FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-4598

FLORIDA DEPARTMENT OF HEALTH,

Appellant,

v.

LOUIS DEL FAVERO ORCHIDS, INC.,

Appellee.

On appeal from the Division of Administrative Hearings.
Garnett W. Chisenhall, Judge.

February 17, 2021

OSTERHAUS, J.

The Florida Department of Health appeals an administrative final order awarding Louis Del Favero Orchids, Inc. (Del Favero) attorney's fees and costs pursuant to § 120.595(2), Florida Statutes (2017). The Department argues that fees and costs should not have been awarded because its rulemaking actions were substantially justified for purposes of this statute. We agree and reverse.

I.

Florida voters in 2016 approved an amendment to the Florida Constitution allowing the medical use of marijuana for persons

diagnosed with debilitating medical conditions. *See* Art. X, § 29, Fla. Const. The amendment called for establishing "Medical Marijuana Treatment Centers" (MMTCs) that would acquire, cultivate, possess, process, transfer, transport, sell, distribute, dispense, or administer marijuana to qualifying patients. Art. X, § 29(b)(5), Fla. Const. Following from this amendment, the Florida Legislature passed an implementing law in 2017 setting forth the Department's rulemaking authority related to the process for issuing and renewing MMTC licenses. *See* Ch. 2017-232, § 1, Laws of Fla.; § 381.986(8)(b), Fla. Stat. The law specifically required the licensing of ten applicants as MMTCs. § 381.986(8)(a)2., Fla. Stat. It also included a "citrus provision" allowing up to two MMTC applicants to receive a preference under the following terms:

> For up to two of the licenses . . . 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.

§ 381.986(8)(a)3., Fla. Stat. (emphasis added).

In 2018, the Department proposed rule 64-4.002 implementing an MMTC application and scoring provision that included a citrus preference with the following terms:

> (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)(c) In accordance with section 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 or [sic] marijuana will receive an additional 35 points to their respective total score.

44 Fla. Admin. Reg. 2055–56 (May 1, 2018) (emphasis added). Del Favero filed an administrative challenge to the Department's proposed rule under § 120.56(2). It argued that the Department invalidly exercised its legislative authority in its proposed method of scoring MMTC applicants, allowing citrus preferences to be awarded to a broader group of applicants than permitted by § 381.986(8)(a)3. The ALJ issued a split decision on these arguments. It determined the Department's proposed methods for scoring competing applications to be acceptable. But as to the citrus preference, it found that the proposed rule invalidly allowed for preferences based on the ownership and conversion of citrus-related "property" instead of "facilities." On this basis, the ALJ found the proposed rule to be an invalid exercise of legislative authority and declared it to be invalid.

After prevailing on the merits, Del Favero moved for an award of attorney's fees and costs pursuant to § 120.595(2). It prevailed

and was awarded $50,000 in attorney's fees and $3,828.69 in costs after the ALJ concluded that the Department didn't demonstrate that it had acted reasonably in substituting the word "property" for "facility" in its proposed rule. The Department timely appealed the fees and costs order.

II.

Section 120.595(2) calls for the award of fees and costs in cases involving invalid proposed rules unless an agency proves that "its actions were substantially justified, or special circumstances exist which would make the award unjust." § 120.595(2), Fla. Stat. The Department argues that the ALJ too narrowly focused on the fact that the Department lost the property-versus-facility argument in the underlying rule action instead of assessing the reasonableness of its broader rulemaking actions. It makes both "substantially justified" and "special circumstances" arguments in this appeal. We don't find merit in the Department's § 120.595(2) "special circumstances" argument but find its "substantially justified" argument to be compelling.

