

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MAGGIE L. ALLEN)
)
 Petitioner,)
)
 vs.) CASE NO. 81-1694RX
)
 DEPARTMENT OF LAW ENFORCEMENT,)
)
 Respondent.)
 _____)

FINAL ORDER

Pursuant to notice, an administrative hearing was held before R. L. Caleen, Jr., Hearing Officer with the Division of Administrative Hearings, on August 24, 1981, in Tallahassee, Florida. Appearances

For Petitioner: Ben R. Patterson, Esquire
Post Office Box 4289
Tallahassee, Florida 32303

For Respondent: Janet E. Ferris, Esquire
Post Office Box 1489
Tallahassee, Florida 32302

ISSUE PRESENTED

Whether respondent's rules of conduct contained in Department of Law Enforcement Directive #200.08 constitute an invalid exercise of delegated legislative authority on the ground that they were not promulgated in accordance with Chapter 120, Florida Statutes (1979)

BACKGROUND

On June 25, 1981, petitioner Maggie L. Allen ("Petitioner") filed a "Petition for Rule Determination" pursuant to Section 120.56, Florida Statutes (1979). Petitioner alleges that she was employed by the respondent Department of Law Enforcement ("Department"), that on June 15, 1981, the Department terminated her employment because of her willful violation of Department Directive #200.08; and that such directive has not been adopted as a rule in accordance with Chapter 120, Florida Statutes (1979).

By order dated July 7, 1981, the Director of the Division of Administrative Hearings assigned this matter to the undersigned; hearing was thereafter set for August 6, 1981.

On July 31, 1981, the Department moved to dismiss based on petitioner's alleged failure to comply with a prehearing order requiring identification of exhibits, witnesses, and issues of fact and law. Counsel for "petitioner" responded that the noncompliance was inadvertent. The motion was therefore denied; however, final hearing was continued and reset for August 24, 1981.

At final hearing, the parties stipulated to certain facts and offered joint Exhibit Nos. 1 through 3 into evidence; Exhibit No. 4 was moved into evidence by the Department without objection by petitioner. No testimonial evidence was presented.

The issues are clearly drawn. Petitioner contends that Department Directive #200.08 (containing rules of conduct for employees) is a "rule" within the meaning of the Administrative Procedure Act ("APA"), that it has not been properly promulgated in accordance with the APA, and that it thus constitutes an invalid exercise of delegated legislative authority.

The Department responds that Directive #200.08 is an internal management memoranda, not a "rule" within the meaning of the APA. Alternatively, if the directive is a "rule," the Department argues that it has been properly promulgated, by reference, in Department Rule 11-1.12, Florida Administrative Code.

The parties have submitted proposed findings of fact and conclusions of law. To the extent such findings and conclusions are not incorporated herein, they are rejected as contrary to the evidence, irrelevant to the issues, or not in accordance with law.

Based on the evidence and the agreed-upon facts, the following findings are entered:

FINDINGS OF FACT

1. Petitioner Maggie L. Allen was a Career Service employee (with permanent status) of the Department of Law Enforcement until she was terminated from her position or about June 15, 1981. She has appealed her termination to the Florida Career Service Commission. (Prehearing Stipulation, p. 2; Respondent's Admissions.)

2. The reason given for her termination was, in part, her alleged violation of Department Directive #200.08(5), Rules of Conduct ("Directive"). More specifically, the Department charged her with violating specific rules of conduct contained in the Directive: Rule 10, entitled, "Insubordination"; Rule 22, entitled, "Departmental Reports"; Rule 23, entitled, "Performance of Lawful Duty"; and Rule 34, entitled, "Truthfulness." (Prehearing Stipulation, p. 2; Respondent's Admissions; Exhibit No. 3.)

