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IN THE MISSOURI SUPREME COURT
No. SC101617

HIPPOS, LLC

Appellant,

V.

MISSOURI DEPARTMENT OF HEALTH AND SENIOR SERVICES,

Respondent.

Appeal from the Administrative Hearing Commission
The Honorable Commissioner Renee Slusher, Commissioner

SUBSTITUTE BRIEF OF APPELLANT HIPPOS, LLC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES 4

JURISDICTIONAL STATEMENT 6

STATEMENT OF FACTS 8

A Medical Marijuana Facility Licensure System 9

B. Scoring and Ranking Medical Marijuana Applications 10

C. Grader Qualifications and Assignments. 14

D. Consistency and Lack of Scorer Note-Taking. 14

E. Review of Scoring Performed by Wise Health 15

F. Application Scoring Results 17

1. Hippos' Cultivation Scoring Results 17
2. Hippos' Manufacturing Scoring Results 18
3. Hippos' Dispensary Scoring Results 19

G. Hippos' Expert Witnesses 20

H. Hippos' Cultivation Scoring 22

1. Cultivation Expert Testimony 22

I. Hippos' Manufacturing Scoring Challenges 24

J. Hippos' Dispensary Scoring Challenges 26

POINTS RELIED ON 34

OVERVIEW 37

Standard of Review 37

Electronically Filed - SUPREME COURT OF MISSOURI - July 22, 2026 - 06:11 PM

ARGUMENT 40

A. Rescoring of Cultivation Applications 44

B. Rescoring of Manufacturing Applications 45

C. Rescoring of Dispensary Applications 46

I. The Commission erred in entering a decision against Hippos affirming the Department's denial of Hippos' two (2) applications for a medical marijuana cultivation facility license because the Decision was not supported by competent and substantial evidence in that the Commission improperly disregarded the uncontradicted and unimpeached expert testimony of Ashley Picillo and Joe Patterson 48

II. The Commission erred in entering a decision against Hippos affirming the Department's denial of Hippos' five (5) applications for a medical marijuana dispensary facility because the Decision was not supported by competent and substantial evidence in that the Commission improperly disregarded the uncontradicted and unimpeached expert testimony of Ashley Picillo and Joe Patterson 56

III. The Commission erred in entering a decision against Hippos affirming the Department's denial of Hippos' two (2) applications for a medical marijuana cultivation facility license because it violates the prohibition on arbitrary and capricious action by an administration agency in that the Department's denial treats identically situated applications differently 62

IV. The Commission erred in entering a decision against Hippos affirming the Department's denial of Hippos' two (2) applications for a medical marijuana cultivation facility license because the Decision was not supported by competent and substantial evidence in that the Decision relied upon the "subjective preferences" of the scorers but the Department did not offer competent and substantial evidence of the scorers' preferences 65

V. The Commission erred in entering a decision against Hippos affirming the Department's denial of Hippos' six (6) applications for a medical marijuana manufacturing facility license because the

Decision was not supported by competent and substantial evidence in that the assigned scorer for the answer to Question 64 lacked the appropriate background and expertise to score the answer..... 70

CONCLUSION. 74

CERTIFICATE OF COMPLIANCE 77

Electronically Filed - SUPREME COURT OF MISSOURI - July 22, 2026 - 06:11 PM

Electronically Filed - SUPREME COURT OF MISSOURI - July 22, 2026 - 06:11 PM

TABLE OF AUTHORITIES

Cases

Albanna v. State Bd. of Registration for Healing Arts,
293 S.W.3d 423 (Mo. banc. 2009) 39

CenterPoint Energy Entex v. Railroad Com'n of Texas,
213 S.W.3d 364 (Tex. App. 2006) 50

Department of Soc. Svcs. v. Mellas,
220 S.W.3d 778 (Mo.App. W.D. 2007) 37

Furman v. Bd. of Nursing Home Administrators,
608 S.W.3d 742 (Mo.App. W.D. 2020) 38

Hampton v. Big Boy Steel Erection,
121 S.W.3d 220 (Mo. 2003) 36, 72

Hundley v. Wenzel,
59 S.W.3d 1 (Mo.App. W.D. 2001) 34, 38, 56, 61

In re Glenville, 565 N.E.2d 623 (Ill. 1990) 50

J.C. Nichols Co. v. Director of Revenue,
796 S.W.2d 16 (Mo. banc 1990) 38

Jefferson City Apothecary, LLC v. Mo. Bd. of Pharmacy,
499 S.W.3d 321 (Mo.App. W.D. 2016) 35, 38, 49, 57

Lagud v. Kansas City Bd. of Police Comm'rs,
136 S.W.3d 786 (Mo. banc 2004) 39

Matter of Dykas, 619 A.2d 660 (N.J. App. Div. 1993) 50

MFA Petroleum Co. v. Director of Revenue,
279 S.W.3d 177 (Mo. banc. 2009) 39

Missouri Real Estate Comm'n v. Held,
581 S.W.3d 668 (Mo.App. W.D. 2019) 35, 49, 55, 57, 60, 72

State Bd. of Registration for Healing Arts v. Trueblood,
368 S.W.3d 259 (Mo.App. W.D. 2012) 37, 39

State ex rel. Kahler v. State Tax Comm'n,
393 S.W.2d 460 (Mo. 1965) 34, 49, 54, 57

Whispering Oaks RCF Management Co. v. Missouri Dept. of Health and Senior Services,
444 S.W.3d 492 (Mo.App. W.D. 2014) 39

Wolfner v. Bd. of Adjustment of City of Frontenac,
672 S.W.2d 147 (Mo.App. E.D. 1984) 35, 63

Statutes & Rules

Mo. Const. Art. V 8

Mo. Const. Art. XIV 9, 10, 40, 69

§536.140, RSMo. 7, 34-36, 38-39, 49, 57, 62-65, 70

§621.120, RSMo. 6

§621.145, RSMo. 7

19 CSR 30-95.025 (Rescinded July 30, 2023) 6, 10, 16, 40, 42, 66, 69

19 CSR 30-95.050 (Rescinded July 30, 2023) 9, 43

19 CSR 30-95.060 (Rescinded July 30, 2023) 9, 43

19 CSR 30-95.080 (Rescinded July 30, 2023) 9, 43

Other Authorities

Webster's Ninth New Collegiate Dictionary (1983) 40

Electronically Filed - SUPREME COURT OF MISSOURI - July 22, 2026 - 06:11 PM

Electronically Filed - SUPREME COURT OF MISSOURI - July 22, 2026 - 06:11 PM

JURISDICTIONAL STATEMENT

Appellant Hippos, LLC ("Hippos") submitted fourteen (14) applications to the Missouri Department of Health and Senior Services (the "Department") seeking licenses to operate medical marijuana cultivation, infused products manufacturing, and/or dispensary facilities.[1] Specifically, Hippos sought three (3) cultivation licenses, six (6) infused products manufacturing licenses, and five (5) dispensary licenses.[2]

On December 26, 2019, the Department awarded Hippos one (1) cultivation license but denied Hippos' other two (2) cultivation applications.[3] On January 24, 2020, Hippos timely appealed those denials to the Administrative Hearing Commission ("AHC") pursuant to 621.120, RSMo., and 19 CSR 30-95.025(6)(B).[4] On January 10, 2019, the Department denied Hippos' six (6) infused products manufacturing applications.[5] On February 5, 2020, Hippos timely appealed those denials to the AHC pursuant to 621.120, RSMo., and 19 CSR 30-95.025(6)(B).[6] On January 23, 2019, the Department denied Hippos five (5) dispensary applications.[7] On February 21, 2020, Hippos timely appealed those denials to the AHC pursuant to 621.120, RSMo., and 19 CSR 30-95.025(6)(B).[8]

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[1] D20:P39, D44:P102, D395:P18, D430:P12, D435:P18, D436:P10; App A69.
[2] *Id.*
[3] D20:P40, D44:P103
[4] D20.
[5] D395:P19, D430:P13.
[6] D395.
[7] D435:P19, D436:P11.
[8] D435.

Electronically Filed - SUPREME COURT OF MISSOURI - July 22, 2026 - 06:11 PM

Hippos' appeals were each assigned an AHC case number; Cultivation (AHC No. 20-0551), Infused Products Manufacturing (AHC No. 20-1634), and Dispensary (AHC No. 20-1181)[9]. Hippos' appeals were consolidated for the purpose of hearing, and a three (3) day in-person hearing was held before Commissioner Dandamudi on February 17, 18, and 19, 2021.[10]

On November 16, 2021, Commissioner Slusher issued her Decision in the Cultivation appeal.[11] On December 8, 2021, Hippos timely filed its Motion for Reconsideration of the Decision issued in the Cultivation appeal.[12] On December 8, 2021, the AHC granted Hippos' Motion for Reconsideration.[13] On March 15, 2022, Commissioner Slusher issued her Amended Decision in the Cultivation appeal.[14] Commissioner Slusher also issued on March 15, 2022 her Decisions in the Manufacturing and Dispensary appeals.[15]

On April 12, 2022, Hippos timely petitioned for judicial review of the AHC's Amended Decision in AHC No. 20-0551, Decision in AHC No. 20-1634, and Decision in AHC No. 20-1181 in the Circuit Court of Maries County as permitted by sections 621.145 and 536.140, RSMo.[16] On November 7, 2022, the three (3) cases pending in the

[9] *See* D20, D430, and D435.
[10] D50:P99; App A1.
[11] D49:P58-118.
[12] D49:P119-139; D50:1-78; App A1.
[13] D50:P100; App A1.
[14] D50; App A1.
[15] D430; App A113, D436; App A69.
[16] D2, D392, D432.

Electronically Filed - SUPREME COURT OF MISSOURI - July 22, 2026 - 06:11 PM

Circuit Court of Maries County, Missouri were consolidated into and designated Case No. 22MS-CC00040 as the surviving case.[17]

On August 15, 2023, the circuit court entered its Judgment affirming the Amended Decision and Decisions previously entered by the AHC.[18] Hippos timely appealed the Judgment of the Circuit Court on September 19, 2023.[19]

On June 2, 2026, this Court granted transfer after an opinion from the Court of Appeals, Southern District. This Court has jurisdiction to consider appeals on transfer after an opinion from the Court of Appeals. Mo. Const. art. V, § 10.

STATEMENT OF FACTS

Hippos applied for a total of fourteen (14) Missouri Medical Marijuana Facility Licenses. The Department awarded Hippos one (1) cultivation facility license but denied Hippos' remaining applications on the basis that Hippos did not receive enough points. Hippos appealed the Department's decision to the AHC, arguing that Hippos' denied applications were scored arbitrarily, unfairly, erroneously, capriciously, or negligently by the third-party company hired to perform the scoring, Wise Health Solutions, LLC ("Wise"). Because Hippos' appeals involved licenses for cultivation, manufacturing, and dispensary, three (3) total appeals were filed with the AHC, but they were consolidated for the purpose of hearing.

[17] D358.
[18] D389.
[19] D390.

Electronically Filed - SUPREME COURT OF MISSOURI - July 22, 2026 - 06:11 PM

After a three-day hearing, Commissioner Slusher entered her Amended Decision and Decisions in the three (3) appeals affirming the decision of the Department and denying Hippos' license applications. After the Circuit Court affirmed the Amended Decision and Decisions of the Commission, Hippos appealed to the Missouri Court of Appeals, Southern District, which issued its Opinion on March 10, 2026 reversing and remanding this matter with directions that the Circuit Court Order the Department to grant Hippos the facility licenses for which it applied

A. Medical Marijuana Facility Licensure System

Article XIV of the Missouri Constitution legalized the use and sale of marijuana for medical purposes, and gave the Department the responsibility to issue licenses to cultivators, manufacturers, dispensaries, and testing facilities.[20] The Constitution sets forth a minimum number of licenses that the Department was required to grant but it also permitted the Department to limit the number of licenses.[21] The Department initially capped the number of licenses at the minimum number required by the Missouri Constitution.[22] The cap for medical marijuana facility licenses was 60 Cultivation licenses; 86 Manufacturing licenses; and 24 Dispensary licenses (per Congressional District).[23]

The Department also had authority to "[e]stablish a system to numerically score

[20] *See generally* Mo. Const. art. XIV.
[21] Mo. Const. art. XIV, § 1.3(15-17).
[22] 19 CSR 30-95.050(1)(A); 19 CSR 30-95.060(1)(A); 19 CSR 30-95.080(1)(A); D51 (Tr. 1A at 158: 4-6).
[23] D51 (Tr. 1A at 50: 12-22).

Electronically Filed - SUPREME COURT OF MISSOURI - July 22, 2026 - 06:11 PM

competing medical marijuana licensee . . . applicants" if "more applicants appl[ied] than the minimum number of licenses."[24] The Department received more applications than the number of licenses available and as a result the Department was required to score the applications numerically and use the scores to rank the applications in each license category against each other.[25] The Regulations gave the AHC authority to order the Department to grant cultivation, manufacturing, and dispensary facility licenses to appellants timely filing meritorious appeals, notwithstanding the license caps imposed by the Department.[26]

B. Scoring and Ranking Medical Marijuana Applications

The Department did not score any of the facility license applications.[27] Instead, the Department, through the Office of Administration, contracted with a third party, Wise, to score the license applications.[28] Consistency and fairness were of utmost importance in the application scoring process.[29] The Grader Training Manual V3 stated: "consistency across all application is of the utmost importance!"[30] Per the contract with Wise, the Department was required to provide Wise a "Facility Scoring Guide."[31]

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[24] Mo. Const. art. XIV, § 1.3(1)(h).
[25] D51 (Tr. 1A at 62: 9-23); 19 CSR 30-95.025.
[26] 19 CSR 30-95.025(6)(C).
[27] D51 (Tr. 1A at 77: 19-25).
[28] D51 (Tr. 1A at 76: 3-6; 80: 4-5); D229; P1-19 (**Resp. Ex. C.**, 00307-326).
[29] D51 (Tr. 1A at 69: 16-18; 72: 4-10; 123: 5-8; 137: 12-138: 12; 171: 7-10); D52 (Tr. 1B at 188: 17-25; 200: 23-201: 22); D77; P9 (**Pet. Ex. 24** at p. 0024), D123; P9 (**Pet. Ex. 83** at p. 9).
[30] D77; P9 (**Pet. Ex. 24** at p. 0024)
[31] D82; P8 (**Pet. Ex. 30**, p. 00333); D98; P3 (**Pet. Ex. 31**, p. 00430).

