STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PATRICIA BROOKS,

Petitioner,

vs. Case No. 21-0076RU

FLORIDA DEPARTMENT OF HEALTH,
BOARD OF PHYSICAL THERAPY,

Respondent.
_____/

FINAL ORDER OF DISMISSAL

This proceeding was initiated by a Petition to Determine the Invalidity of Existing "Non-Rule" Agency Policy (Petition) on January 8, 2021. An Amended Petition to Determine the Invalidity of Existing "Non-Rule" Agency Policy was filed January 29, 2021 (Amended Petition). Prior to the filing of the Amended Petition, the undersigned issued an Order to Show Cause, to which both parties responded, and Respondent filed a Motion to Dismiss Petition for Failure to State a Cause of Action on Which Relief Can be Granted, and a Request for Amendment of the Petition. In Petitioner's response to the Motion to Dismiss, Petitioner requested "summary judgment." On February 1, 2021, Respondent filed a Motion to Dismiss "Amended Petition to Determine the Invalidity of Existing 'Non-Rule' Agency Policy" For Failure to State a Cause of Action Upon Which Relief Can Be Granted (Motion to Dismiss Amended Petition). Although little, if any, evidence has been submitted to support a Summary Final Order, it is apparent from the papers filed by both parties that the material facts are not in dispute, and the issues presented in this case are questions of law. For the reasons set forth below, the undersigned is persuaded that the Motion to Dismiss Amended Petition should be granted, and the case dismissed.

Providing Petitioner another opportunity to further amend the Amended Petition would be futile, because the statements alleged to be unadopted rules are neither statements of the Department of Health (Department) or the Board of Physical Therapy Practice (Board). Accordingly, this is a Final Order of Dismissal.

APPEARANCES

For Petitioner: Christopher Brooks, Qualified Representative
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For Respondent: Lynette Norr, Esquire
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STATEMENT OF THE ISSUES

The issues to be presented for determination are whether the statements alleged in the Petition and the Amended Petition are agency statements of the Board meeting the definition of a rule in section 120.52, Florida Statutes, and, if so, whether they have been adopted as rules through the rulemaking process outlined in section 120.54.

PRELIMINARY STATEMENT

On January 8, 2021, Patricia Brooks (Petitioner) filed the Petition at issue in this case. The Petition identified the Board as the Respondent. The case was assigned to the undersigned and is noticed for hearing to commence February 25, 2021, by Zoom teleconferencing. Both parties waived the requirement that the hearing be conducted within 30 days of filing the Petition. Since the filing of the Petition, an Order to Show Cause was issued, to which both parties have responded. The Order to Show Cause directed the

parties to show cause why the Petition should not be barred based upon the resolution of *Brooks v. Department of Health*, Case No. 18-0705RU (Fla. DOAH May 31, 2018), in which the same or substantively similar statements as those alleged in this case were alleged to be unadopted rules of the Department as opposed to the Board, and in which Administrative Law Judge Elizabeth McArthur found that the statements alleged to be unadopted rules were statements of the Professional Resource Network (PRN).

On January 19, 2021, Respondent filed a Motion to Dismiss Petition for Failure to State a Cause of Action on Which Relief Can be Granted, to which Petitioner responded on January 27, 2021. Respondent also filed a Request for Amendment of Petition, and on January 29, 2021, Petitioner filed an Amended Petition. Petitioner did not seek leave to file the Amended Petition as required by Florida Administrative Code Rule 28-106.202. Finally, on February 1, 2021, Respondent filed a Motion to Dismiss Amended Petition, and on February 3, 2021, Petitioner filed a response to the Motion to Dismiss Amended Petition, attaching as exhibits copies of Florida Administrative Code Rule 64B17-7.001 (the Board's disciplinary guidelines), the transcript of the probable cause meeting related to the probable cause finding for her disciplinary proceeding in Case No. 20-5348, and a copy of PRN's Participant Manual.

