STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LEAFLY HOLDINGS, INC.,

Petitioner,

vs. Case No. 21-2431RU

FLORIDA DEPARTMENT OF HEALTH,

Respondent.
_____/

FINAL ORDER

A duly-noticed final hearing was conducted in this case on September 14, 2021, via Zoom teleconference, before Administrative Law Judge Suzanne Van Wyk of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Seann M. Frazier, Esquire
Kristen Bond Dobson, Esquire
Parker, Hudson, Ranier & Dobbs, LLP
215 South Monroe Street, Suite 750
Tallahassee, Florida 32301

For Respondent: Louise Wilhite-St. Laurent, General Counsel
Katelyn Rose Boswell, Esquire
Department of Health
4052 Bald Cypress Way, Bin A-02
Tallahassee, Florida 32399

STATEMENT OF THE ISSUES

Whether Respondent, Department of Health ("Department"), has made an agency statement which constitutes an agency rule, as defined in section 120.52(16), Florida Statutes,[1] but has not been adopted as a rule in violation

[1] Except as otherwise provided, all citations to the Florida Statutes are to the 2021 version.

of section 120.54(1)(a); and whether Petitioner, Leafly Holdings, Inc. ("Leafly"), has standing to challenge that statement, pursuant to section 120.56(4).

PRELIMINARY STATEMENT

On August 6, 2021, Petitioner filed a Petition Challenging Agency Statements as Unpromulgated Rules ("Petition"). Petitioner seeks the determination that a statement of the Department constitutes an unpromulgated and invalid rule.

On August 12, 2021, Petitioner filed a Motion to Amend its Petition, which was granted, and the Amended Petition was deemed filed as of August 13, 2021.

The Department filed a Motion to Dismiss, or in the Alternative, Motion for Final Summary Order and a Motion for Protective Order on August 16, 2021 ("Motions"). The undersigned conducted a hearing on the Motions on August 25, 2021, and entered an Order denying the Motions on August 26, 2021.

The Final Hearing in this case was originally scheduled for September 2, 2021, but was subsequently rescheduled to September 9, 2021, upon a Joint Motion of the parties to allow for completion of discovery, which was granted on August 30, 2021.

The Final Hearing commenced as rescheduled on September 9, 2021, via Zoom teleconference. Joint Exhibits 1 through 35 were admitted into evidence. Petitioner presented the testimony of Ross Moulton and Chris Ferguson, and Petitioner's Exhibits 1 through 5 were admitted into evidence.

Respondent also presented the testimony of Chris Ferguson, and Respondent's Exhibits 1 through 6 were admitted into evidence.

FINDINGS OF FACT

The Parties

1. Leafly is a foreign corporation authorized to do business in Florida. Leafly provides websites, including Leafly.com and success.leafly.com, and related mobile or software applications that contain information generally related to cannabis, including user reviews and ratings, dispensary and retailer directories, medical provider directories, and news and editorial coverage.

2. The Department is the state agency charged with regulating medical marijuana in the State of Florida. The Department administers the provisions of section 381.986, Florida Statutes, and has a constitutional duty to ensure the availability and safe use of medical marijuana pursuant to Article X, Section 29 of the Florida Constitution.

Medical Marijuana Regulation in Florida

3. In 2014, the Florida Legislature legalized the cultivation, processing, and dispensing of low-THC cannabis for certain qualified patients. *See* § 381.986, Fla. Stat. (2014); and ch. 2014-157, Laws of Fla. Section 381.986 was titled "Compassionate Use of Low-THC Cannabis."

4. In 2016, the citizens of Florida approved an amendment to the Florida Constitution to legalize the medical use of marijuana for patients with debilitating medical conditions. Art. X, § 29, Fla. Const.

5. Following the approval of the constitutional amendment, the 2017 Florida Legislature substantially amended section 381.986, and retitled the section as "Medical Use of Marijuana." § 381.986(8)(a), Fla. Stat. (2017).

6. The scope of section 381.986 is broad and governs the entire legislative scheme for the legal use of medical marijuana in Florida. Among other things, the statute codifies the medical conditions that can qualify a patient

to use medical marijuana, sets forth the requirements for qualified physicians, establishes the medical marijuana use registry, provides for the imposition of penalties for violations of the law, empowers the Department to regulate unlicensed activity, and sets forth the requirements for medical marijuana treatment centers ("MMTCs"). *See* § 381.986(2), (3), (5), (8), and (12), Fla. Stat.

7. A qualified physician must, following patient examination, certify the patient's qualification to receive medical marijuana. That certification must include the patient's qualifying condition, the daily dosage of medical marijuana approved, the amount and forms of marijuana authorized for the patient, and any type of marijuana delivery devices needed by the patient for the medical use of marijuana. *See* § 381.986(4)(a), Fla. Stat. That information is entered into the medical marijuana use registry. *Id*. Prior to dispensing medical marijuana to a qualified patient, an MMTC must verify that the qualified patient has an active and valid marijuana use registry identification card, that the amount and type of marijuana dispensed matches the physician certification in the medical marijuana use registry for that patient, and that the physician certification has not already been filled. *See* § 381.986(8)(e)16.d., Fla. Stat.