Electronically Filed - SUPREME COURT OF MISSOURI - July 22, 2026 - 06:11 PM

Graders were required to score applications "in an objective way using the predetermined point range and instructions outlined in the Facility Scoring Guide."[32] Pursuant to the Facility Scoring Guide:

> It is imperative that every response is scored in a consistent manner for all applicants. Some of the questions and answers may require a scorer to use his or her own professional knowledge and expertise in scoring the responses. In doing so, a scorer must score every response consistently. For example, if two applicants applying for the same facility type provide identical responses to a question, the score must be the same.[33]

The Department also provided Wise with The Facility License Application Question and Scoring Criteria, which was incorporated into the Department's regulations.[34] This included the Evaluation Scoring Criteria Table, which provided the different scoring methodologies:

[32] D98: P3 (**Pet. Ex. 31**, p. 00430); *see also* D52 (Tr. 1B at 179: 10-22).
[33] D79: P2 (**Pet. Ex. 26**, p. 00043).

[34] D112: P10 (**Pet. Ex. 112**, p. HIPPOS002352); D51 (Tr. 1A at 94: 2-4, 17-20); D250 (**Resp. Ex. E).**

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Evaluation Criteria Scoring Table	
Answer	**Points**
Question on 0-10 Point Scale	
Unsatisfactory - Response fails to meet minimum expectations; has significant weaknesses and lacks detail and/or clarity; little or no confidence in the proposed approach or ability to fulfill claims.	0
Satisfactory - Response meets minimum expectations; offers no significant benefits beyond the minimum expectations; no significant weaknesses exist; reasonable confidence in the proposed approach or ability to fulfill claims.	4
Superior - Response offers some benefits beyond the minimum expectations; no material weaknesses exist; confidence in the proposed approach or ability to fulfill claims.	7
Distinctive - Response promises significant benefits beyond the minimum expectations; answer presents innovative, and/or best-in-class solutions; high confidence in the proposed approach or ability to fulfill claims.	10
Satisfactory / Unsatisfactory	
Satisfactory - Response meets minimum expectations; no significant weaknesses exist; reasonable confidence in the proposed approach or ability to fulfill claims.	10
Unsatisfactory - Response fails to meet minimum expectations; has significant weaknesses and lacks detail and/or clarity; little or no confidence in the proposed approach or ability to fulfill claims.	0
Yes / No	
Yes (when a preferred response) - Response indicates assent or agreement.	10
No (when an undesirable response) - Response indicates negation, dissent, or denial.	0
No / Yes	
No (when a preferred response) - Response indicates negation, dissent, or denial.	10
Yes (when an undesirable response) - Response indicates assent or agreement.	0

The same methodologies are set forth in the Facility Scoring Guide, which states: "Scorers are required to score each response…using the criteria and points in the Evaluation Scoring Criteria Table."[35] One scoring methodology is labeled "0-10 Point Scale." Under this scoring methodology, an applicant could receive 0, 4, 7, or 10 "raw" points on a question, based on whether the grader believed the applicant's answer was Unsatisfactory, Satisfactory, Superior, or Distinctive (terms defined in the Facility

[35] D79: P1 (**Pet. Ex. 26**, p. 00042).

Scoring Guide).[36] Another methodology allowed a scorer to award a score of 0 or 10 raw points for any questions that were reviewed on a Satisfactory/Unsatisfactory basis.[37]

Wise prepared a Wise Health Solutions Final Work Plan ("Work Plan"), which was finalized September 15, 2019.[38] The Department approved the Work Plan.[39] The Work Plan states: "The most important part of [a scorer's] job is being consistent in grading so that each application is scored in the same manner and compared to other applications received within the specific facility type."[40] Wise Health also prepared a Grader Training Manual V3 ("Training Manual") for its graders, which the Department reviewed and approved.[41] The Training Manual stated:

> The most important part of your job is being consistent in your grading so that each application is scored in the same manner and compared to other applications received within the specific facility type. Conflict, challenges to the process and lawsuits arise when inconsistent scoring results are evident; the companies will likely see their individual scores and will be able to compare across multiple application's results to see for themselves if we are consistent. An example is if a company submits multiple applications with an identical answer to a certain question (on different applications) but receives a different score for each. **This should NEVER happen, and would be considered a statistical anomaly. You can and should self-correct this.**[42]

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[36] D79: P1 (**Pet. Ex. 26**, p. 00042).
[37] D79: P1 (**Pet. Ex. 26**, p. 00042).
[38] D52 (Tr. 1B at 195: 19-24); D76 (**Pet. Ex. 23).**
[39] D52 (Tr. 1B at 195: 13-20).
[40] D76: P7 (**Pet. Ex. 13** at 7).
[41] D77 (**Pet. Ex. 24)**; D51 (Tr. 1A at 97: 14-98: 2).
[42] D77: P9 (**Pet. Ex. 24** at 9 (emphasis in original)).

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C. Grader Qualifications and Assignments

Per its contract with the Department, Wise was required to assign a scorer to each question who possessed the appropriate background and expertise to evaluate that question and response.[43] The Work Plan stated that each grader was to have the experience and background appropriate to perform the task they were assigned.[44]

Wise was required to provide the Department with information concerning each grader that would allow the Department to determine if the individual was appropriate for the task they were given.[45] Additionally, the Work Plan required Wise to provide the Department, by September 9, 2019, a spreadsheet that included a list of the graders, including their primary subject matter and expertise.[46] Wise Health did not provide the Department with such a spreadsheet.[47] Wise Health only sent the Department resumes for each scorer, and the questions assigned to each scorer; the Department reviewed each resume and confirmed that they agreed.[48]

D. Consistency and Lack of Scorer Note-Taking

Pursuant to the Work Plan, the most important part of the graders' job was to be consistent in grading so that each application was scored in the same manner and

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[43] D89: P2 (**Pet. Ex. 31).**
[44] D51 (Tr. 1A at 108: 1-10); D259 (**Resp. Ex. F).**
[45] D51 (Tr. 1A at 109: 7-16).
[46] D76 (**Pet. Ex. 23).**
[47] D52 (Tr. 1B at 197: 13-17).
[48] D51 (Tr. 1A at 109; 17-25); D266-268 (**Resp. Exs. M, N, O).**

compared to other applications received within the same facility type.[49] The Department testified that notes from the scorers would have helped to show an indication of consistency.[50] The Training Manual created by Wise reminded graders that any emails, notes, and other things they write will be discoverable if any scores are challenged in court.[51] Additionally, the Training Manual stated: "Don't write anything that you don't want everybody to read. Past versions, something deleted will be discoverable in the versions. Adhere to this axiom: say it and forget it write it and regret it."[52]

Jonathan Andres, on behalf of Hippos, reviewed and analyzed all of the scorers' notes and all of the scoring rubrics produced by the Department in search of any notes concerning Hippos.[53] The only reference to Hippos was in the notes of Erin Bruckner and Noah Hirsch, and in each instance the scorer merely listed Hippos' application ID.[54] Neither Erin Bruckner nor Noah Hirsch provided any description, notes, or narrative about Hippos in their scorer notes beyond listing Hippos' application ID.[55]

E. Review of Scoring Performed by Wise Health

Wise scored all of the license applications, and the Department did not change any of the scores.[56] The scorers were charged with self-correcting their own scores.[57]

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[49] D76: P7 (**Pet. Ex. 23** at 0007).
[50] D51 (Tr. 1A at 122: 6-25; 123: 1-2; 232: 22-23).
[51] D77 (**Pet. Ex. 24).**
[52] D77 (**Pet. Ex. 24).**
[53] D53 (Tr. 2A at 454: 13-25; 455: 1-25; 456: 1-25; 457: 1-2).
[54] D53 (Tr. 2A at 457: 4-20).
[55] D53 (Tr. 2A at 457: 4-20).
[56] D51 (Tr. 1A at 77: 23-25).

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Pursuant to the Work Plan, if there were any statistically significant variances Wise was required to re-score the applicable question(s) to ensure consistency and integrity.[58] Pursuant to the Work Plan, Wise Health "understands that only the application question(s) that were determined to have a variance should be re-scored," and "[t]he first score will be discarded and we will record the second score as the final score[,]" and pursuant to the regulations, "scores that vary significantly from other scores for the same question may be rescored [and] if rescored, the first score will be discarded, and the second score will stand[.]"[59]

Pursuant to the Training Manual: **"Statistical Anomalies will be reviewed.** These may be outliers, unusual patterns, an unusual occurrence in the pool of "0" or "10" scores, and "same answer receiving the same score" reviews…(because the "same answer" should always receive the "same score."; **"… consistency across all applications is of the utmost importance!"**[60] After the scores were submitted by the individual graders, Wise did nothing to be sure that identical answers got the same score.[61] The Department performed no review of Wise's scoring to determine if scores varied significantly.[62]

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[57] D51 (Tr. 1A at 174: 10-15).
[58] D76 (**Pet. Ex. 23)**; D52 (Tr. 1B at 202: 5-24).
[59] D76 (**Pet. Ex. 23)**; D52 (Tr. 1B at 203: 4-9); 19 CSR 30-95.025(4)(C)(4).
[60] D123 (**Pet. Ex. 83)** (emphasis in original)
[61] D52 (Tr. 1B at 197:23-25; 198: 1-7).
[62] D51 (Tr. 1A at 107: 12-14).

Electronically Filed - SUPREME COURT OF MISSOURI - July 22, 2026 - 06:11 PM

F. Application Scoring Results

All of the application scores the Department received from Wise were accepted and used as valid by the Department.[63] All facility license applications were scored separately.[64] Hippos submitted three (3) cultivation applications (HIPP9706, 9707, 9708); six (6) manufacturing applications (HIPP9709, 9710, 9711, 9712, 9713, 9714); and five (5) dispensary applications (HIPP9701, 9702, 9703, 9704, 9705).[65]

1. Hippos' Cultivation Scoring Results

On December 26, 2019, the Department released the results of its scoring and ranking of cultivation applications.[66] The lowest-scoring cultivation applicant to receive a license, GF Saint Mary, LLC, received a total score of 1,479.41 points.[67] Hippos' cultivation applications received total scores of: 1481.33 (HIPP9708); 1440.13 (HIPP9706); and 1439.73 (HIPP9707).[68] The Department determined that Hippos was qualified to receive a license for a cultivation facility in Vienna, Missouri and granted it a license for application HIPP9708.[69] Hippos' cultivation applications HIPP9706 and

[63] D51 (Tr. 1A at 141: 12-15).
[64] D51 (Tr. 1A at 142: 13-24).
[65] D59 (**Pet. Dem. Ex. 3)**
[66] D66.
[67] D66: P2 (**Pet. Ex. 3** at 00502).
[68] D66: P2 and P4 (**Pet. Ex. 3** at 00502 and 504); D57 (**Pet. Dem. Ex. 1).**
[69] D51 (Tr. 1A at 155: 5-8); D59 (**Pet. Dem. Ex. 3).**

HIPP9707, met the minimum standards for licensure but were denied based on the results of the ranking and scoring.[70]

If it had received a score of 1479.41, Application HIPP9706 would have placed within the top 60 cultivation applications and would have qualified for award of a cultivation license.[71] If it had received a score of 1479.41, Application HIPP9707 would have placed within the top 60 cultivation applications and would have qualified for award of a cultivation license.[72]

2. Hippos' Manufacturing Scoring Results

On January 10, 2019, the Department released the results of its scoring and ranking of manufacturing applications.[73] The lowest-scoring manufacturing applicant to receive a license, Bloom Medicinals of MO, LLC, received a total score of 1,526.16 points.[74] Hippos' manufacturing applications received total scores of: 1,391.39 (HIPP9709); 1,391.99 (HIPP9710, 9711, 9712, and 9713); and 1,383.19 (HIPP9714).[75] If any of those applications had received a score of 1526.16, Hippos' manufacturing applications would have placed within the top 86 manufacturing applications and would

[70] D51 (Tr. 1A at 125: 12-19); D66: P2 and P4 (**Pet. Ex. 3** at 00502 and 504); D59 (**Pet. Dem. Ex. 3)**; D243 (**Respondent Ex. DF).**
[71] D60 and D65; App A187 (**Pet. Dem. Exs. 4** and **9**, p. 1-2); D53 (Tr. 2A at 453: 19-25; 454: 1-5); D66 (**Pet. Ex. 3).**
[72] D60 and D65; App A187 (**Pet. Dem. Exs. 4** and **9**, p. 1-2); D53 (Tr. 2A at 453: 19-25; 454: 1-5); D66 (**Pet. Ex. 3)**.
[73] D67 (**Pet. Ex. 4).**
[74] D67: P3 (**Pet. Ex. 4** at 00527); D60 (**Pet. Dem. Ex. 4).**
[75] D67: P6 (**Pet. Ex. 4** at 00530); D57 (**Pet. Dem. Ex. 1).**

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have qualified for award of a manufacturing facility license.[76] Hippos' manufacturing applications met the minimum standards for licensure and were denied based on the results of the ranking and scoring.[77]

