

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LARRY PHILLIPS,)
)
 Petitioner,)
)
 vs.) Case No. 07-1969RU
)
 DEPARTMENT OF CHILDREN AND)
 FAMILY SERVICES,)
)
 Respondent.)
 _____)

FINAL ORDER

A formal hearing was held in this case on October 3, 2007, in Arcadia, Florida, at the Florida Civil Commitment Center (FCCC) before J. D. Parrish, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Thomas Panno, Qualified Representative
SVP No. 99-0565
Florida Civil Commitment Center
13613 Southeast Highway 70
Arcadia, Florida 34266-7829

For Respondent: Gregory D. Venz, Agency Clerk
John A. Raymaker, Esquire
Department of Children and
Family Services
1317 Winewood Boulevard
Building 2, Room 204
Tallahassee, Florida 32399-0700

STATEMENT OF THE ISSUE

Whether statements issued by the GEO Group, Inc. (GEO), a private company under contract with the Respondent, Department of Children and Family Services (Respondent or Department) to operate the FCCC constitute unpromulgated "rules" within the definition of Section 120.52, Florida Statutes (2007).

PRELIMINARY STATEMENT

The Petitioner, Larry Phillips, filed the first petition in this cause on May 7, 2007. That petition was deemed a challenge to an unpromulgated rule and was assigned to the undersigned for formal hearing on May 11, 2007. Thereafter, the Respondent filed a Motion to Dismiss GEO and individuals who are employees of GEO who were named Respondents in the original petition. After affording the Petitioner time to respond to that motion, an Order Granting the Motion to Dismiss was issued on June 5, 2007.

The Petitioner was granted leave to amend the petition and did so on August 1, 2007. The hearing was scheduled for October 3, 2007, at the FCCC to afford the Petitioner with a meaningful opportunity to participate in the hearing. Rule challenges are normally conducted in Tallahassee, Florida.

Being mindful that the Petitioner is involuntarily retained at the FCCC, has limited copying and mail services, and sought the assistance of a qualified representative, the undersigned

scheduled the hearing in this cause at the FCCC. All of the Petitioner's requests with regard to these issues were fully considered. Deadlines were extended to allow for delays inherent in the FCCC mail system. Additionally, as the Petitioner's time in the FCCC law library was also limited (as was his qualified representative's), additional time was provided to allow the Petitioner to prepare and file documents. Finally, the Petitioner represented he has a hearing deficiency that was also considered. At the final hearing, the undersigned verified that the Petitioner was able to hear all of the proceedings. The Petitioner's qualified representative was also allowed to confer with the Petitioner and the proceedings were delayed to assure the attendance of the qualified representative at the hearing.

At the hearing, the Petitioner identified the following FCCC operating procedures as unpromulgated rules: D-4 (Resident Receipt of Postal and Legal Mail); D-6 (Publication of Resident Rules); D-13 (Limiting and Suspending Privileges); D-14 (Movement Restrictions); D-15 (Behavior Management and Intervention); D-16 (Secure Management); D-21 (Resident Receipt of Packages, Books, and Mail Order); G-6 (Resident and Area Searches); G-10 (Pornography, Prohibited and Inappropriate Materials); G-19 (Use of Force); G-24 (Computer Lab); G-5 (Grievance Handbook); and the FCCC Resident Handbook. As to

each of the foregoing, the Petitioner maintains the FCCC operating procedure has not been adopted as a rule and therefore must be invalidated until the Department engages and adopts the policies as rules. In response to the Respondent's Motion to Dismiss raised at hearing, the Petitioner voluntarily abandoned his claim against operating procedures D-17 (Religious Services and Activities), E-6 (Use of Medical Seclusion and Restraint), and E-80 (Baker Act Procedure). Ruling was reserved on the Respondent's Motion to Dismiss as to the Petitioner's challenge to procedures D-6 and G-19. However, since the Petitioner presented no evidence during the final hearing as to either of those provisions, the Respondent's Motion to Dismiss the claim against FCCC operating procedures D-6 and G-19 is granted.

The Petitioner's Motion to Continue filed September 27, 2007 (renewed at the hearing by the Petitioner's qualified representative) was denied. Challenges to rules may be filed at any time. The Petitioner did not express any circumstance sufficient to warrant the continuance of the instant case given the protracted period of time taken to get the matter to hearing. The understandable confusion regarding the internal policies (whether they are currently used, the current version, and who drafted) also delayed the Petitioner's preparation of his case. Nevertheless, the issue of law underlying each of the Petitioner's claims remained the same: that is, whether the

internal policies and operational guidelines utilized by the private company operating the FCCC must be adopted as rules by the Department?

