STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JACOB R. MYERS, Petitioner, vs. FLORIDA CIVIL COMMITMENT CENTER, DEPARTMENT OF CORRECTIONS, DESOTO COUNTY SHERIFF'S OFFICE, LIBERTY BEHAVIORAL HEALTH CORPORATION, AND DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Respondents.	)	Case No. 05-4004RU

FINAL ORDER OF DISMISSAL

On October 25, 2005, Jacob R. Myers (Petitioner) filed a Petition of Unpromulgated Rule Challenge as an Improper Exercise of Delegated Legislative Authority, in which the Petitioner seeks "a Declaration pursuant to Section 120.56, Fla. Stat., ordering Petitioner's immediate release from solitary confinement, or restrictive status, and an Order commanding Respondents to cease and desist in enforcing Policy No. F-24 . . . ."

The Petitioner is a person being detained under the provisions of Chapter 394, Part V, Florida Statutes (2005), (entitled "Involuntary Civil Commitment of Sexually Violent Predators" and commonly known as the Jimmy Ryce Act, hereinafter the "Act"). The Act provides for the continued confinement of persons classified as "sexually violent predators" after the completion of incarceration imposed for convictions of sexually violent offenses. The Department of Children and Family Services (DCFS) is the state agency charged with post-incarceration "control, care, and treatment until such time as the person's mental abnormality or personality disorder has so changed that it is safe for the person to be at large." § 394.917(2), Fla. Stat. (2005).

Section 394.9151, Florida Statutes (2005), authorizes DCFS to contract with "a private entity or a state agency" for operation of the facility within which persons so identified may be confined. The DCFS has contracted with Liberty Behavioral Health Corporation (LBHC), a private entity, to operate the Florida Civil Commitment Center (FCCC) as the facility housing persons confined under the Act.

The challenged policy (hereinafter "F-24") was issued by FCCC and sets forth a program of "privileges and incentives" intended to encourage "appropriate and therapeutic behavior" by residents, and to establish consequences for inappropriate behavior.

On November 9, 2005, Respondents Rick Harry (Harry) and Herbert T. Caskey (Caskey) filed a Motion to Dismiss, or in the alternative, Motion for Summary Final Order. Respondent Harry is the executive director for FCCC. Respondent Caskey is president of LBHC.

Although time for response to the Motion to Dismiss has not yet expired, the hearing is currently scheduled for November 29, 2005. The time for response expires on November 23, 2005. The Division of Administrative Hearings (DOAH) will be closed from November 24 until November 28, 2005. Accordingly, this Order is being entered absent a response from the Petitioner; however, for purposes of this Order, it is deemed that all the allegations of the Petitioner's rule challenge are true, notwithstanding the assertions in the Harry/Caskey Motion to Dismiss disputing the Petitioner's alleged placement in solitary confinement and/or other restrictive status.

The Motion to Dismiss asserts that the Petition for Rule Challenge filed in this case should be dismissed for the following reasons:

1. Neither the FCCC nor LBHC is an "agency" as the term is defined at Section 120.52, Florida Statutes (2005).

2. Neither Harry nor Caskey is an employee of any state agency, and DOAH is without jurisdiction over them as individuals.

3. The Petitioner's rule challenge seeks to address constitutional issues that are outside the jurisdiction of DOAH.

4. The challenged Policy F-24 is no more than an internal operating procedure, and not a rule subject to challenge under Section 120.56, Florida Statutes (2005).

Section 120.56, Florida Statutes (2005), sets forth the grounds upon which a substantially affected person may challenge the validity of a rule or a proposed rule. Subsection 120.56(1)(a), Florida Statutes (2005), provides:

> Any person substantially affected by a rule or a proposed rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority.

Subsection 120.52(1), Florida Statutes (2005), sets forth the definition of "agency" applicable to this case and provides as follows:

> "Agency" means:
> (a) The Governor in the exercise of all executive powers other than those derived from the constitution.
> (b) Each:
> 1. State officer and state department, and each departmental unit described in s. 20.04.
> 2. Authority, including a regional water supply authority.
> 3. Board.
> 4. Commission, including the Commission on Ethics and the Fish and Wildlife Conservation Commission when acting pursuant to statutory authority derived from the Legislature.
> 5. Regional planning agency.
> 6. Multicounty special district with a majority of its governing board comprised of nonelected persons.
> 7. Educational units.
> 8. Entity described in chapters 163, 373, 380, and 582 and s. 186.504.
> (c) Each other unit of government in the state, including counties and municipalities, to the extent they are expressly made subject to this act by

> general or special law or existing judicial decisions.
>
> This definition does not include any legal entity or agency created in whole or in part pursuant to chapter 361, part II, any metropolitan planning organization created pursuant to s. 339.175, any separate legal or administrative entity created pursuant to s. 339.175 of which a metropolitan planning organization is a member, an expressway authority pursuant to chapter 348, any legal or administrative entity created by an interlocal agreement pursuant to s. 163.01(7), unless any party to such agreement is otherwise an agency as defined in this subsection, or any multicounty special district with a majority of its governing board comprised of elected persons; however, this definition shall include a regional water supply authority.

A private entity is not an "agency" under the Administrative Procedures Act even though it performs certain public functions or contractually agrees to provide services for a state agency. Florida Dept. of Ins. v. Florida Ass'n of Insurance Agents, 813 So. 2d 981 (Fla. 1st DCA 2002); Vey v. Bradford Union Guidance Clinic, Inc., 399 So. 2d 1137 (Fla. 1st DCA 1981); State Road Department v. Cone Brothers Contracting Co., 207 So. 2d 489 (Fla. 1st DCA 1968).

