

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RONALD C. HOOD, JR. (AKA: ERIKA
DENISE HOOD),

Petitioner,

vs.

Case No. 19-0539RU

DEPARTMENT OF CHILDREN AND
FAMILIES,

Respondent.

EZRA RAULERSON,

Petitioner,

vs.

Case No. 19-0540RU

DEPARTMENT OF CHILDREN AND
FAMILIES,

Respondent.

FERNANDO LUIS VIRUET,

Petitioner,

vs.

Case No. 19-0541RU

DEPARTMENT OF CHILDREN AND
FAMILIES,

Respondent.

JOSEPH C. EVANS, JR.,

Petitioner,

vs.

Case No. 19-0542RU

DEPARTMENT OF CHILDREN AND FAMILIES,

Respondent.

_____/
WILLIE MCCORD,

Petitioner,

vs.

Case No. 19-0920RU

DEPARTMENT OF CHILDREN AND FAMILIES,

Respondent.

_____/
RICKY GIBSON,

Petitioner,

vs.

Case No. 19-0977RU

DEPARTMENT OF CHILDREN AND FAMILIES,

Respondent.

_____ /

SUMMARY FINAL ORDER OF DISMISSAL

This matter came on for consideration on March 14, 2019, without hearing, on the Department's Amended Response to Petition for Administrative Determination Motion to Dismiss with Prejudice and Motion for Summary Final Order as to each Petition for Administrative Determination filed herein. The undersigned has considered Respondent's motion, Petitioners' response

thereto, and all matters of record. There is a different Petitioner in each of the consolidated cases. This Summary Final Order of Dismissal governs each case consolidated herein.

FINDINGS OF FACT

1. There are no issues of material fact in dispute.
2. Respondent, Department of Children and Families (Department), pursuant to section 394.9151, Florida Statutes (2018),^{1/} has contracted with a private entity, Wellpath, LLC (Wellpath), to use and operate a facility, Florida Civil Commitment Center (FCCC), to comply with the requirements of chapter 394, part V (entitled "Involuntary Civil Commitment of Sexually Violent Predators").
3. Petitioners are persons subject to chapter 394, part V, and are confined in the FCCC.
4. Petitioners allege that the FCCC Resident Handbook and internal memorandum are unpromulgated rules which are imposed on FCCC residents, and that the same are an improper exercise of delegated legislative authority as de facto agency rules that have not been adopted pursuant to the rulemaking procedures of section 120.54(1)(a), Florida Statutes.

CONCLUSIONS OF LAW

5. Section 120.52(1) defines "Agency" as:
 - (a) The Governor; each state officer and state department, and each departmental unit described in s. 20.04; the Board of Governors of the State University System;

the Commission on Ethics; the Fish and Wildlife Conservation Commission; a regional water supply authority; a regional planning agency; a multicounty special district, but only if a majority of its governing board is comprised of nonelected persons; educational units; and each entity described in chapters 163, 373, 380, and 582 and s. 186.504.

(b) Each officer and governmental entity in the state having statewide jurisdiction or jurisdiction in more than one county.

(c) Each officer and governmental entity in the state having jurisdiction in one county or less than one county, to the extent they are expressly made subject to this chapter by general or special law or existing judicial decisions.

This definition does not include a municipality or legal entity created solely by a municipality; a legal entity or agency created in whole or in part pursuant to part II of chapter 361; a metropolitan planning organization created pursuant to s. 339.175; a 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 any transportation authority or commission under chapter 343 or chapter 349; or a 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.

6. Section 120.52(16), in part, defines a "Rule" as:

"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. The term does not include:

(a) Internal management memoranda which do not affect either the private interests of any person or any plan or procedure important to the public and which have no application outside the agency issuing the memorandum.

(b) Legal memoranda or opinions issued to an agency by the Attorney General or agency legal opinions prior to their use in connection with an agency action.

