

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GARY M. PICCIRILLO and)
DOUGLAS L. ADAMS,)
)
Petitioners,)
)
vs.) CASE NO. 83-1652RX
)
DEPARTMENT OF CORRECTIONS,)
)
Respondent.)
_____)

FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, William E. Williams, held a public hearing in this cause on August 13, 1983, at Union Correctional Institution, Raiford, Florida.

APPEARANCES

For Petitioners: Gary M. Piccirillo and
Douglas L. Adams, pro se
Union Correctional Institution
Post Office Box 221
Raiford, Florida 32083

For Respondent: William H. Ravenell, Esquire
Assistant Attorney General
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Petitioners, who at the time of formal hearing in this cause were inmates incarcerated at Union Correctional Institution, challenged the validity of Rules 33-11.025, 11.065, 11.075, 11.085, and 11.11, Florida Administrative Code, as invalid exercises of delegated legislative authority. In addition, Petitioners challenge as an unpromulgated, and therefore invalid, rule Respondent's Policy and Procedure Directive 4.07.24.

Final hearing in this cause was scheduled for August 12, 1983, by Amended Notice of Hearing dated July 15, 1983. At the final hearing Petitioners testified in their own behalf and called Glen Chambers and Kenneth Snow as their witnesses. Petitioners offered Petitioners' Exhibits 1 and 2, which were received into evidence. Respondent called Ron Jones as its only witness and offered Respondent's Exhibit 1, which was received into evidence.

In the petition filed herein, Petitioners challenge the validity of Respondent's promulgated rules as hereinbefore described on the grounds that they restrict and condition the award of gain time as provided in Section 944.275, Florida Statutes, and further argued that those rules are impermissibly vague allegedly due to their ". . . failure to set forth procedures [to insure]

that inmates who earn additional gain time under statutory provisions actually receive [it] " Petitioners also contend that Policy and Procedure Directive 4.07.24 is invalid because it: improperly delegates decision-making authority to deny an award of additional gain time to a classification specialist who may arbitrarily deny such an award; restricts and conditions the provisions of Chapter 33-11, Florida Administrative Code; and because it ". . . has a practical and actual effect of a `rule' without being properly adopted"

Both Petitioners and Respondent have submitted proposed findings of fact for consideration by the Hearing Officer. To the extent that those proposed findings are not included in this order, they have been specifically rejected as being either irrelevant to the issues in this cause or as not having been supported by evidence of record.

FINDINGS OF FACT

At all times material hereto, Petitioners were inmates incarcerated at Union Correctional Institution in Raiford, Florida. Respondent has stipulated that Petitioners have "standing" to challenge the rules and the policy and procedure directives which are the subject matter of this proceeding.

The Secretary of the Department of Corrections has issued Policy and procedure Directive initially dated June 23, 1982, and revised July 12, 1982. The purpose of the directive was" [t]o thoroughly explain the gain time program and to set forth guidance for uniform implementation department-wide on its face, the directive purports to be issued pursuant to the authority contained in Sections 944.275, 944.28, 945.21, and 775.087, Florida Statutes, and Chapter 33-11, Florida Administrative Code.

The directive contains ten separate sections. The first two sections, entitled Authority and Purpose of Directive merely recite the aforementioned statutory and rule basis for issuance of the directive, and indicate that the purposes of the directive is to explain and facilitate implementation of the gain time program. The third section, entitled Definitions, simply reiterates in substantially similar language, the definitions of the different types of gain time contained in Section 944.275, Florida Statutes. Section 4 of the directive contains special conditions to the award of gain time, including disciplinary or court action, unsatisfactory institutional performances, corrective consultations, administrative confinement, close management, inmates' assignment on Death Row, inmates serving three years' mandatory sentences, and the like. Each of the requirements of this section of the directive is either identical to or drawn directly from Rule 33-11.11, Florida Administrative Code, or Section 944.28(2)(a), Florida Statutes. The remaining six sections of the directive deal with eligibility for, methods for crediting and processing procedures for the award of basic gain time, additional gain time, work gain time, constructive gain time, extra gain time, and special gain time. Again, each of these sections reiterate requirements already contained in Rules 33-11.045, 33-11.055, 33-11.065, 33-11.075, 33-11.085, and 33-11.09. These sections of the directive do not purport to create or otherwise adversely affect rights of inmates in any manner which differs from the aforementioned rules.

