
> 2. The applicant as an individual holds, in his or her name, or the applicant as an entity holds, in the legal name of the entity, the deed to property meeting the criteria set forth in subparagraph 1. above; and

3. A brief explanation of how the property will be used for purposes of growing, processing, or dispensing medical marijuana if the applicant is selected for registration.

* * *

(6) Subject matter experts will substantively and comparatively review, evaluate, and score applications using [the Scorecard incorporated by reference].

* * *

(a)7.(b) Scores for each section of the application will be combined to create an applicant's total score. The department shall generate a final ranking of the applicants in order of highest to lowest scores. . . .

(c) In accordance with ss. 381.986(8)(a)3., F.S., the two highest scoring applicants that own one or more facilities that are, or were, used for the canning, concentrating, or otherwise processing of citrus fruit or citrus molasses and will use or convert the facility or facilities for the processing of marijuana will receive an additional 35 points to their respective total score.

(7) Licenses will be awarded, subject to availability as set forth in ss. 381.986(8)(a)2. and 381.986(8)(a)4., F.S., based on the highest total score in the following manner:

(a) The highest scoring applicant that is a recognized member of Pigford or [African American Farmers Discrimination Litigation] will receive a license.

(b) The remaining highest scoring applicants, after the addition of the preference points for applicants pursuant to paragraph (7)(c) above, will receive

> licenses up to the statutory cap set forth in ss. 381.986(8)(a)2., F.S.
>
> (c) The remaining highest scoring applications, after removing any preference points received under paragraph (7)(c), will receive licenses up to the statutory cap set forth in ss. 381.986(8)(a)4., F.S. (emphasis added).

II. The Parties

3. The Department is the state agency charged with implementing the Compassionate Medical Cannabis Act of 2014. See § 381.986, Fla. Stat.

4. Del Favero has been incorporated since 1974 and has been primarily engaged in the business of growing orchids. At the time of the final hearing in this matter, Del Favero aspired to apply for licensure as a medical marijuana treatment center.

5. After Senate Bill 8A became law and substantially rewrote section 381.986, Del Favero elected to seek the citrus preference described in section 381.986(8)(a)3. In order to accomplish that goal, Del Favero purchased the real property and facilities of a citrus processing business in Safety Harbor, Florida, for approximately $775,000. The purchase occurred prior to the Proposed Rule's publication.

6. Del Favero intends to convert the citrus processing facility located on the Safety Harbor property into a medical marijuana processing facility if Del Favero becomes a licensed MMTC.

III. Pertinent Portions of ALJ McKibben's Analysis

7. In ruling that the Proposed Rule was invalid, ALJ McKibben made the following findings:

> 20. The Legislature clearly intended to give a preference to applicants who "own . . . facilities that are, or were, used for canning, concentrating, or otherwise processing of citrus . . . and will use or convert the . . . facilities for the processing of medical marijuana." The Legislature failed, however, to provide guidance by way of definitions.
>
> 21. While the Legislature chose the words "facility or facilities" in the Preference Statute, the Department complicated the issue by using the word "property" for the most part, but also using the words "facility" and "facilities" at times. Favero contends that a property is much broader in scope than a facility, and the Department therefore exceeded its delegated legislative authority. The Department argues that facilities used to process citrus must be located on some property, obviously. But, facilities located on a property might be leased, so that the fee simple owner of the property is different from the leaseholder of that facility. Thus, if an applicant for a medical marijuana treatment center license wants to avail itself of the preference, it would need to own the facility. Whether that means the applicant must own the property on which the facility is located is not clear in the Preference Statute or in the Proposed Rule.
>
> 22. The Department argues that the way to show ownership of a facility is by way of a deed to the property on which the facility is located. In fact, Favero will use a warranty deed to prove ownership of the facilities it purchased in order to obtain

the preference. But if Favero purchased land on which citrus had been grown but not processed, i.e., if there had been no facilities on the land to can, concentrate or otherwise process the fruit, except in fresh fruit form, the preference would not apply. And if an applicant obtained a leasehold interest in a facility, it would not be able to "show ownership" by way of a deed to the property.

23. The Preference Statute requires the applicant to convert the facility in order to gain the preference. It is unclear how a piece of unimproved property can be "converted" to another use; land is land. This begs the question of whether growing citrus on a piece of property, and then removing all the citrus trees in order to grow medical marijuana, is a "conversion" of a facility as contemplated by the Legislature. Neither the Preference Statute nor the Proposed Rule contain any definitional assistance to answer that question.

