

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FRANK JAMES,

Petitioner,

vs.

Case No. 19-2946RU

DEPARTMENT OF CHILDREN AND
FAMILIES,

Respondent.

ALFREDO ROEBUCK,

Petitioner,

vs.

Case No. 19-2947RU

DEPARTMENT OF CHILDREN AND
FAMILIES,

Respondent.

SAMMY DOUSE,

Petitioner,

vs.

Case No. 19-2948RU

DEPARTMENT OF CHILDREN AND
FAMILIES,

Respondent.

SUMMARY FINAL ORDER OF DISMISSAL

This matter came on for consideration on June 11, 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 the Petition for Administrative Determination. On June 24, 2019, Petitioners filed a reply to the Department's motion. The undersigned has considered Respondent's motion, Petitioners' reply thereto, and all matters of record.

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. Each Petitioner is a sexually violent predator, and collectively are persons subject to chapter 394, part V. Petitioners are confined in the FCCC.
4. Petitioners allege that the FCCC Resident Handbook is an unpromulgated rule which is imposed on FCCC residents, and that the same is an improper exercise of delegated legislative authority as a de facto agency rule that has not been adopted pursuant to the rulemaking procedures of section 120.54(1)(a), Florida Statutes.

5. Petitioners also claim that because "Baker Act residents" are housed at FCCC, then "all rules governing every aspect of the facility must be implemented" in accordance with section 394.457. Petitioners do not allege that they are housed at FCCC pursuant to the Baker Act.^{2/}

CONCLUSIONS OF LAW

6. Chapter 394, part I (sections 394.451 through 394.47892), is known interchangeably as both "The Florida Mental Health Act" and "The Baker Act." Section 394.457(5) provides, in part, as follows:

(a) The department shall adopt rules establishing forms and procedures relating to the rights and privileges of patients seeking mental health treatment from facilities under this part.

(b) The department shall adopt rules necessary for the implementation and administration of the provisions of this part, and a program subject to the provisions of this part shall not be permitted to operate unless rules designed to ensure the protection of the health, safety, and welfare of the patients treated through such program have been adopted. Rules adopted under this subsection must include provisions governing the use of restraint and seclusion which are consistent with recognized best practices and professional judgment; prohibit inherently dangerous restraint or seclusion procedures; establish limitations on the use and duration of restraint and seclusion; establish measures to ensure the safety of program participants and staff during an incident of restraint or seclusion; establish procedures for staff to follow before, during, and after incidents of restraint or seclusion;

establish professional qualifications of and training for staff who may order or be engaged in the use of restraint or seclusion; and establish mandatory reporting, data collection, and data dissemination procedures and requirements. Rules adopted under this subsection must require that each instance of the use of restraint or seclusion be documented in the record of the patient.

Florida Administrative Code Chapter 65E sets forth the rules promulgated pursuant to the requirements of The Baker Act.

7. Sections 394.910 through 394.932, as previously referenced, deal with the involuntary civil commitment of sexually violent predators. Section 394.910 provides as follows:

The Legislature finds that a small but extremely dangerous number of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for involuntary treatment under the Baker Act, part I of this chapter, which is intended to provide short-term treatment to individuals with serious mental disorders and then return them to the community. In contrast to persons appropriate for civil commitment under the Baker Act, sexually violent predators generally have antisocial personality features which are unamenable to existing mental illness treatment modalities, and those features render them likely to engage in criminal, sexually violent behavior. The Legislature further finds that the likelihood of sexually violent predators engaging in repeat acts of predatory sexual violence is high. The existing involuntary commitment procedures under the Baker Act for the treatment and care of mentally ill persons are inadequate to address the risk these sexually violent predators pose to society. The Legislature further finds that the prognosis for rehabilitating sexually violent predators in a prison setting is

poor, the treatment needs of this population are very long term, and the treatment modalities for this population are very different from the traditional treatment modalities for people appropriate for commitment under the Baker Act. It is therefore the intent of the Legislature to create a civil commitment procedure for the long-term care and treatment of sexually violent predators.