As to the Department's "substantially justified" argument, § 120.595(2) provides that "[a]n 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." § 120.595(2), Fla. Stat. There aren't many cases analyzing this Administrative Procedures Act version of the "substantially justified" standard, so we have looked to the Equal Access to Justice Act cases, *see* § 57.111, Florida Statutes, which uses nearly identical language. *See State, Dep't of Ins. v. Fla. Bankers Ass'n*, 764 So. 2d 660, 662 (Fla. 1st DCA 2000) (citing *Helmy v. Dep't of Bus. & Prof'l Regulation*, 707 So. 2d 366, 368 (Fla. 1st DCA 1998)). The consideration of whether the Department's actions were substantially justified lies between two extremes. *See Agency for Health Care Admin. v. MVP Health, Inc.,* 74 So. 3d 1141, 1143–44 (Fla. 1st DCA 2011). The Department must show more than that its actions weren't frivolous to avoid a fees and costs award. *See id.* at 1143. But "the standard is not so strict as to require the agency to demonstrate that its action was correct." *Id.* at 1144. If the Department had a reasonable basis in law and fact at the time it took the action, and can justify its rulemaking actions in a way that a reasonable person could think

it correct, then its actions will be considered "substantially justified." *See id.* at 1143–44.

The Department takes issue with the award on the basis that the ALJ's "substantially justified" inquiry too narrowly focused on the reason the Department lost the proposed-rule challenge in the first place—that the word "property" was used in some parts of the proposed rule instead of the statutory term "facility." The Department acknowledges that it lost this issue on the merits. But it emphasizes that, for fees and costs purposes, the "substantially justified" issue is broader than whether it used one wrong word in a proposed rule. The fees-and-costs question is not a simple rehash of whether it lost on the merits.

The fees-and-costs standard in § 120.595(2) requires analyzing whether the Department's rulemaking "actions [plural]" were reasonable. And so, we review the Department's rulemaking efforts in their totality, beginning with the Department's decision to initiate rulemaking in the first place. In *Helmy*, this Court discussed the "substantially justified" standard in terms of whether the agency has "a working knowledge of the applicable statutes under which it is proceeding." *See Helmy*, 707 So. 2d at 370. The Department's rulemaking actions here showed a working knowledge and intention to follow the governing constitutional and statutory mandates that received little attention in the Final Order.

A constitutional amendment and a corresponding implementing statute required the Department to start rulemaking and to establish a procedure for the issuance and renewal of MMTC licenses, including a citrus preference, within a limited timeframe. *See* Art. X, § 29(d)(1)c., Fla. Const. (requiring rule promulgation within six months); § 381.986(8)(a)1. & 3., Fla. Stat. (requiring prompt MMTC licensing and a citrus preference). The Department responded to these directives by initiating rulemaking using APA-based procedures. *See Adam Smith Enters., Inc. v. State Dep't of Envtl. Regulation*, 553 So. 2d 1260, 1265 (Fla. 1st DCA 1989) (describing rule adoption under Florida's APA as a "complex process") (noting that an agency must, for example, draft the entire text of the proposed rule, give public notice of proposed rulemaking, and give affected persons an

opportunity to present evidence and argument). The Department's rulemaking efforts culminated in the publication of a proposed rule notice on May 1, 2018, to implement the constitutional and statutory directives. The six-page proposed rule set forth extensive MMTC application requirements, forms, and processes, as well as a system for the Department to evaluate and score applications and to register MMTCs.

In response to this publication, Del Favero broadly challenged the evaluation and scoring processes for MMTC applications set forth in the proposed rule as well as the citrus preference process. Almost all of the proposed rule survived Del Favero's administrative challenge. The Final Order concluded that "the scoring system utilized by the Department in evaluating competing applicants . . . was reasonably effective [and] an acceptable process." In other words, the Department had the bulk of its work upheld by the ALJ, which tended to demonstrate its working knowledge of the law underlying its actions leading to the publication of the proposed rule.

Besides these rulemaking efforts, the text of the now-invalid proposed rule is part of the analysis of whether the Department's rulemaking actions here were "substantially justified." The ALJ approved most of the proposed rule, but invalidated it based on the Department's use of the term "property" instead of "facility" in (1)(f). A reasonable person can probably imagine scenarios where just a word or few words of unsupportable text could defeat an agency's attempts to show a substantial justification for its proposed rule. It would be difficult to find a substantial justification, for instance, if the Department's rule had proposed to qualify Florida's sugar, cattle, or shrimp farms to receive § 381.986(8)(a)'s "citrus" preference no matter how blameless the Department's other rulemaking actions had been. But here, it isn't so clear that the Department's efforts conflicted with the citrus preference statute.