8. An MMTC is an entity licensed by the Department and authorized to cultivate, process, transport, and dispense marijuana for medical use. Art. X, § 29, Fla. Const. This structure requiring the MMTC to control the process from seed-to-sale is known as "vertical integration." Under the statute, MMTCs are prohibited from "contract[ing] for services directly related to the cultivation, processing, and dispensing of marijuana or marijuana delivery devices[.]" § 381.986(8)(e), Fla. Stat.

9. Applicants for MMTC certification must have applied on a form supplied by the Department, which is adopted by Florida Administrative Code Rule 64-4.002. *See* § 381.986(8)(b), Fla. Stat. The statute requires the applicant to document the following on the prescribed form:

1. That, for the 5 consecutive years before submitting the application, the applicant has been registered to do business in the state.

2. Possession of a valid certificate of registration issued by the Department of Agriculture and Consumer Services pursuant to s. 581.131.

3. The technical and technological ability to cultivate and produce marijuana, including, but not limited to, low-THC cannabis.

4. The ability to secure the premises, resources, and personnel necessary to operate as a medical marijuana treatment center.

5. The ability to maintain accountability of all raw materials, finished products, and any byproducts to prevent diversion or unlawful access to or possession of these substances.

6. An infrastructure reasonably located to dispense marijuana to registered qualified patients statewide or regionally as determined by the department.

7. The financial ability to maintain operations for the duration of the 2-year approval cycle, including the provision of certified financial statements to the department.

* * *

8. That all owners, officers, board members, and managers have passed a background screening pursuant to subsection (9).

9. The employment of a medical director to supervise the activities of the medical marijuana treatment center.

10. A diversity plan that promotes and ensures the involvement of minority persons and minority business enterprises, as defined in s. 288.703, or

> veteran business enterprises, as defined in s. 295.187, in ownership, management, and employment. An applicant for licensure renewal must show the effectiveness of the diversity plan by including the following with his or her application for renewal:
>
> a. Representation of minority persons and veterans in the medical marijuana treatment center's workforce;
>
> b. Efforts to recruit minority persons and veterans for employment; and
>
> c. A record of contracts for services with minority business enterprises and veteran business enterprises.

§ 381.986(8)(b), Fla. Stat. The licensing process is comprehensive and the regulation is tightly controlled to ensure the vertical integration of the MMTC function, from seed-to-sale. As of the date of the final hearing, the Department had issued 22 MMTC licenses.

10. An MMTC must, at all times, maintain compliance with the criteria demonstrated and representations made in its initial application. *See* § 381.986(8)(d), Fla. Stat. Any deviation from the representations made in its application must be reviewed by the Department through a variance request. *Id*. The Department considers each variance request based on the specific facts and circumstances of the request, and may not grant a variance unless the MMTC demonstrates that the proposed alternative to representations made in its initial application fulfills the same or similar purpose and the Department determines the variance will not be a lower standard than the specific representation made in the application. *Id*.

11. An MMTC may not engage in internet advertising and marketing except as approved by the Department. *See* § 381.986(8)(h)2., Fla. Stat. All advertisements must be approved by the Department. *Id*. Approval of an advertisement includes approval of the specific products to be advertised

(e.g., edibles, cartridges, or flower). If an MMTC wishes to change the form of its advertisements, the advertising platforms, or advertise additional products, the MMTC must apply for a variance from the Office of Medical Marijuana Use ("OMMU").

Leafly's Online Services

12. Leafly provides advertising services to marijuana retailers, manufacturers, producers, and distributors to advertise their products on Leafly's website. Through this service, MMTCs can post a menu on Leafly's website advertising their products to patients, which includes product name, price, and THC content, as well as the location and hours of operation of the MMTC dispensing facility where the product is available.

13. Advertisements on Leafly's website include specific product and dispensary location information to connect consumers with marijuana dispensaries and products near them. Rather than visiting each individual dispensary's website, a patient located in Tallahassee, Florida, for example, can visit Leafly's website and search for specific marijuana products and product types available at several dispensing facilities in and around Tallahassee.

14. Leafly's Chief Operating Officer, Ross Moulton, testified that this form of advertising is intended to directly connect the consumer to the dispensaries where a desired product is available, so that a sale may occur, and marijuana may be dispensed.

15. Through Leafly's online ordering service, patients can view a marijuana product or products available at a particular dispensing facility and place reservations for those products. Once the order is requested, Leafly transmits the order to the dispensing facility, which is responsible for accepting and fulfilling the order. If the dispensary elects to fulfill the order, and when the order is ready, the dispensary notifies Leafly, which, in turn, notifies the patient. When the patient arrives at the selected dispensary, the dispensary collects payment from, and dispenses the marijuana product to,

the patient. This ordering system does not relieve the MMTC of its duty to verify, through the medical marijuana use registry, whether the types and dosage of medical marijuana ordered matches those approved for the patient and whether the physician certification has already been filled.

