STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ARCHIE D. WHITE,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 92-2392RXP
	)	
PAROLE AND PROBATION COMMISSION,	)	
	)	
Respondent.	)	
	)	
JEFFREY S. MCMAHON,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 92-2685RXP
	)	
PAROLE AND PROBATION COMMISSION,	)	
	)	
Respondent.	)	

FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, K. N. Ayers, held a formal hearing in the above-styled case on May 22, 1992, at Tallahassee, Florida.

APPEARANCES

For Petitioner White: Peter B. Dolinger
Qualified Representative
Florida Prison Legal Research and Representation Services
35246 U.S. Highway 19 North, Suite 111
Palm Harbor, Florida 34684

For Petitioner McMahon: Richard A. Belz, Esquire
Florida Institutional Legal Services
925 Northwest 56th Terrace
Gainesville, Florida 32605

For Respondent: William A. Camper, Esquire
Kurt E. Ahrendt, Esquire
Florida Parole Commission
1309 Winewood Boulevard, Building 6
Tallahassee, FL 32399-2450

STATEMENT OF THE ISSUES

Whether Rule 23-22.008(3)(d) and (e), Florida Administrative Code, constitutes an invalid exercise of delegated legislative authority.

PRELIMINARY STATEMENT

By Petition For Determination Of The Invalidity Of An Existing Rule dated April 17, 1992, Archie D. White, by and through his representative, challenges the validity of Rule 23-22.008(3)(d) and (e)4, 10, and 35, Florida Administrative Code. As grounds therefor, it is generally alleged the rules exceed the grant of statutory authority, are arbitrary, and capricious. This case was initially scheduled to be held on May 14, 1992.

By Petition For Administrative Determination received in this office April 30, 1992, Jeffrey S. McMahon, by and through his attorney, challenged the validity of Rule 23-22.008(3)(e), Florida Administrative Code. As grounds therefor, it alleged the Commission exceeded its legislative grant of rulemaking authority and that the rule is vague, fails to establish adequate standards or vests unbridled discretion in the Commission, and is arbitrary and capricious.

The two cases were consolidated for hearing, and following a telephone conference on Petitioner White's Motion For Continuance, the hearing was rescheduled to May 22, 1992, and was held as scheduled. At the hearing, motions to dismiss for lack of standing were denied. Thereafter, Petitioner called two witnesses, both employed by the Parole Commission, Respondent called one witness, and 14 exhibits were admitted into evidence. Proposed findings have been submitted by the parties. Treatment accorded those proposed findings is contained in the Appendix attached hereto and made a part hereof.

Having fully considered all evidence presented, I submit the following.

FINDINGS OF FACT

1. Petitioner, Archie D. White, is an inmate in the Florida Department of Corrections (DOC) serving a 4 1/2 year sentence for felony DUI, and Petitioner Jeffrey S. McMahon is an inmate of the DOC at Marion Correctional Institute Work Camp. Both Petitioner's are eligible for participation in the DOC Control Release Program in which Control Release Dates (CRD) are established for prisoners.

2. The Control Release Authority was established in 1989 by Section 947.146, Florida Statutes, to establish and implement a system of uniform criteria for the determination of the number and types of inmates who must be released into the community to maintain the state prison system below 97.5 percent of its lawful capacity as defined in Section 944.096, Florida Statutes.

3. In establishing the Control Release Authority, the Legislature designated the Parole Commission to publish rules and to operate the program. The statute exempted prisoners who had been convicted of named offenses from being selected for early release.

4. In determining eligibility for control release, the statute requires the CRD be based upon a system of uniform criteria which shall include, but not be limited to, present offenses for which the person is committed, past criminal conduct, length of cumulative sentences, and the age of the offender at the time of commitment.

5. Inherent in control release is the concept that the number of inmates requiring release due to prison population will vary and that those inmates less

likely to constitute a danger to the public should be selected. No inmate has a right to control release.

6. In many respects control release is similar to parole in determining eligibility, and evidence to this effect was presented. This fact could be inferred simply by reason of the Legislature conferring the running of the program to the Parole Commission and designating members of the Parole Commission as the Control Release Authority.

7. The system of uniform criteria established pursuant to statutory direction was modeled from the instrument currently used to determine relative release risk for parole-eligible inmates. The salient factors are similar, the offense severity mechanism is similar, and the aggravating factors are similar.