Petitioner also filed a Motion for Representation, requesting that Christopher Brooks be allowed to serve as her Qualified Representative. The motion is granted.

All references to Florida Statutes are to the current codification, unless otherwise indicated.

In light of the disposition of this case based upon the Petition, Amended Petition, responses to the Order to Show Cause, and motions and responses filed, the material facts necessary to reach a determination in this case are either not in dispute or are determined by statute. Additional detail regarding the Petition, Amended Petition, motions and responses are provided in the Findings of Fact. For purposes of ruling on the Motion to Dismiss Amended Petition, the allegations of fact (as opposed to expressions of opinion or statutory construction) contained in the Petition and the Amended Petition and its attached Administrative Complaint are accepted as true. *Altee v. Duval Cty. Sch. Bd.,* 990 So. 2d 1124, 1129 (Fla. 1st DCA 2008).

FINDINGS OF FACT

1. Petitioner is a physical therapist licensed in the State of Florida.

2. Respondent is the Florida Board of Physical Therapy Practice, which is established within the Division of Medical Quality Assurance of the Department of Health. *See* § 20.43(2)(g)26., Fla. Stat. The duties generally assigned to health care boards and the duties assigned to the Department are contained in chapter 456, Florida Statutes, while those assigned to this Board specifically are contained in chapter 486, Florida Statutes.

3. Petitioner is the subject of an Administrative Complaint filed by the Department. The Administrative Complaint is docketed at the Division of Administrative Hearings (DOAH) as Case No. 20-5348PL.

4. Petitioner alleges that certain statements made by PRN in a monitoring contract are unadopted rules of the Board and the Department. Those alleged unadopted rules are as follows:

> (1) Adopting a policy *through the Department's consultant Professional Resource Network* (PRN) under Section 456.076, Florida Statutes, to require licensees with a previously diagnosed illness to incur substantial costs to be monitored for five years by PRN without following proper rulemaking authority.

> (2) Adopting a policy *through the Department's consultant PRN* under section 456.076, Florida Statutes, to require licensees with a previously diagnosed illness to incur substantial costs and seek an "Appropriateness to Exit Evaluation" from a non-treating professional after treatment completion without following proper rulemaking authority.
>
> (3) Adopting a policy *through the Department's consultant PRN* under Section 456.076, Florida Statutes, to require licensees with a previously diagnosed illness to incur substantial costs and Peth [drug] test for five years without following proper rulemaking authority.

5. In August of 2014, Petitioner removed herself from practice, and in January 2015, entered the impaired practitioner's program. In April 2015, Petitioner signed an agreement to have her aftercare monitored by PRN. A copy of the monitoring agreement has not been provided in this case.

6. In March 2018, PRN filed a complaint regarding Petitioner with the Department.

7. On or about June 17, 2020, the Department filed Administrative Complaint Case No. 2018-07401. The Administrative Complaint is the basis for the proceeding in *Department of Health v. Brooks*, DOAH Case No. 20-5348PL. The factual allegations in the Administrative Complaint include the following:

> 6. On or about April 6, 2015, Respondent entered into a Five-Year Monitoring Contract (Contract) with Professionals Resource Network (PRN), requiring Respondent to be regularly PEth tested.
>
> 7. During the term of the Contract, Respondent expressed to PRN that she was financially unable to continue the required testing.
>
> 8. Respondent requested an early termination of the Contract from PRN.

> 9. PRN required Respondent to undergo an Appropriateness to Exit Evaluation (Evaluation) if she desired to terminate the Contract.
>
> 10. Respondent ceased performing the required testing and did not submit to an Evaluation.
>
> 11. On or about March 20, 2018, PRN terminated the Contract with Respondent for failure to comply with the terms of the Contract without good cause.