The Petitioner presented testimony from George Emanuolidis, Timothy Budz, and Teion Wells-Harrison. Although the Petitioner pre-filed copies of Petitioner's Exhibits A through P, these exhibits were either not offered into evidence or, if offered, not received. The Petitioner's Exhibit 1 was proffered for the record but also not received. The Respondent also called witnesses Timothy Budz and Teion Wells-Harrison to testify on behalf of the Department. The Respondent's Exhibits 1, 2, 5, 6, 7, 8, 9, and 12 were admitted into evidence.

A transcript of the proceeding was not filed. At the conclusion of the hearing the Petitioner requested 30 days within which to file Proposed Final Orders. That request was granted. On November 08, 2007, the Petitioner sought additional time to file a proposed final order. That request was also granted. The Petitioner was given leave until December 11, 2007, to file a proposed final order. On December 12, 2007, the Petitioner filed a Notice of Not Filing Proposed Final Order. This Final Order is therefore entered to resolve the issues of the case. The Respondent's Proposed Final Order (filed November 5, 2007) has been considered in the preparation of this Final Order.

A Motion to Stay filed by someone not a party to this proceeding was denied on December 3, 2007. This case was not consolidated with any other case pending before the Division of Administrative Hearings.

FINDINGS OF FACT

1. According to Part V of Chapter 394, Florida Statutes (2007), the Legislature determined that sexually violent predators generally have antisocial personality features that are not amenable to mental illness treatment. In response to a finding that such persons are likely to engage in repeated acts of criminal behavior, the Legislature created a civil commitment procedure for the long-term care and treatment of sexually violent predators. The FCCC was created as the appropriate facility to house and treat these individuals. See §§ 394.910 et seq., Fla. Stat. (2007).

2. When a "sexually violent predator" is to be released from the incarceration portion of a criminal sentence, the person is committed to the custody of the Department for "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." See § 394.917, Fla. Stat. (2007).

3. The GEO Group, Inc. (GEO) is a private company that operates the FCCC under a contract with the Respondent. The contract ends on June 30, 2009.

4. The contract dictates that GEO will:

. . . fully implement all programs for FCCC residents which shall include a comprehensive sexual offender treatment program and all services necessary, including internal security, to support the full-time residential care of persons living in a secure facility, as described in the Program Description (attached as Exhibit H).

5. The contract also directs GEO to:

. . . be responsible for implementing a resident behavior management system that encourages good conduct, corrects misconduct, and generally promotes safety and security (as described in Exhibit H, Program Description).

6. The contract specifies that resident behavior management would allow residents to earn or lose privileges in accordance with their conduct at FCCC; would list specific acts and types of misconduct, with a specific range of consequences associated with each act or type of misconduct; would secure confinement for residents whose conduct endangers the safe and secure operation of the facility; and would have an adequate due process mechanism for residents impacted by a behavior decision. The Respondent did not and does not dictate the specifics of how FCCC internal policies and guidelines are to be worded or developed.

7. Timothy J. Budz, MSW, LCSW, is the FCCC facility administrator. Mr. Budz is responsible for the day-to-day operations at the FCCC and supervises employees and activities at the facility. He is also responsible for the development and implementation of internal policies and guidelines that GEO uses to comply with its contractual obligations with the Department.

8. The Petitioner, Larry Phillips, is involuntarily committed to the FCCC. The record is not clear as to how long Mr. Phillips has resided at the FCCC.

9. The Petitioner has challenged internal operating policies employed at the FCCC. Generally speaking, the operating procedures that are the subject of this proceeding are policies that held over from when the FCCC was operated by another company, Liberty Behavioral Health Corporation (Liberty). GEO took over this facility from Liberty in July 2006 and although it has attempted to revisit some of the policies (to include consideration of input from residents at FCCC, staff at FCCC, and the Respondent), the policies have not been completely reviewed or revised. Implicit in the testimony of Mr. Budz was a recognition that this Petitioner has been at the facility since (at least) July of 2006. The policies left by Liberty are not all enforced by GEO.

10. The Petitioner challenges FCCC policy D-4. The policy (Respondent's Exhibit 9) states:

It is the policy of the Florida Civil Commitment Center (FCCC) to ensure that residents will be able to send and receive mail and authorized packages.

