STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HELEN PEEK,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 11-4166RX
	)	
FLORIDA PAROLE COMMISSION,	)	
	)	
Respondent.	)	
_____	)	

FINAL ORDER OF DISMISSAL

This matter came before the undersigned on Petitioner's "Amended Petition Requesting Rulemaking Challenge of Rule 23-21.0155 Fla. Admin. Code," filed September 1, 2011. For the reasons detailed below, the Amended Petition must be dismissed, as it contains insufficient factual allegations to establish Petitioner's standing to bring the instant challenge.

I. Background

Petitioner initiated this proceeding on August 16, 2011, with the filing of her "Petition Requesting Rule Challenge of Rule 23-21.0155 Fla. Admin. Code." The gravamen of the Petition is that Florida Administrative Code Rule 23-21.0155——which provides that if the Parole Commission declines to authorize the effective parole release date of an inmate referred for extraordinary review, the Commission must suspend the established presumptive parole release date until the inmate is

found to be a good candidate for parole release——constitutes an invalid exercise of delegated legislative authority.

In an apparent effort to establish standing to bring this challenge, Petitioner merely asserted in her original Petition that the rule is causing "a class of inmates to be illegally detained in the Florida Department of Corrections indefinitely . . . at great expense to [her] as a taxpaying resident in the State of Florida." Significantly, Petitioner did not contend that she has ever been an inmate in the Florida Department Corrections, nor did she allege any other facts that would tend to show that she possesses standing to initiate this proceeding.

On August 23, 2011, the undersigned entered an Order to Show Cause,[1] which observed, quoting the First District's opinion in Abbott Laboratories v. Mylan Pharmaceuticals, Inc., 15 So. 3d 642, 651 n.2 (Fla. 1st DCA 2009), that "standing in the administrative context is a matter of subject matter jurisdiction and cannot be conferred by consent of the parties." The undersigned further noted, again citing Abbott, that where a petitioner lacks standing to initiate a rule challenge, an order on the merits by an Administrative Law Judge would constitute a nullity. The Order to Show cause concluded by providing:

> Petitioner's bare allegation that the challenged rule——which deals with the Parole Commission's handling of inmates referred

> for parole release——generally impacts her as a taxpaying Florida resident appears insufficient to satisfy the "substantially affected" standard. Accordingly, it is
>
> ORDERED that Petitioner shall show cause no later than September 1, 2011, why her Petition should not be dismissed for failure to allege facts sufficient to establish her standing as a person "substantially affected" by Rule 23-21.0155. In the alternative, Petitioner shall file an amended petition by the same date that includes sufficient factual allegations of standing.

Subsequently, on September 1, 2011, Petitioner responded to the Order of Show Cause by filing an "Amended Petition Requesting Rulemaking Challenge of Rule 23-21.0155 Fla. Admin. Code." With respect to the issue of standing, the Amended Petition alleges, in relevant part:

> Petitioner avers here in the affirmative, that Rule 23-21.0155 has, and continues to annually cause an ongoing prima facie direct injury in fact to Petitioner as a Florida taxpayer, and to all taxpaying Floridians whereas:
>
> 1. The rule illegally gives the Commission the undelegated legislative authority to suspend parole eligible inmates [sic] parole dates indefinitely, contrary to the provisions of s. 947.18, F.S., the law implemented.
>
> 2. The rule factually costs the Petitioner as a taxpayer, and all Floridian taxpayers collectively, a basic annual cost to the Corrections budget at approximately $20,000.00 annually per inmate per year, multiplied by approximately 500 similarly situated parole eligible inmates, whose

parole dates are presently suspended, which amounts to approximately $10,000,000.00 dollars a year. This conservative number in annual costs to Petitioner as a taxpayer of the Corrections budget, does not include the cost of medical expenses that are associated with the aging segment of parole eligible inmates with suspended parole dates . . . .

* * *

3. Petitioner contends . . . that the substantial affect [sic] of this segment of parole eligible inmates . . . whose parole status . . . has been illegally suspended indefinitely pursuant to Rule 23-21.0155 (which the Petitioner duly challenges here as invalid, pursuant to the provisions of s. 120.52(8) F.S., where it was not amended in 2006 pursuant to the provisions of s. 120.536(1) and 120.54(3)(a)1. F.S.), clearly demonstrates with record evidence, "a direct injury in fact," of sufficient reality to the Petitioner as a taxpayer, which is not based on speculation or conjecture, and which clearly satisfys [sic] and meets the substantially affected test for Petitioner's standing to challenge rule 23-21.0155 as unauthorized and as an invalid exercise of delegated legislative authority.