8. Based on these and other allegations not relevant to this proceeding, Petitioner is charged in the Administrative Complaint with failing to report to the Board a guilty plea to driving under the influence within 30 days, in violation of section 456.072(1)(x), and being terminated from an impaired practitioner program without good cause, in violation of section 456.072(1)(hh).

9. Section 456.076 identifies the responsibilities of the Department with respect to establishment of an impaired practitioner program. Pursuant to the terms of section 456.076, the Department has contracted with PRN to serve as a "consultant." Section 456.076(1)(a) defines a consult as "an entity who operates an approved impaired practitioner program pursuant to a contract with the [D]epartment."

10. The impaired practitioner program is a program "established by the [D]epartment by contract with one or more consultants to serve impaired and potentially impaired practitioners for the protection of the health, safety, and welfare of the public." § 456.076(1)(d), Fla. Stat.

11. Section 456.076(e) defines "impairment" as "a potentially impairing health condition that is the result of the misuse or abuse of alcohol, drugs, or both, or a mental or physical condition that could affect a practitioner's ability to practice with skill and safety."

12. A participant in the program is "a practitioner who is participating in the impaired practitioner program by having entered into a participant

contract. A practitioner ceases to be a participant when the participant contract is successfully completed or is terminated for any reason." § 456.076(h), Fla. Stat. A participant contract is "a formal written document outlining the requirements established by a consultant for a participant to successfully complete the impaired practitioner program, including the participant's monitoring plan." § 456.076(1)(i), Fla. Stat.

13. Section 456.076(2) provides that the Department may retain one or more consultants to operate its impaired practitioner program and outlines the qualifications that consultants must have. Subsection (3) provides that the terms and conditions for the impaired practitioner program must be established by contract between the Department and the consultant(s) and identifies the minimum requirements for the program. Those minimum requirements include arranging for evaluation and treatment of impaired practitioners when the consultant deems such evaluation and treatment is necessary; acceptance of referrals; and monitoring recovery progress and status of impaired practitioners to ensure that they are able to practice with skill and safety. It is expressly required in section 456.076(3)(c) that "[s]uch monitoring must continue until the consultant or department concludes that monitoring by the consultant is no longer required for the protection of the public or until the practitioner's participation in the program is terminated for material noncompliance or inability to progress."

14. Consultants do not directly evaluate, treat, or otherwise provide patient care to participants in the program. § 456.076(3)(d), Fla. Stat.

15. The participant contract that an impaired practitioner signs is a contract with the consultant and is not a contract with the Department or the Board. Section 456.076(5) provides:

> A consultant shall enter into a participant contract with an impaired practitioner and shall establish the terms of monitoring and shall include the terms in a participant contract. In establishing the terms of monitoring, the consultant may consider the

> recommendations of one or more approved evaluators, treatment programs, or treatment providers. A consultant may modify the terms of monitoring if the consultant concludes, through the course of monitoring, that extended, additional, or amended terms of monitoring are required for the protection of the health, safety, and welfare of the public.

16. Generally, when a licensee has self-reported to an impaired practitioner program and remains in compliance with the terms of his or her contract, the matter remains between the licensee and the consultant. § 456.076(10), Fla. Stat. However, section 456.076(12)(a) provides that when a participant is terminated for "material noncompliance with a participant contract, inability to progress, or any other reason than completion of the program," the consultant is required to disclose to the Department all information in its possession related to the practitioner, and the disclosure is considered a complaint within the meaning of section 456.073.

17. Section 456.076, as currently enacted, contains no rulemaking authority for either the Department or the Board.[1]

18. Petitioner alleges that the statements contained in paragraph four are unadopted rules of the Department and the Board. The statements are requirements with which Petitioner had to comply under the terms of her PRN contract, or monitoring agreement.