3. Hippos' Dispensary Scoring Results

On January 23, 2019, the Department released the results of its scoring and ranking of dispensary applications. The lowest-scoring dispensary applicant to receive a license in each of Congressional Districts in which Hippos submitted an application was: (i) Growing Jobs Missouri LLC received a total score of 1,496.71 in Congressional District 1; (ii) LSL Management LLC received a total score of 1,487.44 in Congressional District 2; and (iii) TC AppliCO LLC received a total score of 1,513.83.[78]

Hippos' dispensary applications received total scores of: 1,393.78 (HIPP9703 and HIPP9705 in Congressional District 1); 1,393.78 (HIPP9704 in Congressional District 2); and 1,393.78 (HIPP9701 and HIPP9702 in Congressional District 5).[79] Hippos' dispensary applications met the minimum standards for licensure and were denied based on the results of the ranking and scoring.[80]

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[76] D60 and D65; App A187 (**Pet. Dem. Exs. 4** and **9**, p. 3-4); D53 (Tr. 2A at 453: 19-25; 454: 1-5); D67 (**Pet. Ex. 4).**
[77] D51 (Tr. 1A at 126: 10-17); D245 (**Resp. Ex. DH).**
[78] D60: P1.
[79] D67 (**Pet. Ex. 4** at 00541-42, 546); D57 and D59 (**Pet. Dem. Exs. 1, 3).**
[80] D51 (Tr. 1A at 125: 23-25; 126: 1-6); D244 **(Resp. Ex. DG).**

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G. Hippos' Expert Witnesses

Hippos designated Ashley Picillo of Point 7 LLC ("Picillo") to offer expert opinion testimony in its cultivation and dispensary appeals.[81] In 2014, Picillo founded Point 7 LLC, a management consulting firm specializing in cannabis compliance, cannabis facility design staffing, and community engagement. Point 7 provides services to clients in the US and international market (Canada, Mexico, and Australia), and works with existing cannabis operators and those seeking to become cannabis operators.[82] Picillo provided cannabis licensing assistance in 21 different states.[83] Picillo is currently working with the Dean of Excelsior College in New York to assist in developing cannabis specific college coursework.[84]

Picillo and Point 7 wrote approximately 50 applications for Missouri's medical marijuana program, and their clients were awarded 42 licenses.[85] Picillo was named Consultant of the Year in Greenway Magazine for her work in drafting applications for Missouri's medical marijuana program.[86]

Picillo utilized the DHSS Medical Marijuana Application Scorer's Guide General Instructions when evaluating Hippos' response.[87] Picillo testified, based on her knowledge and experience, that she is capable and confident in her ability to evaluate

[81] D55 (Tr. 3A at 648: 8-18, 649: 3-8).
[82] D55 (Tr. 3A at 649: 23-35; 650: 1-12; 662: 4-6); Pet. Ex. 33.
[83] D55 (Tr. 3A at 653: 6-24).
[84] D55 (Tr. 3A at 660: 1-8).
[85] D55 (Tr. 3A at 670: 1-10; 671: 2-8).
[86] D54 (Tr. 2B at 568: 13-17); D55 (Tr. 3A at 666: 14-25; 667: 1-6).
[87] D55 (Tr. 3A at 672: 15-19; 674: 1-4); D95 (**Pet. Ex. 34**).

each component of the evaluation criteria scoring table.[88] Picillo testified there are significant differences between scores of 0 and 4, 4 and 7, and 7 and 10.[89] The methodology Picillo used included reliance upon: (1) Hippos' application answers; (2) the Department's Scoring Criteria; (3) Point 7's responses prepared for its Missouri clients; (4) scores received on the responses prepared by Point 7; and (5) documentation issued by the Department.[90]

Hippos also designated Joe Patterson of Ceres Management Group LLC to offer expert opinion testimony in connection with the dispensary appeal.[91] Patterson formed Ceres Management Group, LLC, a company staffed primarily by former law enforcement officers, military personnel from special operations, and a former White House staff member with extensive experience in writing government proposals.[92] Patterson and Ceres Management also wrote the security responses or the entire applications for thirty-three (33) medical marijuana applications submitted by their Missouri clients.[93] Approximately fifty percent (50%) of those application were awarded a license.[94]

[88] D55 (Tr. 3A at 676; 677: 1).
[89] D55 (Tr. 3A at 678: 17-21).
[90] D55 (Tr. 3A at 687: 3-13).
[91] D54 (Tr. 2B at 573: 19-22).
[92] D54 (Tr. 2B at 540: 20-25; 541: 1-14).
[93] D54 (Tr. 563: 7-20).
[94] D54 (Tr. 2B at 563: 7-23).

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H. Hippos' Cultivation Scoring

Hippos received different scores for identical answers to Questions 26, 27, 41, 48, 49, 50, 51, 52, and 66 in cultivation Applications HIPP9706, HIPP9707, and HIPP9708.[95]

1. Cultivation Expert Testimony

Hippos designated Picillo to offer expert opinion testimony about the scores Hippos received on cultivation Applications HIPP9706 and HIPP9707 on Questions 3, 27, 30, 41, 44, 50, 51, 52, 66, and 67.[96] After her review, Picillo opined that 10 out of the 22 cultivation application responses should have received an increased score.[97] Based on Picillo's expert opinion, Applications HIPP9706 and HIPP9707 each should have received a score of 10 points on Question 3[98] and 10 points on Question 27.[99] In Picillo's expert opinion, Applications HIPP9706 and HIPP9707 each should have received a score of at least 7 points on Question 30, [100] and Application HIPP9707 should have received a score of no less than 4 points on Question 41.[101] Picillo also opined that Applications HIPP9706 and HIPP9707 should have received a score of 7

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[95] D74, D145, and D171 (**Pet. Exs. 19, 116, 142)**; D53 (Tr. 2A at 335: 23-24; 449: 23-25; 450: 1-7); D55 (Tr. 3A at 791: 23-25; 792: 1).
[96] D55 (Tr. 3A at 648: 8-18); D65; App A187 (**Pet. Dem. Ex. 9**, pp. 1-2).
[97] D55 (Tr. 3A at 649: 3-8).
[98] D55 (Tr. 3A at 751-752).
[99] *Id.*
[100] D55 (Tr. 3A at 755-756).
[101] D55 (Tr. 3A at 709-711, 759-761).

points on Question 44[102], and Application HIPP9706 should have received a score of at least 7 points on Question 50.[103] Also based on the expert opinion of Picillo, Application HIPP9707 should have received a score of 10 points on Question 51[104], and Application HIPP9706 should have received a score of 10 points on Question 52. [105] Picillo also opined that Applications HIPP9706 and HIPP9707 each should have received a score of 10 points on Question 66[106], and Applications HIPP9706 and HIPP9707 each should have received a score of 10 points on Question 67.[107]

The Department offered no rebuttal to the expert testimony introduced by Hippos' expert witnesses, provided no testimony or evidence that might show why the higher scores received by Hippos for identical answers, whether those of Hippos or of other Maddock clients, were incorrect, and provided no testimony or evidence showing why Picillo's expert opinions on scoring were unsubstantiated or incorrect.

Applying the necessary math under the Department's scoring criteria, the total weighted question score points awarded Application HIPP9706 if Hippos' identical answers to Questions 3, 27, 30, 41, 44, 50, 51, 52, 66, and 67 received the increased scores to which expert witness Picillo testified, would have given Application HIPP9706 a total score of 1526.52 which would have placed the application within the top 60

[102] D55 (Tr. 3A at 716, 762, 764).
[103] D55 (Tr. 3A at 766-767).
[104] D55 (Tr. 3A at 766-767).
[105] D55 (Tr. 3A at 769).
[106] D55 (Tr. 3A at 772-775).
[107] D55 (Tr. 3A at 776).

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cultivation applications.[108] Applying the necessary math under the Department's scoring criteria, the total weighted question score points awarded Application HIPP9707 if Hippos' identical answers to Questions 3, 27, 30, 41, 44, 50, 51, 52, 66, and 67 received the increased scores to which expert witness Picillo testified, would have given Application HIPP9707 a total score of 1528.32 which would have placed the application within the top 60 cultivation applications.[109]

I. Hippos' Manufacturing Scoring Challenges

In its manufacturing appeal, Hippos identified several bases for increasing the scores Hippos received on the manufacturing applications.[110] The Department did not offer any testimony regarding what the correct score was in the situations where the same answer received different scores.[111] The manufacturing facility application contained a total of seventy-eight (78) questions.[112] On appeal to this Court, the sole remaining issue is with respect to Tina Szopinski's qualifications to score Question 64.

Tina Szopinski was assigned to score Question 64 in the manufacturing license applications.[113] The contract between the Department and Wise Health required Wise to assign application questions "to scoring team members with background and expertise

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[108] D65; App A187 (**Pet. Dem. Ex. 9**, p. 1-2); D65; App A187 and D74 (**Pet. Exs. 3** and **19**, pp. HIPPOS002289—2292).
[109] D65; App A187 (**Pet. Dem. Ex. 9**, p. 1-2); D65; App A187 and D74 (**Pet. Exs. 3** and **19**, pp. HIPPOS002293—2296).
[110] D58 (**Pet. Dem. Ex. 2**, p. 2); D53 (Tr. 2A at 435: 19-25; 436: 1-6).
[111] D53 (Tr. 2A at 415: 18-22).
[112] D141 (**Pet. Ex. 112**, pp. HIPPOS002343—2351).
[113] D268: P2.

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Electronically Filed - SUPREME COURT OF MISSOURI - July 22, 2026 - 06:11 PM

necessary to score questions and responses" and evaluate the question and response.[114] Wise Health provided the Department with copies of the graders' resumes.[115] Szopinski's thirteen (13) page resume is the only evidence of her subject matter expertise and qualifications to be a grader.[116] Szopinski's resume does not list or describe any experience or background in cannabis.[117] Her resume also does not list or describe any experience or background in business evaluation or analysis.[118]

The Training Manual instructed Szopinski and the other graders that "[i]n the notes, you should explain how your own expertise and personal experience influenced how you arrived at the assigned score."[119] Szopinski did not explain her expertise or anything else in the notes section of scoring rubric; Szopinski's "Graders' Rubric Notes" section is blank.[120] Szopinski did not record anything in her "Grader's Notes" other than one line which the Department chose to redact in the copy introduced as a hearing exhibit.[121]

Jacob Cohen was assigned to score the answers to Question 68 on the cultivation applications based on his experience and expertise.[122] Cohen has experience as a

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[114] D91:P6 (**Pet. Ex. 31**, p. 00456).
[115] D51 (Tr. 1A at 149: 22-24); D121; App A193 (**Pet. Ex. 72).**
[116] LF No. 40, Tr. 1A at 149: 22-24; **Pet. Ex. 72.**
[117] LF No. 40, **Pet. Ex. 72.**
[118] *See Generally*, LF No. 40, **Pet. Ex. 72.**
[119] LF No. 40, **Pet. Ex. 24**, p. 00027.
[120] *See* LF No. 40, **Resp. Ex. BT.**
[121] D354 (**Resp. Ex. CW).**
[122] D51 (Tr. 1A at 150: 18-24).

business analyst including analyzing companies in the cannabis industry.[123] Cohen awarded Hippos a score of ten (10) for its answer to Question 68 on all three (3) of its cultivation applications and all five (5) of its dispensary applications.[124]

Applying the necessary math under the Department's scoring criteria, the total weighted question score awarded to Hippos' manufacturing applications if the scoring of Tina Szopinski is not utilized and instead the scoring of Jacob Cohen is utilized, is at least 1,528.78.[125] That score would have placed each application within the top 86 manufacturing applications.[126]

J. Hippos' Dispensary Scoring Challenges

In its dispensary appeal, Hippos identified several bases for increasing the scores Hippos received on the applications at issue.[127] This included the expert testimony of Ashley Picillo and Joe Patterson.[128] The Department did not offer any testimony regarding what the correct score was in the situations were the same answer received different scores.[129]

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[123] D122 (**Pet. Ex. 73).**
[124] D73-74 (**Pet. Ex. 18-19)**
[125] D65; App A187 (**Pet. Dem. Ex. 9**, p. 3-4); D66 and D74 (**Pet. Exs. 3** and **19**, pp. HIPPOS002299-2300); D75 (**Pet. Ex. 20**, p. HIPPOS002301-2304).
[126] D65; App A187 (**Pet. Dem. Ex. 9**, p. 3-4); D66 (**Pet. Ex. 3)**; D74 (**Pet. Ex. 19**, pp. HIPPOS002299-2300); D75 (**Pet. Ex. 20**, p. HIPPOS002305-2320).
[127] D58 (**Pet. Dem. Ex. 2**, p. 1); D53 (Tr. 2A at 413: 7-9).
[128] D53 (Tr. 2A at 416:1-4; 417: 16-17; 439: 11-25; 440: 1); D58 (**Pet. Dem. Ex. 2).**
[129] D53 (Tr. 2A at 415: 18-22).

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Electronically Filed - SUPREME COURT OF MISSOURI - July 22, 2026 - 06:11 PM

In total, the dispensary facility application contained seventy-six (76) questions.[130] Hippos designated Picillo to offer expert opinion testimony about ten dispensary application responses to Questions 26, 41, 43, 44, 51, 52, 66, 67, Dispensary 4, and Dispensary 6.[131] After her review, Picillo recommended that out of the 18 dispensary application responses she reviewed ten should have received an increased score.[132]

Picillo opined that any expert in the field of pharmacology would have deemed Hippos' response to Question 26 to have been distinctive.[133] Picillo compared Hippos' response to Question 26 to a response drafted by Point 7 that was awarded a score of 10, and Picillo found zero material difference between the response.[134]

Picillo testified, based on the evaluation scoring criteria table, that the lack of any significant weaknesses in Hippos' response, and the confidence it engendered, the approach Hippos proposed in response to Question 41 deserved a score of no less than a 4.[135] Picillo explained in her professional opinion that Hippos' response was Superior because of the notable details the response included: two team members with twenty years of experience operating a sizeable cannabis facilities in comparable markets.[136] Picillo also concluded based on her expertise and experience that Hippos' response to

[130] D141 (**Pet. Ex. 112**, pp. HIPPOS002343—2350).
[131] D53 Tr. 3A at 648: 8-18; 649: 3-8; D65; App A187 (**Pet. Dem. Ex. 9**, pp. 5-6).
[132] D53 Tr. 3A at 649:3-8.
[133] D53 Tr. 3A at 701: 8-16.
[134] D53 Tr. 3A at 705: 10-14; D360 (**Pet. Ex. 44A).**
[135] D55 (Tr. 3A at 710: 15-25; 711: 1-24).
[136] D55 (Tr. 3A at 712: 23-25; 713: 1-10).