16. Leafly does not transfer the marijuana product to the patient. Leafly does not accept any payment for the purchase of marijuana, and never accepts payment for marijuana from any patient. However, Mr. Moulton testified directly that "[t]he purpose [of the online ordering platform] is for products to be dispensed by the retailer to that customer."[2]

17. MMTCs pay Leafly for these services on a subscription basis. Leafly's online ordering service is included in the basic advertising subscription service. Placement of an order on Leafly's website requires the patient or caregiver to provide basic information, including name, contact information, and the patient's medical marijuana card number. All information that a patient provides to Leafly to place an order is encrypted. Leafly never sells patient information for commercial purposes. MMTCs do not provide patient information to Leafly.

Alleged Unpromulgated Rule

18. The Department has approved MMTCs' requests to advertise various medical marijuana products on Leafly's website through the variance process. Curaleaf Florida, LLC ("Curaleaf"), a licensed MMTC regulated by the Department, has approval to advertise certain of its products on Leafly's website.

19. On December 15, 2020, Curaleaf requested approval from the Department to allow qualified patients and caregivers to place orders for medical marijuana through Leafly's website. On January 11, 2021, the Department issued a written denial of Curaleaf's variance request, noting as follows:

[2] T.63:20-21.

> Section 381.986(8)(e), Florida Statutes, provides that a [MMTC] may not contract for services directly related to the cultivation, processing, and dispensing of marijuana or marijuana delivery devices. Contracting through Leafly.com to allow qualified patients and caregivers to place orders for the dispensation of marijuana and low-THC cannabis is a violation of section 381.986(8)(e), Florida Statutes.

20. Following the denial of its request to contract with Leafly for online ordering, Curaleaf notified the Department that other licensed MMTCs were using Leafly's online ordering services. Curaleaf complained that the Department was engaging in disparate treatment of Curaleaf by allowing other MMTCs to use third-party online ordering platforms.

21. In response to this complaint, Chris Ferguson, OMMU Director, requested his legal staff to draft a letter using the language from Curaleaf's variance denial letter to be sent to all MMTCs "ASAP."

22. On February 1, 2021, the Department issued the following letter to all MMTCs:

> RE: Online Ordering Hosted by Third-Party Websites
>
> To All Medical Marijuana Treatment Centers,
>
> The [Department] [OMMU] has received inquiries and complaints regarding qualified patients and caregivers placing orders for the dispensation of marijuana and low-THC cannabis through Leafly.com.
>
> Section 381.986(8)(e), Florida Statutes, provides that a [MMTC] may not contract for services directly related to the cultivation, processing, and dispensing of marijuana or marijuana delivery devices. Contracting with Leafly.com, or any other third-party website, for services directly related to dispensing is a violation of this provision.

> An MMTC licensed by the [Department] is the only entity permitted to dispense marijuana or marijuana delivery devices or perform services directly related thereto. An MMTC that contracts for services directly related to dispensation may be subject to penalties in accordance with Rule 64-4.210(9)(eee), Florida Administrative Code.

23. This letter contains the agency statement that Leafly alleges is an unpromulgated rule: contracting with a third-party for online ordering of medical marijuana products violates section 381.986(8)(e) because it constitutes a service directly-related to dispensation of medical marijuana.

Fallout from February 1, 2021 letter

24. In July 2021, the OMMU concluded an audit of MMTCs to determine whether any of them were using a third-party platform allowing qualified patients to place orders for medical marijuana. Of the 22 licensed MMTCs, the OMMU found eight to be utilizing third-party platforms, only one of which was utilizing Leafly's platform. The Department sent each of those MMTCs a Notice of Violation with formal hearing rights.

25. The MMTC that was in violation with respect to Leafly's services did not dispute the violation, paid the $5,000 fine required by the OMMU, and submitted a Corrective Action Plan ("CAP") that was approved by the OMMU. In its CAP, the MMTC noted that they had deactivated all online ordering capabilities using Leafly's platform and removed Leafly from its own website. Further, the MMTC represented that it does not contract with Leafly for advertising its retail locations and products. Two MMTCs disputed the Notice of Violation and requested a formal hearing. As of the date of the final hearing, those two cases remained pending.

26. Mr. Moulton testified that, prior to the letter, Leafly contracted with 277 MMTC retail locations in Florida. He alleged that, following issuance of the February 1, 2021 letter, "some of those contracts canceled their subscriptions with Leafly. All have stopped doing online ordering with

Leafly."[3] Mr. Moulton quantified the loss to Leafly from those canceled contracts as at least $300,000.

27. On cross-examination, Mr. Moulton could not give the number of contracts which had been canceled, could not name a single MMTC which had canceled its contract with Leafly, and admitted that the $300,000 loss figure was "provided … from counsel and from our sales team."[4] Apparently, Mr. Moulton had no personal knowledge of the contracts canceled or the amount of loss to the company.

