

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

I. B. AND D. B.,)
)
 Petitioners,)
)
 vs.) Case No. 03-3302RX
)
 DEPARTMENT OF CHILDREN)
 AND FAMILY SERVICES,)
)
 Respondent.)
 _____)

FINAL ORDER

A final hearing was conducted in this case on November 18, 2003, in Daytona Beach, Florida, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioners: Richard J. D'Amico, Esquire
619 North Grandview Avenue
Daytona Beach, Florida 32118

For Respondent: George P. Beckwith, Jr., Esquire
Department of Children
and Family Services
210 North Palmetto Avenue, Suite 412
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STATEMENT OF THE ISSUE

The issue is whether Florida Administrative Code Rule 65C-16.008(2) is an invalid exercise of delegated legislative authority because it exceeds Respondent's grant of rulemaking authority.

PRELIMINARY STATEMENT

On September 15, 2003, Petitioners I.B. and D.B. (Petitioners) filed a Petition to Challenge the Validity of Florida Administrative Code Rule 65C-16.008(2). Subsequently, the undersigned issued a Notice of Hearing by Video Teleconference. The notice scheduled the hearing on October 17, 2003.

On September 26, 2003, Respondent Department of Children and Family Services (Respondent) filed a Motion to Dismiss Petition to Challenge the Validity of Florida Administrative Code Rule 65C-16.008(2). The undersigned issued an Order Denying Motion to Dismiss on October 6, 2003.

On October 3, 2003, Respondent filed an unopposed Motion to Continue or Reschedule Hearing in a related case, DOAH Case No. 03-1641. In subsequent telephone conversations, the parties indicated that the motion applied to the instant case as well as DOAH Case No. 03-1641. During the telephone conference, the parties also agreed to waive the 30-day time frame set forth in Section 120.56(1)(c), Florida Statutes (2003), as it applies to the instant case.

On October 10, 2003, the undersigned issued an Order Granting Continuance and Re-scheduling Hearing. The Order scheduled the hearing for November 18, 2003.

During the hearing, neither party presented any witnesses or offered any exhibits. Instead, the parties agreed that there were no disputed issues of material fact.

A transcript of the proceeding was not filed with the Division of Administrative Hearings.

Petitioners and Respondent filed their Proposed Final Orders on December 15, 2003.

FINDINGS OF FACT

1. In 2001, Petitioners requested Respondent to approve them as adoptive parents. In July 2001, Respondent completed an Adoption Home Study on the Petitioners and approved them as prospective adoptive parents.

2. On October 26, 2001, Petitioners filed an application for license to provide foster care for dependent children.

3. T.T. was born on October 26, 2001. He has been adjudicated dependent in accordance with Chapter 39, Florida Statutes, since October 29, 2001.

4. On December 13, 2001, Petitioners signed an Agreement to Provide Substitute Care for Dependent Children. T.T. began residing in Petitioners' licensed foster home in February 2002.

5. A Florida Circuit Court terminated the parental rights of T.T.'s biological parents on June 10, 2002.

6. Petitioners filed an application to adopt T.T. in November 2002.

7. T.D. and J.D. are T.T.'s biological relatives from Tennessee. They filed an application to adopt T.T. in February 2003.

8. In March 2003, Respondent approved the adoption application submitted by T.T.'s biological relatives and denied the adoption application submitted by Petitioners. The denial of Petitioner's application to adopt T.T. advised Petitioners that they had a right to contest the decision by requesting an administrative hearing pursuant to Florida Administrative Code Rule 65C-16.008.

9. In March 2003, Florida Administrative Code Rule 65C-16.008 stated as follows:

65C-16.008. Complaints, Dispute Resolutions and Appeals.

