STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ELIZABETH GREEN,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 02-4723RP
	)	
DEPARTMENT OF CORRECTIONS,	)	
	)	
Respondent.	)	
	)	

ORDER

This cause comes before the undersigned on a Motion to Dismiss filed by the Respondent February 6, 2003, which the Respondent, by unopposed motion requested that the undersigned treat as a Motion for Summary Final Order on the issue of standing. That request was granted by the Order of the undersigned entered February 12, 2003.

On or about December 4, 2002, the Petitioner filed a "Petition to Determine the Invalidity of a Proposed Rule" of the Department of Corrections.

The Petitioner asserts standing to contest rules proposed by the Department of Corrections (Department) involving inmate mail in her capacities as (1) a "duly authorized power of attorney" for an unnamed prisoner in the custody of Department of Corrections and (2) the "Official record custodian" for an unnamed prisoner in the custody of the Department of Corrections. The Petitioner does not assert standing other than that derived from the power of attorney.

Rules 33-210.101 (regulating routine mail), 33-210.102 (regulating legal mail) and 33-210.103 (regulating privileged mail), were certified and adopted on November 14, 2002, and became effective on December 4, 2002. See Volume 28, Number 48 FAW 5415 (November 27, 2002).

It is well settled that a threshold determination of standing is necessary in rule challenges. See John H. Phipps Broadcasting Stations, Inc., v. Florida Department of Environmental Regulation, DOAH Case No. 79-216RP (Final Order February 15, 1980). ("Thus in any rule challenge a necessary forerunner to the determination of the invalidity or validity of a proposed rule is the determination of standing on behalf of the Petitioner challenging the proposed rule.")

Section 120.56(1), Florida Statutes, provides that "any person substantially affected by an agency statement may seek administrative determination" that the statement violates Section 120.54(1)(a), Florida Statutes.

Not everyone having an interest in a dispute over an agency's rule that determines the rights and interests of others has standing.

> Were that not so, each interested citizen could, merely by expressing an interest, participate in the agency's efforts to govern, a result that would unquestionably impede the ability of the agency to function efficiently and inevitably cause an increase in the number of litigated disputes well above the number administrative and appellate judges are capable of handling. Therefore, the legislature must define and the courts must enforce certain limits on the public's right to participate in administrative proceedings.

Florida Society of Ophthalmology v. State of Florida, Board of Optometry, 532 So. 2d 1279, 1284 (Fla. 1st DCA 1988).

In order to comply with standing requirements, a petition must meet a two pronged test. First the petition must show "a real and immediate effect upon one's case as well as injury in fact;" and it must be shown that the injury asserted falls "within the zone of interest to be protected or regulated." See All Risk Corporation of Florida v. State, 413 So. 2d 1200 (Fla. 1st DCA 1982).

Inmates may send and receive mail only under such conditions as prescribed by the Department under Section 944.09, Florida Statutes. The Department has specific authority to adopt rules regulating mail moving into and out of its facilities pursuant to Section 944.09(1)(g), Florida Statutes.

It is the right of the inmate to send and receive mail that is here regulated, not the right of the Petitioner to send or receive mail. Even if the Petitioner did claim standing outside of her status as an attorney in fact, she would fail, because it is not her right to send and receive mail that is being regulated, rather it is that of the inmate. Burns v. Department of Corrections, DOAH Case 97-4538RP. (Wife's interest in visiting her spouse in prison; it was the inmate's privilege to receive visitors that was being regulated.)

The only possible basis for standing in this Petitioner to bring this action is that derived from the unnamed prisoner through the power of attorney. A power of attorney is a written instrument by which one person, as principal, appoints another as

his agent and confers upon him the authority to perform certain specified acts or kinds of acts on behalf of that principal.

Any attorney in fact stands in the shoes of the principal and possess the same rights and limitation of rights as does the principal.

The rights of a prisoner vis-a-vis the Department rules are limited by statute to those rights addressed in Section 120.54(3)(c) (submission of materials pertinent to the issues within 21 days of the publication of the notice or at a public hearing), and Section 120.54(7), (petition to initiate rule making). See Section 120.81(3)(b), Florida Statutes.

Under Florida law, prisoners do not have a right to file a rule challenge pursuant to Section 120.56, Florida Statutes. See Section 120.81(3)(b), Florida Statues.

Participation in these proceedings by an inmate is not permitted by statute and therefore no attorney in fact, whose standing to participate is derivative and limited only to the right of the unnamed inmate, has standing.

The Petitioner is attempting a derivative action to assert a Section 120.56(4) rule challenge by an unnamed prisoner to a proposed rule. That action is not authorized by law and this tribunal has no jurisdiction to entertain that petition.

In his Final Order entered December 8, 1997, in Teresa Burns v. Department of Corrections, DOAH 97-4538RP, Judge Arrington endorsed Judge James W. York's observation from Florida Prisoner's Legal Aid Organization, Inc., and Teresa Burns v. Department of Corrections, DOAH Case No. 96-2943RX, that the legislature's intent in Section 120.81(3), Florida Statutes, should not be eroded by allowing non-prisoner parties to litigate in the place of a prisoner and quoted him as follows:

> However, there are a myriad of circumstances in which the direct regulation of prisoners in the custody of the Department might indirectly affect petitioners. The geographic assignment of prisoners, visitation times, disciplinary actions for prisoner infractions, even personal property prisoners are permitted to possess are issues that might indirectly affect the relatives of inmates. However, the legislature has clearly defined limits on standing to challenge the DOC rules regarding the regulation of prisoners and to permit such challenges in the manner petitioners seek to do would circumvent this legislative intent.

The petition and amended petition herein is thus an improper attempt to circumvent Section 120.81(3), Florida Statutes, that states that prisoners are considered parties only under Section 120.54(3)(c) or (7), Florida Statutes. The Petitioner seeks a derivative action to assert a challenge by prisoners to the rules. The Petitioner's only interest is that of a "stand in" for prisoners. This is not lawful. See Department of Corrections v. Van Poyk, 610 So. 2d 1333 (Fla. 1st DCA 1992).

The subject petition is also not timely. The petition was filed after the adoption of the subject rule and contemporaneously with its effective date, having been filed with the Division of Administrative Hearings on December 4, 2002. The petition is thus untimely as the rule became effective on the same day and was no longer a proposed rule, even if the Petitioner herein had standing to bring the Petition. Accordingly, being advised in the premises, it is

ORDERED

That the Motion to Dismiss or for Summary Final Order be and the same is hereby granted and the Petition and Amended Petition filed by Elizabeth Green is hereby dismissed.

DONE AND ORDERED this 23rd day of May, 2003, in Tallahassee, Leon County, Florida.

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P. MICHAEL RUFF
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of May, 2003.

COPIES FURNISHED:

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