Resolving the "substantial justification" issue requires a close textual inspection of how the Department used the disputed word. Upon review of the text of the proposed rule, taking its language at face value, we don't find support for the ALJ's conclusion that the proposed rule improperly extended the citrus preference to

non-facility-owning "property" owners. Conversely, the proposed rule explicitly limits receipt of the preference to "facility" owners – the same word used in the statute.

The confusion on the "property" versus "facility" question stems from the references made to "property" ownership in (1)(f) of the proposed rule. This part of the proposed rule addresses what information must be submitted with an MMTC-citrus-preference applicant's application. The proposed rule requires that "the applicant must provide evidence that . . . [t]he property at issue currently is or was previously used for the [processing, etc.] of citrus fruit." 44 Fla. Admin. Reg. 2055 (May 1, 2018). The Department argued that it sought "property"-specific information from applicants partly because this information helped to show facility ownership. The statute requires that the citrus preference be given "to applicants that demonstrate in their applications that they *own* one or more facilities." § 381.986(8)(a)3., Fla. Stat. (emphasis added). Because facilities tend to be fixed improvements situated on real property, property-ownership information could be used by applicants and the Department to demonstrate the statutory facility-ownership requirement. In fact, the Final Order noted that Del Favero intended to use a warranty deed to prove its ownership of its facilities. Importantly, this language does not say that the citrus preference will be awarded based on "property" ownership.

Different from the application requirements in (1)(f), the part of the proposed rule addressing which applicants "will receive" the citrus preference is found in paragraph (6)(c). This rubber-meets-the-road provision in (6)(c) sticks closely to the text of the statute. It doesn't say "property" owners can receive the preference, but limits receipt of the preference to applicants owning one or more facilities—"the two highest scoring applicants that own one or more facilities that are, or were, used for the [processing, etc.] of citrus fruit." 44 Fla. Admin. Reg. 2056 (May 1, 2018). The upshot here is that the proposed rule limits the award of the citrus preference to applicants owning a facility or facilities. Conversely, the text of the proposed rule does not support the conclusion underlying the ALJ's and dissent's view that the Department's action altered the crucial facility-owning qualification for receiving the citrus preference. And so, we find the text of the proposed rule

to be reasonably framed for purposes of the fees-and-costs analysis, because it tracks § 381.986(8)(a)3.'s requirement by limiting the ultimate award of 35 additional citrus preference points to applicants owning one or more "facilities" that will be used or converted for the processing of marijuana.

In reaching this conclusion, we recognize that the parties and ALJ spent much effort below addressing whether citrus-related applicants with open-air facilities or unimproved properties might qualify under the Department's rule. But, for now, we needn't dive into how a final version of the proposed rule might be interpreted or misinterpreted later. This challenge was directed to the text of the published proposed rule. We don't have a final rule yet, and a rule hasn't been applied to any particular applicants. Agencies can also revise proposed rules before they reach their final form. *See* § 120.54, Fla. Stat. (describing the rulemaking process). Hearing testimony by the Department suggesting that it could misapply the final rule doesn't control the present fees-and-costs dispute where the face of the invalidated proposed rule satisfies the "substantially justified" standard. *See* § 120.595(2), Fla. Stat. (limiting the fees-and-costs review to whether the agency's actions were substantially justified "*at the time* the actions were taken by the agency") (emphasis added); *Dep't of Health, Bd. of Physical Therapy Practice v. Cralle*, 852 So. 2d 930, 932 (Fla. 1st DCA 2003) (criticizing the consideration of evidence presented at a fee hearing as opposed to sticking to the question of whether the agency panel's underlying action was reasonable in law and fact). And so, parts of the Final Order, like paragraphs 22-23, which fault the Department's hearing testimony related to extending the citrus preference to packinghouses and the like, injected improper evidence into the fees-and-costs calculus, whereas the proposed rule acceptably limits who "will receive" the preference points with text in (6)(c) that mirrors the statute.