11. The "purpose" for policy D-4 states:

To ensure that FCCC residents can receive and send mail and receive authorized packages in a timely manner while protecting against the introduction of contraband and other prohibited materials into the facility.

12. FCCC policy D-4 was effective July 29, 2005. Attached to the three page policy were forms to be used in connection with mail that is received and sent. The Petitioner did not testify. There is no evidence that the Petitioner has been denied the ability to receive or send mail through the United States Postal Services (all mail and packages must be sent to residents via this method per the policy procedure).

13. The Petitioner also challenged FCCC policy D-13. This policy provides:

The Florida Civil Commitment Center will utilize restrictions on, or suspensions of, resident privileges in response to behavior that poses a danger to self, others, or property, or which is disruptive or otherwise interferes with the treatment milieu.

14. The stated purpose of FCCC policy D-13 was:

To limit or suspend privileges for residents who exhibit inappropriate or threatening behavior, until it is determined that the resident is able to exercise the privileges in a safe and proper manner.

15. FCCC policy D-13 was effective March 3, 2003. Listed among its procedures are the restrictions and suspensions that are individualized to the resident and circumstance of the behavior reported. The Petitioner did not establish that any restrictions or suspensions of privileges had been enforced against him for any reason. At all times during the hearing of this cause the Petitioner and his qualified representative exhibited appropriate behavior and did not appear to be limited by any of the restrictions noted in policy D-13.

16. The Petitioner challenged FCCC policy D-14. This policy states:

The Florida Civil Commitment Center will impose restrictions on a resident's movement in response to inappropriate behavior, which is disruptive to the normal, efficient operation of the facility.

17. The purpose of FCCC policy D-14 is:

To limit exposure to external stimulation for residents who are disruptive and/or demonstrate a need to reduce their level of agitation.

18. FCCC policy D-14 was effective March 3, 2003. Among the procedures noted for this policy is a provision of daily visits by a clinical therapist for a resident with movement restrictions. The Petitioner did not establish that he was ever subjected to movement restrictions. The Petitioner did not establish that he was ever denied a visit by a clinical

therapist. The Petitioner did establish, however, that certain rooms used for residents whose movements are limited are the equivalent of a locked "cell" as that term is generally understood.

19. The Petitioner challenged FCCC policy D-15. This policy was effective October 27, 2003, and has been identified as "under revision" by GEO. This policy, entitled "Behavior Intervention and Management," is one of the policies GEO is redrafting. In this regard GEO has sought input from the Respondent but is not governed by or dictated to follow any suggestions offered by the Department. Nevertheless, as adopted at the time of hearing, the policy provided:

The Florida Civil Commitment Center will intervene when residents behave in a manner that jeopardizes their own safety or the safety of the facility, its staff, and/or residents; disrupts the orderly operation of the facility; and/or is inconsistent with the treatment goals established for the resident. Interventions will be based on the therapeutic and clinical needs of the resident, with due consideration given to the rights, consistent fair treatment, and well being of all residents and facility staff.

20. The purpose of FCCC policy D-15 is:

To establish a set of procedures whereby inappropriate behavior can be corrected or controlled in a reasonable and timely fashion, and the resident has a meaningful opportunity to participate in the behavior management process and seek review of the final disposition.

21. The procedure for FCCC policy D-15 recognizes "minor misbehavior" that does not pose a significant threat and denotes its differences from resident behavior that does jeopardize security or safety. The Petitioner did not establish that he committed or was subject to either designation (minor misbehavior or otherwise). It is unknown if the policy has ever been enforced against this Petitioner. At hearing the Petitioner and his qualified representative conducted themselves in an appropriate, respectful manner and did nothing by word or act to suggest either has exhibited conduct within the governance of this policy.

22. FCCC policy D-16 provides:

The Florida Civil Commitment Center will utilize Secure Management in response to aggravated misbehavior, which jeopardizes the safety and security of the facility, its staff, and/or residents or seriously and maliciously disrupts the normal operations of the facility.

23. The purpose for FCCC policy D-16 is:

To restrict the mobility of a resident whose aggravated misbehavior demonstrates the need for a more secure environment until such time as the resident's mental status has returned to a manageable level and the resident no longer poses a risk to the safety or efficient operation of the facility.

24. Under the procedures of this policy, the resident's liberty (mobility) and privileges may be limited. Again, as

previously stated, the rooms wherein a resident who is subject to this policy may be confined are similar to "cells."