28. Some licensed MMTCs continue to pay for and advertise approved medical marijuana products on Leafly.com at the same minimum cost of the base subscription package. Leafly also continues to provide locations and addresses of all MMTCs, irrespective of whether the MMTC pays Leafly for a separate medical marijuana product advertising service or whether the OMMU has approved product advertising on Leafly.com.

CONCLUSIONS OF LAW

29. The Division of Administrative Hearings has jurisdiction over this rule challenge and the parties hereto. § 120.56(1), Fla. Stat.

30. The burden of proof is on Petitioner to establish by a preponderance of the evidence that: (1) it has standing to challenge the alleged unpromulgated rule; and (2) that the Department's statement is an unadopted rule.

31. If Petitioner proves that the statement is an unadopted rule, the Department must demonstrate that rulemaking is not feasible or not practicable. *See* § 120.56(4)(c), Fla. Stat.

[3] T.47:5-9.
[4] T.54:11-12.

Standing

32. "Any person substantially affected by an agency statement may seek an administrative determination that the statement violates section 120.54(1)(a)." § 120.56(4), Fla. Stat.

33. The substantially affected language is not codified in chapter 120, but is instead a judicially-created test for standing that examines what constitutes a legally-sufficient interest.

34. To establish standing to challenge an administrative rule or policy under the "substantially affected" test, a party must show: (1) that the rule or policy will result in a real and immediate injury in fact, and (2) that the alleged interest is within the zone of interest to be protected or regulated. *See Jacoby v. Fla. Bd. of Med.*, 917 So. 2d 358, 360 (Fla. 1st DCA 2005).[5] The first prong of the test addresses the *degree of injury*, while the second prong addresses the *nature of the injury*. *See Agrico v. Dep't of Envtl. Reg.*, 406 So. 2d 478, 482 (Fla. 1981).

35. Although the two-pronged test articulated in *Jacoby* and *Agrico* is the same, both the First and Fourth District Courts of Appeal have applied this standard differently depending on whether standing is being analyzed in a rule challenge proceeding or in a licensing/permitting proceeding. In *Florida Medical Association., Inc. v. Department of Professional Regulation,* 426 So. 2d 1112, 1114-15 (Fla. 1st DCA 1983), the First District distinguished the case before it—a rule challenge proceeding where the petitioners challenged the validity of the proposed rule—from *Agrico*, a permitting proceeding that did not involve a claim of illegality. The court concluded that in the rule challenge case, the hearing officer "erred in the interpretation and application of the 'zone of interest' requirement" because there was a

[5] The injury-in-fact prong and zone of interest prong were earlier articulated in *Agrico Chemical Co. v. Department of Environmental Regulation*, 406 So. 2d 478 (Fla. 1981), applying in the context of challenges to agency action for proceedings that involve "decisions that determine substantial interests" under sections 120.569 and 120.57.

contention of unlawful exercise of authority, unlike in *Agrico*, which only involved opposition to a granting of a permit.

36. The First District has expressly observed that "standing in a licensing proceeding may well have to be predicated on a somewhat different basis than standing in a rule challenge proceeding" because "there can be ... a difference between the concept of 'substantially affected' under section 120.56(1) and 'substantial interests' under section 120.57(1)." *Fla. Soc'y of Ophthalmology v. State of Fla. Bd. of Optometry,* 532 So. 2d 1279, 1288 (Fla. 1st DCA 1988). The court further explained in *Department of Professional Regulation, Board of Dentistry v. Florida Dental Hygienist Association, Inc.,* 612 So. 2d 646, 651 (Fla. 1st DCA 1993), that this distinction between the type of proceeding is significant because:

> Prior decisions in licensing or permitting cases have made it clear that a claim of standing by third parties based solely upon economic interests is not sufficient unless the permitting or licensing statute itself contemplates consideration of such interests, or unless standing is conferred by a rule, statute, or based on constitutional grounds.

37. In contrast, for a challenge to a proposed or adopted agency rule, an interest economic in nature can satisfy the injury in fact element of the standing test. *See Fla. Med. Ass'n., Inc.,* 426 So. 2d at 1115. However, to satisfy the real and immediate injury in fact element, the injury must not be based on pure speculation or conjecture. *See, e.g., Prof'l Firefighters of Fla., Inc. v. Dep't of HRS*, 396 So. 2d 1194, 1196 (Fla. 1st DCA 1981); *Off. of Ins. Reg. and Fin. Servs. Comm'n v. Secure Enters., LLC*, 124 So. 3d 332 (Fla. 1st DCA 2013). In *Secure Enterprises*, the First District distinguished between the cases that held economic injury satisfied injury in fact from the present case, where it concluded that the economic harm alleged did not meet injury in fact:

> It is reasonable to conclude as we did in those two cases that allowing either a generic drug to enter

> the pharmaceutical market or less-educated dental hygienists to enter the field of hygienists in Florida would result in economic harm to a brand-name drug manufacturer or dental hygienists currently working in the state. Unlike the situations in *Abbott Laboratories* and *Department of Professional Regulation, Board of Dentistry*, a manufacturer in this case is claiming economic harm based upon the absence of an insurance credit that Florida homeowners have never been provided. Had this been a situation where [Office of Insurance Regulation] eliminated an existing insurance credit for garage doors, Appellee's injury in fact argument would be much stronger.