Electronically Filed - SUPREME COURT OF MISSOURI - July 22, 2026 - 06:11 PM

Question 43 absolutely deserved at a minimum a score of 7, [137] and that Hippos earned at least a score of 7 for its response to Question 44 as the company exceeded minimum expectations by providing job titles, detailed summaries of roles, a breakdown of hiring by year, and indication when the company will provide employees with discretionary and mandatory pay raises.[138] Based on her expertise and experience, Picillo considered this response as a possible 10.[139]

Hippos' response to Question 51 in application HIPP9701 received a ten (10) and the response in application HIPP9703 received a four (4).[140] Picillo testified that the response in HIPP9703 merits and deserves a 7 because even though it was absolutely an effective and superior plan, much of the equipment described was, in her view, likely overkill for a retail environment.[141] Picillo stated that the answers to HIPP9703-9705 should have received scores of seven.[142]

For its identical answers on the five dispensary applications, Hippos received three scores of 7 and two scores of 10 on Question 52.[143] Picillo found that Hippos' response promised significant benefits above the minimum and its answer discussed and

[137] D55 (Tr. 3A at 715: 13-15).
[138] D55 (Tr. 3A at 716).
[139] D55 (Tr. 3A at 717: 23-25).
[140] D58 (**Pet. Dem. Ex. 2).**
[141] D55 (Tr. 3A at 720-721).
[142] D55 (Tr. 3A at 723:12-21).
[143] D58 (**Pet. Dem. Ex. 2)**; D143 (**Pet. Ex. 114)**.

summarized all three components.[144] Picillo compared Hippos' answer to Question 52 with a different answer that scored a 10.[145]

Picillo testified that Hippos provided a Distinctive answer to Question 66.[146] Picillo also opined that proper evaluation of any response to this question first requires an individual with in-depth understanding of the conditions necessary to operate a cannabis facility in a compliant fashion.[147] Hippos received a 4 but Ms. Picillo offered her firm opinion that while Hippos' response certainly deserved a minimum score of 7, she was compelled to recommend a score of 10.[148] Hippos received a score of 4 but Picillo without hesitation testified Hippos' answer should have received a 7.[149] Picillo compared Hippos' response to one that scored a 7 and could find no material difference between the answers.[150] Hippos received a 4 on Dispensary Question 6, and Ms. Picillo testified Hippos' answer deserved a 7.[151]

Hippos also designated Joe Patterson to offer expert opinion testimony about answers to Questions 55-60 related to security in the applications.[152] For the security questions in the medical marijuana applications reviewed, Patterson interpreted

[144] D55 (Tr. 3A at 725: 20-23).
[145] D55 (Tr. 3A at 726: 14-25; 727: 1-3).
[146] *Id.*
[147] D55 (Tr. 3A at 733: 18-24).
[148] D55 (Tr. 3A at 734: 1-25; 735: 1-4).
[149] D55 (Tr. 3A at 739: 7-25 – 742).
[150] D55 (Tr. 3A at 742: 3-5).
[151] D55 (Tr. 3A at 748).
[152] D54 (Tr. 2B at 573: 19-22); D65; App A187 (**Pet. Dem. Ex. 9**, pp. 5-6).

Electronically Filed - SUPREME COURT OF MISSOURI - July 22, 2026 - 06:11 PM

"minimum expectations" as the term is set forth in the Regulations.[153] The Department agreed that security questions in the applications specifically identify the minimum expectations for the question.[154]

The scoring methodology used for Questions 55-60 related to security a "0-10 Point Scale" whereby an applicant receives a score of 0, 4, 7, or 10 based on whether the applicant's answer was Unsatisfactory, Satisfactory, Superior, or Distinctive, respectively.[155] The Facility Scoring Guide defines "Satisfactory" as "[r]esponse meets minimum expectations; offers no significant benefits beyond the minimum expectations; no significant weaknesses exist; reasonable confidence in the proposed approach or ability to fulfill."[156] The Facility Scoring Guide defines "Superior" as "[r]esponse offers *some benefits beyond the minimum expectations*; no material weaknesses exist; confidence in the proposed approach or ability to fulfill claims."[157]

Mr. Patterson testified and explained how Hippos' identical answers in dispensary applications to security Question 55-60 offered not just benefits beyond the minimum expectations but significant benefits.[158] Based on his knowledge and experience, Mr. Patterson testified that in his expert opinion, Hippos should have received a score of at

[153] D54 (Tr. 2B at 553: 14-22).
[154] D51 (Tr. 1A at 101: 6-10).
[155] D79; P1 (**Pet. Ex. 26**, p. 00042); D141 (**Pet. Ex. 112**, p. HIPPOS002347).
[156] D79: P1 (**Pet. Ex. 26**, p. 00042).
[157] D79: P1 (**Pet. Ex. 26**, p. 00042 (emphasis added)).
[158] D54 (Tr. 2B at 556: 1-10).

Electronically Filed - SUPREME COURT OF MISSOURI - July 22, 2026 - 06:11 PM

Electronically Filed - SUPREME COURT OF MISSOURI - July 22, 2026 - 06:11 PM

least 7 rather than 4 on its responses to security Questions 55 through 60 in its dispensary applications.[159]

Applying the necessary math under the Department's scoring criteria, the total weighted question score points awarded Applications HIPP9701 and HIPP9702 if Hippos' answers to Questions 26, 41, 43, 44, 51, 52, 66, 67, Dispensary 4, and Dispensary 6 received the increases raw scores based on Picillo's expert testimony discussed *supra*, would have given Applications HIPP9701 and HIPP9702 each a total score of 1495.76.[160]

Applying the necessary math under the Department's scoring criteria, the total weighted question score points awarded Applications HIPP9703, HIPP9704, and HIPP9705 if Hippos' answers to Questions 26, 41, 43, 44, 51, 52, 66, 67, Dispensary 4, and Dispensary 6 received the increases raw scores based on Picillo's expert testimony discussed *supra*, would have given Applications HIPP9703, HIPP9704, and HIPP9705 each a total score of 1498.16.[161] [162]

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[159]D54 (Tr. 2B at 584: 10-23; 592: 6-23; 613: 20-25; 614: 1-3; 592): D63 (**Pet. Dem. Ex. 7).**

[160] D65; App A187 (**Pet. Dem. Ex. 9**, pp. 5-6); D73: P1-6 (**Pet. Ex. 18**, pp. HIPPOS002274-2279).

[161] D65; App A187 (**Pet. Dem. Ex. 9**, pp. 5-6); D73: P7-15 (**Pet. Ex. 18**, pp. HIPPOS002280-2288).

[162] For clarity of review, Hippos would note that the Opinion from the Southern District Court of Appeals provides the combined total of increased scores based on the testimony of Patterson and Picillo, and not solely the increased scores based on the testimony of Patterson (Slip Op. at 18).

Electronically Filed - SUPREME COURT OF MISSOURI - July 22, 2026 - 06:11 PM

Applying the necessary math under the Department's scoring criteria, the total weighted question score points awarded Applications HIPP9701 and HIPP9702 if Hippos' answers to Questions 55, 56, 57, 58, 59, and 60 received the increases raw scores based on Patterson's expert testimony discussed *supra*, would have given Applications HIPP9701 and HIPP9702 each a total score of 1453.48.[163]

Applying the necessary math under the Department's scoring criteria, the total weighted question score points awarded Applications HIPP9703, HIPP9704, and HIPP9705 if Hippos' answers to Questions 55, 56, 57, 58, 59, and 60 received the increases raw scores based on Patterson's expert testimony discussed *supra*, would have given Applications HIPP9703, HIPP9704, and HIPP9705 each a total score of 1453.48.[164]

Applying the necessary math under the Department's scoring criteria, the total weighted question score points awarded Applications HIPP9701 and HIPP9702 if (a) if Hippos' answers to Questions 55, 56, 57, 58, 59, and 60 received the increases raw scores based on Patterson's expert testimony discussed *supra*, and (b) Hippos' answers to Questions 55, 56, 57, 58, 59, and 60 received the increases raw scores based on

[163] D65; App A187 (**Pet. Dem. Ex. 9**, pp. 5-6); D73: P1-6 (**Pet. Ex. 18**, pp. HIPPOS002274-2279).
[164] D65; App A187 (**Pet. Dem. Ex. 9**, pp. 5-6); D73: P1-6 (**Pet. Ex. 18**, pp. HIPPOS002274-2279).

Patterson's expert testimony discussed *supra*, would have given Applications HIPP9701 and HIPP9702 each a total score of 1555.48.[165]

A total score of 1555.48 would have placed the Application HIPP9701 within the top 24 dispensary applications in Congressional District 5.[166] A total score of 1555.48 would have placed the Application HIPP9702 within the top 24 dispensary applications in Congressional District 5.[167] Applying the necessary math under the Department's scoring criteria, the total weighted question score points awarded Applications HIPP9703, HIPP9704, and HIPP9705 if (a) if Hippos' answers to Questions 55, 56, 57, 58, 59, and 60 received the increases raw scores based on Patterson's unrebutted expert testimony discussed *supra*, and (b) Hippos' answers to Questions 55, 56, 57, 58, 59, and 60 received the increases raw scores based on Patterson's unrebutted expert testimony discussed *supra*, would have given Applications HIPP9703, HIPP9704, and HIPP9705 each a total score of 1557.48.[168]

These totals would result in an award of a dispensary facility license to HIPP9701, HIPP9702, HIPP9703, HIPP9704, and HIPP9705.[169]

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[165] D65; App A187 (**Pet. Dem. Ex. 9**, pp. 5-6); D73: P1-6 (**Pet. Ex. 18**, pp. HIPPOS002274-2279).
[166] D59 (**Pet. Dem. Ex. 3)**; D60 (**Pet. Dem. Ex. 4)**; D65; App A187 (**Pet. Dem. Ex. 9**, p. 4-5); D73; P1-3 (**Pet. Ex. 18**, pp. HIPPOS002274—2276).
[167] D59 (**Pet. Dem. Ex. 3)**; D60 (**Pet. Dem. Ex. 4)**; D65; App A187 (**Pet. Dem. Ex. 9**, p. 4-5); D73; P4-7 (**Pet. Ex. 18**, pp. HIPPOS002277—2279).
[168] D65; App A187 (**Pet. Dem. Ex. 9**, pp. 5-6); D73: P1-3 (**Pet. Ex. 18**, pp. HIPPOS002274-2279).
[169] D65; App A187 (**Pet. Dem. Ex. 9**, pp. 5-6).

Electronically Filed - SUPREME COURT OF MISSOURI - July 22, 2026 - 06:11 PM

Electronically Filed - SUPREME COURT OF MISSOURI - July 22, 2026 - 06:11 PM

POINTS RELIED ON

I. **The Commission erred in entering a decision against Hippos affirming the Department's denial of Hippos' two (2) applications for a medical marijuana cultivation facility license because the Decision was not supported by competent and substantial evidence in that the Commission improperly disregarded the uncontradicted and unimpeached expert testimony of Ashley Picillo and Joe Patterson.**

State ex rel. Kahler v. State Tax Comm'n, 393 S.W.2d 460, 465 (Mo. 1965).

Hundley v. Wenzel, 59 S.W.3d 1, 8 (Mo.App. W.D. 2001).

§536.140, RSMo.

II. **The Commission erred in entering a decision against Hippos affirming the Department's denial of Hippos' five (5) applications for a medical marijuana dispensary facility license because the Decision was not supported by competent and substantial evidence in that the Commission improperly disregarded the uncontradicted and unimpeached expert testimony of Ashley Picillo and Joe Patterson.**

State ex rel. Kahler v. State Tax Comm'n, 393 S.W.2d 460, 465 (Mo. 1965).

Hundley v. Wenzel, 59 S.W.3d 1, 8 (Mo.App. W.D. 2001).

§536.140, RSMo.

III. **The Commission erred in entering a decision against Hippos affirming the Department's denial of Hippos' two (2) applications for a medical marijuana**

cultivation facility license because it violates the prohibition on arbitrary and capricious actions by an administrative agency in that the Department's denial treats identically situated applications differently.

Wolfner v. Bd. of Adjustment of City of Frontenac, 672 S.W.2d 147 (Mo.App. E.D. 1984).

§536.140, RSMo.

IV. **The Commission erred in entering a decision against Hippos affirming the Department's denial of Hippos' two (2) applications for a medical marijuana cultivation facility license because the Decision was not supported by competent and substantial evidence in that the Decision relied upon the "subjective preferences" of the scorers but the Department did not offer competent and substantial evidence of the scorers' preferences.**

Jefferson City Apothecary, LLC v. Mo. Bd. of Pharmacy, 499 S.W.3d 321, 330 (Mo.App. W.D. 2016).

Missouri Real Estate Comm'n v. Held, 581 S.W.3d 668, 675–76 (Mo.App. W.D. 2019).

§536.140, RSMo.

