STATE OF FLORIDA
DEPARTMENT OF CHILDREN AND FAMILIES

METRO TREATMENT OF FLORIDA,

Petitioner,

v.

CASE NO. 20-4323
RENDITION NO. DCF-21-33-FO

DEPARTMENT OF CHILDREN AND FAMILIES,

Respondent,

and

CFSATC d/b/a CENTRAL FLORIDA TREATMENT CENTERS,

Intervenor.
_____/

FINAL ORDER

THIS CAUSE is before me for entry of a final order concerning the Department of Children and Families' (Department) July 10, 2020, Notice of Intended Award for Broward County. The Recommended Order, dated December 9, 2020, concluded that the tiebreaking procedures found in the Notice do not meet the definition of a "rule," as they cannot be considered a statement of "general applicability" that implements, interprets, or prescribes law or policy. It further recommended a dismissal of Metro Treatment of Florida, L.P.'s (Metro) Petition for Formal Administrative Hearing and an award of the MAT license in Brevard County to CFSATC. Metro filed exceptions to the Recommended Order and the Department and CFSATC filed a response to Metro's exceptions.

Exceptions

Metro takes exception to the footnote to Paragraph 13 of the Findings of Fact:

> Footnote: The undersigned notes that the Department has amended the Rule since conducting the determination of need and evaluations pertinent to this matter; however, the undersigned will refer to the version of the Rule (amended 6-15-19) that was promulgated and in effect at that time.

Metro argues in this exception that the Rule at issue was amended on June 25, 2019, not June 15, 2019, as found in this footnote. The Department and CFSATC both agree with Metro's exception. After a review of the record, it is determined that this finding of fact is not supported by competent substantial evidence; the rule was amended on June 25, 2019. J.E. 3. This exception is granted.

The footnote to Paragraph 13 of the Findings of Fact is rewritten as follows:

> Footnote: The undersigned notes that the Department has amended the Rule since conducting the determination of need and evaluations pertinent to this matter; however, the undersigned will refer to the version of the Rule (amended 6-25-19) that was promulgated and in effect at that time.

Metro takes exception to Paragraphs 26 through 37 of the Findings of Fact.

> 26-37: See the Recommended Order pages 10-14.

Metro argues that it does not take exception to the list of criteria that the Department testified it used in reaching its decision detailed in the Notice, however, it "does take exception to the ALJ's ultimate finding of fact that regardless of the criteria set forth in the properly promulgated Rule, the Department is allowed to award the opportunity to apply for licensure to Brevard County to Central Florida" based upon a tiebreaking procedure which was developed outside the rulemaking process.

As argued in the responses of both the Department and CFSATC, Metro's exception is a general exception to Paragraphs 26 through 37 of the Recommended Order. Metro does not specify which particular findings of fact it is contesting and/or why any such findings are not supported by competent substantial evidence. As stated above, Metro actually states in its exception that it does not take exception to the list of criteria that the Department testified it used in reaching its decision—the precise content of the findings of fact contained in Paragraphs 26 through 37. An agency "may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence..." Section 120.57(1)(l), Florida Statutes. As Metro has not put forth an argument that these findings of fact are not supported by competent substantial evidence, this exception is denied.

Although this exception is denied as detailed, an additional discussion is warranted. Metro argues that it takes exception to the ALJ's ultimate finding of fact that the Department is allowed to award the opportunity to apply for licensure to CFSATC based upon a tiebreaking procedure which was developed outside the rulemaking process. This "ultimate finding of fact" the Department points out is actually a conclusion of law; one that is not contained within Paragraphs 26 through 37 of the Recommended Order. Pursuant to section 120.57(1)(k), Florida Statutes, "an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph." Because Metro did not "clearly identify the disputed portion of the recommended order by page number or paragraph" for its "ultimate finding of fact," it will not be ruled upon in this final order.

Metro takes exception to Paragraph 34 of the Findings of Fact.

> 34. There is no evidence in the record that establishes whether the Department had time to initiate rulemaking to adopt a tiebreaking procedure for the Rule.

Metro's argument in this exception is one sentence: The Department has had time to adopt tie breaking rules, but has not initiated rulemaking. Metro does not include any appropriate and specific citations to the record to demonstrate that this finding is not supported by competent substantial evidence; therefore, the Department need not rule on this exception. Section 120.57(1)(k), Florida Statutes.

Metro takes exception to Paragraph 35 of the Findings of Fact.

> 35. There is no evidence in the record that establishes whether rulemaking (to establish a tiebreaking procedure) was feasible or practicable.

Again, Metro's argument is contained in one sentence: There is nothing in the record that suggests that rulemaking is neither feasible nor practicable. As in the exception to Paragraph 34, Metro does not include any appropriate and specific citations to the record to demonstrate that this finding is not supported by competent substantial evidence; therefore, the Department need not rule on this exception. Section 120.57(1)(k), Florida Statutes.

Metro takes exception to Paragraphs 46 through 49 of the Conclusions of Law.

> 46. In determining whether the tiebreaking procedures are an unadopted rule, the undersigned must consider its effect. "An agency statement that either requires compliance, creates certain rights while adversely affecting others, or otherwise has the direct and consistent effect of law is a rule." *Dep't of Rev. v. Vanjaria Enterprises, Inc.*, 675 So. 2d 252, 255 (Fla. 5th DCA 1996) (citing *Dep't of Transp. v. Blackhawk Quarry Co.*, 528 So. 2d 447, 450 (Fla. 5th DCA 1988).
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> 47. In *Department of Highway Safety and Motor Vehicles v. Schluter*, 705 So. 2d 81 (Fla. 1st DCA 1997), the First District held that certain policies of the Florida Highway Patrol that were applied "in certain circumstances" did not constitute rules, holding "[t]hey cannot be considered statements of general applicability

because the record establishes that each was to apply only under 'certain circumstances.'" *Id.* at 82. The court further held that these policies were not "intended by their own effect to create rights, or to require compliance, or otherwise to have the direct and *consistent effect* of law." *Id.* (quoting *McDonald v. Dep't of Banking & Fin.*, 346 So. 2d 569, 581 (Fla 1st DCA 1977) (emphasis added).