Additionally, a resident subject to this confinement may be placed in hand and leg restraints. There is no evidence that the Petitioner has ever been subjected to this policy or is likely to be subjected to the terms of this policy. Further, there is no evidence that the policy would be applied to any resident not governed by the specific terms of the policy, ie. someone who must be placed in a locked room to prevent injury to others, damage to property, or threats to the security or normal operation of the facility.

25. FCCC policy D-16 is currently under revision, but the version applicable to this case became effective March 3, 2003.

26. The Petitioner challenged FCCC policy D-21 but it was not received in evidence. Petitioner's Exhibit H (not in evidence) purported to be this policy but is, on its face, outdated and has been superseded by another policy: FCCC policy D-4. As previously discussed, the receipt of packages by residents is governed by the "Packages and Mail" provision found in FCCC policy D-4.

27. FCCC policy G-10 was also not admitted into evidence. It is entitled "Pornography, Prohibited and Inappropriate Materials." It was marked for identification (but not offered)

as Petitioner's pre-filed Exhibit L. The Petitioner did not present any evidence regarding this policy.

28. FCCC policy G-24 was also not admitted into evidence. It is entitled "Resident Computer Lab." It was marked for identification (but not offered) as Petitioner's pre-filed Exhibit N. The Petitioner did not present any evidence regarding how he has been adversely or positively affected by this policy.

29. The Petitioner may have sought to challenge FCCC policy D-5. This policy (admitted into evidence as Respondent's Ex. 12) is entitled "Resident Communications, Complaints and Grievances." FCCC policy D-5 was effective June 23, 2003. The reason it is unclear whether this is the policy Petitioner sought to challenge is due to the numbering of policies. The FCCC policy included with Petitioner's pre-filed exhibits, Petitioner's Exhibit P, was numbered "G-5" however that provision purportedly dealt with "Supervision of Resident Movement." As to either policy, the Petitioner did not present any evidence to establish he had been adversely affected or would likely be affected by the policies.

30. As previously indicated, the Petitioner abandoned his challenge to FCCC policy E-6, Use of Medical Seclusion and Restraints (Petitioner's Pre-filed but not offered Exhibit I).

31. The Petitioner's pre-filed Exhibit K [FCCC policy G-6 entitled "Facility Searches"] was not admitted into evidence. The Petitioner offered no evidence to support a challenge to this provision.

32. The Petitioner also challenged the FCCC Resident Handbook. The handbook was revised August 1, 2005, and portions of it are being revisited by GEO. A copy of the Handbook is provided to the FCCC resident upon arrival. It is also available to FCCC residents within the dormitories. The handbook gives an overview of the various FCCC operational policies and affords the resident a concise, quick reference for topics also addressed during the resident's orientation.

33. One of the problems in this case stems from a general confusion as to what policy will govern a particular situation. In this regard GEO has not provided current editions of policies to the Petitioner or his qualified representative. In some instances it may be that the policy is still under consideration. The Respondent does not have control over the terms of the policies that have been or will become effective. The FCCC internal operating policies are ultimately determined by GEO and its staff. Presumably, GEO will provide updated versions of all policies to the Petitioner (and others at FCCC) when the handbook and policies are completed. The ability of a resident to review internal policies would undoubtedly prove

instructive as to the types of behaviors and consequences likely to result from them. Additionally, as a grievance procedure will be provided it should afford residents with an outlet to vent their disagreements with any policy.

CONCLUSIONS OF LAW

34. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of these proceedings. §§ 120.54, and 120.56, Fla. Stat. (2007).

35. Section 120.56, Florida Statutes (2007), provides in pertinent part:

(4) CHALLENGING AGENCY STATEMENTS DEFINED AS RULES; SPECIAL PROVISIONS.--

(a) Any person substantially affected by an agency statement may seek an administrative determination that the statement violates s. 120.54(1)(a). The petition shall include the text of the statement or a description of the statement and shall state with particularity facts sufficient to show that the statement constitutes a rule under s. 120.52 and that the agency has not adopted the statement by the rulemaking procedure provided by s. 120.54.

(b) The administrative law judge may extend the hearing date beyond 30 days after assignment of the case for good cause. If a hearing is held and the petitioner proves the allegations of the petition, the agency shall have the burden of proving that rulemaking is not feasible and practicable under s. 120.54(1)(a).

(c) The administrative law judge may determine whether all or part of a statement violates s. 120.54(1)(a). The decision of the administrative law judge shall

constitute a final order. The division shall transmit a copy of the final order to the Department of State and the committee. The Department of State shall publish notice of the final order in the first available issue of the Florida Administrative Weekly.