3. The Directive, effective November 27, 1978, is an official statement of Department policy and is generally applicable to all employees of the Department. Its stated purpose is "to provide each Departmental employee with clear examples of acts which would violate the above personnel rules or statutes." (Emphasis supplied.) (Exhibit No. 1.) Essentially, the Directive defines acceptable conduct for Department employees by specifically enumerating 35 standards of conduct. By its terms, breach of one or more of those standards constitutes employee misconduct and may result in disciplinary action against an employee ranging from oral reprimand to discharge. However, these standards are not intended to be an exclusive, or exhaustive listing of impermissible conduct. (Respondent's Admissions; Exhibit No. 1.)

4. The Directive is part of the Department's Duty Manual, a volume containing directives on personnel, administrative, training, and fiscal matters as well as the operations of the Department's divisions. The stated purpose of the Duty Manual is to "inform and guide . . . [Department] officers and employees in the performance of their official duties." (Exhibit No. 2.) The Duty Manual recites that it is "promulgated" pursuant to Chapter 120, Florida Statutes, that copies are disseminated to all employees and that employees must obey, comply with, and follow the Manual's directives. The Manual has been incorporated, by reference, in Department Rule 11-1.12, Florida Administrative Code. All formalities concerning publication of Rule 11-1.12 were complied with prior to its publication in the Florida Administrative Code. (Prehearing Stipulation; Exhibit No. 2.)

5. Department Rule 11-1.12, incorporating--by reference--the Duty Manual, was adopted on March 20, 1979, for the purpose of validating those portions (unspecified) of the Manual which constituted "rules" under the APA. At the time, the Department anticipated that adopting the Manual, by rule, would "lead to greater efficiency." (Exhibit No. 2.)

CONCLUSIONS OF LAW

6. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding. Petitioner is substantially affected by Department Directive #200.08, since it forms--in part--the basis for the Department's termination of her employment. 120.56, Fla. Stat. (1979)

7. On June 25, 1981, petitioner commenced discovery by filing requests for admissions; since the Department failed to answer those requests within the prescribed 30-day period, the requests were deemed admitted. See, Rule 1.370, Fla. R. Civ. P.; 120.58(1)(b), Fla. Stat. (1979).

8. Thereafter, on August 19, 1981, the parties executed a pre-hearing stipulation pursuant to prehearing order, and included a Statement-of-stipulated-facts. Those stipulated facts, in part, conflict with the Department's earlier admissions (which resulted from its failure to timely answer the requests for admissions). 1/ Any inconsistency has been resolved in favor of the parties' subsequently filed prehearing stipulation. By agreeing to the matters in the stipulation, petitioner, in effect, allowed the Department to "amend" its earlier admissions 2/ to the extent necessary to conform them to the subsequently filed statement-of-stipulated-facts. Furthermore, no showing has been made that allowing the Department to so "amend" its prior admissions would prejudice petitioner in presenting her case. See, Rule 1.370(b), Fla. R. Civ. P.

9. In Section 120.56 proceedings, the burden is upon one who attacks an agency rule to show that it is an invalid exercise of delegated legislative authority. Cf., *Agrico Chemical Co. v. State*, 365 So.2d 759, 763 (Flab 1st DCA 1979). A rule not adopted in accordance with the rulemaking procedures prescribed by Section 120.54 is invalid. *Department of Environmental Regulation v. Leon County*, 344 So.2d 297, 299 (Fla. 1st DCA 1977)

10. Here, the petitioner has not sustained her burden of proof; she has not presented sufficient evidence to establish her allegation that "Department Directive #200.08, has not been adopted as a rule as required by Chapter 120 of the Florida Statutes." (Petition for Rule Determination, p. 2, dated June 25, 1981.)

11. In March, 1979, the Department adopted Rule 11-1.12, Florida Administrative Code, which incorporated, by reference, the Department's Duty Manual (containing Directive #200.08).

12. Agencies may adopt rules incorporating, by reference, other material provided they comply with several requirements. Rule 15-1.005, F.A.C. see, Department of Health and Rehabilitative Services v. Florida Project Directors Association, 368 So.2d 954 (Fla. 1st DCA 1979). For example, the material incorporated must be generally available to affected persons, and must be filed with the Department of State. Rule 15-1.005(1)(a), (2), F.A.C.