V. **The Commission erred in entering a decision against Hippos affirming the Department's denial of Hippos' six (6) applications for a medical marijuana manufacturing facility license because the Decision was not supported by competent and substantial evidence in that the assigned scorer for the answer**

Electronically Filed - SUPREME COURT OF MISSOURI - July 22, 2026 - 06:11 PM

to Question 64 lacked the appropriate background and expertise to score the answer.

Hampton v. Big Boy Steel Erection, 121 S.W.3d 220, 223 (Mo. 2003).

§536.140, RSMo.

Electronically Filed - SUPREME COURT OF MISSOURI - July 22, 2026 - 06:11 PM

Electronically Filed - SUPREME COURT OF MISSOURI - July 22, 2026 - 06:11 PM

OVERVIEW

Hippos LLC ("Hippos") petitions this Court for review of the denials by the Administrative Hearing Commission ("AHC") of its applications for certain medical marijuana facility licenses. Hippos submitted three (3) applications for a cultivation facility license, six (6) applications for an infused product manufacturing facility license, and five (5) applications for a dispensary facility license to the Missouri Department of Health and Senior Services ("Department"). The Department granted Hippos one (1) cultivation facility license but denied Hippos' other license applications.

Hippos appealed those denials to the AHC, but the AHC[170] issued decisions denying Hippos' two (2) applications for a cultivation license, six (6) applications for a manufacturing license, and five (5) applications for a dispensary license. The decisions by the AHC are against the weight of the evidence, arbitrary and capricious, and an abuse of discretion. The Court, therefore, should reverse and enter Judgment awarding Hippos the requested licenses.

Standard of Review

The AHC decides the issue that was before the Department, the grant or denial of an application for a license and reviews the Department's decision *de novo*.[171] The function of the AHC in administrative-review proceedings is to render the agency's final

[170] D50; App A1, D436; App A69; D430; App A113.
[171] *State Bd. of Registration for Healing Arts v. Trueblood*, 368 S.W.3d 259, 267 (Mo.App. W.D. 2012); *Department of Soc. Svcs. v. Mellas*, 220 S.W.3d 778 (Mo.App. W.D. 2007).

decision.[172] The AHC exercises the same authority granted to the Department.[173] The agency adjudicative power the AHC exercises "extends only to the ascertainment of facts and the application of existing law thereto in order to resolve issues within the given area of agency expertise."[174]

The scope of judicial review is confined to deciding whether the AHC decisions violated the Constitution, exceeded the AHC's authority or jurisdiction, are unsupported by competent and substantial evidence upon the whole record, are unauthorized by law, resulted from an unlawful procedure, are arbitrary or capricious, or constitute an abuse of discretion.[175] "An administrative agency acts unreasonably and arbitrarily if its decision is not based on substantial evidence."[176] Substantial evidence is competent evidence that, if believed, has probative force upon the issues.[177] "Likewise, the agency's failure to consider important aspects or factors of the issue can support a finding that the decision was arbitrary and capricious."[178]

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[172] *Furman v. Bd. of Nursing Home Administrators*, 608 S.W.3d 742, 748 (Mo.App. W.D. 2020).
[173] *J.C. Nichols Co. v. Director of Revenue*, 796 S.W.2d 16, 20 (Mo. banc 1990).
[174] *Id.* at 20 (internal citation omitted).
[175] §536.140.2, RSMo.; App. A185.
[176] *Jefferson City Apothecary, LLC v. Mo. Bd. of Pharmacy*, 499 S.W.3d 321, 330 (Mo.App. W.D. 2016) (citation and internal quotation marks omitted).
[177] *Id.*
[178] *Hundley v. Wenzel*, 59 S.W.3d 1, 8 (Mo.App. W.D. 2001) (citation omitted).

Electronically Filed - SUPREME COURT OF MISSOURI - July 22, 2026 - 06:11 PM

Electronically Filed - SUPREME COURT OF MISSOURI - July 22, 2026 - 06:11 PM

The Court must consider "whether, considering the whole record, there is sufficient competent and substantial evidence to support the [agency's decision]"[179] This standard is not met "when the [agency's decision] is contrary to the overwhelming weight of the evidence."[180]

The AHC's factual findings will be upheld if the findings are supported by substantial evidence in the record.[181] The decision of the AHC will be upheld unless it is unsupported by competent and substantial evidence or unauthorized by law.[182] The Court, however, may substitute its discretion for the discretion legally vested in the agency if the Court determines that the agency decision was arbitrary or capricious.[183]

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[179] *Albanna v. State Bd. of Registration for Healing Arts*, 293 S.W.3d 423, 428 (Mo. banc. 2009) (internal citations omitted).
[180] *Lagud v. Kansas City Bd. of Police Comm'rs,* 136 S.W.3d 786, 791 (Mo. banc 2004) (internal citations omitted).
[181] *MFA Petroleum Co. v. Director of Revenue*, 279 S.W.3d 177, 178 (Mo. banc. 2009).
[182] *Whispering Oaks RCF Management Co. v. Missouri Dept. of Health and Senior Services*, 444 S.W.3d 492, 500 (Mo.App. W.D. 2014).
[183] §536.140.5, RSMo.; App. A185.

Electronically Filed - SUPREME COURT OF MISSOURI - July 22, 2026 - 06:11 PM

ARGUMENT

Article XIV of the Missouri Constitution provides the Department with authority to issue medical marijuana cultivation, manufacturing, and dispensary facility licenses. The Missouri Constitution and applicable regulations give the Department responsibility to score the facility license applications.[184] In addition to evaluating whether applicants for a particular facility type met the minimum standards for licensure, the Department implemented a scoring and ranking system to allocate licenses for a particular facility type among applicants based on certain numerical scoring criteria.[185]

The Department issued a regulation intended to promote consistency in scoring that stated, "[t]he same evaluation criteria question in each application will be scored by the same individual, if possible, and scores that vary significantly from other scores for the same questions may be rescored."[186] The Department did not define the term "vary significantly;" however, the dictionary defines "significant" as having meaning, having or likely to have influence or effect.[187] The term "vary significantly" thus means a variance in scores that has meaning or has or is likely to have influence or effect.

Rather than score the applications itself, the Department delegated this responsibility to a private contractor, Wise Health Solutions, LLC ("**Wise**") through a contract. The contract mandated Wise and its application graders to score all facility

[184] Mo. Const. art. XIV § 1.3(1)(h), 19 CSR 30-95.025(4).
[185] *Id.*
[186] *Id.*
[187] Webster's Ninth New Collegiate Dictionary (1983)

Electronically Filed - SUPREME COURT OF MISSOURI - July 22, 2026 - 06:11 PM

applications in accordance with Article XIV of the Missouri Constitution and associated Rules.[188]

The contract required the individuals who scored the applications (to whom the record refers interchangeably as scorers and graders) to "score each question in an objective way using the predetermined point range and instructions outlined in the Facility Scoring Guide."[189] The graders were employed by Wise, but the Department had final approval of the grader assigned to score each application question.[190]

Wise prepared a Grader Training Manual ("**Manual**") for license application scorers that the Department reviewed and approved.[191] The Manual reiterates the Department's demand for consistency in scoring and emphasizes "**consistency across all applications is of the utmost importance!**"[192] An example of inconsistent scoring "is if a company submits multiple applications with an identical answer to a certain question (on different applications) but receives a different score for each. **This should NEVER happen, and would be considered a statistical anomaly. You can and should self-correct this.**"[193]

The Manual section discussing Statistical Anomalies states that instances where the totality of the grades "indicates inconsistences, for instance the same answer

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[189] *Id.*
[190] *Id.*
[191] D51 (Tr. 1A at 41:13-19, 117: 5-8, 121: 17 to 122: 5).
[192] D77; P9 (Pet. Exh. 24 pt. 1 at 00024 (emphasis in original)).
[193] *Id.* (emphasis in original).

receiving a different score for no apparent reason, will trigger a re-score for that set of questions[.]"[194]

The Department also issued a DHSS Medical Marijuana Application Scorer's Guide ("**Guide**"), and Wise was contractually mandated to follow it. The Guide stresses the importance of consistency in scoring across all applications and provides the following directive:

> Department rules require that the same individual score each question if possible. A scorer may be assigned to score only a few questions, or even just one question. It is imperative that every response is scored in a consistent manner for all applicants. Some of the questions and answers may require a scorer to use his or her own professional knowledge and expertise in scoring the responses. In doing so, a scorer must score every response consistently. For example, if ***two applicants*** applying for the ***same facility type*** provide ***identical responses*** to a question, the score ***must*** be the same. (emphasis added) [[195]]

The Guide includes the Evaluation Scoring Criteria Table ("**Scoring Table**") identified in 19 CSR 30-95.025(4)(C)3. The Table required scorers to score each response provided by the applicants using the criteria and points in the Table.[196] Based on the stated criteria, answers scored on a scale of 0 to 10 points were ranked Distinctive (10 pts.), Superior (7 pts.), Satisfactory (4 pts.) or Unsatisfactory (0 pts.). Answers scored as

[194] D78; P3.
[195] D79; P2 (Pet. Exh. 26 pt. 1 at 00043 (internal citations omitted) (emphasis added).
[196] D79; P1.

Electronically Filed - SUPREME COURT OF MISSOURI - July 22, 2026 - 06:11 PM

either Satisfactory or Unsatisfactory received 10 pts. or 0 pts., respectively. Finally, answers to questions where a "yes" response were preferred and "no" was undesirable were to receive 10 pts. or 0 pts., respectively.

During the bidding process for the scoring contract with the Department, Wise submitted a Final Work Plan in which it agreed to abide by the Guide. That Final Work Plan states:

> The most important part of [a grader's] job is being consistent in grading so that each application is scored in the same manner and compared to the applications received within the specific facility type. [197]

The Department limited the number of facility licenses to the minimum number of licenses required by the Missouri Constitution.[198] The licenses were capped at sixty (60) cultivation facility licenses; eight-six (86) manufacturing licenses; and twenty-four (24) dispensary licenses in each of Missouri's eight Congressional Districts.[199]

The number of facility license applications submitted to the Department exceeded the number of available licenses. Thus, applicants needed their application to score within the top number of applications for the available licenses because any application receiving a total score below the top 60 cultivation, 86 manufacturing, and 24 dispensary (per Cong. Dist.) scores meant no license for the applicant.

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[197] D76; P7 (Pet. Exh. 23 at 007).
[198] 19 CSR 30-95.050(1)(A); 19 CSR 30-95.060(1)(A); 19 CSR 30-95.080(1)(A).
[199] D51 (Tr. Vol. 1A at 50).

Electronically Filed - SUPREME COURT OF MISSOURI - July 22, 2026 - 06:11 PM

Electronically Filed - SUPREME COURT OF MISSOURI - July 22, 2026 - 06:11 PM

Wise graded the facility license applications, and the Department used the application scores received from Wise and accepted those scores as valid scores.[200]

There is no dispute Hippos' facility license applications met the minimum standards for licensure; the applications Hippos submitted that were denied were denied solely on the results of ranking and scoring.[201]

A. Rescoring of Cultivation Applications

After the applications were scored, the Department released the scoring by facility type. The lowest-scoring cultivation applicant to receive a license, GF Saint Mary, LLC, received a total score of **1,479.41** points.[202] Hippos' cultivation applications received total scores of: **1,481.33** on App. 9067 (HIPP9708); **1,440.13** on App. 8997 (HIPP9706); and **1,439.73** on App. 9072 (HIPP9707).[203]

Based upon the weight of the evidence, Hippos should have received the following scores for submitting identical applications as those submitted in App. 9067 (HIPP9708) which was granted a cultivation facility license:

Application	Old Total Score	New Total Score
8997 (HIPP9706)	1,440.13	1,481.33
9072 (HIPP9707)	1,439.73	1,481.33

[200] D51 (Tr. Vol 1A at 141: 12-15).
[201] D243, D244, D255, D51 (Tr. 1A at 125: 12-19, 125: 23-25, 126: 1-17).
[202] D66; P2 (Pet. Exh. 3 at 00502); D60 (Pet. Dem. Exh. 4).
[203] D66; P2 and P4 (Pet. Exh. 3 at 00502, 504); D57 (Pet. Dem. Exh. 1).

Electronically Filed - SUPREME COURT OF MISSOURI - July 22, 2026 - 06:11 PM

A total application score of 1,481.33 would have placed Hippos' two (2) cultivation facility license applications within the 60 top-scoring cultivation applications.

Alternatively, based upon the weight of the evidence/lack of competent and substantial evidence, specifically the uncontradicted and unimpeached testimony of Hippos' expert witnesses, Hippos should have received the following scores which also would have resulted in licenses as it placed Hippos' two (2) cultivation applications within the 60 top-scoring cultivation applications:

Application	Old Total Score	New Total Score
8997 (HIPP9706)	1,440.13	1,534.66
9072 (HIPP9707)	1,439.73	1,536.46

B. Rescoring of Manufacturing Applications

The lowest-scoring manufacturing applicant to receive a license, Bloom Medicinals of MO, LLC[204], received a total score of **1,526.16** points.[205] Hippos' manufacturing applications received total scores of: **1,391.39** on App. 9064 (HIPP9709); **1,391.99** on App. 8901 (HIPP9710), App. 9056 (HIPP9711), App. 10329 (HIPP9712), and App. 10327 (HIPP9713); and **1,383.19** on App. 10333 (HIPP9714).[206]

[204] Additional manufacturing licenses were issued by the Department (D51 Tr. 1A at 156; l. 1-11) after the initial release, but as it does not impact the analysis in this matter Hippos will rely upon the score awarded to Bloom Medicinals for simplicity.
[205] D67 (**Pet. Exh. 4** at 00527); D60 (**Pet. Dem. Exh. 4**).
[206] D67 (**Pet. Exh. 4** at 00530); D60 (**Pet. Dem. Exh. 4**).