Accordingly, neither the LBHC nor the FCCC is an agency under the provisions of Chapter 120, Florida Statutes (2005), and DOAH has no jurisdiction over either LBHC or FCCC. Likewise, insofar as is material to this proceeding, DOAH has no jurisdiction over Harry or Caskey, private individuals employed by the private entities with which DCFS has contracted for operation of the facility.

The Petitioner asserts that the restrictions allegedly imposed upon him violate his due process and equal protection rights under the U.S. and Florida Constitutions. The Petitioner further asserts that his confinement under the provisions of the Act constitutes a violation of prohibitions against ex post facto laws set forth in the U.S. and Florida Constitutions.

As to the constitutional issues raised by the Petitioner, an Administrative Law Judge is without authority to determine the constitutionality of existing rules. Key Haven Associated Enterprises, Inc. v. Board of Trustees of the Internal Improvement Trust Fund, 427 So. 2d 153 (Fla. 1982); Cook v. Florida Parole and Probation Commission, 415 So. 2d 845 (Fla. 1st DCA 1982). Further, DOAH is without authority to order that the Petitioner be released from any existing confinement.

As to the issue of whether Policy F-24 is an invalid delegation of legislative authority, Subsection 120.52(8), Florida Statutes (2005), provides the following definition:

> "Invalid exercise of delegated legislative authority" means action which goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:
> (a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;
> (b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;
> (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;
> (d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;
> (e) The rule is arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational; or
> (f) The rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.
>
> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be

> implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute.

The Petition generally alleges that DCFS is without authority to adopt Policy F-24 or to delegate such authority to LBHC or FCCC. There has been no response of record filed by the DCFS in this case. However, Section 394.930, Florida Statutes (2005), clearly provides DCFS with specific rulemaking authority related, but not limited, to the designation of the facility as follows:

> 394.930 Authority to adopt rules.--The Department of Children and Family Services shall adopt rules for:
> (1) Procedures that must be followed by members of the multidisciplinary teams when assessing and evaluating persons subject to this part;
> (2) Education and training requirements for members of the multidisciplinary teams and professionals who assess and evaluate persons under this part;
> (3) The criteria that must exist in order for a multidisciplinary team to recommend to a state attorney that a petition should be filed to involuntarily commit a person under this part. The criteria shall include, but are not limited to, whether:
> (a) The person has a propensity to engage in future acts of sexual violence;

(b) The person should be placed in a secure, residential facility; and
(c) The person needs long-term treatment and care.
(4) The designation of secure facilities for sexually violent predators who are subject to involuntary commitment under this part;
(5) The components of the basic treatment plan for all committed persons under this part;
(6) The protocol to inform a person that he or she is being examined to determine whether he or she is a sexually violent predator under this part.

In that the Petition does not specifically address the statutory rulemaking authority provided to DCFS or reference any related rules adopted by DCFS in response to the statute, the Petition fails to comply with the requirement at Subsection 120.56(1)(b), Florida Statutes (2005), that the petition "must state with particularity the provisions alleged to be invalid with sufficient explanation of the facts or grounds for the alleged invalidity."

As to whether Policy F-24 was required to be adopted as a "rule," the Motion to Dismiss asserts that Policy F-24 is essentially an internal operating procedure (IOP) and that based on Adams v. Barton, 507 So. 2d 665 (Fla. 1st DCA 1987), IOPs are not rules subject to challenge under the Section 120.56, Florida Statutes (2005).

In Adams, the District Court continued a line of decisions holding that individual prisons were not "agencies," and that the IOPs of an individual prison were not rules subject to challenge in a Section 120.56 proceeding. However, the FCCC is not a prison but a "civil commitment center," and whether Adams would preclude the Petitioner from properly challenging the IOP is unknown.

Further, the District Court held that the IOP "must be based upon an agency policy, preferably policy set by a properly promulgated rule, that provides the specificity required to constitute a sufficiently narrow basis" for issuance of the operating procedure. Id. at 666, citing Department of Corrections v. Piccirillo, 474 So. 2d 1199, 1201 (Fla. 1st DCA 1985) (on rehearing); Department of Corrections v. Adams, 458

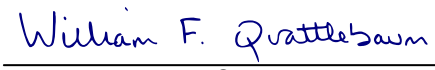
So. 2d 354, 356-57 (Fla. 1st DCA 1984). Accordingly, the policy upon which an FCCC IOP is based may potentially be subject to a properly-raised rule challenge; however, in this case the Petitioner has failed to do so.

Finally, the Petitioner asserts that employees of the Florida Department of Corrections (DOC) and the DeSoto County Sheriff's Office (DCSO) were involved in a "raid" on February 9, 2005, yet beyond the assertion, the Petition fails to allege that either the DOC or the DCSO has any responsibility for adoption of "rules" under which the facility is operated, thereby again failing to comply with Subsection 120.56(1)(b), Florida Statutes (2005).

Based on the foregoing, it is hereby

ORDERED that the Petition for Unpromulgated Rule Challenge as an Improper Exercise of Delegated Legislative Authority is hereby DISMISSED.

DONE AND ORDERED this 17th day of November, 2005, in Tallahassee, Leon County, Florida.



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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original Notice of Appeal with the agency Clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.