(1) Adoptive applicants must be helped to understand that the department reserves the right to reject the application of any applicant who does not meet its eligibility criteria as outlined in Sections 65C-16.005 and 10M-8.0051, 65C-16.006 and 65C-16.007. If applicants cannot be encouraged to withdraw their application, the adoption counselor must arrange for them to have a conference with the supervisor. If after this conference the family still refuses to withdraw and wishes to pursue the matter further, arrangement must be made within the district to convene the district Adoptive Applicant Review Committee as outlined in 65C-16.005(11). If this review results in a decision by the district administrator that the application will be rejected, the applicants must be told of that decision in writing and be advised of their judicial

option as described in the Administrative Procedures Act, Chapter 120.68, Florida Statutes, and of their right to a hearing pursuant to Section 120.57, Florida Statutes, and in the manner prescribed therein.

(2) When adoptive parents or other relevant parties are adversely affected by other action in this program, the above outlined procedures must also apply.

(3) The department will make this information available in writing and accessible in the waiting rooms of all department offices.

10. On April 18, 2003, Petitioners requested an administrative hearing to challenge Respondent's denial of their application to adopt T.T. Respondent referred the hearing request to the Division of Administrative Hearings on May 7, 2003. See I.B. and D.B. v. Department of Children and Family Services, Case No. 03-1641 (DOAH case in abeyance pending resolution of the instant rule challenge).

11. T.T. resided with Petitioners until he was placed in the home of his biological relatives, T.D. and J.D. A Florida Circuit Court Judge ordered the change in placement on or about June 6, 2003.

12. The Florida Circuit Court ruled that T.T. shall reside with his biological relatives in Tennessee pending completion of the adoption proceeding. Additionally, the Circuit Court dismissed Petitioners' Petition for Adoption of T.T. See In the

Interest of: T.T. (a.k.a. C.M.), DOB 10/26/01, Case No. 01-33109-CJCI (Fla. 7th Cir. Ct. June 6, 2003).

13. On September 8, 2003, Respondent moved to dismiss DOAH Case No. 03-1641 because an amendment to Florida Administrative Code Rule 65C-16.008, effective August 19, 2003, precludes an administrative hearing. The rule currently states as follows:

65C-16.008 Dispute Resolutions and Appeals.

(a) When an adoptive applicant or parent is adversely affected by a decision or action taken by the department, or by a community based agency action for the department, efforts should be made to settle the dispute and the counselor/supervisor level. If this attempt is unsuccessful, the Adoption Review Committee will be convened as outlined in Subsection 65C-16.005(9), Florida Administrative Code. If this review results in a decision by the district administrator that supports the departments/agency's original decision, the applicant or parent must be told of that decision in writing and advised of their judicial option as described in the Administrative Procedures Act, Section 120.68, Florida Statutes, and of their right to a hearing pursuant to Section 120.57, Florida Statutes.

(2) Adoptive applicants do not have the right to appeal the department's decision on the selection of and [sic] adoptive home for a particular child.

The only portion of the rule at issue here is Florida Administrative Code Rule 65C-16.008(2).

CONCLUSIONS OF LAW

14. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. § § 120.56(1) and 120.56(3), Fla. Stat. (2003).

15. Respondent denied Petitioners' application to adopt T.T. and seeks to rely on Florida Administrative Code Rule 65C-16.008(2) to deny Petitioners a right to challenge that decision. Accordingly, Petitioners have standing to challenge the validity of the subject rule.

16. Because Petitioners are attacking an existing agency rule, they have the burden to prove by a preponderance of the evidence that the rule constitutes an invalid exercise of delegated legislative authority. See Cortes v. State Board of Regents, 655 So. 2d 132 (Fla. 1st DCA 1995).

17. Section 120.52(8), Florida Statutes (2003), reads in pertinent part as follows:

(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 any one of the following applies:

* * *

(b) The agency has exceeded its grant of rulemaking authority, citation to which is required by Section 120.54(3)(a)1.;

* * *

A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute.

18. Florida Administrative Code Rule 65C-16.008 cites the following statutory authority: (a) Specific Authority--Sections 120.57, 120.68, 409.026(8), and 409.145, Florida Statutes; and (b) Law Implemented--120.68 and 409.145, Florida Statutes.