* * *

Petitioner further avers in the affirmative, that she is clearly affected by the Commission's 2006 amendment of Rule 23-21.0155, and Petitioner's specific (interest injured) by the Commission's invalid rule challenged herein, is therefore within the "zone of interest to be protected," where the rule improperly cites s. 947.18 F.S. as the law implemented, encroaches upon Petitioner's zone of interest, where the commission failed to comply with the essential requirements of the non-discretional rulemaking procedures . . . .

(Pet. Amended Petition, pp. 3-5).

II. Analysis

Standing to challenge proposed or existing administrative rules is governed by section 120.56(1)(a), Florida Statutes, which provides that "any person substantially affected by a rule or a proposed rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority." In order to meet the substantially affected test, a petitioner must establish: (1) a real and sufficiently immediate injury in fact; and (2) that the alleged interest is arguably within the zone of interest to be protected or regulated. Lanoue v. Fla. Dep't of Law Enf., 751 So. 2d 94, 96 (Fla. 1st DCA 1999). To satisfy the real and immediate injury in fact element, "the injury must not be based on pure speculation or conjecture." Ward v. Bd. of Trs. of the Int. Imp. Trust Fund, 651 So. 2d 1236, 1237 (Fla. 4th DCA 1995). 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." Id. at 1238.

In light of Petitioner's attempt to utilize her status as a "Florida taxpayer" to establish standing, a useful application

of the substantially affected standard is provided by Hilliard v. Department of Transportation, Case No. 97-971RP, 1998 Fla. Div. Adm. Hear. LEXIS 5448 (Fla. DOAH Apr. 3, 1998), aff'd, 728 So. 2d 209 (Fla. 1st DCA Dec. 22, 1998)(table decision). In Hilliard, several petitioners, based upon their status as "Florida taxpayers," attempted to challenge proposed rules relating to nonconforming outdoor advertising signs. The Administrative Law Judge dismissed the rule challenge, concluding that neither petitioner had demonstrated a real and sufficiently immediate injury in fact or that their alleged interests were arguably within the zone of interest to be regulated:

> Both Petitioners asserted standing based on each being a Florida taxpayer . . . . Neither Petitioner owns any outdoor advertising signs. Nor do they own any land upon which such signs are located . . . Petitioners like all motorists in Florida, simply drive down roads on which these signs may be located. Neither Petitioner is significantly impacted by these proposed rules or impacted differently than the general population . . . .
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> * * *
>
> The record in this case demonstrates that neither Petitioner's interest in outdoor advertising signs is significantly different from the interests of the general population. Similarly, neither Petitioner demonstrates any sufficiently immediate

> impact on them different from the general population . . . . Therefore the Petitions . . . should be dismissed.

Id. at *7-10 (emphasis added); see also Fla. Soc'y of Ophthalmology v. State Bd. of Optometry, 532 So. 2d 1279, 1284 (Fla. 1st DCA 1988)("We initially observe that not everyone having an interest in the outcome of a particular dispute . . . is entitled to participate as a party in an administrative proceeding to resolve that dispute. 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 . . . .").

Although the undersigned has been unable to locate any Florida appellate decisions addressing a taxpayer's standing to challenge a proposed or existing rule (where the taxpayer is no differently affected than a member of the general population), it is well-settled in other jurisdictions that "a petitioner making a general attack on . . . administrative action or inaction must demonstrate special damages distinct from that suffered by the public at large." Matter of Abrams v. New York City Transit Auth., 368 N.Y.S.2d 165, 166 (N.Y. App. Div. 1975); Lesczynski v. Bloomberg, 2005 N.Y. Misc. LEXIS 3532, *5-6 (N.Y. Gen. Term 2005)(granting motion to dismiss where taxpayer's

allegations failed to establish an injury in fact or that the injury fell within the zone of interests protected; "[A]ny tax consequences from the act is an injury suffered by all taxpayers, not just by Lesczynski. A private citizen who does not show any special rights or interests in the matter in controversy, other than those common to all taxpayers and citizens, has no standing to sue")(internal quotation and citation omitted); Allan v. Univ. of Wash., 959 P.2d 1184, 1186-87 (Wash. Ct. App. 1998)(holding petitioner, the wife of a University of Washington professor, lacked standing to challenge amendments to university's administrative rules, where petitioner could not demonstrate the injury in fact or zone of interest prongs of the adversely affected test; "We agree with the University that in passing the APA, the Legislature did not confer standing on simply anyone who is dissatisfied with the outcome of the rule-making process . . . . [Petitioner's] claimed injury stems from the University's failure to comply with the APA rule-making procedures. Failure to comply with the procedural requirements, however, is not a sufficient injury to confer standing . . . . [Petitioner's] relationships with others, who may or may not have standing, do not confer standing upon her . . . . Rather [petitioner's] interest is merely one that she holds in common with all other citizens")(internal citations omitted); see also Lujan v. Defenders of Wildlife, 504