8. Section 394.911 provides as follows:

The Legislature intends that persons who are subject to the civil commitment procedure for sexually violent predators under this part be subject to the procedures established in this part and not to the provisions of part I of this chapter. Less restrictive alternatives are not applicable to cases initiated under this part.

9. As previously noted, Petitioners contend that because FCCC houses Baker Act residents, then "all rules (i.e. the FCCC Resident Handbook) governing every aspect of the facility must be implemented" pursuant to rulemaking requirements set forth in The Baker Act. Petitioners' contentions are not supported by the law. Section 394.911 makes it clear that the procedures set forth in The Baker Act do not apply to persons, like Petitioners, who are subject to the civil commitment procedures governing sexually violent predators. Accordingly, the only remaining issue is whether the FCCC Resident Handbook is an unadopted rule.

10. 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.

11. 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.

12. 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.

13. 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.

14. 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).

15. 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 that it utilizes for the internal operation of the FCCC is therefore not an "agency statement" within the meaning of section 120.52(16).

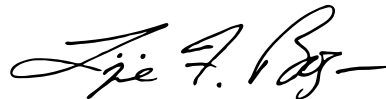
16. Since the FCCC Resident Handbook is not an agency statement, and therefore not a rule within the meaning of section 120.52(16), then the same cannot be subject to challenge under section 120.56(4) unless adopted, endorsed, or approved by the Department. Petitioners do not allege that the Department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

17. The rulemaking authority extended to the Department in section 394.930 does not extend to the policies of a private contractor as authorized by section 394.9151.

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 as an unadopted rule of the Department of Children and Families is DISMISSED WITH PREJUDICE, as the defects in Petitioners' claim(s) cannot be cured by amendment. All pending motions are DENIED as moot. The hearing scheduled for July 3, 2019, is cancelled.

DONE AND ORDERED this 27th day of June, 2019, in Tallahassee, Leon County, Florida.



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

Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of June, 2019.

ENDNOTES

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

^{2/} Petitioner Alfredo Roebuck filed an affidavit, and avers therein that "[w]hile civilly committed under the [Involuntary Civil Commitment of Sexually Violent Predators] Act, [he] was placed under the Baker Act, and [he] remained housed at the

Florida Civil Commitment Center under the [Involuntary Civil Commitment of Sexually Violent Predators] Act and Baker Act." Accepting Petitioner's Roebuck's allegation as true, it is noted that resolution of the dispute herein is not altered by Petitioner Roebuck's alleged "dual status."

COPIES FURNISHED:

Javier Enriquez, Esquire
Department of Children and Families
Building 2, Room 204F
1317 Winewood Boulevard
Tallahassee, Florida 32399-0700

Ivory Avant, Esquire
Department of Children and Families
Building 2, Room 204Q
1317 Winewood Boulevard
Tallahassee, Florida 32399
(eServed)

Sammy Douse, 990797
Florida Civil Commitment Center
13619 Southeast Highway 70
Arcadia, Florida 34266

Frank James, 991534
Florida Civil Commitment Center
13619 Southeast Highway 70
Arcadia, Florida 34266

Alfredo Roebuck, 990286
Florida Civil Commitment Center
13619 Southeast Highway 70
Arcadia, Florida 34266

Ernest Reddick, Program Administrator
Anya Grosenbaugh
Florida Administrative Code and Register
Department of State
R. A. Gray Building
500 South Bronough Street
Tallahassee, Florida 32399-0250
(eServed)

Ken Plante, Coordinator
Joint Administrative Procedures Committee
Room 680, Pepper Building
111 West Madison Street
Tallahassee, Florida 32399-1400
(eServed)

Lacey Kantor, Agency Clerk
Department of Children and Families
Building 2, Room 204Z
1317 Winewood Boulevard
Tallahassee, Florida 32399-0700
(eServed)

Chad Poppell, Secretary
Department of Children and Families
Building 1, Room 202
1317 Winewood Boulevard
Tallahassee, Florida 32399-0700
(eServed)

Javier Enriquez, General Counsel
Department of Children and Families
Building 2, Room 204F
1317 Winewood Boulevard
Tallahassee, Florida 32399-0700
(eServed)

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.