Electronically Filed - SUPREME COURT OF MISSOURI - July 22, 2026 - 06:11 PM

Based on the weight of the evidence, as more fully discussed herein and contained in the record, Hippos should have received the following scores:

Application	Old Total Score	New Total Score
9064 (HIPP9709)	1,391.39	1,528.79
8901 (HIPP9710)	1,391.99	1,528.79
9056 (HIPP9711)	1,391.99	1,528.79
10329 (HIPP9712)	1,391.99	1,528.79
10327 (HIPP9713)	1,391.99	1,528.79
10333 (HIPP9714)	1,383.19	1,528.79

A score of 1,528.79 would place each of Hippos' six (6) manufacturing facility license applications within the 86 top-scoring manufacturing applications and qualified Hippos to receive a license for each manufacturing application.

C. Rescoring of Dispensary Applications

The lowest-scoring dispensary applicants to receive a license in the relevant Congressional Districts were: Growing Jobs Missouri LLC in Cong. Dist. 1, which received a total score of **1,496.71**; LSL Management LLC in Cong. Dist. 2, which received a total score of **1,487.44**; and TC AppliCO LLC in Cong. Dist. 5, which received a total score of **1,513.83**.[207]

[207] D252; P1-2 (**Resp. ex. EB** at pp. 1, 2).

Electronically Filed - SUPREME COURT OF MISSOURI - July 22, 2026 - 06:11 PM

Hippos' dispensary applications received total scores of: **1,393.78** on App. 9803 (HIPP9703) and App. 9076 (HIPP9705) in Cong. Dist. 1; **1,393.78** on App. 9080 (HIPP9704) in Cong. Dist. 2; and **1,393.78** on App. 9093 (HIPP9701) and App. 9088 (HIPP9702) in Cong. Dist. 5).[208]

Based on the weight of the evidence, as more fully discussed herein and contained in the record, Hippos should have received at least the following scores:

Application	Old Total Score	New Total Score
9803 (HIPP9703)	1,393.78	1,557.88
9076 (HIPP9705)	1,393.78	1,557.88
9080 (HIPP9704)	1,393.78	1,557.88
9093 (HIPP9701)	1,393.78	1,555.48
9088 (HIPP9702)	1,393.78	1,555.48[209]

Hippos new scores would place each of Hippos' five (5) dispensary facility license applications within the top 24 scoring dispensary applications in the Congressional District for which the application was made, and qualified Hippos to receive a license for each dispensary application.

On February 17, 18, and 19, 2021, the AHC received evidence and heard testimony and argument from Hippos and the Department. The Department filed

[208] D252; P2, 3, and 7 (**Resp. ex. EB**); D57 and D59 (**Pet. Dem. Exhs. 1, 3**).
[209] While unnecessary to obtain a license, the new total score for HIPP9702 would be 1,631.33 based upon the House District Bonus.

Electronically Filed - SUPREME COURT OF MISSOURI - July 22, 2026 - 06:11 PM

proposed findings of fact and conclusions of law on June 7, 2021, and Hippos' filed its proposed findings and conclusions on June 18, 2021.

The AHC Decisions denying Hippos' medical marijuana facility license applications are not supported by competent and substantial evidence upon the whole record, are arbitrary and capricious, constitute an abuse of discretion, and are contrary to the overwhelming weight of the evidence and for these reasons, as more fully discussed herein, the Court should reverse the AHC Decisions and direct the Department to issue Hippos medical marijuana facility licenses for each medical marijuana facility license application that was denied.

I. The Commission erred in entering a decision against Hippos affirming the Department's denial of Hippos' two (2) applications for a medical marijuana cultivation facility license because the Decision was not supported by competent and substantial evidence in that the Commission improperly disregarded the uncontradicted and unimpeached expert testimony of Ashley Picillo and Joe Patterson.

Preservation Statement

This error was preserved. Hippos challenged the scoring of certain Questions in its cultivation license applications on the bases of inconsistent scoring and errors in scoring, and offered the expert testimony of Ashley Picillo and Joe Patterson on what the score for

each Question at issue should have been.[210] The AHC rejected that argument in its Amended Decision.[211] The applicable standard of review is whether the AHC's action was supported by competent and substantial evidence.[212]

Argument

An administrative agency acts unreasonably and arbitrarily if its decision is not based on substantial evidence.[213] Substantial evidence is competent evidence that, if believed, has probative force upon the issues.[214] An agency's failure to consider important aspects or factors of the issue can support a finding that the decision was arbitrary and capricious.[215]

In addition to these general principles regarding arbitrary and capricious action and lack of substantial and competent evidence, Missouri case law prohibits the AHC from ignoring certain testimony and evidence. The AHC may not arbitrarily disregard substantial and undisputed testimony of expert witnesses who were not impeached or shown by the record to have been disbelieved.[216] While an agency, in determining a

[210] D50, p. 160-161.
[211] D50, p. 160-161.
[212] §536.140, RSMo.
[213] *Jefferson City Apothecary, LLC v. Mo. Bd. of Pharmacy*, 499 S.W.3d 321, 330 (Mo.App. W.D. 2016).
[214] *Missouri Real Estate Comm'n v. Held*, 581 S.W.3d 668, 675–76 (Mo.App. W.D. 2019).
[215] *Id.*
[216] *State ex rel. Kahler v. State Tax Comm'n*, 393 S.W.2d 460, 465 (Mo. 1965).

Electronically Filed - SUPREME COURT OF MISSOURI - July 22, 2026 - 06:11 PM

question of fact, may pass upon the credibility of a witness, where there is no finding of lack of credibility the testimony **may not be ignored**.[217]

This requirement that to disregard expert testimony there must be a clear finding is not unique to Missouri. *See CenterPoint Energy Entex v. Railroad Com'n of Texas*, 213 S.W.3d 364, 373 (Tex. App. 2006) (holding that while an agency can reject unimpeached and uncontradicted expert testimony, it must provide a basis for that rejection); *Matter of Dykas*, 619 A.2d 660, 664 (N.J. App. Div. 1993) (holding that where uncontroverted expert evidence is rejected in an administrative proceeding, reasons must be given); *In re Glenville*, 565 N.E.2d 623, 627 (Ill. 1990) (holding that uncontradicted and unimpeached expert testimony cannot be rejected arbitrarily).

Here, the AHC ignored the testimony of expert witnesses Ashley Picillo and Joe Patterson concerning inconsistency of the scoring, and the correct scores that should have been assigned if the scoring was consistent. Instead of considering the weight of that testimony, the AHC simply concluded that because the scoring process was subjective that reasonable minds may disagree as to the appropriate score for each answer. Based on that conclusion, the AHC utilized only the scores awarded by the scorers in its analysis. Simply put, the AHC was not free to ignore the uncontradicted expert testimony and simply rely on the admitted inconsistent scoring performed by the scorers.[218]

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[217] *Id.*
[218] *Id.*

Electronically Filed - SUPREME COURT OF MISSOURI - July 22, 2026 - 06:11 PM

Electronically Filed - SUPREME COURT OF MISSOURI - July 22, 2026 - 06:11 PM

As noted, scoring consistency was very important. In fact, the Work Plan created by Wise, and approved by the Department, stated that "The most important part of the [scorer's] job is being **consistent** in grading so that each application is scored in the same manner and compared to other applications received within the specific facility type."[219]

Similarly, the Department's scoring instructions reiterated the importance of consistent scoring; "It is imperative that every response is scored in a **consistent** manner for all applicants."[220] There are numerous examples of the importance of consistent scoring set forth in the Cultivation Decision: (i) the Wise training manual states "…consistency across all applications is of the utmost importance!"; (ii) the Department instructed scorers to score responses in a consistent manner with identical responses receiving the same score; and (iii) the Wise work plan required graders to perform mock scoring and Wise committed to perform a post scoring review.[221]

Despite the preeminence of consistency, the evidence is undisputed that Wise did not score the applications consistently. The AHC noted that "more than one in ten responses in Hippos' applications contained instances of inconsistent scoring."[222] Picillo also testified that the scorers failed to apply the Scoring Table consistently.[223] This testimony was uncontradicted. Additionally, Mr. Sean Maddocks testified that "scoring was inconsistent by the department across multiple applications." The AHC's crude

[219] D50; P103-104 *citing* D59 at 7 (emphasis added); App A1.
[220] D79; P2 (Pet. Exh. 26 pt. 1 at 00043 (emphasis added)).
[221] D50; P103; App A1.
[222] *Id.*
[223] D55 (Tr. 3A at 780: 6-11).

attempt to rectify the inconsistency by using mode scoring is itself an admission of the inconsistency yet fails to fix it. Based on the AHC's stated finding, and the uncontradicted testimony presented by Hippos, the scoring by the scorers, including application of the Evaluation Criteria Scoring Table, was inconsistent.

Consistency in the scoring was a central issue in the AHC's Decisions. The AHC stated its reasoning for disregarding the testimony of Picillo and Patterson on the issue of consistency:

> Hippos challenges the scores it received for Questions . . . [that] were scored on the subjective 0-10 scale. As such, we find that any score for these questions could be the correct score depending on the subjective valuation of its scorer.
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> As discussed throughout this decision, the Department's scoring system hinged on the subjective determinations of its scorers. **So long as those determinations are consistent, we find that reasonable minds may disagree as to the appropriate score for any given question.** Although Picillo and Patterson possess expertise related to their respective fields, their determinations regarding what constitutes "minimum expectations," "material weaknesses," and other subjective considerations represent only their individual opinions; they do not disprove the validity of the original scorers' determinations who evaluated all responses to a single question within a specific facility type.[224]

[224] D50; P160 (emphasis added); App A1.

Electronically Filed - SUPREME COURT OF MISSOURI - July 22, 2026 - 06:11 PM

Electronically Filed - SUPREME COURT OF MISSOURI - July 22, 2026 - 06:11 PM

This makes abundantly clear that the premise "reasonable minds may disagree" only applies, in the AHC's view, if the determination of value or scoring are consistent.

But here the record establishes that the AHC determined scores were awarded to Hippos' answers inconsistently, and Picillo's expert testimony that the Scoring Table Criteria was not applied consistently was uncontroverted. In other words, while reasonable minds may differ if the scoring is consistent, the scoring performed here was inconsistent and the AHC, therefore, improperly used this so-called "reasonable minds" logic that resulted in improperly ignoring the expert testimony of Picillo and Patterson. Application of the reasonable minds may differ logic is further flawed because the undisputed evidence was that a single Wise scorer, using the same mind, frequently awarded different scores to identical answers.

Importantly, the AHC lacks the authority to take away licenses.[225] Therefore, for this Court to treat the three identically situated cultivation applications the same and remedy the AHC's affirmation of the Department's arbitrary and capricious actions, the AHC's Amended Decision should be reversed and licenses awarded to Applications 8997 and 9072.

Alternatively, the scoring inconsistencies in the record create the need to determine the scores Hippos should have received, based on the substantial and competent testimony presented and the whole record. Simply because the Department declined to offer testimony from any of the scorers or (despite the repeated instruction to

[225] D50: P165; App A1.

the scorers to take notes) any scorer notes,[226] does not mean therefore that the AHC is free to disregard the uncontroverted and unchallenged opinion testimony of two experts Hippos produced and other uncontroverted documentary evidence. The absence of scorer testimony and notes only heightens or increases the probative force of Picillo and Patterson's testimony upon the issues.

In sum, the AHC's sole reliance on the pure scores assigned by the scorers, many of whom are inconsistent with themselves, is not only inconsistent with the AHC's position the "reasonable minds" logic is limited to consistent scoring, but it impermissibly ignores Hippos' uncontradicted expert testimony in contravention of *State ex rel. Kahler.*

Because the AHC was not free to rely solely on pure scores awarded by the scorers, the AHC was required to give weight to – rather than ignore – the uncontradicted expert testimony of Picillo and Patterson regarding what Hippos' answer scores should have been. The uncontradicted expert testimony of Picillo was that Hippos' answers to Questions 3, 26-27, 41, 44, 50, 51-52, and 66-67 should have received higher scores.[227] The uncontradicted expert testimony of Patterson was that Question 59 should have received a higher score.[228] It is unnecessary to re-examine the specific analysis for each question performed by each expert as the Department did not present contrary testimony,

[226] The Amended Decision notes that the graders' manual encouraged the scorers to take notes, but none of the individuals scoring Hippos' applications made any substantive notes. D50; P106; App A1.
[227] *See* D65; App A187.
[228] *Id.*

Electronically Filed - SUPREME COURT OF MISSOURI - July 22, 2026 - 06:11 PM

and the AHC found that Picillo and Patterson possessed expertise related to their fields.[229]

Important to note, Picillo and Patterson did not base their testimony solely on Hippos' application answers, but also upon the scoring of various applications responses they each prepared in response to the questions. For example, Picillo testified that her opinions were based in part on the scores received by her clients on Missouri applications.[230] The Cultivation Decision makes no mention of this testimony, and instead erroneously states that Picillo and Patterson's opinions were based (solely) on their subjective experience and expertise.[231] Given the stated importance of consistency in the scoring the fact that Hippos' experts based their evaluation upon actual scores awarded by the scorers, this expert testimony should not have been ignored.

Substantial evidence is competent evidence that, if believed, has probative force upon the issues.[232] A record showing the applications were scored inconsistently, Picillo's uncontradicted testimony that the scorers failed to apply the scoring criteria consistently, Picillo and Patterson's uncontradicted expert testimony of what Hippos' answer scores should have been, coupled with the lack of any testimony or notes from any scorer that might possibly bear on these issues, serve to establish that the Cultivation Decision is not supported by substantial and competent evidence.

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[229] D50; P160; App A1.
[230] D55 (Tr. 3A at 779: 1, 14-17).
[231] D50; P160; App A1.
[232] *Missouri Real Estate Comm'n v. Held*, 581 S.W.3d 668, 675–76 (Mo.App. W.D. 2019).