Id. at 338-39.

38. The court's conclusion followed from its reasoning that the injury was based on conjecture because the administrative law judge inferred that the absence of such a discount would likely cause economic injury, the manufacturer had no protected economic right impaired by the rules at issue, and neither the statute nor the rules at issue regulate, either directly or indirectly, the manufacturer's industry. *Id*. The First District recently reiterated the rule that speculation and conjecture of an economic harm are insufficient to satisfy the real or immediate injury-in-fact prong. In *Calder Race Course, Inc. v. SCR, Inc.*, 2021 WL 3672206 (Fla. 1st DCA Aug. 19, 2021), SCR challenged the Division of Pari-Mutuel Wagering's Final Order approving Calder's slot machine gaming license as an unadopted rule. On appeal, the court found that "SCFs speculation that the removal of the Grandstand and reconfiguration of the slot machine gaming area may cause it to have some indeterminate degree of financial injury is not enough to support a finding of standing under the first prong of the two-part test." *Calder Race Course* at *2.

39. The instant case is distinguishable from both *Secure Enterprises* and *Calder Race Course*. In the instant case, the economic injury that Petitioner

is alleging is real and immediate as opposed to purely speculative or conjecture. Leafly had 277 contracts with MMTC retail locations in Florida prior to the OMMU's statement in its February 1, 2021 letter. After the letter was issued, some of Leafly's clients canceled their contracts, and Leafly no longer provides online ordering services in Florida. Leafly's injury is real and immediate, even though the loss from canceled contracts was not quantified at the final hearing. The "proper inquiry is on the likelihood of injury, not that it be certain." *SCF, Inc. v. Fla. Thoroughbred Breeder's Ass'n, Inc.*, 227 So. 3d 770, 776 (Fla. 1st DCA 2017). Unlike *Secure Enterprises,* where the economic injury was based on the administrative law judge's inference of economic injury based on words such as "probably," "likelihood," "likely cause," Petitioner here has sustained cancelation of real contracts. While Mr. Moulton's testimony was insufficient to establish the amount of economic harm Leafly incurred, it was sufficient to establish that an economic injury occurred in the form of canceled contracts.

40. The zone of interest prong of the substantially affected test is met where a party asserts that a statute, or a rule implementing such statute, encroaches upon an interest protected by a statute or the constitution. *Ward v. Bd. of Trs.*, 651 So. 2d 1236, 1238 (citing *Fla. Med. Assn., Inc.,* 426 So. 2d at 1117). The zone of interest prong can be met where an agency's proposed rule "has the collateral effect of regulating [the challenging entity's] industry." *ABC Fine Wine & Spirits v. Dep't of Bus. & Prof'l Reg.,* 323 So. 3d 794 (Fla. 1st DCA 2021) (citing *Televisual Commc'ns, Inc. v. Dep't of Labor & Emp't Sec./Div. of Workers' Comp.*, 667 So. 2d 372, 374 (Fla. 1st DCA 1995)). In *Televisual,* a publisher of educational materials useful to healthcare practitioners challenged the agency's proposed rules relating to the certification of health care providers and training courses for physician certification. *Televisual,* 667 So. 2d at 373. The First District reversed the hearing officer's determination that the publisher lacked standing because the hearing officer erred "in concluding that the proposed rule does not

purport to subject [the publisher], or those similarly situated, to regulation or control." *Id.* at 374. The court explained that although the hearing officer correctly noted the publisher was not a healthcare provider affected by the enabling statute, the hearing officer failed to recognize that the publisher was indeed affected by the proposed rule because it had the collateral effect of regulating the industry that provides the medium for education of health care providers. *Id.*

41. In the instant case, the Department does not directly regulate Leafly because Leafly is not an MMTC, a qualified physician, or a patient or caregiver, subject to the provisions of section 381.896. However, the Department's February 1, 2021 letter concluded that, "contracting with Leafly.com, or any other third-party website, for services directly related to dispensing is a violation of this provision," specifically identifying Leafly's services as violative of the operative statute. Even though the letter was addressed to all licensed MMTCs in the state of Florida, the letter had the collateral effect of regulating the activities Petitioner can engage in as a third-party operator of an online website and application-based resource for cannabis information.

42. Petitioner established by a preponderance of the evidence that it has standing to bring the instant rule challenge, pursuant to section 120.56(1)(a). Petitioner has suffered an injury in fact due to the publication of the February 1, 2021 letter, and that injury is within the zone of interest the statute is designed to protect.

Is the Statement a Rule?