8. The Commission initially utilizes the Control Release Salient Factor Scoring System contained in Rule 23-22.008(3)(a),(b),(c) and (d), Florida Administrative Code. This system provides for the determination of control release dates by:

> a. Creating eight individual "indices" which are collectively called "salient factors." Salient factors is defined in Rule 23-22.006(27);
> b. Creating a "Severity of Offense Behavior" category; and
> c. Using the "Control Release Matrix Grid" which indicates an objective measurement of control release suitability and supervisional term by scoring each inmate's salient factors in relation to the severity and type of offense behavior resulting in commitment.

9. In addition to the Control Release Salient Factor Scoring System described above, the Commission also considers "aggravation" and "mitigation."

10. Aggravating factors (of which 27 are named) are listed in Rule 23-22.008(3)(e), Florida Administrative Code, and mitigating factors (of which 24 are named) are listed in Rule 23-22.008(3)(f), Florida Administrative Code.

11. Neither aggravating nor mitigating factors can readily be incorporated into the salient factor mechanism because they cannot be quantitatively measured, and their multiplicity would make the scoring mechanism too awkward.

12. Although one witness testified that if only one aggravating factor is found the CRD is automatically placed at the expiration of the inmate's sentence, other testimony deemed more accurate is that when the CRD is ultimately established, both aggravating and mitigating factors are considered, if both are present, and the mitigating factors may well supercede the aggravating factors.

13. Petitioner White challenges the propriety of including the offense of Felony Driving While Intoxicated in the classification of property offense. Criminal offenses are generally placed in three categories: property, violent, and drug. Felony DUI is neither violent nor drug, and placing this offense in the property category in Rule 22-23.008(3)(d)6II is not arbitrary or capricious.

14. When an inmate is received in the DOC, he/she is accompanied with documents relating to the inmate. The Respondent's Field Examiner uses these documents from which he makes a recommendation to Respondent's central office in

Tallahassee with respect to the inmate's CRD. In making these recommendations, the Field Examiners note only those aggravating and mitigating factors which are contained in subsections (e) and (f) of the rule here challenged. Weighing the aggravating and mitigating factors requires the exercise of some judgment on the part of the examiner. Similarly, judgment is exercised by the two Commissioners who make the final determination of CRD for each inmate.

15. Petitioners contend the rule is invalid because there are no specific standards promulgated by which the Commissioners determine how to balance or weigh the aggravating and mitigating factors to determine the effect both are to be given in establishing the CRD.

16. Field Examiners and Commissioners are selected only from the population with experience in the corrections field. In weighing the aggravating and mitigating factors, no iron clad rules can be established due to the complexity of the facts pertaining to each inmate. Accordingly, exercise of sound judgment is required. Leaving room for the exercise of judgment in determining which inmate is deemed less likely to be a danger to the public if released early on a CRD is essential to the sound and consistent carrying out of the program. Exercise of sound judgment under these circumstances is not arbitrary and capricious.

17. Petitioners further contend that the rule is invalid because the aggravating and mitigating factors utilized are not further defined in the rules. One phrase questioned in this manner is "multiple separate offenses." While the meaning of this phrase may not be readily apparent to one unfamiliar with adjudication and sentencing, the phrase has a well established meaning in the corrections, probation and parole field.

18. Other aggravating factor language questioned by Petitioners as not further defined are "inmate has a history of alcohol or narcotic abuse" and "trivial." Testimony that an aggravation factor is applied when the crimes committed by the inmate show a pattern of being alcohol or drug related and not when the alcohol or drug abuse are unrelated to the crimes committed by the inmate, is the logical interpretation to be expected when the overall aim of the control release program is considered. Similarly, the word "trivial" is a word of common and wide usage, and in these rules it is given its well recognized meaning. While it is possible for different people to make different findings regarding whether past offenses committed by the inmate were of a trivial nature, the people here making that determination are experienced in the field of corrections. Further, before a control release date is finally established, the recommendation of the Field Examiner is reviewed by two Commissioners. If these two Commissioners do not agree on the CRD, a third Commissioner has the deciding vote. Thus, no CRD is established without the approval of two Commissioners.

CONCLUSIONS OF LAW

19. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings.

20. As inmates in the Florida Correctional System and subject to receiving a CRD, both Petitioners have standing to challenge the rules affecting their CRD.

21. The rules here challenged are alleged to be an invalid exercise of delegated legislative authority. Section 120.52(8), Florida Statutes, provides:

> (8) "Invalid exercise of delegated legislative authority" means action which goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if one or more of the following apply:
> (a) The agency has materially failed to follow the applicable rulemaking procedures set forth in Section 120.54;
> (b) The agency has exceeded its grant of rule-making authority, citation to which is required by Section 120.54(7);
> (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by Section 120.54(7);
> (d) The rule is vague, fails to establish adequate standards for agency decisions, or vest unbridled discretion in the agency; or
> (e) The rule is arbitrary or capricious.