Electronically Filed - SUPREME COURT OF MISSOURI - July 22, 2026 - 06:11 PM

Electronically Filed - SUPREME COURT OF MISSOURI - July 22, 2026 - 06:11 PM

The law requires the AHC to give weight to the uncontradicted expert testimony of Patterson and Picillo regarding what the scores should have been. An agency's failure to consider important aspects or factors of the issue, as is this case, can support a finding that the decision was arbitrary and capricious."[233]

For the foregoing reasons, this Court should reverse the Cultivation Decision and award Hippos two (2) cultivation licenses as the evidence presented establishes that Hippos should have received scores within the sixty (60) highest scoring cultivation facility license applications.

II. The Commission erred in entering a decision against Hippos affirming the Department's denial of Hippos' five (5) applications for a medical marijuana dispensary facility license because the Decision was not supported by competent and substantial evidence in that the Commission improperly disregarded the uncontradicted and unimpeached expert testimony of Ashley Picillo and Joe Patterson.

Preservation Statement

This error was preserved. Hippos challenged the scoring of certain Questions in its dispensary license applications on the bases of inconsistent scoring and errors in scoring, and offered the expert testimony of Ashley Picillo and Joe Patterson as for what the score for each Question should have been.[234] The AHC rejected that argument in its

[233] *Hundley v. Wenzel*, 59 S.W.3d 1, 8 (Mo.App. W.D. 2001).
[234] D431, p. 45-69.

Electronically Filed - SUPREME COURT OF MISSOURI - July 22, 2026 - 06:11 PM

Decision.[235] The applicable standard of review is whether the AHC's action was supported by competent and substantial evidence.[236]

Argument

An administrative agency acts unreasonably and arbitrarily if its decision is not based on substantial evidence.[237] Substantial evidence is competent evidence that, if believed, has probative force upon the issues.[238] An agency's failure to consider important aspects or factors of the issue can support a finding that the decision was arbitrary and capricious. *Id*. The AHC may not arbitrarily disregard substantial and undisputed testimony of expert witnesses who were not impeached or shown by the record to have been disbelieved.[239] While an agency, in determining a question of fact, may pass upon the credibility of a witness, where there is no finding of lack of credibility the testimony **may not be ignored**.[240]

For sake of brevity, Hippos will not restate the analysis in detail, but rather simply notes that the AHC in its Dispensary Decision impermissibly again ignored Picillo's and Patterson's uncontradicted expert testimony and documentary evidence, and incorrectly

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[235] D431, p. 45-69.
[236] §536.140, RSMo.
[237] *Jefferson City Apothecary, LLC v. Mo. Bd. of Pharmacy*, 499 S.W.3d 321, 330 (Mo.App. W.D. 2016).
[238] *Missouri Real Estate Comm'n v. Held*, 581 S.W.3d 668, 675–76 (Mo.App. W.D. 2019).
[239] *State ex rel. Kahler v. State Tax Comm'n*, 393 S.W.2d 460, 465 (Mo. 1965).
[240] *Id.*

Electronically Filed - SUPREME COURT OF MISSOURI - July 22, 2026 - 06:11 PM

applied the "reasonable minds may disagree" logic.[241] Consistency in the scoring was a central issue in the AHC's Dispensary Decision. The AHC stated its reasoning for disregarding the testimony of Picillo and Patterson on the issue of consistency as follows:

> Hippos challenges the scores it received for Questions . . . [that] were scored on the subjective 0-10 scale. As such, we find that any score for these questions could be the correct score depending on the subjective valuation of its scorer.
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>
> As discussed throughout this decision, the Department's scoring system hinged on the subjective determinations of its scorers. **So long as those determinations are consistent, we find that reasonable minds may disagree as to the appropriate score for any given question.** Although Picillo and Patterson possess expertise related to their respective fields, their determinations regarding what constitutes "minimum expectations," "material weaknesses," and other subjective considerations represent only their individual opinions; they do not disprove the validity of the original scorers' determinations who evaluated all responses to a single question within a specific facility type.[242]

Emphasis added.

However, as the AHC noted, that logic can only be applied if the scoring determinations are consistent. The evidence reflects that the scoring was not consistent.

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[241] D431; P55.
[242] *Id.* at P54-55 (emphasis added).

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This evidence includes the uncontradicted expert testimony of Picillo, and the factual evidence that one in ten responses in Hippos' applications were scored inconsistently.[243]

Even though the AHC ignores the uncontroverted testimony of Picillo and Patterson, the AHC acknowledges each witness's impressive background directly applicable to their testimony. For example, the AHC notes in the Dispensary Decision that through her company, Point 7, LLC, Picillo wrote approximately 50 applications for Missouri's Medical Marijuana Program, 42 of which were awarded licenses.[244] The astonishing success of Hippos' expert witness in Missouri cannot be ignored and is evidence of her knowledge, understanding, and mastery of the application questions and that of which appropriate responses consist.

Patterson's background is equally impressive and applicable. A former member of law enforcement with a degree in criminal justice, Patterson wrote responses for security questions for thirty-three (33) applicants.[245] Half of Patterson's clients received licenses.[246] Again, this success rate cannot be ignored and is evidence of his knowledge, understanding, and mastery of the application questions and that of which appropriate responses consist.

The AHC's failure to consider and give weight to the expert testimony of these two highly accomplished and knowledgeable individuals is dispositive on the issue of

[243] *Id.* at P45.
[244] *Id.* at P10.
[245] *Id.* at P10-11.
[246] *Id.*

Electronically Filed - SUPREME COURT OF MISSOURI - July 22, 2026 - 06:11 PM

scoring; however, something else highlights the degree to which the AHC improperly ignored the expert testimony.

Patterson reviewed and provided testimony concerning Hippos' dispensary application answers to Questions 55-60.[247] Those questions all concern security of the facilities and, more importantly, with the exception of Question 60, all start with the phrase "[w]ill your security exceed the minimum requirements established by Rule[?]"[248] Patterson testified, and his testimony was uncontradicted, that for those questions, the "minimum expectations" in the Scoring Table means meeting the minimum requirements of the cited-Regulation.[249]

Because the "minimum expectations" for those specific questions are established by Regulation, the analysis of those questions is not subjective but objective. The Dispensary Decision fails to mention or refer to this testimony or the indisputable fact that the security questions, because they have a specific minimum expectation, are unique. The AHC impermissibly ignored this evidence.

As noted, substantial evidence is competent evidence that, if believed, has probative force upon the issues.[250] As a result of (1) the AHC's finding that the scoring performed by Wise was inconsistent, (2) Picillo's uncontradicted testimony that the scorers failed to apply the scoring criteria consistently, (3) the absence of testimony by

[247] D52 (Tr. 2B at 573: 19-22).
[248] D431; P20-25.
[249] D52 (Tr 2B at 553: 14-22).
[250] *Missouri Real Estate Comm'n v. Held*, 581 S.W.3d 668, 675–76 (Mo.App. W.D. 2019).

any scorer or notes that might reflect some consistency in scoring, and (4) the uncontradicted expert testimony of Consultants of the Year Picillo and Patterson as to what the scores should have been, the Dispensary Decision is not supported by substantial and competent evidence.

The AHC, as a matter of law, should have given weight to the uncontradicted expert testimony of Patterson and Picillo regarding the inconsistency of the scoring by Wise and what the scores should have been. An agency's failure to consider important aspects or factors of the issue can support a finding that the decision was arbitrary and capricious."[251] Therefore, this Court should reverse the Dispensary Decision and award Hippos five (5) dispensary licenses as the evidence presented establishes that Hippos should have received scores within the top twenty four (24) dispensary facility license applications in the relevant Congressional District for each application.

[251] *Hundley v. Wenzel*, 59 S.W.3d 1, 8 (Mo.App. W.D. 2001).

Electronically Filed - SUPREME COURT OF MISSOURI - July 22, 2026 - 06:11 PM

Electronically Filed - SUPREME COURT OF MISSOURI - July 22, 2026 - 06:11 PM

III. The Commission erred in entering a decision against Hippos affirming the Department's denial of Hippos' two (2) applications for a medical marijuana cultivation facility license because it violates the prohibition on arbitrary and capricious actions by an administrative agency in that the Department's denial treats identically situated applications differently.

Preservation Statement

This error was specifically raised in and preserved via Hippos' Motion to Reconsider.[252] The AHC rejected that argument in its Amended Decision.[253] The applicable standard of review is whether the AHC's decision was arbitrary and capricious.[254]

Argument

During the hearing, in the briefing process, and in the Amended Decision, there was substantial discussion and argument regarding the raising and lowering of scores of Hippos for answers to specific questions, and how that should be accomplished given the indisputably inconsistent scoring by Wise and the Department. Those issues are discussed in more detail in other sections of this Brief, but with respect to the two denied cultivation applications that analysis is entirely unnecessary because the Department, due to the prohibition on arbitrary and capricious action, cannot treat three identically situated applicants differently. Missouri law prohibits an administrative agency from taking

[252] *See* D49, p. 129-130.
[253] D50, p. 164-165.
[254] §536.140, RSMo.

Electronically Filed - SUPREME COURT OF MISSOURI - July 22, 2026 - 06:11 PM

arbitrary and capricious actions, and an example of that is treating two or more similarly situated applicants differently.[255]

The pertinent undisputed facts are: (1) Hippos submitted three identical cultivation applications; (2) one of the applications with identical answers was awarded a license; and (3) two of the applications with identical answers were denied a license. Missouri law, specifically the *Wolfner* case, notwithstanding, the AHC held that the Department did not act arbitrarily or capriciously when it granted a license to one application and denied a license to two identical applications. The AHC, in its Amended Decision, drew a distinction between *Wolfner* and the present case, and stated that the Department can only ascertain whether the denied applicants qualified for a license.

Wolfner v. Bd. of Adjustment of City of Frontenac involved the denial of a building permit for construction, and a challenge that the Board of Adjustment acted arbitrarily and capriciously by granting a permit to one applicant and denying a permit to a similarly situated applicant.[256] The purported distinction drawn by the AHC was that *Wolfner* involved the discretionary granting of a variance and not the granting of a license. The variance versus license analysis is a distinction without a difference. By law, an administrative agency is prohibited from any arbitrary and capricious action.[257] Whatever distinction may exist between granting a variance instead of a license, as in *Wolfner*, does

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[255] *Wolfner v. Bd. of Adjustment of City of Frontenac*, 672 S.W.2d 147, 151 (Mo.App. E.D. 1984); *See* §536.140, RSMo.; App. A185.
[256] *Wolfner* at 147.
[257] *See* §536.140, RSMo.; App. A185; *Wolfner v. Bd. of Adjustment of City of Frontenac*, 672 S.W.2d 147, 151 (Mo.App. E.D. 1984).

not therefore mean an administrative agency is free to act arbitrarily or capriciously in the context of competitive licensing. The statutory prohibition on arbitrary and capricious action, by its terms, applies to all actions.

As to the AHC's position concerning its role and the license process, respectfully, the AHC misstates its role here. The AHC's role in this appeal, was not to discern whether Hippos met the qualifications for a license. As noted in the Amended Decision, and evidenced by the fact that Hippos was awarded one license for a facility in Vienna, Missouri, Hippos met the qualifications for a license.[258] The role of the AHC, with respect to this particular issue, was to determine if the Department's actions were arbitrary and capricious.

By law, an administrative agency is prohibited from taking action which is arbitrary and capricious.[259] There is no dispute that Applications 8997, 9067, and 9072 were identically situated, but that Application 9067 was treated differently than Applications 8997 and 9072. This is a textbook example of an action, i.e., denial of a license application, which is arbitrary and capricious because there is no legitimate and justifiable explanation for how an agency can treat three identical applications differently. As such, the only issue here is whether, in order to treat the three identically situated applicants the same, the license awarded to Application 9067 should be revoked or licenses should be awarded to Applications 8997 and 9072.

[258] D50; P107; App A1.
[259] *See* §536.140, RSMo.; App. A185.

Electronically Filed - SUPREME COURT OF MISSOURI - July 22, 2026 - 06:11 PM

Electronically Filed - SUPREME COURT OF MISSOURI - July 22, 2026 - 06:11 PM

The decision should be apparent. As noted in the Amended Decision, the AHC lacks the authority to take away licenses.[260] Therefore, in order to treat the three identically situated applications the same and avoid violation of the prohibition on arbitrary and capricious action, this Court must reverse the Amended Decision and award cultivation licenses to Applications 8997 and 9072.

IV. The Commission erred in entering a decision against Hippos affirming the Department's denial of Hippos' two (2) applications for a medical marijuana cultivation facility license because the Decision was not supported by competent and substantial evidence in that the Decision relied upon the "subjective preferences" of the scorers but the Department did not offer competent and substantial evidence of the scorers' preferences.

Preservation Statement

This error was preserved. Hippos challenged the scoring of certain Questions in its cultivation license applications on the bases of inconsistent scoring and errors in scoring, and the AHC rejected that argument in its Amended Decision.[261] The applicable standard of review is whether the AHC's action was supported by competent and substantial evidence.[262]

[260] D50; P165; App A1.
[261] D50, p. 149-166.
[262] §536.140, RSMo.

Electronically Filed - SUPREME COURT OF MISSOURI - July 22, 2026 - 06:11 PM

Argument

The Cultivation Decision examined first whether the scores assigned answers to the application questions at issue vary significantly from other scores assigned to identical answers to the same questions. The AHC properly concluded, and implicitly agreed with Hippos that the scoring accepted by the Department was arbitrary; specifically, where identical answers to the same question received different scores, the scores varied significantly and should be re-scored.