19. Petitioner's Amended Petition does not expressly allege that either the Board or the Department approve or adopt the provisions contained in her PRN contract alleged to be unadopted rules. She states that both the Department and the Board are responsible for "receiving the text of non-rule statements" (Amended Petition, ¶ 2); are "beneficiaries of a contract between

[1] Most of the rules associated with the impaired practitioner program have been repealed. *See* Fla. Admin. Code Rs 64B31-10.002, .003, and .004 (repealed Mar. 30, 2014). However, rule 64B31-10.001 was last amended on December 21, 2015, before the substantial rewrite of section 456.076 in 2017, when the specific rulemaking authority formerly contained in section 476.076(1) was removed. It appears that this rule, which Petitioner cites, is no longer authorized, but that is an issue for another day.

the Department and PRN to operate an impaired practitioners' program" (¶ 7); "by statute and rule use and refer to the services of the consultant who operates the impaired practitioners' program" (¶ 8); and "benefit from the use of the PRN services for licensees involved in impairment situations." (¶10). In her response to the Board's Motion to Dismiss Amended Petition, she acknowledges that the Board is not responsible for the creation of section 456.076; for the contents of a participant contract; or for the contract between the Department and PRN. The crux of her complaint is that "this program is not a treatment program operated by the consultant's doctors and nurses, [and] there is no rule or law requiring testing for 5 years, monitored treatment for 5 years and an evaluation from a non-treating professional when already under the care and treatment of a licensed treating professional." (¶ 19). In short, she does not like how the PRN program is structured in general.

20. Petitioner acknowledges that the PRN contract or monitoring agreement "was not the result of board involvement."

21. Through this proceeding, Petitioner seeks a final order declaring the challenged statements invalid; and an award of costs and interest, and such other orders as deemed necessary against the Department and its Board "for mandating license holders with a specific illness to be drug tested, monitored by its consultant for a stated period and require evaluations from a non-treating professional when already under the care of a licensed professional. This includes but is not limited to non-rule regulatory fees incurred for testing." Petitioner also wants the Department and the Board to develop rules for the impaired practitioner program according to the intent of the Legislature. Petitioner is seeking relief that is beyond the parameters of an unadopted rule challenge. Given the current structure provided in section 456.076, the remedy she seeks is best provided by the Legislature.

CONCLUSIONS OF LAW

22. DOAH has jurisdiction over the subject matter and the parties of this proceeding pursuant to section 120.56, Florida Statutes.

23. In this case, there are four preliminary issues that must be resolved for Petitioner to prevail. First, Petitioner must demonstrate that she has standing to bring this challenge regarding the alleged statements. Second, Petitioner must show that she has filed this action against the proper party. Third, Petitioner must allege and show how the statements identified in the Amended Petition become agency statements. To do so, Petitioner must demonstrate that the statements have been approved or adopted by Respondent as its own. Fourth, Petitioner must show that this case is not barred by the resolution in *Brooks v. Department of Health*, Case No. 18-0705RU (Fla. DOAH May 31, 2018).

24. Should Petitioner overcome these hurdles, she would have to prove by a preponderance of the evidence that the statements are rules as defined by section 120.52(15). § 120.56(4)(b), Fla. Stat.

25. Petitioner has standing to bring this proceeding. She is a licensee who is facing disciplinary action for not complying with the provisions of her contract with PRN. She has alleged that the statements which she alleges to be agency statements are being applied in a manner that affects her substantial interests.

26. Section 120.56(4)(a) is the statutory vehicle in the Administrative Procedure Act by which substantially affected persons may challenge an agency statement that should have been adopted as a rule. Section 120.56(4) provides in pertinent part:

> (a) Any person substantially affected by an agency statement that is an unadopted rule may seek an administrative determination that the statement violates section 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.

27. While Petitioner has standing to bring this action, Respondent has suggested, correctly, that she has brought the action against the wrong party. The only respondent named in the Amended Petition is the Board. Only the Board's counsel is provided notice. While there are numerous references to the Department in the Petition and the Amended Petition, it is not a party to the proceeding.