24. An important question to be answered is whether the growing of citrus constitutes "processing" as alluded to by the Legislature. The Preference Statute provides no definition of the word. The Citrus Code (chapter 601, Florida Statutes) also does not define "processing," but does describe a "processor" of citrus as: '[A]ny person engaged within this state in the business of canning, concentrating, or otherwise processing citrus fruit for market other than for shipment in fresh fruit form." § 601.03(32), Fla. Stat. (Emphasis added) (sic).

25. Processing must therefore mean something other than merely growing citrus and packing it up for shipment. That being the case, a property where citrus is grown that is "converted" to a property growing marijuana would not afford an applicant a

> preference. There must be some "facility" that is or has been used to process citrus, i.e., doing something more with the raw product, in order to constitute "processing."
>
> 26. Therefore, a "packinghouse," i.e., "[a]ny building, structure, or place where citrus fruit is packed or otherwise prepared for market or shipment in fresh fruit form," would not be engaged in "processing" citrus. See § 601.03(29), Fla. Stat. (emphasis added).

8. ALJ McKibben then made the following Conclusions of Law:

> 34. In this instance, the Department interprets the statutory language concerning "facility or facilities" to include "property." It is impossible to reconcile that interpretation, especially in light of the fact the Legislature contemplated conversion of the facilities. The Department's interpretation is hereby rejected as being outside the range of permissible interpretations. See Cleveland v. Fla. Dep't of Child. & Fams., 868 So. 2d 1227 (Fla. 1st DCA 2004).[27]
>
> 35. The test is whether the agency's proposed rule properly implements specific laws. See § 120.52(8)(f), Fla. Stat. The Preference Statute specifically provided a preference for using or converting citrus facilities, not properties. The Proposed Rule does not implement that specific provision of the law. (emphasis added).

IV. The Department's Rationale for Substituting "Property" for "Facility"

9. The Department asserted during the final hearing that it consulted with the Citrus Department on how to interpret the

phrase "otherwise processing."[3/] See § 381.986(8)(a)3. (providing that "the department shall give preference to applicants that demonstrate in their applications that they own one or more facilities that are, or were, used for the canning, concentrating, or otherwise processing of citrus fruit . . ."). (emphasis added).

10. Ms. Shepp, the Citrus Department's executive director, testified that activities such as picking, grading, sorting, polishing, and packing citrus fruit constitute "otherwise processing." She also testified that a packinghouse conducts the aforementioned activities. Section 601.03(29), Florida Statutes, defines a "packinghouse" as "any building, structure, or place where citrus is packed or otherwise prepared for market or shipment in fresh form." (emphasis added) See the Department's Proposed Final Order at 9, 10, and 15.

11. Because "a place" can be an area without a physical structure, the Department concluded that using the word "property" in the Proposed Rule rather than "facility" would enable applicants who engage in "otherwise processing" to be eligible for the preference. The Department also argued that this substitution is justified because "it is not uncommon in the citrus industry to conduct citrus operations in the open air or in a tent." See Department's Memorandum of Law in Opposition to Petitioner's Motion for Attorney's Fees at 9.[4/]

12. Ms. Coppola explained that the Department substituted "property" for "facility" in order to assist the distressed citrus industry.

13. Finally, Ms. Coppola stated that using the term "property" serves the legislative intent to extend the preference to applicants that are not presently engaged in canning, concentrating, or otherwise processing but had been in the past.[5/]

14. As discussed below in the Conclusions of Law, the Department had no substantial justification for substituting the word "property" for "facility" and thus extending the citrus preference beyond what the Florida Legislature had intended. Moreover, there are no special circumstances that would make an award of attorneys' fees to Del Favero unjust.

CONCLUSIONS OF LAW

15. DOAH has jurisdiction over the parties to and the subject matter of this proceeding. § 120.595(2), Fla. Stat.

16. Section 120.595(2), Florida Statutes, provides that:

> If the appellate court or administrative law judge declares a proposed rule or portion of a proposed rule invalid pursuant to s. 120.56(2), a judgment or order shall be rendered against the agency for reasonable costs and reasonable attorney's fees, unless the agency demonstrates that its actions were substantially justified or special circumstances exist which would make the award unjust. An agency's actions are "substantially justified" if there was a

> reasonable basis in law and fact at the time the actions were taken by the agency. If the agency prevails in the proceedings, the appellate court or administrative law judge shall award reasonable costs and reasonable attorney's fees against a party if the appellate court or administrative law judge determines that a party participated in the proceedings for an improper purpose as defined by paragraph (1)(e). No award of attorney's fees as provided by this subsection shall exceed $50,000. (emphasis added)

17. The parties stipulated that Del Favero incurred reasonable attorneys' fees and costs exceeding $50,000. Therefore, the only issue to be resolved is whether the Department can demonstrate that its adoption of the Proposed Rule was substantially justified or that special circumstances exist which would make an award of fees unjust.