The AHC found: [fix formatting of par. below]

> The Department instructed scorers to score responses in a consistent manner with
> identical responses from the same applicant receiving the same scores. Having different scores for identical responses is contrary to the process established by the Department, defeats the principle purpose of the "ranked" system described in 19 CSR 19 CSR 30-95.025(4)(C)2.A, and must be corrected for consistency to the extent the evidence warrants it.[263]

For identical answers to nine separate questions, Hippos received different scores for identical answers in the three cultivation license applications.[264] These questions were evaluated on a score of either 0, 4, 7 or 10. The AHC's premise to re-scoring these questions was that because the application questions were scored subjectively, "we look for evidence reflecting the scorer of that question's subjective valuation."[265] The AHC reasoned that "[t]he actual scores assigned to identical answers by [the] scorers" provide

[263] D50; P151; App A1.
[264] *Id*. at P108.
[265] *Id*. at P151.

the "most concrete indication" in the record of the scorers' so-called subjective preferences.[266] The uncontroverted and unchallenged opinion testimony of two experts Hippos produced and other documentary evidence, the AHC found "pale in comparison to the weight these scores carry for identical responses to the same question."[267]

For example, if an identical answer received a score of 7 and a score of 10, the AHC tried to determine which was the preferred score. The choices are either 7 or 10, and *not*, for reason shown below, 7, 7, 7, 10 or 10.

In examining each of the nine questions the AHC did not determine the scorers' so-called subjective preferences by a comparison of two inconsistent scores, as its premise suggests. Instead, the AHC quietly slipped the frequency of scores into the mix.

On Question 48, for instance, Hippos received scores of 4, 4, and 7.[268] Instead of using the score of 4 and the score of 7 to decide the scorer's subjective preference, the AHC pivoted and re-scored Question 48 by finding the choices were, consistent with the example above, 4, 4, or 7, and used all three scores.

Conveniently, the AHC reasoned that because Hippos received *more* 4s than 7s for Question 48, "the preponderance of the evidence is that a score of 4 is the appropriate score for this question."[269] This reasoning improperly conflates "most frequent score" with "appropriate score."

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[266] *Id*. at P151-152.
[267] *Id*. at P152.
[268] *Id.* at P153.
[269] *Id.*

Electronically Filed - SUPREME COURT OF MISSOURI - July 22, 2026 - 06:11 PM

Electronically Filed - SUPREME COURT OF MISSOURI - July 22, 2026 - 06:11 PM

The notion that a wrong score awarded often enough will thereby make it the right score is a clear flaw in the AHC's reasoning. And the AHS used this flawed rationale and scoring method with all nine questions.[270]

In addition to using this flawed rationale to choose the score of 4, the AHC also ignored the uncontroverted expert testimony and documentary evidence offered by Appellant. Such disregard is true of all the remaining "re-scores" by the AHC and detailed hereinbelow. Had the AHC properly considered the uncontradicted and unimpeached expert testimony and documentary evidence, the AHC would have fulfilled its duty to find the one score for the identical answers. Instead, the AHC left the Appellant with two different scores for identical answers.

For Question 48, the preponderance of the number set 4, 4, and 7 points simply to 4 as the mode, *i.e.*, most frequently occurring number. Pawning the mode off as the tiebreaker or so-called subjective preference for re-scoring Question 48 is conjecture due to the AHC's finding of widespread inconsistency in scoring by the graders and absence of any evidence regarding what the scorers actually did. This is equally true of all the other cultivation questions that the AHC re-scored on this basis.

The record not only discloses the Department's position that Hippos "received the correct score" for each inconsistently scored question,[271] but that the scores in App. 9067 (HIPP9708) gave the application a total score sufficient to be awarded a cultivation

[270] *Id* at P153-159.
[271] *Id.* at P151, *citing* the Department's brief.

Electronically Filed - SUPREME COURT OF MISSOURI - July 22, 2026 - 06:11 PM

license. And the scores for that winning application are not subject to review or reconsideration.[272]

The AHC determined that "the Department mistakenly assigned different scores to identical answers for applicants of the same facility type"[273] The preponderance of the evidence is the scores Hippos received for its answers in App. 9067 (HIPP9708) are correct scores upon which the Department issued Hippos a cultivation license and are the scores, therefore, preferred by, and admitted by, the Department as the most accurate scores.

The record demonstrates that denial of Hippos' cultivation applications by the AHC was arbitrary and capricious under the circumstances and not supported by competent and substantial evidence.

[272] *Id.* at P165 ("[o\f course, we did not rescore Application 9067 because our authority is limited to denials of facility applications."), *citing* Mo. Const. art. XIV § 1.3(23), 19 CSR 30-95.025(6)(A)(1).
[273] D50; P165; App A1.

Electronically Filed - SUPREME COURT OF MISSOURI - July 22, 2026 - 06:11 PM

V. The Commission erred in entering a decision against Hippos affirming the Department's denial of Hippos' six (6) applications for a medical marijuana manufacturing facility license because the Decision was not supported by competent and substantial evidence in that the assigned scorer for the answer to Question 64 lacked the appropriate background and expertise to score the answer.

Preservation Statement

This error was preserved. Hippos challenged the scoring of Question 64 on its manufacturing license applications.[274] Specifically, Hippos' challenged the scoring of Tina Szopinski[275] on the basis that she lacked the proper background and expertise to score Question 64.[276] The AHC declined to rescore Question 64 in its Decision.[277] The applicable standard of review is whether the AHC's action was supported by competent and substantial evidence.[278]

Argument

Question 64 was common to the all facility-type license applications, and it asked applicants to describe the experience in the legal cannabis market of their principal officers or managers.[279]

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[274] D436, p. 70.
[275] D65, p. 3-4.
[276] *See* D55 (Tr. Vol. 1A, p. 38, l. 19-25; p. 149, l. 17 – p. 151, l. 19); *See also*, D383, p. 28-31.
[277] D436, p. 70-71.
[278] §536.140, RSMo.
[279] D141; P5.

Electronically Filed - SUPREME COURT OF MISSOURI - July 22, 2026 - 06:11 PM

Wise was contractually required to assign each question to a scorer who possessed the appropriate background and expertise to evaluate the particular question and the answer.[280] Wise assigned Tina Szopinski to score all answers to Question 64 submitted in the manufacturing facility license applications.[281] Jacob Cohen was assigned to score all answers to Question 64 submitted in the cultivation and dispensary facility license applications.[282] Its contract with Wise gave the Department final approval of the persons Wise assigned to score each question

Neither Ms. Szopinski's resume[283] nor any other part of the record shows Ms. Szopinski had any experience or background in cannabis or in business evaluation and analysis.[284] Mr. Cohen on the other hand was qualified to score Question 64 because of his experience as a business analyst including analyzing companies in the cannabis industry.[285]

Given Ms. Szopinski's demonstrable lack of appropriate background and expertise, Hippos argued the answer to Question 64 in the manufacturing facility license applications should be re-scored. The evidence Hippos offered was the score of 10 Mr. Cohen awarded the Hippos' identical answer in its cultivation and dispensary license

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[280] *Id.*
[281] *Id.,* D268; P2. Ms. Szopinski also awarded Hippos answers to Question 68 in the manufacturing license applications an incorrect score. *See* D436; P69; App A69.
[282] D51 (Tr. 1A at 150:18-24).
[283] *Id.*; D121; App A193.
[284] D121; App A193; S*ee also* D51 (Tr. 1A at 149: 22-24).
[285] D121; App A193.

applications; 8 total scores of 10.[286] The Department provided no testimony or evidence as to what the re-score should be, other than relying on the scoring by Ms. Szopinski, who plainly lacked the ability to properly evaluate and score the answers to Question 64.

The AHC declined to correct the incorrect scores of 4 that Hippos received for its answers to Question 64 in its manufacturing applications, despite the plain and clear evidence, including Ms. Szopinski's resume, that she was not qualified to score the Question. The AHC turned a blind eye to the lack of evidence of, and Hippos' arguments about Ms. Szopinski's qualifications. In fact, the AHC failed to even address Hippos' arguments about Ms. Szopinski's qualifications.

Whether the AHC's Manufacturing Decision is supported by competent and substantial evidence requires examining the evidence in the context of the whole record.[287] A decision contrary to the overwhelming weight of the evidence is one not supported by competent and substantial evidence.[288] Substantial evidence is competent evidence that, if believed, has probative force upon the issues.[289]

Hippos received inconsistent scores for identical answers to Question 64 in its cultivation, manufacturing, and dispensary applications. The overwhelming evidence was that Ms. Szopinski was not qualified to score Question 64, but Jacob Cohen was qualified to score Question 64. Therefore, the score assigned to Hippos' answer to Question 64

[286] D73-74, D266, D267.
[287] *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 223 (Mo. 2003).
[288] *Id.*
[289] *Missouri Real Estate Comm'n v. Held*, 581 S.W.3d 668, 675–76 (Mo. App. W.D. 2019).

Electronically Filed - SUPREME COURT OF MISSOURI - July 22, 2026 - 06:11 PM

should be the score Mr. Cohen awarded eight (8) separate times. Additionally, as discussed above in Section B.2, the preponderance of the evidence is the score Hippos received for its answer to Question 64 in App. 9067 (HIPP9708) is a correct score upon which the Department issued Hippos a cultivation license, is not subject to review or revision, and is the score, therefore, preferred by the Department.

The Manufacturing Decision wherein the AHC let an incorrect score awarded by a person lacking the appropriate background and expertise stand uncorrected is a decision flatly inconsistent with and contrary to the Department's regulations, rules, Guide, and approval of the Manual.

Correction of the scores Hippos received for Question 64 and re-scoring the answer with a score of 10, the Department's preferred score between scores of 4 and 10, will increase the score of Hippos manufacturing applications by 91.19 points and give each a total score of 1,528.78, which is higher than the lowest scoring manufacturing facility applications to receive a license.

For the foregoing reasons, the AHC's Manufacturing Decision is arbitrary and capricious and not based on competent and substantial evidence, and the Court, therefore, should reverse the AHC's Manufacturing Decision and direct the Department to award Hippos' six manufacturing licenses.

Electronically Filed - SUPREME COURT OF MISSOURI - July 22, 2026 - 06:11 PM

Electronically Filed - SUPREME COURT OF MISSOURI - July 22, 2026 - 06:11 PM

CONCLUSION

It is undisputed the Department found Hippos qualified to operate a marijuana facility in Missouri because the applications at issue were denied solely on the basis of scoring and ranking and the Department awarded Hippos a cultivation facility license, not to mention that Hippos has operated its state-of-the-art cultivation facility for nearly two years. Whether Hippos meets the qualifications of licensure is not at issue.

The sole issue before this Court concerning the AHC Decisions is whether, based on the record as a whole, the AHC improperly denied Hippos' facility applications. As detailed herein, for the reasons discussed, and based on the record as a whole, Hippos submits that the AHC's decisions denying all of Hippos' facility license appeals were arbitrary and capricious and/or not supported by competent and substantial evidence.

A. Cultivation

Resolution of this issue relating to the denials of the cultivation facility license applications could hardly be simpler. Hippos submitted three applications with identical answers, the applications were redacted for identifying information and graded anonymously, and scored separately; but only one was awarded a license. Based on that undisputed evidence, the Department clearly treated three identically situated applicants differently. As noted in the Amended Decision, the AHC lacks the authority to take away licenses.[290] Therefore, in order to treat the three identically situated applications the same and avoid violation of the prohibition on arbitrary and capricious (inconsistent) action,

[290] D50; P165; App A1.

this Court must reverse the Amended Decision and award cultivation licenses to Applications 8997 and 9072.

This disparate treatment is textbook illustration of an arbitrary and capricious agency decision not supported by competent and substantial evidence, and the Court therefore should reverse the Cultivation Decision and grant Hippos the relief it requests.

Resolution of this issue relating to denials of the manufacturing and dispensary facility applications is equally straightforward.

B. Manufacturing.

Hippos submitted six (6) manufacturing applications with identical answers to Question 64. Such answers were also identical to all of Hippos' other application answers, all of which received higher scores, including Appellant's winning cultivation application. But unlike the higher and consistently scored Question 64 answers for cultivation and dispensary applications, these manufacturing answers were scored inconsistently by a person demonstrably lacking the appropriate background and expertise to evaluate Question 64 and the answer.

The AHC's Manufacturing Decision is yet another textbook example of an arbitrary and capricious agency decision not supported by competent and substantial evidence, and the Court therefore should reverse the Manufacturing Decision and grant Hippos the relief it requests.

Electronically Filed - SUPREME COURT OF MISSOURI - July 22, 2026 - 06:11 PM

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C. Dispensary

Hippos submitted five (5) dispensary applications that were scored inconsistently with other applications, the AHC received in evidence uncontradicted expert testimony of Hippos' designated experts, Patterson and Picillo about consistent scoring, and the AHC, contrary to binding precedent, promptly ignored this testimony and its preponderance. The AHC attempted to justify its misstep with a logic and rationale that conflicted with other parts of its decision. Based on the AHC's failure to give weight to undisputed expert testimony and infirm logic, the Dispensary Decision is arbitrary and capricious and not supported by competent and substantial evidence. If the probative force the expert testimony had upon the issues is considered and given weight, as required, Hippos would have received enough additional points for its dispensary applications to justify the award of five dispensary licenses.

As shown in this Brief and detailed above, the history of this case and events that transpired outside of the control of Hippos that adversely affected its appeals are unique. But Hippos' petition for judicial review gives the Court an opportunity to consider properly the record confronting the AHC, remedy the improper denials of Hippos' facility license applications, and order the Department to award Hippos the licenses for which its applications qualified and the company should have received.

Electronically Filed - SUPREME COURT OF MISSOURI - July 22, 2026 - 06:11 PM

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CERTIFICATE OF COMPLIANCE

This brief was served on all parties through the Court's e-filing system. This brief includes the information required by Rule 55.03 and complies with the limitation in Rule 84.06. Relying on the word count of the Microsoft Word program, the undersigned certifies that this brief contains 16,271 words excluding those parts exempted by Rule 84.06.

/s/ Jay Preston
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