STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HILLSBOROUGH COUNTY,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 07-4398
	)	
DEPARTMENT OF JUVENILE JUSTICE,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the final hearing of this case for the Division of Administrative Hearings (DOAH) on November 29, 2007, in Tampa, Florida.

APPEARANCES

For Petitioner: Stephen M. Todd, Esquire
Hillsborough County Attorney's Office
Post Office Box 1110
Tampa, Florida 33601

For Respondent: Brian Berkowitz, Esquire
Department of Juvenile Justice
2737 Centerview Drive, Room 312V
Tallahassee, Florida 32399-3100

STATEMENT OF THE ISSUE

The issue is whether Respondent assessed Petitioner for secure juvenile detention care for the 2007-2008 fiscal year in a manner that implements Section 985.686, Florida Statutes (2007), and Florida Administrative Code Rule 63G-1.[1]

PRELIMINARY STATEMENT

By letters dated June 6 and September 6, 2007, Respondent notified Petitioner of the per diem rate that Respondent proposed to charge Petitioner for secure juvenile detention care for the 2007-2008 fiscal year. Petitioner requested an administrative hearing to contest the proposed agency action, and Respondent referred the matter to DOAH to assign an ALJ to conduct the hearing.

At the hearing, Petitioner presented the testimony of three witnesses and submitted five exhibits for admission into evidence. Respondent presented the testimony of three witnesses and submitted five exhibits.

Respondent also filed two late-filed exhibits on January 16, 2008. With leave from the ALJ, Petitioner took the deposition testimony of one of Respondent's witnesses. The subject of the deposition pertains to the two late-filed exhibits filed by Respondent. The Transcript of the deposition testimony was filed on January 15, 2008.

The identity of the witnesses and exhibits, and the rulings regarding each, are reported in the two-volume Transcript of the hearing filed with DOAH on January 28, 2008. Petitioner and Respondent timely filed their Proposed Recommended Orders on February 1, 2008.

FINDINGS OF FACT

1. Respondent is the state agency responsible for administering the cost sharing requirements in Section 985.686 for juvenile detention care. Petitioner is a non-fiscally constrained county[2] subject to the cost sharing requirements.

2. The relevant statutory backdrop affects the findings in this proceeding. Subsection 985.686(1) requires Petitioner and Respondent to share the costs of "financial support" for "detention care" for juveniles who reside in Hillsborough County, Florida (the County), and are held in detention centers operated by Respondent.

3. Subsection 985.686(3) requires Petitioner to pay the costs of detention care "for the period of time" prior to final court disposition (predisposition care). Respondent must pay the costs of detention care on or after final court disposition (post-disposition care).

4. Detention care is defined in Subsection 985.686(2)(a) to mean secure detention. Secure detention is defined in Subsection 985.03(18)(a), for the purposes of Chapter 985, to include custody "prior to" adjudication or disposition as well as custody "prior to" placement.[3]

5. Detention centers are legally unavailable to circuit courts for post-disposition placement (residential placement). Post-disposition care of juveniles in detention centers is limited to juveniles who are waiting for residential placement.

6. The statutory reference in Subsection 985.03(18)(a) to placement is construed in this proceeding to mean residential

placement. Thus, secure detention means custody in a detention center for both predisposition care prior to adjudication or final court disposition, and post-disposition care after adjudication or disposition but prior to residential placement.

7. A literal reading of Subsections 985.03(18)(a), 985.686(1), and 985.686(2)(a) may foster ambiguity, at least for a stranger to the workings of juvenile detention. If Subsection 985.686(1) requires Petitioner and Respondent to share the costs of secure detention and secure detention includes custody prior to adjudication or disposition, a literal interpretation arguably could require Respondent to share the costs of secure detention prior to adjudication or final disposition.

8. Factual findings in this proceeding are not based on a literal interpretation of the definition of secure detention in Subsections 985.686(2)(a) and 985.03(18)(a). Rather, the findings are based on an interpretation of secure detention that is consistent with the statutory requirement in Subsection 985.686(3) for Petitioner to pay the costs of secure detention during predisposition care and for Respondent to pay the costs of secure detention during post-disposition care.

9. The annual legislative "appropriation" for the counties' share of detention care is actually an account payable by the counties rather than an appropriation of funds. For the 2007-2008 fiscal year,[4] the legislature "appropriated" a total of $125,327,667.00 for detention care. However, only $30,860,924.00 of the total amount was actually appropriated from general revenue.