Under the policy and procedure directive, classification officers employed by the Department of Corrections serve a limited function in the award of gain time. With respect to basic gain time, corrections officers merely check to make sure that no disciplinary report has been filed against an inmate for the period in which gain time is being awarded. They exercise no discretion in the

award of basic gain time. With respect to extra gain time or constructive gain time, the classification officer merely sits as a member of a classification team which determines the amount of any such award. Meritorious gain time is customarily instituted by the classification team as a whole, with the final decision-making authority resting with the agency head of the Department of Corrections. In each instance, classification officers have limited participation in the award of gain time, and may not act alone to deny inmates appropriate gain time awards.

CONCLUSIONS OF LAW

1. The Division of Administrative Hearings has jurisdiction over the subject matter of, and the parties to this proceeding. Section 120.56, Florida Statutes.

2. Section 945.21, Florida Statutes, provides, in pertinent part, as follows:

(1) The department shall promulgate regulations governing the administration of the correctional system and the operation of the department. In addition to specific subjects otherwise provided for herein, the regulations of the department may relate to:

(c) Gain-time for good conduct of, release payments to, and release transportation of inmates. . . ."

3. Section 944.275(7), Florida Statutes, provides that ". . . [t]he department shall promulgate rules to implement the granting, forfeiture, and restoration of gain-time."

4. Pursuant to the authority contained in the aforementioned sections, Respondent has promulgated Chapter 33-11, Florida Administrative Code. In this proceeding, Petitioners have specifically challenged the validity of Rules 33-11.025 relating to limitation on gain time deductions; 33-11.065 relating to the award of work gain time; 33-11.075 relating to the award of constructive gain time; 33-11.085 relating to the award of extra gain time; and, 33-11.11 governing with-holding or forfeiture of gain time. Petitioners argue that each of these sections ". . . restricts and conditions the award of gain time as provided in Section 944.275, Florida Statutes . . .", and that each of the challenged rules is ". . . vague by [their] failure to set forth procedures [to insure] that inmates who earn additional gain time under statutory provisions actually receive [it]" It is specifically concluded, as a matter of law, that each of these contentions is without merit. Where, as here, the legislature has delegated broad discretionary rulemaking authority to an agency, ". . . the validity of regulations promulgated thereunder will be sustained so long as they are reasonably related to the purposes of the enabling legislation and are not arbitrary or capricious. . . ." Florida Beverage Corporation v. Wynne, 306 So.2d 200, 202 (Fla. 1st DCA 1975); General Telephone Company of Florida v. Florida Public Service Commission, 6 FALR 1016, 1019 (Fla. 1984). Further, where an agency has responded to rulemaking incentives and has adopted as rules its policy statements of general applicability, ". . . [p]ermissible interpretations of statute must and will be sustained, though other interpretations are possible and may even preferable according to some views" Here, the legislature has specifically delegated broad rulemaking authority to the Department of Corrections in the award of various categories of gain

time. The rules adopted by the department, as challenged herein, are permissible interpretations pursuant to its statutory grant of authority, and it is therefore concluded, as a matter of law, that Petitioners have failed to establish a record basis for invalidating the challenged rule.

5. Section 120.52(15), Florida Statutes, defines the term "rule" to mean:

. . . each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, 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

Agency statements which meet the definition of a "rule" within the meaning of Section 120.52(15), Florida Statutes, but have not been adopted according to the rulemaking requirements of Section 120.54, Florida Statutes, are invalid. *Department of Administration v. Stevens*, 344 So.2d 290 (Fla. 1st DCA 1977) Agency statements which purport in and of themselves to create rights and adversely affect others, and which are applied prospectively with the force and effect of law, allowing little or no discretion in their implementation, are rules and are void unless formally adopted. *Florida State University v. Dann*, 400 So.2d 1304 (Fla. 1st DCA 1981). However, where agency statements that have not been adopted as rules simply track the language of either a statute or a validly adopted rule, it is unnecessary that they be adopted pursuant to the requirements of Section 120.54, Florida Statutes. See, *DeDakis v. Florida Real Estate Commission*, 388 So.2d 22 (Fla. 1st DCA 1980). In such cases, as with the policy and procedure directive here attacked as an unpromulgated rule, it is not the statement itself, but rather the statute and the validly promulgated rules which create or otherwise affect the rights of persons subject to its application. Here, the policy and procedure directive does no more than reiterate the requirements of existing statutes and validly promulgated rules, and was not required to be formally adopted. Accordingly, Petitioners' contention that Policy and Procedure Directive No. 4.07.24 constitutes an invalid unpromulgated rule is without merit.

Accordingly, based upon the foregoing Findings of Fact and Conclusions of Law, the relief sought by Petitioners should be, and the same is, hereby denied, and the petition dismissed.

DONE AND ENTERED this 17th day of April, 1984, at Tallahassee, Florida.

WILLIAM E. WILLIAMS
Hearing Officer
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Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of April, 1984.

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