Finally, we credit as part of the "substantially justified," fees-and-costs calculus the Department's action in seeking help from the State of Florida's Department of Citrus before drafting the proposed rule. The executive director of the Department of Citrus testified at the merits hearing that her department advised the Department on its interpretation of the citrus preference statute and what type of "facilities" might be contemplated by its

"otherwise processing of citrus fruit" language. It makes sense that the Department of Health would reach out to citrus-industry experts for advice about this statutory language instead of going at it alone. Because the ALJ's decision to discount the Department's advice-seeking efforts stemmed from its incorrect view that the proposed rule's "property" language defied the statute, we cannot accept its evaluation that the Department unreasonably relied on bad advice that was "facially contrary to the Citrus Code." Rather, the Department's legwork in seeking out industry-specific advice tended to show that it responded reasonably to its constitutional and statutory rulemaking responsibilities here, even though it lost on the merits in the rule challenge litigation.

In sum, the record shows that the Department acted reasonably in proposing rule 64-4.002 in response to its constitutional and statutory directives to establish an application process for the registration of MMTCs that included the citrus preference mandated by § 381.986(8)(a)3. Its actions had a reasonable basis in law and fact and were "substantially justified" for purposes of § 120.595(2). In view of this conclusion, we need not address our basis for rejecting the Department's alternate "special circumstances" argument.

III.

For these reasons, we REVERSE the final fees-and-costs order and REMAND with instructions to enter an order denying Del Favero's motion for fees and costs.

WINOKUR, J., concurs; MAKAR, J., dissents with opinion.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

MAKAR, J., dissenting.

This case involves the Department of Health's action in substituting the word "property" in its implementing administrative rule for the word "facility" set forth in the statutory definition of medical marijuana treatment centers (MMTCs), section 381.986(8)(a)3., Florida Statutes, which an administrative law judge invalidated on that basis in a rule challenge proceeding and a second administrative law judge determined was not "substantially justified," thereby entitling the successful rule-challenger to attorneys' fees and costs. In other words, two administrative law judges have ruled definitively against the Department's position, one on the merits of the rule-challenge and the second on the related question of entitlement to fees.

The fee statute requires an award of reasonable costs and fees unless the Department establishes that "its actions were substantially justified."[1] "It is the burden of the state agency to show that this exception applies." *Agency for Health Care Admin. v. MVP Health, Inc.*, 74 So. 3d 1141, 1143 (Fla. 1st DCA 2011). The Department failed to meet its burden below and appellate review of that determination is given leeway, providing for reversal only if factual findings are unsupported or a clear legal error is shown that "compels a particular action." § 120.68 (7)(d), Fla. Stat. (2020); *see MB Doral, LLC v. Dep't of Bus. & Pro. Regul., Div. of Alcoholic Beverages & Tobacco*, 295 So. 3d 850, 853 (Fla. 1st DCA 2020) ("The ALJ's findings of fact are reviewed for competent, substantial evidence, and its conclusions of law and determinations of statutory interpretation are reviewed *de novo*."). We are not entitled to "substitute [our] judgment for that of the agency as to the weight of the evidence on any disputed finding of fact." § 120.68(7)(b), Fla. Stat. In essence, a deferential standard

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[1] § 120.595(2), Fla. Stat. (2020) ("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.")

applies. *Pierce v. Underwood*, 487 U.S. 552, 563 (1988) ("[T]he text of the statute permits, and sound judicial administration counsels, deferential review of a district court's decision regarding attorney's fees under the EAJA.").

The statutory subsection at issue involves licensing up to two applicants with citrus-processing *facilities* as MMTCs:

> 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.

§ 381.986(8)(a)3., Fla. Stat. (2020) (emphasis added). In assessing whether the Department was substantially justified in using the word "property" in its administrative rule rather than the legislatively-compelled term "facility," the administrative law judge made detailed factual findings and legal conclusions, providing no support for the Department's position that its substitution of the word "property" for the statutorily specified word "facility" was justified in any way.