43. Section 120.52(16) defines a rule as follows:

> "Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute

> or by an existing rule. The term also includes the amendment or repeal of a rule.

44. Section 120.52(20) provides that an "'[u]nadopted rule' means an agency statement that meets the definition of the term 'rule,' but that has not been adopted pursuant to the requirements of s. 120.54."

45. Section 120.54(1)(a) provides that "[r]ulemaking is not a matter of agency discretion. Each agency statement defined as a rule by s. 120.52 shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practicable."

46. The requirement for agency rulemaking, codified in section 120.54(1), prevents an administrative agency from relying on general policies that are not tested in the rulemaking process, but it does not apply to every kind of statement an agency may make. *See McDonald v. Dep't of Banking & Fin.*, 346 So. 2d 569, 581 (Fla. 1st DCA 1977) (stating that rulemaking requirements were never intended to "encompass virtually any utterance by an agency"), *superseded by statute on other grounds*, § 120.54(1)(a), Fla. Stat. (Supp. 1996), as recognized in *Dep't. of High. Saf. & Motor Veh. v. Schluter*, 705 So. 2d 81 (Fla. 1st DCA 1997). Rulemaking is required only for an agency statement that is the equivalent of a rule.

47. In the instant case, the Department argues that the letter constitutes the agency's application of the law to a particular set of facts, which is not itself a rule. *See Amerisure Mut. Ins. Co. v. Fla. Dep't of Fin. Servs., Div. of Workers' Comp.*, 156 So. 3d 520, 531 (Fla. 1st DCA 2015) (concluding that the agency did not rely on an unadopted rule, but "simply applied the governing statute to the information" reported by the relevant entity), *superseded by state constitutional amendment on other grounds*, art. V, § 21, Fla. Const., as recognized in *Lee Mem'l Health Sys. Gulf Coast Med. Ctr. v. Ag. for Health Care Admin.*, 272 So. 3d 431, 437 (Fla. 1st DCA 2019); *see also* § 120.57(1)(e)1., Fla. Stat. (expressly authorizing "application of . . . applicable provisions of law to the facts").

48. Where an agency statement analyzes existing law, as it applies to a particular set of circumstances, the statement is not itself a rule and is not subject to the rulemaking process. *See Envtl. Trust v. State, Dep't of Envtl. Prot.*, 714 So. 2d 493, 498 (Fla. 1st DCA 1998). To conclude otherwise would effectively require an agency to adopt a rule for every possible circumstance that may arise. Instead, "an agency is free to simply apply a statute to facts … without engaging in rulemaking." *Office of Ins. Reg. v. Guarantee Trust Life Ins. Co.*, Case No. 11-1150 at ¶ 75 (Fla. DOAH Mar. 16, 2012; Fla. OIR June 28, 2012).

49. The case at hand is distinguishable from *Environmental Trust*. There the court construed an internal memorandum from the department environmental manager to the environmental administrator, and a subsequent email from the administrator to his staff, regarding application of an existing rule on qualification for reimbursement of contractors for underground petroleum cleanup projects. *Envtl. Trust*, 714 So. 2d at 496, 498-99. There the court found that the internal documents were "nothing more than an analysis of the existing rule as it applies to the circumstances in which a general contractor is employed for the apparent purpose of increasing the amount of the bill." *Id*. at 499.

50. The Department cited *Agency for Health Care Administration v. Custom Mobility, Inc.*, 995 So. 2d 984 (Fla. 1st DCA 2008); and *Department of Financial Services v. Capital Collateral Regional Counsel-Middle Region*, 969 So. 2d 527 (Fla. 1st DCA 2007), as more recent holdings of the First District that agency statements that are not self-executing and do not by their own effect create rights, require compliance, or otherwise have the direct and consistent effect of law, are not rules.

51. The statement in the Department's February 1, 2021 letter is completely distinguishable from those cases. The Department's statement is not analogous to a recommendation made in a memorandum following an investigation into an office of state or regional government. *See Capital*

Collateral, 969 So. 2d at 531. Nor is the letter analogous to the statistical formula used to calculate overpayments to Medicaid providers examined in *Custom Mobility*. Neither of those statements created rights, required compliance, or had the direct and consistent effect of law. In *Capital Collateral*, the determination might have been used in a later administrative complaint to seek reimbursement of funds spent on a lobbyist for a state agency. In *Custom Mobility*, the court found that that methodology "does not itself establish that the service provider owes money." *Custom Mobility*, 995 So. 2d at 987. The applicable statute required compliance; the formula was the tool used to determine the amount owed. *Id*. at 986.

52. By contrast, the Department's February 1, 2021 letter applied uniformly to all 22 licensed MMTCs; notified them that contracting with Leafly, or any other third-party website for online ordering of marijuana and low-THC cannabis, was a violation of section 381.986(8)(e); and informed them that violating the statute may subject them to penalties outlined in rule 64-4.210(9)(eee) (i.e., fines ranging in amount from $2,500 to $5,000). The statement is generally applicable to all MMTCs.