22. Here no allegation is made that prescribed rulemaking procedures were not followed. The allegations are that the agency went beyond the authority granted by the Legislature, and the rule is arbitrary or capricious. Specifically, the Petitioners challenge the authority of the Commission to enact the rule providing for aggravating factors to be considered in establishing an inmate's CRD.

23. In these proceedings, the Petitioners have the burden to prove, by a preponderance of the evidence, that the challenged rules are invalid. Agrico Chemical Co. v. Department of Environmental Regulation, 365 So.2d 759 (Fla. 2nd DCA 1979).

24. Respondent's general rulemaking authority is contained in Section 947.07, Florida Statutes, which provides:

> The Commission shall have the power to make such rules and regulations as it deems best for its governance, including among other things rules of practice and procedure and rules prescribing qualifications to be possessed by its employees.

25. More specifically Section 947.146, Florida Statutes, established the Control Release Authority and provides in pertinent part:

* * *

> (2) The authority shall have as its primary purpose the implementation of a system of uniform criteria for the determination of the number and type inmates who must be released into the community under control release in order to maintain the state prison system below 97.5 percent of its lawful capacity as defined in s. 944.096. No inmate has a right to

control release. Control release is an administrative function solely used to manage the state prison population within lawful capacity.

* * *

(4) A panel of no fewer than two member of the authority shall establish a control release date for each parole ineligible inmate committed to the department within 90 days following notification by the department of receipt of the inmate, . . .

(5) Control release date shall be based upon a system of uniform criteria which shall include, but not be limited to, present offenses for which the person is committed, past criminal conduct, length of cummulative sentences, and age of the offender at the time of commitment.

* * *

(7) The authority shall have the power and duty to:

(a) Extend or advance the control release date of any inmate for whom a date has been established, based upon:

1. Recently discovered information of:

a. Past criminal conduct;

b. Verified threats by inmates provided by victims, law enforcement, or the department.

c. History of abuse or addiction to a chemical substance verified by a presentence or postsentence investigative report;

d. The inmates ties to organized crime;

e. A change in the inmates sentence structure;

f. Cooperation with law enforcement;

g. Strong community support; and

h. A documented mental condition as a factor for future criminal behavior.

2. The recommendation of the department regarding institutional adjustment by the inmate, which may include refusal by the inmate to sign the agreement to the conditions of the release plan; or

3. Lawful capacity of the state prison system.

(b) Determine the terms, conditions, and period of time of control release for persons released pursuant to this section.

(c) Determine violations of control release and what action shall be taken with reference thereto.

(d) Provide for victim input into the decisionmaking process for placing

> persons on controlled release.
> (e) Make such investigations as may be necessary for the purpose of establishing, modifying, or revoking a control release date.
> (f) Contract with a public defender or private counsel for representation of indigent persons charged with violating the terms of control release.
> (g) Adopt such rules as the authority deems necessary for implementation of the provisions of this section.

26. The earlier cases strictly limiting the rulemaking authority of governmental agencies to the specific language of the statute have largely been overruled and that legal concept abandoned. As stated in Agrico, supra, at 365 So.2d 763:

> The burden is upon one who attacks the proposed rule to show that the agency, if it adopts the rule, would exceed its authority; that the requirements of the rule are not appropriate to the ends specified in the legislative act; that the requirements contained in the rule are not reasonably related to the purpose of the enabling legislation or that the proposed rule or the requirements thereof are arbitrary or capricious.
> A capricious action is one which is taken without thought or reason or irrationally. An arbitrary decision is one not supported by facts or logic, or is despotic.

27. Where lawful rulemaking authority is clearly conferred or fairly implied, and it is consistent with the general statutory duty of the agency, a wider discretion is accorded it in the exercise of such authority. Statutory authority to make reasonable and just rules and regulations to carry into effect a legislative purpose necessarily includes the power to make all rules and regulations needed or expedient to accomplish the general statutory purpose. State Board of Education v. Nelson, 372 So.2d 114 (Fla. 1st DCA 1979). Accord, State Department of Health and Rehabilitative Services v. Framat Realty, 407 So.2d 311 (Fla. 1st DCA 1981).