28. It is likely that Petitioner brings this action against the Board instead of the Department, because she has already brought an action challenging these statements as unadopted rules against the Department and has been unsuccessful in that endeavor. *See Brooks v. Dep't of Health, supra.* Whether she is foreclosed from bringing this claim because of the disposition in that proceeding will be discussed more fully below. However, section 456.076 is clear that the Department, and not the Board, has the responsibility to contract with PRN or other consultants to implement an impaired practitioner program. The Board has no role in that aspect of the statutory scheme. Petitioner insists that the Board is a proper party because it is the Board that directed the Department to file the Administrative Complaint currently pending against her.

29. Petitioner misstates the process. Section 456.072 requires a probable cause panel of the Board, not the Board itself, to determine whether there is probable cause to find a licensee in violation of the laws and/or rules applicable to the licensee. § 456.073(2), (4), Fla. Stat. The members of a probable cause panel who consider whether an Administrative Complaint should be filed can be either current or past members of the Board. Those probable cause members who are current members of the Board will not participate in final agency action when the case is presented for final agency action, which has yet to happen in this case. § 456.073(6), Fla. Stat.

30. Petitioner also contends that the Board is "admitting statements and policies are not of the Board, rather the statements and policies of the Board's consultant." (Petitioner's Response to Motion to Dismiss Petition). Once again, section 456.076 provides that PRN is the Department's consultant, not the Board's. Even assuming that PRN was a consultant of the Board, the Petition does not allege how statements made by PRN become statements of the Board. In her response to the Motion to Dismiss the Petition, Petitioner asserts that the requirements about which she complains are from PRN policies and manuals, and that somehow, by the Board pointing that out, these requirements become statements of the Board. That is simply not the case.

31. Petitioner has named the wrong entity as a respondent in this case. The statutory scheme is clear that while the Board has some interaction with PRN during the licensing and regulatory process, none of those interactions have been alleged in this case. The Board has not caused Respondent's injury and cannot provide her any relief from the requirements of her contract. For these reasons alone, it is appropriate to dismiss the proceeding against the Board.

32. Petitioner also must allege that the statements about which she complains are statements of an agency as defined in section 120.52. She has not done so.

33. Section 120.54(1)(a) provides that "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." A rule is "each *agency* statement of general applicability that implements, interprets, or proscribes 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." (emphasis added).

34. The pivotal issue in this case is which entity is responsible for the statements Petitioner seeks to challenge as unadopted rules. In order to be the subject of an unadopted rule challenge, the statements must be agency statements. PRN is not an agency.

35. An "agency" for the purposes of chapter 120, is defined in section 120.52(1), as follows:

> "Agency" means the following officers or governmental entities if acting pursuant to powers other than those derived from the constitution:
>
> (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 agency 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. (exclusions omitted).

36. The Board is an agency, as a governmental agency in the state having statewide jurisdiction. The Department is also an agency, as a state department, but is not a party to this proceeding. PRN is not named as a party but is the entity responsible for the statements Petitioner alleges are unadopted rules. PRN is also not a state agency. "A private entity which contracted to provide services for a state agency does not thereby become a

state agency itself." *Vey v. Bradford Union Guidance Clinic, Inc.*, 399 So. 2d 1137, 1139 (Fla. 1st DCA 1981); *see also First Quality Home Care, Inc. v. Alliance for Aging, Inc.,* 14 So. 3d 1149, 1153 (Fla. 3d DCA 2009). Moreover, the fact that PRN is considered an agent of the Department for purposes of tort liability is also not dispositive. Section 769.28, Florida Statutes, envisions a much broader definition of the term "agency" than does chapter 120. *Rubenstein v. Sarasota Cty. Pub. Hosp.,* 498 So .2d 1012, 1013 (Fla. 2d DCA 1986).

37. There is no real dispute that the statements at issue here originate with PRN. It is not enough to allege that the Board and the Department receive the statements or benefit from them. To meet the definition of a rule, the statements must be the agency's statements, or affirmatively adopted as its own. The statements about which Petitioner complains are not statements of the Board and are not statements by any agency. They are statements of a private entity.