Words matter to the Legislature; under textualist principles, the words used in a statute have primacy. Here, both administrative law judges found that no reasonable basis existed to override the Legislature's clear and plain choice of the word "facility" in subsection (8)(a)3. with a wholly different word, "property," whose meaning differs greatly from legislative intent. ("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."). The term "facility" has an unambiguous meaning in this context as "an area with some sort of physical structure."

> 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.

In stark contrast, "property" is a much broader concept than facility, such that substituting the former word for the latter unjustifiably changes the statute's meaning.

> 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 [sic]. While a "facility" may be "property," a piece of property is not necessarily a "facility."

It is thereby unreasonable for the Department to argue that "an unimproved piece of land"—lacking any "facility" for processing citrus fruit—can be converted "from citrus processing to marijuana processing." In short, it "is impossible to reconcile [the Department's] interpretation, especially in light of the fact the Legislature contemplated conversion of the facilities."

Further, no justification was shown for the Department of Health's reliance on the Citrus Department's guidance because it too deviated from the plain statutory language. ("Even a cursory examination demonstrates that the Citrus Department's supposed guidance is directly contrary to the pertinent statutory definitions in the Citrus Code."). It is one thing to seek guidance on citrus industry practices, it is another "to rely on advice that is facially contrary" to written law.[2] In response to the Department's argument that "using the word 'property' served a legislative intent to assist the struggling citrus industry," the administrative

[2] Notably, the Department "did not: (a) identify who it consulted with at the Citrus Department; (b) call that person as witness; or (c) establish the substance of what that person relayed to the Department," making its reliance on Citrus Department advice a bit tenuous.

law judge held "[t]hat policy may be a good one, but it is not one for the Department to make without legislative direction."

In sum, "[b]y 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." The Department's policy argument—that "using the word 'property' served a legislative intent to assist the struggling citrus industry"—might "be a good one, but it is not one for the Department to make without legislative direction."

On the record presented and the deferential standard of review, no basis exists to overturn the well-reasoned and highly persuasive factual findings and legal conclusions of the administrative law judges who observed the witnesses, made detailed factual findings, and rendered wholly reasonable conclusions of law. The Department's position, though not frivolous, is "nonetheless . . . based on such an unsteady foundation factually and legally as not to be substantially justified." *MVP Health, Inc.*, 74 So. 3d at 1144 (quoting *Dep't of Health & Rehab. Servs. v. S.G.,* 613 So.2d 1380, 1386 (Fla. 1st DCA 1993)); *see also McCloskey v. Dep't of Fin. Servs.*, 172 So. 3d 973, 976-77 (Fla. 5th DCA 2015) (noting that "an agency's reliance on case law does not automatically provide a substantial justification for agency actions").

It appears the Department was seeking to enact a policy choice in using the word "property," but that was unreasonable in the face of the narrower and more precise term the Legislature required. The Department's reinterpretation of the term "facility" is given no deference, *see* art. V, § 21, Fla. Const. (2020). Plus, "if the agency's interpretation conflicts with the plain and ordinary meaning of the statute, deference is not required. . . . [W]hen the language of the statute under interpretation is unambiguous and has a plain and ordinary meaning, the plain meaning should be given effect." *Osorio v. Bd. of Pro. Surveyors & Mappers*, 898 So. 2d 188, 190 (Fla. 5th DCA 2005). Nowhere in section 381.986(8)(a)3. did the Legislature authorize the Department to so dramatically expand the exemption by using the word "property" rather than "facility." *MB Doral, LLC*, 295 So. 3d at 855 ("Nowhere

in the language of section 562.03 did the Legislature authorize the Division to place a county or ownership prerequisite upon the issuance of an OPS permit."). Just as "[c]ourts are not at liberty to add words to statutes that were not placed there by the Legislature," *Fla. Hosp. v. Agency for Health Care Admin.*, 823 So. 2d 844, 848 (Fla. 1st DCA 2002), nor may agencies attempt to do so in their rule-making. The fully reasonable factual findings and legal conclusions of the administrative law judges should be affirmed.

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