Was the Department Substantially Justified in Substituting "Property" for "Facility?"

18. Because Del Favero prevailed during the underlying proceeding, the burden shifts to the Department to demonstrate that its action was substantially justified. See Ag. for Health Care Admin. v. MVP Health, Inc., 74 So. 3d 1141, 1143 (Fla. 1st DCA 2011); Helmy v. Dep't of Bus. & Prof'l Reg., 707 So. 2d 366, 368 (Fla. 1st DCA 1998).

19. The First District Court of Appeal concisely described the factors to be considered in evaluating whether an action was "substantially justified":

An action is "substantially justified" if the state agency had a "reasonable basis in law and fact" to initiate it. § 57.111(3)(e), Fla. Stat. (2010). This Court has found an agency cannot satisfy the "substantial justification" standard simply by showing an action was "not frivolous." This is because "while governmental action may not be so unfounded as to be frivolous, it may nonetheless be based on such an unsteady foundation factually and legally as not to be substantially justified." Dep't of Health & Rehab. Servs. v. S.G., 613 So. 2d 1380, 1386 (Fla. 1st DCA 1993). On the other hand, the standard is not so strict as to require the agency to demonstrate that its action was correct. Id., quoting McDonald v. Schweiker, 726 F.2d 311, 316 (7th Cir. 1983)(stating the government need not have a "necessarily correct basis [] for the position that it took"). The "substantial justification" standard lies between these two extremes. The closest approximation is that if a state agency can present an argument for its action "'that could satisfy a reasonable person[,]'" then that action should be considered "substantially justified." Helmy, 707 So. 2d at 368, quoting Pierce v. Underwood, 487 U.S. 552, 565, 108 S. Ct. 2541, 101 L.Ed.2d 490 (1998).

An additional consideration when evaluating an agency's action under section 57.111 is that the inquiry is limited only to whether the agency had a "reasonable basis in law and fact **at the time**" it took the action. § 57.111(3)(e), Fla. Stat. (2010)(emphasis added). The reviewing body – whether DOAH or a court – may not consider any new evidence which arose at a fees hearing, but must focus exclusively upon the information available to the agency at the time that it acted. See Dep't of Health, Bd. of Physical Therapy Practice v. Cralle, 852 So. 2d 930, 932 (Fla. 1st DCA 2003)(criticizing an ALJ for being "influenced by consideration of

> evidence which was presented at [a fees] hearing rather than being focused solely on whether the [agency's underlying] decision had a reasonable basis in law and fact"). (emphasis in original).

MVP Health, Inc., 74 So. 3d at 1143-44.

20. The question of whether Del Favero is entitled to attorneys' fees partially turns on whether the Department acted reasonably by substituting the word "property" for "facility" when it issued the Proposed Rule. In other words, do any of the justifications set forth by the Department for changing the word utilized by the Florida Legislature amount to substantial justification?

21. The Department asserted that it relied on guidance from the Citrus Department in interpreting the phrase "otherwise processing," and that guidance led the Department to conclude that it needed to use the word "property" in order to enable those engaged in "otherwise processing" activities to be eligible for the citrus preference. While it is entirely reasonable to consult and rely on the Citrus Code to provide guidance as to citrus industry practices, it is unreasonable to rely on advice that is facially contrary to the Citrus Code. Moreover, the Department did not: (a) identify who it consulted with at the Citrus Department; (b) call that person as a witness; or (c) establish the substance of what that person relayed to the Department.