(d) When an administrative law judge enters a final order that all or part of an agency statement violates s. 120.54(1)(a), the agency shall immediately discontinue all reliance upon the statement or any substantially similar statement as a basis for agency action. (Emphasis Added.)

36. In order to prevail in this case the Petitioner must establish:

A. that he is a person substantially affected by an agency statement;

B. that the statement complained of was made by an agency;

C. that the statement meets the definition of "rule;" and

D. that the statement has not been adopted by the rulemaking process.

37. First, GEO is not an agency as that term is defined by law. Further, the FCCC is not an agency.

38. Section 120.52(1), Florida Statutes (2007), defines "agency." That section provides:

(1) "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, including the Board of Governors of the State University System and a state university board of trustees when acting pursuant to statutory authority derived from the Legislature.
 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 or transportation authority under chapter 349, 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.

39. None of the statements complained of were made by an agency. The agency, the Department, has not adopted, endorsed or approved of the statements.

40. Section 120.52(15), Florida Statutes (2007), defines "rule." That section provides, in part:

"Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. The term also includes the amendment or repeal of a rule. (Emphasis Added.)

41. Section 120.54(1)(a), Florida Statutes (2007), provides:

Rulemaking is not a matter of agency discretion. Each agency statement defined as a rule by s. 120.52 shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practicable.

42. Section 394.930, Florida Statutes (2007), provides:

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. (Emphasis Added.)

43. In response to the foregoing directives of the Legislature, the Department has promulgated:

Florida Administrative Code Rule 65E-25.001
entitled "Assessment and Evaluation
Procedures";

Florida Administrative Code Rule 65E-25.002
entitled "Education and Training
Requirements for Multidisciplinary Team
Members";

Florida Administrative Code Rule 65E-25.003
entitled "Criteria for Recommendation that
Involuntary Civil Commitment Petition be
Filed";

Florida Administrative Code Rule 65E-25.004
entitled "Designation of Secure Facilities;"
Florida Administrative Code Rule 65E-25.005
entitled "Basic Treatment Plan Components";
and

Florida Administrative Code Rule 65E-25.006
entitled "Notification of Examination."

44. As to each area designated by the Legislature, the Respondent has an adopted rule. The statute does not direct the Respondent to adopt rules to govern the specifics for the internal operations of the FCCC.

45. Moreover, Section 394.9151, Florida Statutes (2007), authorizes the Respondent to "contract with a private entity or state agency for use of and operation of facilities to comply with the requirements of this act." Clearly the Legislature contemplated that the facilities to house and treat these residents might be operated by a private entity. The act does not specify further restrictions. Accordingly, so long as the Respondent meets its statutory responsibilities and the private entity operating the facility meets its contractual obligations, there is no statutory directive or authority regulating the day-to-day operations of the facilities.

46. In this case, the Petitioner maintains that the internal policies implemented by a private company under

contract with the Department to operate the FCCC facility must be adopted as rules by the Respondent. It is conceded that none of the policies complained about have been so adopted. However, since the internal policies are not agency statements of general applicability that implement, interpret, or prescribe law or policy or describe the procedure or practice requirements of an agency they are not "rules" by definition. See § 120.52(15), Fla. Stat. (2007).

47. As presented in this case, the day-to-day operations of the FCCC are conducted within the contractual obligations required by the statute. GEO must assure that residents are housed in a secure, residential facility and that long-term treatment is provided. The details related to internal operational policies that are unrelated to the Department's statutory responsibility are not "policies" of the Respondent.

48. The Legislature authorized the Respondent to engage a private company to effect the day-to-day operations of the FCCC. In this case, none of the challenged policies relate to the assessment or evaluation of residents. The challenge does not address the education and training requirements for members of the multidisciplinary teams and professionals. The criteria used to involuntarily commit a person to the FCCC have not been challenged. Similarly, the designation of the FCCC as a secure facility is not at issue. The Petitioner has not challenged the

components of the basic treatment plan for all committed residents nor the protocol for examination and determination of whether a person is a sexually violent predator. These are the statutory directives governing the Respondent. Unpromulgated statements or policies construing these topics might be deemed "rules" of the Department. None so designated have been challenged.

49. In this case, the unpromulgated "rules" at issue are the internal operating policies of a private company. The Respondent does not have to approve the "rules" or authorize the "rules." Residents unhappy with the policies of the FCCC may file a grievance in accordance with that facility's grievance policy. The internal policy at this facility may or may not be similar to those at another facility. The population at this facility is, by definition, fairly unique. Presumably its policies are crafted to address those unique matters.