28. Agencies are accorded wide discretion in the exercise of their lawful rulemaking authority, clearly conferred or fairly implied, and consistent with the agencies' general statutory duties. An agency's interpretation of the statute it administers is entitled to great weight and is not to be overturned unless clearly erroneous. Where, as here the agency's interpretation of a statute has been promulgated in rulemaking proceedings, the validity of such rule must be upheld if it is reasonably related to the purpose of the legislation interpreted and is not arbitrary and capricious. Moreover, the agency's interpretation of a statute need not be the sole possible interpretation or even the most desirable one; it need only be within the range of possible interpretations. Department of Professional Regulation, Board of Medicine v. Durrani, 455 So.2d 515 (Fla. 1st DCA 1984).

29. The challenger of the rule, among other things, is required to show that the requirements of the rule are inappropriate to the ends specified in the legislative act, or that the requirements proposed are not reasonably related to the purpose of the enabling legislation, or that the rule is arbitrary or capricious. Florida League of Cities, et al. v. Department of Environmental Regulation, 16 FLW D 1933 (Fla. 1st DCA 1991).

30. From the evidence presented, it is clear that the Control Release Authority, wearing the same hat as the Probation Commission, was directed by the Legislature to establish uniform procedures to select those inmates for the earliest release dates who are less likely to present a danger to the public. The same philosophy used in selecting parolees is applicable to establishing CRDs. Accordingly, many factors used in establishing parole dates, including aggravating factors, are applicable in establishing a control release date for each inmate eligible for a CRD.

31. The only evidence submitted that the challenged rule is arbitrary or capricious is the bare allegation that the plain language of the rule is insufficient from which the intent of the rule can be determined. No words of art are used in these rules which require a specific definition and any language used therein which may not be fully understood by the ordinary layman is consistently interpreted by the correctional authorities who carry out the provisions of the rules and establish an inmate's CRD.

32. In summary, it is sufficient to say that the challenged rules are not arbitrary or capricious, nor do they exceed the grant of legislative authority to enact rules and regulations for determining the appropriate control release date for each inmate of the Florida Correctional System.

ORDER

Accordingly, it is ORDERED:

The challenge of Archie D. White and Jeffrey S. McMahon to the validity of Rule 23-22.008(3)(d) and (e), Florida Administrative Code, be dismissed.

DONE and ORDERED this 26th day of June, 1992, in Tallahassee, Florida.

_____

K. N. AYERS
Hearing Officer
Division of Administrative Hearings
The Desoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of June, 1992.

APPENDIX TO FINAL ORDER, CASE NOS. 92-2392RXP AND 92-2685RXP

Proposed findings submitted by Petitioner White are accepted, except as noted below. Those neither excepted below nor included in the Hearing Officer's findings of fact were deemed unnecessary to the conclusions reached.

18. Rejected. Those acts constituting aggravating factors are clearly stated in the rule.

19. Rejected.

21. The word "subjective" is rejected.

22. Second sentence rejected.

23. Word "(subjectively)" rejected. Otherwise accepted as testimony of a witness, not as fact. See HO #14.

24. Rejected as inaccurate summary of this witness' testimony.

26. (second time this number used) Rejected as mere opinion and not a fact.

Proposed findings submitted by Petitioner McMahon are accepted, except as noted below. Those neither excepted below nor included in H.O. findings were deemed unnecessary to the conclusions reached.

27. Accepted. However, the implication that this results in an arbitrary CRD is rejected. See H.O. #14.

Proposed findings submitted by Respondent are generally accepted, except as noted below. Those proposed findings not included in H.O. findings were deemed unnecessary to the conclusions reached.

12. Accepted as testimony of Strickland. Rejected as fact because it omits mitigating factors.

COPIES FURNISHED:

Peter B. Dolinger
Qualified Representative
Florida Prison Legal Research
and Representation Services
35246 U.S. Highway 19 North
Suite 111
Palm Harbor, FL 34684

Richard A. Belz, Esquire
Florida Institutional
Legal Services
925 Northwest 56th Terrace
Gainesville, FL 32605

William A. Camper, Esquire
Kurt E. Ahrendt, Esquire
Florida Parole Commission
1309 Winewood Boulevard
Building 6
Tallahassee, FL 32399-2450

Harry K. Singleton, Jr.
Secretary
Department of Corrections
2601 Blairstone Road
Tallahassee, FL 32399-2500

Louis A. Vargas
General Counsel
Department of Corrections
2601 Blairstone Road
Tallahassee, FL 32399-2500

Donna Malphurs
Room 439
Department of Corrections
2601 Blairstone Road
Tallahassee, FL 32399-2500

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 ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE DIVISION OF ADMINISTRATIVE HEARINGS AND A SECOND COPY, ACCOMPANIED BY FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, OR WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.