22. Even a cursory examination demonstrates that the Citrus Department's supposed guidance is directly contrary to the pertinent statutory definitions in the Citrus Code. For instance, a Citrus Department witness testified that the Citrus Department considers activities such as picking, grading, sorting, polishing, and packaging of citrus fruit to constitute "otherwise processing," and that such "processing" can be accomplished in packinghouses. That testimony neglects to recognize that the Citrus Code provision regarding "processing" excludes the work conducted in a packinghouse. Specifically, section 601.03(32) defines a "processor" as "any person engaged . . . in the business of canning, concentrating, or otherwise processing citrus fruit for market other than for shipment in fresh fruit form." (emphasis added). However, section 601.03(29) defines a "packinghouse" as "any building, structure, or place where citrus fruit is packed or otherwise prepared for market or shipment in fresh form." (emphasis added). Thus, to construe the term "processing" to include packing and preparing fresh fruit for market in a packinghouse is contrary to the pertinent provisions of the Citrus Code.

23. Thus, it is readily apparent from the plain language of the Citrus Code that a "packinghouse" cannot be engaged in "canning, concentrating, or otherwise processing" of citrus because a packinghouse prepares citrus for shipment in fresh

fruit form. In light of section 381.986(8)(a)3.'s clear direction that the citrus preference could only apply to applicants that are or were engaged in canning, concentrating, or otherwise processing of citrus, the Department had no reasonable basis for extending the citrus preference to fresh fruit packinghouses.

24. The Department's decision to substitute the word "property" for "facility" was also based on the portion of section 601.03(29), extending the definition of "packinghouse" to a "place." Based on the idea that a "place" can be an area with no physical structure and that citrus operations can be conducted in the open air or under a tent, the Department determined that it needed to substitute "property" for "facility" so that the preference could apply to those types of activities.

25. First, the term "facility" is not ambiguous. That term describes an area with some sort of physical structure. The online edition of the Merriam-Webster Dictionary defines the term "facility," in pertinent part, as "something (such as a hospital) that is built, installed, or established to serve a particular purpose." See "Facility," Merriam-Webster.Com, https://meriam-webster.com (last visited December 5, 2019).

26. Even if one were to consider the term “facility” to be ambiguous, it is unreasonable to argue that the term “property” is not broader in meaning than the term “facility” or that the two terms are synonomous.[6/] While a “facility” may be “property,” a piece of property is not necessarily a “facility.” As ALJ McKibben found in his Final Order:

> 25. Processing must therefore mean something other than merely growing citrus and packing it up for shipment. That being the case, a property where citrus is grown that is “converted” to a property growing marijuana would not afford an applicant a preference. There must be some “facility” that is or has been used to process citrus, i.e., doing something more with the raw product, in order to constitute “processing.”

27. ALJ McKibben then ruled in his Conclusions of Law that:

> 34. In this instance, the Department interprets the statutory language concerning “facility or facilities” to include “property.” It is impossible to reconcile that interpretation especially in light of the fact the Legislature contemplated conversion of the facilities. The Department’s interpretation is hereby rejected as being outside the range of permissible interpretations. See Cleveland v. Fla. Dep’t of Child. & Fams., 868 So. 2d 1227 (Fla. 1st DCA 2004). (emphasis added).

28. When the Florida Legislature referred to a “facility” in section 381.986(8)(a)3., it was extending the citrus preference to those applicants that owned a physical structure

that was (or had been) used in the canning, concentrating, or otherwise processing of citrus fruit or citrus molasses. This conclusion is supported by the portion of the statute referring to applicants "converting" such a facility to marijuana processing. Arguing that one can "convert" a table, a tent, or an unimproved piece of land from citrus processing to marijuana processing is unreasonable. Indeed, if that had been the intent of the Florida Legislature, then the Legislature could have simply omitted any reference to "facility" in section 381.986(8)(a)3. and said something to the effect that "the department shall give preference to applicants that demonstrate in their applications that they handle, or handled, citrus in either its fresh or processed form." It did not do so.

29. By substituting "property" for "facility" in the portion of the Proposed Rule identifying which applicants were eligible for the citrus preference, the Department substituted its will for the Legislature's as to who was eligible for the citrus preference.

30. The Department also asserted that it altered the statutory language in order to extend eligibility for the citrus preference to entities that had owned a facility used for canning, concentrating, or "otherwise processing," but the aforementioned facility no longer exists. Section 381.986(8)(a)3. clearly indicates that the facility in question

must still be in existence. Otherwise, the applicant does not own a facility that would make it eligible for the preference.