50. It is concluded that a private company acting under the guidance and control of a contract with an agency is not, itself, an "agency" for purposes of the Administrative Procedure Act. See Myers v. Florida Civil Commitment Center et al., 953 So. 2d 726 (Fla. 1st DCA 2007). Further, it is concluded that the internal operating policies of GEO are not de facto "rules" of the Department because the Respondent's approval is not required to draft or implement a policy. Moreover, the GEO

policies do not implement, interpret, or prescribe law. Further the internal policies do not describe the procedure or practice requirements of an agency. See Department of Corrections v. Adams, 458 So. 2d 354 (Fla. 1st DCA 1984). Entities that contractually agree to provide services for a state agency do not, by that agreement alone, transform into a state agency. See Vey v. Bradford Union Guidance Clinic, Inc., 399 So. 2d 1137 (Fla. 1st DCA 1981).

51. Chapter 394, Florida Statutes (2007), addresses mental health issues and identifies a number of facilities that may be deemed providers of services to persons or patients who have mental health needs. For example, Section 394.455(6), Florida Statutes (2007), recognizes that a "community mental health center or clinic" is a publicly funded, not-for-profit center that contracts with the Department for the provision of inpatient services. Such an entity is not an "agency" as that term is used in Section 120.52(15), Florida Statutes (2007). Clearly, the Legislature intended that residents at the FCCC receive secure housing and treatment. That a private company has been enlisted by contract to provide that care does not make the ministerial functions of contract performance equivalent to agency action. See Florida Department of Insurance and Florida Windstorm Underwriting Association v. Florida Association of

Insurance Agents and Professional Insurance Agents of Florida, Inc., 813 So. 2d 981 (Fla. 1st DCA 2002).

52. Finally, pursuant to Florida law, only a "substantially affected person" may challenge the validity of a "rule." The person seeking an administrative determination that an agency rule is an invalid exercise of delegated legislative authority must show a real and sufficiently immediate injury in fact. See Lanoue v. Florida Department of Law Enforcement, 751 So. 2d 94 (Fla. 1st DCA 1999) and Ward v. Board of Trustees of the Internal Improvement Trust Fund and Department of Environmental Protection, 651 So. 2d 1236 (Fla. 4th DCA 1995). The Petitioner in this cause did not present any evidence to support an injury in fact. Further, the Petitioner failed to present evident to support even the general terms of his petition. At the minimum the Petitioner would have to establish how the "rules" have impacted or might reasonably impact his residency at the FCCC. The Petitioner failed to establish the barest of facts to support this claim.

53. The Petitioner is required to meet the burden of proof, as to both the rule challenge and standing, by a preponderance of the evidence. See Department of Health et al. v. Merritt, 919 So. 2d 561 (Fla. 1st DCA 2006). The Petitioner failed to meet this burden. This case was prolonged beyond the thirty days contemplated by the statute in order to afford the

Petitioner with every opportunity to prepare for and present evidence in support of his claims. It is concluded that such efforts were reasonable under the circumstances of this case. Moreover, had the FCCC made policies and information available to the Petitioner in a timely fashion, the case could have been more easily resolved. Residents at FCCC should be provided with copies of the policies and guidelines that govern their residency. Those policies are not, however, "rules" of the Department. Therefore, for the reasons noted above it is concluded that the internal policies of a private company operating the FCCC are not agency statements constituting unpromulgated rules.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the instant case is hereby dismissed.

DONE AND ORDERED this 16th day of January 2008, in
Tallahassee, Leon County, Florida.



J. D. PARRISH
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of January, 2008.

COPIES FURNISHED:

Gregory D. Venz, Agency Clerk
Department of Children and
Family Services
Building 2, Room 204A
1317 Winewood Boulevard
Tallahassee, Florida 32399-0700

Larry Phillips, No. 990811
Florida Civil Commitment Center
13613 Southeast Highway 70
Arcadia, Florida 34266-7829

Thomas Alfred Panno, Qualified Representative
SVP No. 99-0565
Florida Civil Commitment Center
13613 Southeast Highway 70
Arcadia, Florida 34266-7829

John J. Copelan, General Counsel
Department of Children and
Family Services
Building 2, Room 204
1317 Winewood Boulevard
Tallahassee, Florida 32399-0700

Robert A. Butterworth, Secretary
Department of Children and
Family Services
Building 1, Room 205
1317 Winewood Boulevard
Tallahassee, Florida 32399-0700

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.