STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ALBERT FIGUEROA, JAYLIN FIGUEROA, AND MARTIN L. GLICK,	)	
Petitioners,	)	
vs.	)	Case Nos. 11-3852RP 11-3853RP 11-3854RP
DEPARTMENT OF CORRECTIONS,	)	
Respondent.	)	

FINAL ORDER OF DISMISSAL

This matter came before the undersigned on Respondent's Motion to Dismiss Rule Challenge Petitions for Lack of Standing. The petitions and amended petition seeking an administrative determination of the invalidity of Proposed Rule 33-601.731 are dismissed, as they contain insufficient factual allegations to establish Petitioners' standing to bring the rule challenges.

PRELIMINARY STATEMENT

Petitioners Albert Figueroa, Jaylin Figueroa, and Martin L. Glick filed separate rule challenges to proposed amendments to Florida Administrative Code Rule 33-601.731 on August 1, 2011. The rule amendments would change the circumstances under which visiting privileges may be suspended in the state corrections system. The challenges were consolidated and hearing was set for August 26, 2011. On August 19, 2011, Respondent filed a

Motion to Dismiss for lack of standing. Petitioners Albert Figueroa and Jaylin Figueroa did not participate in the August 26th hearing, either in person or through counsel. Petitioner Glick did not attend the hearing, but filed a Motion for Extension on that date requesting additional time to prepare and to seek assistance of counsel. Orders granting continuance and setting a telephonic hearing for September 15, 2011, on the Motion to Dismiss were issued on August 26, 2011.

Petitioner Glick filed an Amended Petition Seeking an Administrative Determination of the Invalidity of Proposed Rule F.A.C. 33-601.731 on September 12, 2011. The Amended Petition added additional language related to standing, as set forth below, and added a statement that provisions suspending visiting privileges based upon conduct of the visitor provided no process or guidelines to allow for those privileges to be reinstated. Petitioner Glick and Respondent Department of Corrections participated in the telephonic hearing on the Motion to Dismiss held on September 15, 2011, but Petitioners Albert Figueroa and Jaylin Figueroa again did not participate. At the hearing, Respondent did not object to Petitioner Glick's Amended Petition. The undersigned finds no prejudice to the Respondent and hereby accepts the Amended Petition.

In its Motion to Dismiss filed August 19, 2011, Respondent asserts that the petitions do not meet either prong of the two-part standing test developed in applicable case law, and moves for the entry of a final order dismissing the petitions.

FINDINGS OF FACT

For purposes of the Motion, the following allegations contained in the petitions are accepted as true:

1. Albert Figueroa is an approved visitor for an inmate in the custody of the Florida Department of Corrections.

2. Albert Figueroa regularly visits an inmate under the custody of the Florida Department of Corrections.

3. Jaylin Figueroa has a brother in the custody of the Florida Department of Corrections.

4. Jaylin Figueroa regularly visits with this brother.

5. Martin Glick is on the Florida Department of Corrections approved visitor list for an inmate in its custody.

6. Imposition of visitation restrictions upon an inmate, including indefinite suspension of these privileges, would affect the Petitioners' visitation of that inmate.

CONCLUSIONS OF LAW

7. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding. §§ 120.56(1) and (2), 120.569(1), and 120.57(1), Fla. Stat. (2011).

8. In considering a Motion to Dismiss, the trier of fact accepts the factual allegations of the petition as true and considers the allegations in the light most favorable to the nonmoving party. Florida Bar v. Greene, 926 So. 2d 1195 (Fla. 2006).

9. Section 120.56(1)(b) requires a rule challenge petition to state with particularity facts sufficient to show that the person challenging a proposed rule would be substantially affected by it.

10. In order to meet the substantially affected test, a Petitioner must establish: (1) that the Petitioner would suffer a real and sufficiently immediate injury in fact; and (2) that the alleged interest is within the zone of interest to be protected or regulated. Lanoue v. Fla. Dep't of Law Enf., 751 So. 2d 94 (Fla. 1st DCA 1999).

11. In order to constitute a real and immediate injury in fact, "the injury must not be based on pure speculation or conjecture." See Ward v. Bd. of Trs. of the Int. Imp. Trust Fund, 651 So. 2d 1236, 1237 (Fla. 4th DCA 1995).