31. Finally, the Department argued that using the word "property" served a legislative intent to assist the struggling citrus industry. That policy may be a good one, but it is not one for the Department to make without legislative direction. Furthermore, this policy justification is unavailing because the citrus preference applies to no more than two applicants. See § 381.986(8)(a)3., Fla. Stat. (providing that "[f]or up to two of the licenses issued under subparagraph 2., the department shall give preference to applicants that demonstrate in their applications that they own one or more facilities . . ."). Thus, any assistance to the citrus industry as a whole resulting from the two "preference" permits would be negligible at best.

32. In sum, the Department has failed to demonstrate that it acted reasonably by substituting the word "property" for "facility" when it issued the Proposed Rule. In other words, none of the justifications set forth by the Department for altering the verbiage of section 381.986(8)(a)3. are sufficiently substantial to foreclose an award of attorneys' fees to Del Favero.

Are There Special Circumstances That Would Make an Award of Fees to Del Favero Unjust?

33. Despite the lack of substantial justification, the Department can still avoid an award of fees and costs if it can demonstrate that special circumstances exist which would make an award to Del Favero unjust.

34. Section 120.595(2) does not define the term "special circumstances." However, the Florida Equal Access to Justice Act and the Federal Equal Access to Justice Act provide for a special circumstances defense, and cases construing the federal act describe the defense as being based on equitable considerations:

> In Grayson Electric Co. v. N.L.R.B., 951 F.2d 1100, 1103 (9th Cir. 1981), the court quoted from a Congressional report which explained that the "special circumstances" defense in 5 U.S.C.A. Section 504(a)(1) "provides a safety valve where unusual circumstances dictate that the government is advancing in good faith a credible, though novel, rule of law." And see Animal Lovers Volunteer Ass'n v. Carlucci, 867 F.2d 1224, 1226 (9th Cir. 1989)(finding no special circumstances because "[t]he litigation on the merits did not involve a close or novel question"); United States v. Gavilan Joint Community College Dist., 849 F.2d 1246, 1249 (9th Cir. 1988)(finding no special circumstances that would permit denial of an award because the case did not involve a novel but credible interpretation of law, an issue on which reasonable minds could differ, or an important and doubtful question).

> Unlike the substantial justification defense which, by virtue of Section 57.111(3)(e), is limited to circumstances in existence "at time [the proceeding] was initiated by the state agency," the special circumstances defense is grounded in equity and therefore appears to require a broader view of the circumstances of the proceeding which generated the fee request. Accordingly, in determining whether an award under the FEAJA would be equitable (or "unjust"), all of the circumstances of the DOAH Case No. 02-2230BID, including events subsequent to the initiation of the proceeding such as the School Board's successful defense of its new policies and summaries of procedures in the related DOAH Case No. 02-3138RP, are appropriate to be considered.

RHC and Assoc. Inc. v. Hillsborough Cnty. School Bd., Case No. 02-3922F (Fla. DOAH Feb. 3, 2003).

35. The Department argues that a lack of definitions in section 381.96 and inartful statutory drafting amount to special circumstances that make an award of attorneys' fees to Del Favero unjust. However, and as discussed above, the Department erred by unreasonably substituting the word "property" for "facility." Given the importance that Florida jurisprudence places on adhering to the words utilized by the Florida Legislature, there are no special circumstances present in the instant case that would make an award of attorneys' fees to Del Favero unjust. See generally DMB Inv. Trust v. Islamorada, 225 So. 3d 312, 317 (Fla. 3d DCA 2017)(noting that "[l]egislative intent is the polestar that guides a court's statutory

construction analysis, and to discern legislative intent, a court must look first and foremost at the actual language used in the statute.").

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, Del Favero is entitled to an award of attorneys' fees and costs pursuant to section 120.595(2). The Department has failed to demonstrate that its action was substantially justified or that any special circumstances exist which would make an award of fees and costs unjust. Accordingly, it is ORDERED that the Florida Department of Health, Office of Compassionate Use shall pay Louis Del Favero Orchids, Inc. $50,000.00 as compensation for attorneys' fees incurred by Louis Del Favero Orchids, Inc. in its challenge to Proposed Rule 64-4.002, and costs of $3,828.69.

DONE AND ORDERED this 5th day of December, 2019, in Tallahassee, Leon County, Florida.

Garnett Chisenhall

G. W. CHISENHALL
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of December, 2019.

ENDNOTES

[1/] Unless stated otherwise, all statutory references shall be to the 2017 version of the Florida Statutes.

[2/] ALJ McKibben reached his decision before Section 21, Article V of the Florida Constitution took effect. Section 21 provides that "[i]n interpreting a state statute or rule, a state court or an officer hearing an administrative action pursuant to general law may not defer to an administrative agency's interpretation of such statute or rule, and must instead interpret such statute or rule de novo."