U.S. 555, 560, 573-74 (1992)(holding plaintiffs failed to demonstrate injury in fact necessary for standing; "We have consistently held that a plaintiff raising only a generally available grievance about government——claiming only harm to his and every citizen's interest in the application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large——does not state an Article III case or controversy.").

Applying the foregoing authority to the instant case, the allegations contained in the Amended Petition, taken as true, are insufficient to satisfy either prong of the "substantially affected" test. Simply put, Petitioner fails to allege how the financial effects of the challenged rule impact her differently than any other Florida taxpayer, nor does she explain how her interest in addressing the rule's procedural infirmities——as described in the Amended Petition——is any different than the interest she holds in common with all other citizens. See Hilliard, 1998 Fla. Div. Adm. Hear. LEXIS 5448 at *10; Allan, 959 P.2d at 1186-87; Lesczynski, 2005 N.Y. Misc. LEXIS 3532 at *5-6; Abrams, 368 N.Y.S.2d at 166. Accordingly, Petitioner lacks standing to challenge Florida Administrative Code Rule 23-21.0155, and the instant proceeding must be dismissed. See Burns v. Dep't of Corr., Case No. 97-4538RP, 1997 Fla. Div. Adm. Hear. LEXIS 5705 (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).[2]

III. Conclusion

For the reasons detailed above, it is ORDERED:

1. The "Petition Requesting Rule Challenge of Rule 23-21.0155 Fla. Admin. Code" and the "Amended Petition Requesting Rulemaking Challenge of Rule 23-21.0155 Fla. Admin. Code" are DISMISSED.

2. The final hearing scheduled for September 9, 2011, is cancelled.

DONE AND ORDERED this 7th day of September, 2011, in Tallahassee, Leon County, Florida.

Edward T. Bauer
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of September, 2011.

ENDNOTES

[1] On the same date, Respondent filed a Motion to Dismiss on the grounds that Petitioner's status as a taxpayer "does not give her standing to challenge a rule applicable only to parole-eligible inmates." (Resp. Mot. to Dismiss at 1).

[2] Immediately prior to the issuance of this Final Order of Dismissal, the parties filed a Pre-Hearing Joint Stipulation, the contents of which establish that Petitioner is the wife of a parole eligible inmate. However, as this fact was not alleged in either of the petitions, it will not be considered by the undersigned. See § 120.56(1)(b), Fla. Stat. (2010)(requiring petitioner to state "with particularity" facts sufficient to demonstrate standing). In any event, Petitioner's status as the spouse of a parole eligible inmate does not provide her with standing. See Allan, 959 P.2d at 1187 ("[Petitioner's] relationships with others, who may or may not have standing, do not confer standing upon her."). Further, to permit Petitioner to litigate the validity of the challenged rule in her husband's stead would undermine section 120.81(3), Florida Statutes, which prohibits inmates from initiating rule challenges. See Burns v. Dep't of Corr., Case No. 97-4538RP, 1997 Fla. Div. Adm. Hear. LEXIS 5705 (Fla. DOAH Dec. 8, 1997)(issuing final order of dismissal where petitioner, the spouse of an inmate, lacked standing to challenge an existing rule governing prison visitation; concluding that to allow petitioner to challenge the rule in the place of her husband would circumvent section 120.81(3)); see also Tungate v. Florida Dep't of Corr., 742 So. 2d 803, 803-04 (Fla. 1st DCA 1998)(holding that pursuant to section 120.82(3), inmate lacked standing to challenge the adoption of Florida Administrative Code Rule 33-3.0055); Green v. Dep't of Corr., Case No. 02-4723RP, 2003 Fla. Div. Adm. Hear. LEXIS 1064 (Fla. DOAH May 23, 2003)(noting that "prisoners do not have a right to file a rule challenge pursuant to section 120.56").

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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.