53. The statement does not merely reiterate the statute, but places a construction on the statute that is not readily-apparent on its face. The statute does not address third-party websites or online ordering. The statute prohibits MMTCs from contracting with third parties for services directly-related to dispensing medical marijuana. The letter constitutes the Department's interpretation that online ordering is a service directly-related to dispensation of medical marijuana; thus, the letter implements the statute and prescribes policy. The letter has the direct and consistent effect of prohibiting the practice of MMTCs contracting with third-party websites for online ordering of medical marijuana. To further gain compliance with this statement, five months after issuance of the letter, the Department conducted audits of all 22 MMTCs and issued notices of violation to the eight MMTCs still using third-party online ordering platforms.

54. Petitioner has proven, by a preponderance of the evidence, that the Department's statement is a rule within the definition of section 120.52(16), which has not been adopted as a rule, pursuant to section 120.54(1)(a). The burden shifts to the Department to prove that rulemaking was either infeasible or impracticable.

55. Rulemaking is presumed feasible and practicable, but the presumption may be rebutted by the agency. *See* § 120.54(1)(a), Fla. Stat. An agency may demonstrate infeasibility by showing that: (1) it has not had sufficient time to acquire knowledge and experience reasonably necessary for rulemaking; or (2) related matters are not sufficiently resolved. *See* § 120.54(1)(a)2.a.-(1)(a)1.b., Fla. Stat. An agency may prove impracticability by establishing that: (1) it is not reasonable under the circumstances to formulate precise or detailed principles, criteria, or standards; or (2) the issue involved is so narrow in scope that more specific resolution is impractical except through adjudication of a party's substantial interests based on individual characteristics. *See* § 120.54(1)(a)2.a.-(1)(a)2.b., Fla. Stat.

56. The Department argued in its Proposed Final Order that rulemaking to define "directly related to" is unnecessary and not practicable. In explanation, the Department stated that it "need not institute rulemaking on language that is clear from its ordinary meaning in the statute and '[t]he particular questions addressed are of such a narrow scope that more specific resolution of the matter is impractical outside of an adjudication to determine the substantial interests of a party based on individual circumstances.'"[6] The Department presented no evidence that rulemaking was impractical. To the contrary, Mr. Ferguson testified that the Department has determined that certain services provided by third parties to MMTCs—placement of Automated Teller Machines ("ATMs") in the lobby of MMTCs, point-of-sale software, and internet service—are ***not*** directly-related to dispensation of

[6] *Leafly v. Dep't of Health*, Case No. 21-2431RU (Dep't of Health Pro. Fin. Ord. at ¶ 44, citing § 120.54(1)(a)2.b. Fla. Stat.).

medical marijuana. According to Mr. Ferguson, the Department has formulated a "test" it applies to make that determination: whether the service brings patients into the MMTC for the purpose of being dispensed marijuana. Having apparently already formulated detailed criteria or a standard to determine whether third-party services to MMTCs are, or are not, directly-related to dispensation of medical marijuana, it is disingenuous for the Department to claim that rulemaking is impracticable.

57. The Department did not establish that rulemaking is either infeasible or impracticable, pursuant to section 120.54(1)(a).

Validity of the Unadopted Rule

58. Petitioner seeks a determination from the undersigned that the agency statement in the February 1, 2021 letter is an invalid exercise of the Department's delegated legislative authority, pursuant to section 120.56(1)(a), in addition to a determination of whether the statement constitutes an unadopted rule. The day prior to the final hearing, after reviewing the parties' pre-hearing stipulation, the undersigned conducted a pre-hearing conference with the parties to discuss whether the undersigned's jurisdiction extends to consideration of whether the agency statement is an invalid rule, rather than simply whether it constitutes a rule, as defined in section 120.52(16). Rather than ruling on the issue at such a late date, the undersigned requested the parties to address the issue in their Proposed Final Orders, which they have done.

59. Section 120.56(4) specifically governs challenges to agency statements defined as unadopted rules. The statute specifically authorizes the administrative law judge to determine "whether all or part of a statement violates s. 120.54(1)(a)," and provides that the determination is a final order. § 120.56(4)(d), Fla. Stat. Should the administrative law judge find that the agency statement is an unadopted rule, the statute requires the agency to "immediately discontinue all reliance upon the unadopted rule or any

substantially similar statement as a basis for agency action." § 120.56(4)(e), Fla. Stat.

60. Section 120.56 limits the scope of the administrative law judge's determination of validity to *existing* and *proposed* rules. *See* § 120.56(1)(a), Fla. Stat. ("Any person substantially affected by a *rule* or *proposed rule* may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority."). Even in section 120.56(4), which governs challenges to unadopted rules, the reference to a determination of validity of rules is directed to the "proposed rules addressing the challenged unadopted rule[.]" § 120.56(4)(f), Fla. Stat.