[3/] Ms. Coppola testified that the Department consulted with unidentified representatives of the Citrus Department "as it relates to what applicants would meet canning, concentrating, or otherwise processing" and that those conversations influenced the Department's wording of the Proposed Rule. However, there was no evidence about the substance of the consultation or which employee or employees of the Citrus Department communicated with the Department. For instance, Ms. Shepp testified that she did not personally advise the Department as to how section 381.986(8)(a)3. should be implemented. While she oversees employees who supposedly had communications with the Department regarding the citrus preference, she was unaware of what advice was provided.

Even if one assumes that the Department's wording of the Proposed Rule was completely based on advice from the Citrus Department, that would not amount to substantial justification within the meaning of section 120.595(2). As discussed in the Conclusions of Law, the guidance supposedly provided by the Citrus Department as to the meaning of "otherwise processing" was directly contrary to the pertinent portions of the Citrus Code.

[4/] Even though the Department determined that it was necessary to use the word "property" in the Proposed Rule in order to extend the preference to applicants who are, or were, engaged in canning, concentrating, or otherwise processing without utilizing a physical structure, Ms. Coppola, the director of the Department's Office of Medical Marijuana Use (formerly known as

the Office of Compassionate Use), argued that one can have a "facility" without having a physical structure in place.

[5/] Ms. Coppola explained why the Department substituted the word "property" for "facility" in section 381.986(8)(a)3.:

> Q: Could you explain to the Judge why the word property was used instead of just using the word facility?
>
> A: Sure. I think it's kind of twofold. First is the statute requires us to give a preference to those who are or were – so it's at any point in time; so that element of there is or was a facility at the time.
>
> And the second is canning, concentrating, or otherwise processing. And facility by definition is something established for a particular purpose. It's not four walls or it's not three walls and [a] roof. The structure isn't required. And it may not be necessary either because of the was or were, like it was there, or it might not be required because otherwise processing or canning or concentrating, the structure might not be required to do one of those three things.
>
> So property, when proving up real property when you own something, it's a deed of the place, the facility. So whatever the place is and everything that's there with it, you prove you own that with the deed.
>
> Q: So the Department does not interpret facility in the statute to equal a physical building or structure necessarily?
>
> A: No, and I don't think we have the authority to.
>
> Q: Based on the language of the statute?
>
> A: Correct.

> Q: So for example, if there had been a structure and it many years ago but for reasons that don't really matter today, the structure is just not there, but those activities that are described in the statute were at some point in time conducted on that property, is it the Department's perspective that that would be the type of scenario where a structure is not there but that would qualify under the statute because of your interpretation of the relevant provision?
>
> A: That's correct.
>
> Q: For example, if one were selecting, grading, washing, and packing citrus fruit outside of a structure, maybe under a tent, does the Department view the statute as allowing it to limit the qualifying applicants to those who were only within four walls in a physical structure?
>
> A: No.

On cross examination, Ms. Coppola agreed that even a piece of unimproved land could qualify for the citrus preference under the Proposed Rule:

> Q: I am following up on an example from your direct. Property, structure's gone, but there might still be a tent. And you are saying the third requirement is they have to show how the tent could be converted to be used [for] processing medical marijuana?
>
> A: Their facility in its entirety?
>
> Q: If the facility they have is a tent, it's the Department of Health that will judge that and say I am going to put a temporary table with some flasks on it, I am going to heat and cool things and process marijuana under a tent in my open field. Isn't it true the Department retains the

discretion to give 35 points to that converted facility?

A: You are saying a facility is the tent. It could also be the space it's in. So how they will convert that space. They can put a building on it.

Q: Facility could be dirt, right, unimproved dirt? Someone could promise to build a million dollar processing plant on top of it, they would still meet [the] citrus preference; is that true?

A: They might.

[6/] While the Proposed Rule refers to "property" when specifying that "[t]he property at issue currently is or was previously used for the canning, concentrating, or otherwise processing of citrus fruit or citrus molasses," it subsequently uses the term "facility" when providing that "the two highest scoring applicants that own one or more facilities that are, or were, used for the canning, concentrating, or otherwise processing of citrus fruit or citrus molasses and will use or convert the facility or facilities for the processing or marijuana will receive an additional 35 points to their respective total score." The Department provided no explanation for that inconsistency.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.