19. Section 120.57, Florida Statutes, sets forth the procedures for administrative hearings in particular cases. Section 120.68, Florida Statutes, sets forth the procedures for judicial review of administrative cases. These statutes do not provide authority for adoption of Florida Administrative Code Rule 65C-16.008(2).

20. Section 409.026(8), Florida Statutes, does not exist. Neither party has shown that Respondent made a scrivener's error

in listing this non-existent statute as specific authority for Florida Administrative Code Rule 65C-16.008(2). It follows that Section 409.026(8), Florida Statutes, cannot provide authority for the rule at issue here.

21. Section 409.145, Florida Statutes, states as follows:

409.125 Care of children.--

(1) The department shall conduct, supervise, and administer a program for dependent children and their families. The services of the department are to be directed toward the following goals:

(a) The prevention of separation of children from their families.

(b) The reunification of families who have had children placed in foster homes or institutions.

(c) The permanent placement of children who cannot be reunited with their families or when reunification would not be in the best interest of the child.

(d) The protection of dependent children or children alleged to be dependent, including provision of emergency and long-term alternate living arrangements.

(e) The transition to self-sufficiency for older children who continue to be in foster care as adolescents.

(2) The following dependent children shall be subject to the protection, care, guidance, and supervision of the department or any duly licensed public or private agency:

(a) Any child who has been temporarily or permanently taken from the custody of the parents, custodians, or guardians in accordance with those provisions in Chapter 39 that relate to dependent children.

(b) Any child who is in need of the protective supervision of the department as determined by intake or by the court in accordance with those provisions of Chapter 39 that relate to dependent children.

(c) Any child who is voluntarily placed, with the written consent of the parents or guardians, in the department's foster care program or the foster care program of a licensed private agency.

(3) The circuit courts exercising juvenile jurisdiction in the various counties of this state shall cooperate with the department and its employees in carrying out the purposes and intent of this chapter.

(4) The department is authorized to accept children on a permanent placement basis by order of a court of competent jurisdiction for the single purpose of adoption placement of these children. The department is authorized to provide the necessary services to place these children ordered to the department on a permanent placement basis for adoption.

(5) Any funds appropriated by counties for child welfare services may be matched by state and federal funds, such funds to be utilized by the department for the benefit of children in those counties.

(6) Whenever any child is placed under the protection, care, and guidance of the department or a duly licensed public or private agency, or as soon thereafter as is practicable, the department or agency, as the case may be, shall endeavor to obtain such information concerning the family

medical history of the child and the natural parents as is available or readily obtainable. This information shall be kept on file by the department or agency for possible future use as provided in Sections 63.082 and 63.162, Florida Statutes, or as may be otherwise provided by law.

(7) Whenever any child is placed by the department in a shelter home, foster home, or other residential placement, the department shall make available to the operator of the shelter home, foster home, other residential placement, or other caretaker as soon thereafter as is practicable, all relevant information concerning the child's demographic, social, and medical history.

22. Section 409.145, Florida Statutes, grants Respondent very broad powers and duties regarding the care of dependent children. However, the statute does not provide specific authority or a law to be implemented that is sufficient to justify a rule prohibiting appeals of Respondent's decisions on the selection of adoptive homes for particular children.

23. During the hearing, Respondent argued that statutes not cited in the rule, but read together with Section 409.145, Florida Statutes, provide the necessary legislative authority. Respondent referred to specific additional provisions in Chapters 39, 63, 409, and 435, Florida Statutes.

24. For example, Respondent argued that the following statutes in Chapter 39, Florida Statutes, are relevant here:

39.001 Purposes and intent; personnel standards and screening.—

(1) PURPOSES OF CHAPTER.--The purposes of this chapter are:

* * *

(h) To ensure that permanent placement with the biological or adoptive family is achieved as soon as possible for every child in foster care and that no child remains in foster care longer than one year.

* * *

39.012 Rules for implementation.--The department shall adopt rules for the efficient and effective management of all programs, services, facilities, and functions necessary for implementing this chapter. . . .