10. The general revenue funds are appropriated for costs that Respondent must pay, including amounts for fiscally constrained counties. The Legislature identified $101,628,064.00 of the total appropriation as the counties' aggregate share of detention costs. Negative entries in the appropriation reduce the total amount to $125,327,667.00

11. The practical realities of juvenile detention care complicate the allocation of costs between predisposition and post-disposition care. Juveniles are not supposed to remain in detention centers very long while they wait for residential placement. However, juveniles with exceptional needs, such as mental health needs, may remain in detention centers for a longer period of time due to the limited availability of appropriate residential placement facilities.

12. A room in a detention facility may be occupied simultaneously by juveniles in predisposition care and juveniles in post-disposition care waiting for residential placement (dual-use occupancy). Dual-use occupancy complicates the calculation of shared costs between the counties and the state.

13. Subsection 985.686(3) requires Respondent to develop an accounts payable system to allocate the costs of secure detention for predisposition care. Respondent administers the statutory cost sharing requirements through a prospective assessment and retroactive reconciliation system.

14. Prospective assessments for each fiscal year are based on actual costs during the previous year. Petitioner pays the prospective assessment monthly, and, at the end of each fiscal

year, Respondent performs an annual reconciliation to determine whether actual costs during the current fiscal year were more or less than the prospective assessment at the beginning of the fiscal year. Sometime after the end of each fiscal year, Respondent either credits or debits Petitioner for any differences between the prospective assessment and actual costs determined in the annual reconciliation.

15. Subsection 985.686(3) requires Petitioner to pay for the costs of secure detention in the County for the "period of time" juveniles are in predisposition care. No statute defines the phrase "period of time."

16. Subsection 985.686(10) authorizes Respondent to adopt rules to administer Section 985.686. Rule 63G-1.004(1)(c) implicitly defines the statutory reference to a "period of time" in predisposition care to mean "service days." Rule 63G-1.004 also prescribes the methodology to be used in calculating Petitioner's share of the costs for secure detention during the period of time required for predisposition care in the County.

17. Respondent must first identify all juveniles in predisposition care based upon usage during the preceding fiscal year. Second, Respondent must match each placement record with the corresponding identification code. Third, Respondent must calculate the "service days" in predisposition care. Finally, Respondent must divide the number of "service days" Petitioner used for predisposition care in the County by the service days used by all counties to determine the percentage of the counties' costs for predisposition care that Petitioner owes.

18. The term "service days" is not defined by statute or rule. Respondent defines service days to mean "utilization" days. If, for example, 10 individuals occupy one detention room in a facility during any part of a day, 10 utilization days have occurred during one calendar day.

19. Respondent uses utilization days to calculate the statutory period of time for predisposition care and post-disposition care. If the 10 utilization days in the preceding example were to include equal dual-use occupancy, Respondent would count five utilization days for predisposition care and five utilization days for post-disposition care.

20. Petitioner disputes the utilization days that Respondent calculated. However, that dispute is the subject of a companion case identified by DOAH Case No. 07-4432 and is beyond the scope of this proceeding.

21. Respondent determined there were 709,251 utilization days for pre and post-disposition care. The total consisted of 579,409 utilization days for the counties' predisposition care and 129,842 utilization days for post-disposition care. Respondent allocated 47,714 utilization days to Petitioner.

22. Rule 63G-1.004(2) requires Respondent to divide the 47,714 utilization days allocated to Petitioner by the 579,409 utilization days allocated to all counties. The mathematical quotient of that calculation is .08234.

23. The rule requires Respondent to multiply the cost of detention by 8.234 percent. The "cost of detention" means the

counties' cost of detention in the amount of $101,628,064.00. The mathematical product of multiplying $101,628,064.00, by .08234 is $8,368,054.79.

24. Respondent exercised discretion to adopt a methodology that is inconsistent with the methodology prescribed by rule, in violation of Subsection 120.68(7)(e)2. Respondent defined the cost of detention to include the total appropriation of $125,327,667.00. Respondent is legally required to pay $30,860,924.00 of the $125,327,667.00, including $6,329,328.00 allocable to fiscally constrained counties.

25. Respondent divided the total appropriation of $125,327,667.00 by 709,251 utilization days to arrive at a per diem rate of $176.70 for all detention care. Respondent then multiplied the per diem rate by Petitioner's 47,714 utilization days and proposed a gross assessment in the amount of $8,400,165.73.[5] Respondent reduced the gross assessment after adjustments and proposed a net assessment in the amount of $8,320,440.73, which Petitioner paid.[6]

26. The actual gross assessment of $8,400,165.73 exceeded the authorized gross assessment of $8,368,054.79 by $32,110.94. Any adjustments required to determine a net assessment should be made to the authorized gross assessment.