61. Petitioner cited as precedent, *St. Johns River Water Management District v. Modern, Inc.*, Case No. 97-4389 (Fla. DOAH June 15, 1999), in which the administrative law judge determined both whether an agency statement constituted a rule and whether the rule was invalid. However, that case construed an earlier version of section 120.56(4), which provided as follows:

> Prior to entry of a final order that all or part of an agency statement violates s. 120.54(1)(a), if an agency publishes, pursuant to s. 120.54(3)(a), proposed rules which address the statement and proceeds expeditiously and in good faith to adopt rules which address the statement, *the agency shall be permitted to rely upon the statement or a substantially similar statement as a basis for agency action if the statement meets the requirements of s. 120.57(1)(e).*

§ 120.56(4)(e), Fla. Stat. (1997) (emphasis added). Section 120.57(1)(e) at that time, required the agency to demonstrate that the unadopted rule on which it was relying to determine the substantial interests of a party, did not enlarge, modify, or contravene the specific provisions of law implemented. § 120.57(1)(e)1. and 2.b., Fla. Stat. (1997) (this provision was known as the

"prove-up provision"). Thus, the administrative law judge had specific authority to determine whether the unadopted rules were valid as defined in section 120.57(1)(e), in order for the agency to continue relying upon those statements during rulemaking to codify those statements as agency rules.

62. Even if *Modern* did construe the current version of section 120.56, the undersigned would not be required to follow the legal conclusions of the fellow administrative law judge.[7]

63. Petitioner has proposed that the ruling be made because, if the Department undertakes rulemaking, it would be best served by a determination of whether this particular agency statement is valid or invalid. Practically speaking, the Department may simply discontinue reliance on the agency statement, rather than choosing to adopt the statement as a rule. In that case, a ruling on the validity of the statement as a rule would be advisory in nature.

64. The undersigned is sympathetic to Petitioner's argument that this issue was preserved in its Petition, which plainly states that it was brought pursuant to both sections 120.56(1) and 120.56(4); and the prayer for relief, which seeks an order finding that the agency statement is an invalid exercise of delegated legislative authority, as defined in section 120.56(8). However, the undersigned cannot conclude that she has jurisdiction to determine the validity of the agency statement, pursuant to section 120.56(1), and declines to do so. Furthermore, contrary to Petitioner's argument, the parties cannot stipulate to the jurisdiction of the tribunal. *See Polk Cnty. v. Sofka*, 702 So. 2d 1243, 1245 (Fla. 1997); *Youth Crime Watch of Am. v. Dep't of HRS*, Case No. 92-1145 (Fla. DOAH Apr. 23, 1992; Fla. HRS June 2, 1992).

[7] Decisions of her fellow administrative law judges may be persuasive, but are not binding on the undersigned.

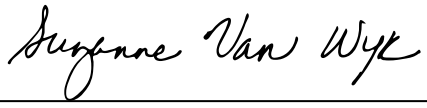
ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. The Department shall immediately discontinue reliance on its policy, stated in paragraph 22, regarding online ordering of medical marijuana through third-party websites; and

2. The Department shall pay reasonable costs and reasonable attorney's fees to Petitioner as required under section 120.595(4)(a). Petitioner shall have 45 days from the date of this Final Order to file a motion for attorney's fees and costs, to which motion (if filed) Petitioner shall attach: (1) proof that, at least 30 days before the filing of the Petition, the Department received notice that the statement may constitute an unadopted rule, *see* § 120.595(4)(b), Fla. Stat.; (2) the essential documentation supporting the claim, such as time sheets, bills, and receipts; and (3) appropriate affidavits (attesting, e.g., to the reasonableness of the fees and costs).

DONE AND ORDERED this 25th day of October, 2021, in Tallahassee, Leon County, Florida.



SUZANNE VAN WYK
Administrative Law Judge
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of October, 2021.

COPIES FURNISHED:

Seann M. Frazier, Esquire
Parker, Hudson, Rainer & Dobbs, LLP
Suite 750
215 South Monroe Street
Tallahassee, Florida 32301

Katelyn Rose Boswell, Esquire
Department of Health
Prosecution Services Unit
Bin A-02
4052 Bald Cypress Way
Tallahassee, Florida 32399

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

Ken Plante, Coordinator
Joint Administrative Procedure Committee
Room 680, Pepper Building
111 West Madison Street
Tallahassee, Florida 32399-1400

Louise Wilhite-St. Laurent, General Counsel
Department of Health
Bin C-65
4052 Bald Cypress Way
Tallahassee, Florida 32399

Kristen Bond Dobson, Esquire
Parker, Hudson, Rainer & Dobbs, LLP
Suite 750
215 South Monroe Street
Tallahassee, Florida 32301

Joseph A. Ladapo, M.D. Ph.D.
State Surgeon General
Department of Health
Bin A-00
4052 Bald Cypress Way
Tallahassee, Florida 32399-1701

Anya Owens, Program Administrator
Margaret Swain
Florida Administrative Code & Register
Department of State
R. A. Gray Building
500 South Bronough Street
Tallahassee, Florida 32399-0250

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.