39.0121 Specific rulemaking authority.--Pursuant to the requirement of Section 120.536, the department is specifically authorized to adopt, amend, and repeal administrative rules which implement or interpret law or policy, or describe the procedure and practice requirements necessary to implement this chapter, including, but not limited to the following:

* * *

(12) Legal and casework procedures, including, but not limited to, mediation, diligent search, stipulations, consents, surrenders, and default, with respect to dependency, termination of parental rights, adoption, guardianship, and kinship care proceedings.

* * *

39.013 Procedures and jurisdiction; right to counsel.--

* * *

(2) The circuit court shall have exclusive original jurisdiction of all proceedings under this chapter, of a child voluntarily placed with a licensed child-caring agency, a licensed child-placing agency, or the department, and of the adoptions of children whose parental rights have been terminated pursuant to his chapter. Jurisdiction attaches when the initial shelter petition, dependency petition, or termination of parental rights petition is filed or when a child is taken into the custody of the department. . . . When the court obtains jurisdiction of any child who has been found to be dependent, the court shall retain jurisdiction, unless relinquished by its order, until the child reaches 18 years of age.

* * *

39.812 Postdisposition relief; petition for adoption.--

(1) If the department is given custody of a child for subsequent adoption in accordance with this chapter, the department may place the child with an agency as defined in Section 63.032, with a child-caring agency registered under Section 409.176, or in a family home for prospective subsequent adoption. The department may thereafter become a party to any proceeding for the legal adoption of the child and appear in any court where the adoption proceeding is pending and consent to the adoption, and that consent alone shall in all cases be sufficient.

* * *

(5) The petition for adoption must be filed in the division of the circuit court which entered the judgment terminating parental rights, unless a motion for change of venue

is grant pursuant to Section 47.122. A copy of the consent executed by the department as required under Section 63.062(7) must be attached to the petition. . . .

25. Respondent also argued that the following statutes in Chapter 63, Florida Statutes, provide legislative authority:

63.022 Legislative intent.--

(1) The Legislature finds that:

(a) The state has a compelling interest in providing stable and permanent homes for adoptive children in a prompt manner, in preventing the disruption of adoptive placements, and in holding parents accountable for meeting the needs of children.

* * *

(c) Adoptive children have the right to permanence and stability in adoptive placements.

* * *

(2) It is the intent of the Legislature that in every adoption, the best interest of the child should govern and be of foremost concern in the court's determination. The court shall make a specific finding as to the best interest of the child in accordance with the provisions of this chapter.

* * *

63.032 Definitions.--As used in this chapter, the term:

* * *

(3) "Adoption entity" means the department, an agency, a child-caring agency registered under Section 409.176, an intermediary, or a

child-placing agency licensed in another state which is qualified by the department to place children in the State of Florida.

* * *

(7) "Court" means any circuit court of this state and, when the context requires, the court of any state that is empowered to grant petitions for adoption.

* * *

63.062 Persons required to consent to adoption; affidavit of nonpaternity; waiver of venue.--

* * *

(7) If parental rights to the minor have previously been terminated, the adoption entity with which the minor has been placed for subsequent adoption may provide consent to the adoption. In such case, no other consent is required.

* * *

63.233 Rulemaking authority.--The department shall adopt rules pursuant to Sections 120.536(1) and 120.54, to implement the provisions of this chapter.

26. Allowing for reference to be made to provisions not found within the subject rule's statement of authority, there are no statutes, collectively or individually, that provide Respondent with the necessary specific legislative authority to promulgate a procedural rule depriving prospective adoptive parents of the right to appeal Respondent's decision on the

selection of an adoptive home for a particular child even if that outcome results from the effect of the statutory law.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED:

That Florida Administrative Code Rule 65C-16.008(2) is an invalid exercise of delegated legislative authority.

DONE AND ORDERED this 7th day of January, 2004, in Tallahassee, Leon County, Florida.



SUZANNE F. HOOD
Administrative Law Judge
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Filed with the Clerk of the
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this 7th day of January, 2004.

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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 appeal with the Clerk of the Division of Administrative Hearings and a 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.