38. Petitioner must also show that this action is not barred by the resolution in *Brooks v. Department of Health.* In that case, Petitioner filed an unadopted rule challenge pursuant to section 120.56 against the Department as opposed to the Board. Administrative Law Judge McArthur stated:

> 50. In similar contexts, statements by an entity contracting with an agency have not been attributed to the agency so as to support a challenge to the statements as unadopted rules, because of the lack of allegations and proof that the agency adopted those statements or at least affirmatively reviewed and approved them. *See, e.g., Carswell v. Fla. State Univ. Schools, Inc., et al.,* Case No. 13-3388RU (Final Order of Dismissal, Fla. DOAH Nov. 26, 2013) (charter school's student Code of Conduct could not be challenged as an unadopted rule by attribution to Florida State University (FSU) through the contract between the charter school and FSU as its sponsor; even though the charter contract required that student dismissals occur in accordance with the policies and

procedures in the charter school's Code of Conduct, FSU could not be said to have adopted the Code as its own); *Fla. Ass'n for Child Care Mgmt., Inc. v. Early Learning Coalition of Duval, et al.,* Case No. 08-1717RU (Fla. DOAH Aug. 26, 2009)(rejecting attempted unadopted rule challenge to a quality rating improvement system developed by an Early Learning Coalition (ELC), a non-profit corporation providing school readiness services pursuant to a grant agreement with the Agency for Workforce Innovation (AWI); even though the challenged system was part of the ELC's school readiness program which was approved by AWI, the system itself was not reviewed and approved by AWI, and even if it had been, review and approval of an ELC's school readiness program does not transform that program into an agency statement subject to challenge as an unadopted rule); …

* * *

52. Petitioner also argued for attribution of the Department of PRN's statements in its manuals because a participant's non-compliance might be raised by the Department as grounds for disciplinary action.

53. Assuming for the sake of argument that a participant did not comply with statements in PRN's manuals, the actual chain of events required by statute shows how attenuated the non-compliance is from any agency action. Pursuant to statute, the chain of events must be as follows: First, PRN might utilize its manuals in some fashion to establish the specific requirements for an individual's participant contract; the practitioner would then have to sign the participant contract in order to become a participant in the impaired practitioner program; then, pursuant to section 456.076(12)(b), if the participant was ultimately terminated from the program by PRN because the participant was found to be materially non-compliant with the terms of the participant contract, PRN would be required to submit the

information to the Department and the submission would be treated as a complaint under section 456.073; then, if, after the Department's investigation of the complaint, the case is submitted to a probable cause panel, and there is s determination by the probable cause panel that there is probable cause to believe there are grounds to take disciplinary action, the Department might prepare an administrative complaint to charge the terminated practitioner.

54. The disciplinary statute cited by Petitioner, section 456.072(1)(hh), provides that the following is grounds for disciplinary action:

> Being terminated from an impaired practitioner program that is overseen by a consultant as described in s. 456.076, for failure to comply, without good cause, with the terms of the monitoring or participant contract entered into by the licensee, or for not successfully completing any drug treatment or alcohol treatment program.

55. As a matter of law, any proposed agency action by the Department, in the form of an administrative complaint charging a practitioner with "non-compliance" in violation of section 456.072(1)(hh), could not be based on statements in a consultant's manuals. The proposed agency action would have to be based on the practitioner's non-compliance, "without good cause," with the terms of the contract that the practitioner entered into in order to become a participant in the impaired practitioner program.

56. The result of a successful unadopted rule challenge is that "the agency must immediately discontinue all reliance upon the unadopted rule or any substantially or similar statement as a basis for agency action." § 120.56(4)(d), Fla. Stat. The Department cannot be directed to discontinue reliance on PRN's statements in its manuals, without Petitioner alleging and proving that the

> Department is relying on PRN's statements in its manuals as a basis for agency action. From this perspective as well, it is clear that Petitioner's true objection is to the terms of her participant contract that she entered with PRN, an objection that cannot be heard in an unadopted rule challenge against the Department.