CONCLUSIONS OF LAW

27. DOAH has jurisdiction over the parties and subject matter in this proceeding. §§ 120.569 and 120.57(1). DOAH provided the parties with adequate notice of the final hearing.

28. The burden of proof is on the party asserting the affirmative of an issue. Florida Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977). The proposed agency action is to assess Petitioner for predisposition care in the County. Respondent asserts the affirmative of that issue and must prove by a preponderance of the evidence that the proposed assessment should become final agency action.

29. Regardless of whether Respondent or Petitioner has the burden of proof, a preponderance of the evidence shows that the gross assessment proposed by Respondent overcharges Petitioner approximately $32,110.94. Respondent determined the gross assessment using a methodology that was inconsistent, within the meaning of Subsection 120.68(7)(e)2., with the methodology prescribed in Rule 63G-1.004.

30. An agency's deviation from a promulgated rule may itself be a rule if the deviation satisfies the definition of a rule in Subsection 120.52(15). If the deviation does not satisfy the statutory definition of a rule, the deviation is non-rule policy.[7]

31. If Respondent's deviation from its rule were determined to be an un-promulgated rule, the un-promulgated rule would be unenforceable in this proceeding unless Respondent

showed that the rule satisfied the requirements of Subsection 120.57(1)(e). If the deviation were found to be non-rule policy, Respondent would be required to "fully and skillfully expound its nonrule policies by conventional proof methods." McDonald v. Dept. of Banking and Finance, 346 So.2d 569, 583 (Fla. 1st DCA 1977).

32. It is unnecessary to determine whether the methodology Respondent used to calculate the proposed assessment is an un-promulgated rule or non-rule policy. The exercise of agency discretion in the form of either an un-promulgated rule or non-rule policy must be constitutional within the meaning of Subsection 120.68(7)(e)4.[8]

33. Agency rules are entitled to a presumption of constitutional validity. Department of Children and Families v. R.H., 819 So. 2d 858, 860 (Fla. 5th DCA 2002). A literal conflict between a rule and a statute must be resolved in favor of the statute in order to preserve the validity of the rule. Willette v. Air Products and Bassett and Department of Labor and Employment Security, Division of Workers' Compensation, 700 So. 2d 397, 399 (Fla. 1st DCA 1997). In Willette, the court wrote:

> Executive branch rulemaking is authorized in furtherance of, not in opposition to, legislative policy. Just as a court cannot give effect to a statute (or administrative rule) in a manner repugnant to a constitutional provision, so a duly promulgated rule, although "presumptively valid until invalidated in a section 120.56

> rule challenge [citations omitted]," must give way in judicial proceedings to any contradictory statute that applies.

Id.

34. If the methodology prescribed in Rule 63G-1.004(2) is a presumptively valid implementation of Section 985.686, the use of a different methodology by Respondent would effectively modify, enlarge or amend the statute implemented within the meaning of Subsections 120.52(8) and 120.57(1)(e). The separation of powers doctrine prohibits an executive agency such as Respondent from exercising legislative power to modify, enlarge, or amend a statute.

35. The separation of powers doctrine encompasses two prohibitions. No branch of government may encroach upon the powers of another, and no branch may delegate its power to another branch. Fla. Const., Art. II, § 3. The second prohibition is the non-delegation doctrine. Chiles v. Children A, B, C, D, E, and F, 589 So. 2d 260, 264-266 (Fla. 1991).

36. The non-delegation doctrine prohibits the Legislature from delegating legislative authority to an agency of the executive branch. Chiles, 589 So. 2d at 264-266. The administration of legislative programs by executive agencies, including Respondent, must be pursuant to minimal standards and guidelines ascertainable by reference to statutory terms enacted by the Legislature and implemented in the agency's rules. Chiles, 589 So. 2d at 264-266.

37. The Legislature may authorize administrative agencies to interpret, but never to alter statutes. Carver v. State of Florida, Division of Retirement, 848 So. 2d 1203, 1206 (Fla. 1st DCA 2003) (citing Cortes v. State Board of Regents, 655 So. 2d 132, 136 (Fla. 1st DCA 1995)). An administrative agency has statutory authority to adopt only those rules that implement or interpret the specific powers and duties granted by the enabling statute. § 120.52(8).

38. An ALJ conducting a proceeding pursuant to Subsection 120.57(1) (a 120.57 proceeding) is not limited to making findings of fact and conclusions of law. The ALJ has the additional duty of serving the public interest by encouraging responsible agency policymaking. Department of General Services v. Willis, 344 So. 2d 580, 592 (Fla. 1st DCA 1977). In Willis the court explained:

> We are accustomed to think that the principal use of hearings is to develop records for "adjudicatory" or "quasi-judicial" decisions. (citations omitted) That was the limited role of administrative hearings in years past, when the "universe of administrative law was hierarchical, with the judiciary at its apex." (Footnote omitted) [The current] administrative process . . . recognizes that a hearing independently serves the public interest by providing a forum to expose, inform and challenge agency policy and discretion.