13. Here, petitioner contends that she should prevail because the Department failed to prove that the incorporated material (the Duty Manual including Directive #200.08) was, in fact, generally available to affected persons and filed with the Department of State. 3/ However, the burden of going forward with evidence to establish such facts never shifted to the Department because petitioner failed to present a prima facie case establishing non-availability of the material or failure to file it with the Department of State. 4/ See, e.g., Florida Department of Transportation v. J.W.C. Company, Inc., 396 So.2d 778 (Fla. 1st DCA 1981); 23 Fla. Jur.2d, Evidence and Witnesses, 63-64; 29 Am. Jur.2d, Evidence, 123-126.

14. Petitioner argues that it was the Department's burden to present evidence on these matters because the Department's contention that Directive #200.08 was validly promulgated constituted an affirmative defense. But, the Department's position (that Directive #200.08 was validly promulgated) is encompassed within its denial of petitioner's charge that Directive #200.08 was not validly adopted; the Department's position does not set up new matters, or matters extrinsic to the allegations made by petitioner; hence it does not constitute an affirmative defense. See, 25 Fla. Jur., Pleadings, 77-78. Neither was the Department's position pled as an affirmative defense.

15. Moreover, even if the Department's contention is considered an affirmative defense, the burden of proving it does not shift to the Department until petitioner proves its allegations by a preponderance of the evidence-- something petitioner failed to do in this case. See, Heitman v. Davis, 172 So. 705, 706 (Fla. 1937)

16. In the alternative, the Department argues that Directive #200.08 qualifies for the "internal management memoranda" exception from the definition of "rule" provided by Section 120.52(14), Florida Statutes (1979). This argument comes too late.

17. In March, 1979, the Department submitted Directive #200.08 to the rulemaking procedures of Section 120.54. It was therefore required to comply with every step in the rulemaking process. Department of Environmental Regulation, supra.

18. By its 1979 adoption of Directive #200.08 as a rule, the Department presumably benefited from the advantages which ordinarily accompany agency rulemaking, e.g., increased administrative efficiency and avoidance of the need to repeatedly explicate and defend agency policy in Section 120.57 hearings. See, Anheuser-Busch, Inc., v. Department of Business, 393 So.2d 1177 (Fla. 1st DCA 1981). It cannot now--more than two years later--argue that it did not have to comply with APA rulemaking requirements because rulemaking was not necessary. In March, 1979, it chose to adopt Directive #200.03 (by reference) as a rule; it now must "be willing to live with . . . [that] basic policy choice," Anheuser-

Busch, supra at 1182, until the rule is changed or repealed. It cannot, now--by argument--effectively repudiate its prior actions or avoid their equal consequences.

It is, therefore,

ORDERED:

That the petitioner's Petition for Rule Determination is DENIED.

DONE AND ORDERED this 23 day of September, 1981, in Tallahassee, Florida.

R. L. CALEEN, JR.
Hearing Officer
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Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of September, 1981.

ENDNOTE

1/ For example, by its admission to petitioner's request for admission No. 7, the Department admits that Directive #200.08 has not been adopted as a rule in accordance with APA rulemaking procedures; yet, in their subsequently filed statement-of-stipulated-facts, both parties agree that the Directive is part of the Duty Manual, that the Manual is referenced in Rule 11-1.12, and that APA formalities concerning publication were complied with prior to publication of Rule 11-1.12 in the Florida Administrative Code.

2/ These consisted of petitioner's requests for admissions, dated June 25, 1981, deemed admitted by the Department's failure to timely answer.

3/ The Department responds that the Duty Manual recitation proves the former, while the language of Rule 11-1.12(3), Florida Administrative Code, establishes the latter.

4/ Petitioner admits her failure to present evidence on these two issues -- an evidentiary failure which cannot be cured by allegations in her petition.

COPIES FURNISHED:

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