12. In Florida Department of Offender Rehabilitation v. Jerry, 353 So. 2d 1230 (Fla. 1st DCA 1978), the court held that Jerry, who had completed his disciplinary confinement imposed under a rule, no longer had standing to challenge that rule because there was no immediate injury unless and until it was

again applied to him. The court was unwilling to presume that Jerry would commit another assault or engage in other misconduct while in custody that would result in application of the rule once again, even though he was at all times subject to the rule. Later cases have followed the Jerry rationale. See, e.g., Dep't of Corr. v. Van Poyck, 610 So. 2d 1333 (Fla. 1st DCA 1992) rev. den., 620 So. 2d 763 (Fla. 1993).

13. The injury to Petitioners here is equally speculative, is not immediate, and is governed by Jerry. The effectiveness of the rule itself would create no injury to Petitioners unless and until the inmate they seek to visit commits a "major violation" subjecting him to suspension of visiting privileges. Such possible injury at some later date does not meet the "immediate injury" prong of the standing test. See also Burns v. Dep't. of Corr., Case No. 97-4538RP (Fla. DOAH Dec. 8, 1997) (final order of dismissal issued where allegations contained in the original petition and amended petition failed to establish petitioner's standing to challenge existing rule and proposed amendment to rule).

14. As to the second prong of the standing test, "the general rule regarding the zone of interest element of the substantially affected test is that such element is met where a party asserts that a statute, or a rule implementing such statute, encroaches upon an interest protected by a statute or

in the constitution." Ward, supra at 1238. In applying the zone of interest test, analysis centers on whether the legislation being implemented by the agency was intended to protect that party's interest.

15. Careful review of the statutes being implemented by the proposed amendments to rule 33-601.731 reveals some passing concerns with the interests of visitors, but in context these are clearly subsidiary to the primary interests in reducing recidivism and providing incentives to modify inmate behavior.

16. While section 944.23, Florida Statutes (2011), refers to rights of certain elected officials and others concerned with the operation of the state corrections system to visitation, and section 944.09 refers to rights of children in special visitation situations involving inmates with convictions for certain sex offenses, nothing in the pleadings asserts either of these interests, and Petitioners have not established standing under either of these provisions. Further, there was no suggestion at the hearing that such interests were involved, even if the petitions were to be amended further.

17. The statutory authority of the Department of Corrections in developing its visitation rules is substantially predicated upon its responsibilities to modify inmate behavior, control contraband, and reduce recidivism.

18. The asserted injuries to Petitioners' visitation privileges resulting from the rule, taken as true, do not fall within the zone of interest protected by the laws governing the state correctional system.

CONCLUSION

The allegations contained in the Petitions and the Amended Petition, taken as true, are insufficient to satisfy either prong of the "substantially affected" test. Petitioners therefore lack standing to challenge the proposed amendments to Florida Administrative Code Rule 33-601.731, and this case must be dismissed.

It is, therefore,

ORDERED:

1. Respondent's Motion to Dismiss Rule Challenge Petitions for Lack of Standing is GRANTED.

2. The Petition Seeking an Administrative Determination of the Invalidity of Proposed Rule 33-601.731 filed by Petitioner Albert Figueroa, the Petition Seeking an Administrative Determination of the Invalidity of Proposed Rule 33-601.731 filed by Petitioner Jaylin Figueroa, and the Petition Seeking an Administrative Determination of the Invalidity of Proposed Rule F.A.C. 33-601.731 filed by Petitioner Martin L. Glick as amended on September 12, 2011, are DISMISSED.

DONE AND ORDERED this 22nd day of September, 2011, in Tallahassee, Leon County, Florida.

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

Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of September, 2011.

COPIES FURNISHED:

Albert Figueroa
Post Office Box 235
Sparr, Florida 32192-0235

Jaylin Figueroa
Post Office Box 235
Sparr, Florida 32192-0235

Martin L. Glick
6735 15th Street North
St. Petersburg, Florida 33702

Deborah B. Loucks, Esquire
Michael Todd Flury, Esquire
Dror Lewy, Esquire
Office of the Attorney General
The Capitol, Plaza Level 01
Tallahassee, Florida 32399

Liz Cloud, Program Administrator
Administrative Code
Department of State
R. A. Gray Building, Suite 101
Tallahassee, Florida 32399

Jesslyn Krouskroup, Acting Coordinator
Joint Administrative Procedures Committee
Room 680, Pepper Building
111 West Madison Street
Tallahassee, Florida 32399-1400

Ken Tucker, Secretary
Department of Corrections
Office of General Counsel
501 South Calhoun Street
Tallahassee, Florida 32399-2500

Kendra Jowers, Assistant General Counsel
Department of Corrections
Office of General Counsel
501 South Calhoun Street
Tallahassee, Florida 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 Administrative 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 Administrative Appeal must be filed within 30 days of rendition of the order to be reviewed.