Willis, 344 So. 2d at 591.

39. The additional duty of encouraging responsible agency policymaking is not limited to findings of fact and conclusions of law.

> [T]he [ALJ] does not merely find the facts and supply the law, as would a court. The [ALJ] "independently serves the public

> interest by providing a forum to expose, inform and challenge agency policy and discretion." (Citations omitted)

McDonald, 346 So. 2d at 580-583.

RECOMMENDATION

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

RECOMMENDED that Respondent enter a final order assessing Petitioner for the costs of predisposition care in the County using the methodology prescribed by rule, including costs of detention in the aggregate amount of $101,628,064.00, and crediting Petitioner for the amount of any overpayment.

DONE AND ENTERED this 7th day of March, 2008, in Tallahassee, Leon County, Florida.

S

DANIEL MANRY
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of March, 2008.

ENDNOTES

[1/] References to subsections, sections, and chapters are to Florida Statutes (2007) unless otherwise stated. References to rules are to rules promulgated in the Florida Administrative Code in effect on the date of the hearing.

[2/] A non-fiscally constrained county is one that is not a fiscally constrained county defined in Subsection 985.686(2)(b) as a county within a rural area of critical economic concern.

[3/] Rule 63G-1.002(6) defines secure detention in substantially the same manner as Subsection 985.03(18)(a).

[4/] References to numbers of days are to numbers available for the 2005-2006 fiscal year. References to dollar amounts are to appropriations for the 2007-2008 fiscal year unless otherwise stated. Respondent determines a per diem rate to be charged by dividing the 2007-2008 appropriations by the 2005-2006 utilization numbers.

[5/] The mathematical product of multiplying 47,714 by a per diem rate of $176.70 is $8,431,063,80. Respondent subsequently reduced the utilization days to 47,214. The product of $176.70 multiplied by 47,214 is $8,342,713.80. However, Respondent assessed Petitioner for $8,400,165.73, rather than $8,342,713.80, and later credited Petitioner for $79,725.00, resulting in a net assessment of $8,320,440.73.

[6/] If Respondent were to have divided the counties' cost of detention of $101,628,064.00 by the counties' total utilization days of 579,409, the per diem rate would have been $175.40. The product of multiplying that per diem rate by 47,714 utilization days allocable to Petitioner would have resulted in a gross assessment against Petitioner in the amount of $8,369,012.99. If the reference in Rule 63G-1.004(2) to the "cost of detention care" were found to mean the $125,327,667.00 that the Legislature appropriated for the combined costs of state and county detention care, the 47,714 utilization days allocable to Petitioner reasonably should be divided by the 709,251 utilization days for all detention care, including predisposition and post-disposition care. The mathematical quotient would be .06727. The mathematical product of multiplying $125,327,667.00 by .06727 is $8,431,266.65; which exceeds $8,431,063.80 by $202.92.

[7/] Agency policy is non-rule policy if it does not satisfy the definition of a rule in Subsection 120.52(15). Agency policy is an un-adopted rule, within the meaning of Subsections 120.56(4) and 120.57(1)(e), if it satisfies the definition of a rule in Subsection 120.52(15) but has not been promulgated in accordance with the rulemaking requirements prescribed in Section 120.54 (an un-promulgated rule). See, "The Scarecrow in McDonald's Farm: A

Fairy Tale About Administrative Law," Fla. Bar. J., No. 3 (March 1999).

[8/] Petitioner does not allege that Rule 63G-1.004 amends, enlarges, or modifies Section 985.686 within the meaning of Subsections 120.52(8), 120.56(3), and 120.68(7)(e)4. The issue is whether the methodology adopted by Respondent either deviates from the rule or interprets the rule in a manner that effectively amends the rule.

COPIES FURNISHED:

Stephen M. Todd, Esquire
Hillsborough County Attorney's Office
Post Office Box 1110
Tampa, Florida 33601

Brian Berkowitz, Esquire
Department of Juvenile Justice
Knight Building, Room 312V
2737 Centerview Drive
Tallahassee, Florida 32399-3100

Frank Peterman, Jr., Secretary
Department of Juvenile Justice
Knight Building
2737 Centerview Drive
Tallahassee, Florida 32399-3100

Jennifer Parker, General Counsel
Department of Juvenile Justice
Knight Building
2737 Centerview Drive
Tallahassee, Florida 32399-3100

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.