39. There are two legal theories by which Petitioner's current challenge could possibly be barred by the *Brooks v. Department of Health* decision: the doctrines of res judicata and collateral estoppel. Both doctrines are based on the premise that there should be some finality in decisions, and in the administrative context, are generally referred to as the doctrine of administrative finality. *Pumphrey v. Dep't of Child. & Fams.,* 292 So. 3d 1264, 1266 (Fla. 1st DCA 2020). As stated in *Austin Tupler Trucking, Inc. v. Hawkins*, 377 So. 379, 681 (Fla. 1979), "[t]here must be a terminal point in every proceeding both administrative and judicial, at which the parties and the public may rely on a decision as being final and dispositive of the rights and issues involved therein."

40. In *Topps v. State,* 865 So. 2d 1253, 1254-55 (Fla. 2004), the Supreme Court of Florida identified the elements required for either res judicata or collateral estoppel to apply, stating:

> Res judicata (or claim preclusion) is one type of procedural bar. Translated from the Latin, it means "a thing adjudicated." *See Black's Law Dictionary* 1312 (7th ed. 1999). The doctrine of res judicata bars relitigation in a subsequent cause of action not only of claims raised, but also claims that could have been raised. The idea underlying res judicata is that if a matter has already been decided, the petitioner has already his or her day in court, and for purposes of judicial economy, that matter generally will not be reexamined again in *any court* (except, of course, for appeals by right). The doctrine of res judicata applies when four identifies are present: (1) identity of the thing sued for; (2) identify of the cause of action; (3) identity of

> the persons and parties to the action; and (4) identity of the quality of the persons for or against whom the claim is made.
>
> The doctrine of collateral estoppel (or issue preclusion), also referred to as estoppel by judgment, is a related but different concept. In Florida, the doctrine of collateral estoppel bars relitigation of the same issues between the same parties in connection with a different cause of action. (Footnotes and citations omitted).

41. Neither doctrine bars the claim in this proceeding, because both require identity of parties, which is lacking. While Petitioner is bringing essentially the same cause of action, i.e., an unadopted rule challenge with respect to the same alleged agency statements, she brought the prior action against the Department, whereas this time she seeks to attribute the statements to the Board.

42. However, examination of the doctrines is relevant, because the undersigned has determined the Board is not a proper party to this proceeding, given that section 456.076 grants the Board no authority regarding the implementation of the impaired practitioners' program. If this case were dismissed with leave to amend to substitute the proper party, any attempt to substitute the Department for the Board *would* be barred by res judicata. While on its face, the concept of res judicata does not bar the current action, for all practical purposes, the concept makes any attempt to amend the Amended Petition further a futility.

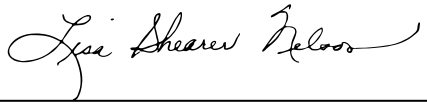
43. Finally, the statements at issue are not statements of the Board or of the Department. They are statements made by PRN, who is not an agency. Because section 120.52 defines an unadopted rule as an "agency statement," statements made in a participant contract between a licensee and the consultant, PRN, are simply not agency statements subject to the rulemaking

process. Accordingly, the Amended Petition does not state a cause of action under section 120.56.[2]

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Amended Petition to Determine the Invalidity of Existing "Non-Rule" Agency Policy, filed by Petitioner Patricia Brooks, be dismissed without further leave to amend.

DONE AND ORDERED this 10th day of February, 2021, in Tallahassee, Leon County, Florida.



LISA SHEARER NELSON
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Filed with the Clerk of the
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[2] It is noted that with respect to the disciplinary proceedings, Petitioner remains free to challenge whether her dismissal from the program was "without good cause."

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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.