(c) The preparation or modification of:

1. Agency budgets.

2. Statements, memoranda, or instructions to state agencies issued by the Chief Financial Officer or Comptroller as chief fiscal officer of the state and relating or pertaining to claims for payment submitted by state agencies to the Chief Financial Officer or Comptroller.

3. Contractual provisions reached as a result of collective bargaining.

4. Memoranda issued by the Executive Office of the Governor relating to information resources management.

7. Section 120.56(4) (a) provides as follows:

Any person substantially affected by an agency statement that is an unadopted rule 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 facts sufficient to show that the statement constitutes an unadopted rule.

8. Section 394.930 provides as follows:

The Department of Children and Families 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.

9. Wellpath is not an "agency" as defined in section 120.52(1). See generally Fla. Dep't of Ins. v. Fla. Ass'n of

Ins. Agents, 813 So. 2d 981 (Fla. 1st DCA 2002); Dep't of Corr. v. Adams, 458 So. 2d 354 (Fla. 1st DCA 1984).

10. Wellpath is an independent contractor. The Department contracted with Wellpath in accordance with its statutory authority under section 394.9151. That the Department enlisted a private entity, by contract, to operate the FCCC, does not make the services the private entity employs to implement the provisions of that contract equivalent to agency action. See Fla. Ass'n of Ins. Agents, 813 So. 2d at 984. Because Wellpath is not an "agency" under section 120.52(1), the FCCC Resident Handbook and the memorandum that it utilizes for the internal operation of the FCCC are therefore not "agency statements" within the meaning of section 120.52(16).

11. Since the internal memoranda and the FCCC Resident Handbook are not agency statements, and therefore not rules within the meaning of section 120.52(16), then the same cannot be subject to challenge under section 120.56(4) unless adopted, endorsed, or approved by the Department. Petitioners do not allege that the Department has taken any such action with respect to Wellpath's internal memoranda or FCCC Resident Handbook.

12. The rulemaking authority extended to the Department in section 394.930 does not extend to the internal memoranda and

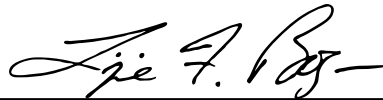
policies of a private contractor as authorized by section 394.9151.

13. The respective Petitions claim that Wellpath's utilization of the FCCC Resident Handbook constitutes disciplinary proceedings of retribution and deterrence, in violation of Article 1, § 9, of the Florida Constitution. Though not well stated, Petitioners seem to suggest that the FCCC Resident Handbook and internal memorandum are depriving them, in some way, of their procedural due process rights. While the Division of Administrative Hearings (DOAH) does not have jurisdiction to declare statutes or existing rules unconstitutional, see Dep't of Bus. Reg. v. Ruff, 592 So. 2d 688 (Fla. 1992), there may be instances where DOAH has authority to declare a proposed rule unconstitutional. See Dept. of Env. Reg'l v. Leon Cnty., 344 So. 2d 297 (Fla 1st DCA 1977). However, as commentators have noted, "it is not entirely clear that [DOAH] would have authority to declare agency policy in the form of an unadopted rule unconstitutional." Fla. Admin. Practice § 2-42 (7th ed. 2004). The predicate to the question, however, is that there must exist "agency policy." In the instant case, as noted above, there is no such agency policy in dispute, and therefore DOAH lacks jurisdiction to address any constitutional questions that are, in reality, directed exclusively towards the actions of Wellpath.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that each Petition for Administrative Determination challenging the FCCC Resident Handbook and internal memorandum as unadopted rules of the Department of Children and Families is DISMISSED WITH PREJUDICE, as the defects in Petitioners' claims cannot be cured by amendment.

DONE AND ORDERED this 12th day of April, 2019, in Tallahassee, Leon County, Florida.



LINZIE F. BOGAN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 12th day of April, 2019.

ENDNOTE

^{1/} All statutory references are to Florida Statutes (2018), unless otherwise noted.

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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 administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.