48. In *Florida League of Cities, Inc. v. Administration Commission*, 586 So. 2d 397 (Fla. 1st DCA 1991), the First District held that a policy that imposes sanctions against municipalities who submitted comprehensive plans that were late, or not in compliance, was not an unadopted rule. The court held:

> With regard to the provisions of section 120.52(16), the policy isn't one of "general applicability" as it applies only to municipalities who are late or not in compliance in submitting their comprehensive plans. Every municipality in the state subject to the requirements of the Growth Management Act is potentially subject to the policy, but only those which fail to comply with the statutory and rule requirements will actually be considered for application of the policy. The policy has been applied, for the first time, to the first municipalities to ever come before the Administration Commission for "nonsubmission." On the record before this court, the "noncompliance" portion of the policy has never been applied to any one at all. The sanctions policy is also not intended by its own effect to create rights or to require compliance.

Id. at 406.

49. The undersigned concludes that the tiebreaking procedures found in the Notice do not meet the definition of a "rule," as they cannot be considered a statement of "general applicability" that implements, interprets, or prescribes law or policy. The tiebreaking procedures in the notice contain the following qualifier: "[t]o resolve the tie in this circumstance...." The record in this proceeding reveals that the Department used these tiebreaking procedures in only one of the 42 reviews that the Department would, or could, use these tiebreaking procedures in any other Florida county if a tie were to occur in an application for MAT licensure (as the Rule does not require applications to be current MAT providers, it is possible that the Department would resort to different tiebreaking procedures if a tie occurred involving a "new" applicant). Because the tiebreaking procedures apply in this "certain circumstance" and do not otherwise have the "consistent effect" of law, the undersigned concludes that they are not an unadopted rule.

In this exception, Metro argues that "the evidence demonstrates the correct conclusion is that the Award Factors are clear attempts to promulgate policy of general applicability on an ad hoc basis without following proper rulemaking." Metro first turns

to case law that holds the Department is required to follow its own rules and argues the Department has not done so. See Vantage Healthcare Corp. v. Agency for Health Care Admin., 687 So. 2d 306, 308 (Fla. 1st DCA 1997). However, the cited law is inapplicable here because the Rule did not contain a procedure to break a tie between two applicants who received the same score. ¶ 20.

Metro argues that the tiebreaker at issue was "contrary or [took] away from the provisions of the properly adopted rule." However, in the case Metro offers to support this position, the agency in question took steps that were directly contrary to what its applicable rule provided. See Flamingo Lake RV Resort, Inc. v. Dept. of Transp., 599 So. 2d 732 (Fla. 1st DCA 1992). This case does not apply as the actions taken by the Department in breaking the tie were not directly contrary to the applicable rule; a rule that does not address the scenario of a tie. As the Department argues in its response, "[t]he tiebreaker at issue cannot contradict that which the rule does not address."

Central to the conclusion that the tiebreaking procedure is not an unadopted rule, the ALJ focuses on the requirement that the action taken must be one of "general applicability," not one that is intended to apply only to "certain circumstances." See Dept. of Highway Safety and Motor Vehicles v. Schluter, 705 So. 2d 81, 82 (Fla. 1st DCA 1997); R.O. ¶¶ 47 and 49. The Department correctly points out in its response to this exception, that Metro does not even attempt to distinguish this conclusion. Likewise for the ALJ's conclusion that the Department could or would have used a different tiebreaker for other awards which involved a new entrant to the Florida MAT market. R.O. ¶ 49. Metro does not argue or offer any support for the position that the tiebreaker at issue would have been applied generally to all (or any other) MAT applicants.

Consequently, Metro has not shown that its position it as or more reasonable than the ALJ's conclusions in Paragraphs 46 through 49. This exception is denied.

Accordingly, the Recommended Order is approved and adopted as modified and the Department's July 10, 2020, Notice of Intended Award for Broward County is **AFFIRMED**.

DONE AND ORDERED in Tallahassee, Leon County, Florida, this 1st day of March, 2021.

Shevaun Harris, Secretary

NOTICE OF RIGHT TO APPEAL

THIS ORDER CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED BY A PARTY PUSUANT TO SECTION 120.68, FLORIDA STATUTES, AND RULES 9.110 AND 9.190, FLORIDA RULES OF APPELLATE PROCEDURE. SUCH APPEAL IS INSTITUTED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE DEPARTMENT OF CHILDREN AND FAMILIES AT 1317 WINEWOOD BOULEVARD, BUILDING 2, ROOM 204, TALLAHASSEE, FLORIDA 32399-0700, AND A SECOND COPY ALONG WITH THE FILING FEE AS PRESCRIBED BY LAW, IN THE DISTRICT COURT OF APPEAL WHERE THE PARTY RESIDES OR IN THE FIRST DISTRICT COURT OF APPEAL. THE NOTICE OF APPEAL MUST BE FILED (RECEIVED) WITHIN 30 DAYS OF RENDITION OF THIS ORDER.[1]

Copies furnished to the following via Electronic Mail on date of Rendition of this Order.[1]

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[1] The date of the "rendition" of this Order is the date that is stamped on its first page.