STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HELEN PEEK,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 12-1503RX
	)	
FLORIDA PAROLE COMMISSION,	)	
	)	
Respondent.	)	
	)	

FINAL ORDER DISMISSING RULE CHALLENGE PETITION

This cause has come before the undersigned on Petitioner's Petition Requesting Rule Challenge of Rule 23-21.0155 Fla. Admin. Code. Based on the pleadings filed in this matter, no genuine issue as to any material fact exists, and Respondent, the Florida Parole Commission (Commission), is entitled as a matter of law to the entry of a final order. Thus, pursuant to section 120.57(1)(h), Florida Statutes, the Petition must be dismissed.

APPEARANCES

For Petitioner: Helen Peek, pro se
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Gainesville, Florida 32607

For Respondent: Sarah J. Rumph, Esquire
Florida Parole Commission
4070 Esplanade Way
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STATEMENT OF THE ISSUE

Whether Petitioner, the spouse of an inmate of the Florida correctional system, has standing to challenge Florida Administrative Code Rule 23-21.0155, which provides that if the 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.

PRELIMINARY STATEMENT

On April 19, 2012, Petitioner filed a Petition Requesting Rule Challenge of Florida Administrative Code Rule 23-21.0155. The basis for standing alleged by Petitioner is that the Commission's adoption and application of the rule has infringed upon her marital right to intimate association and cohabitation with her husband.

On April 24, 2012, the Commission filed a Motion to Dismiss, seeking dismissal of this proceeding on three grounds. The grounds asserted were:

a) that Petitioner previously challenged rule 23-21.0155 in DOAH Case 11-4166RX, and unsuccessfully alleged standing in that case as a taxpayer of the State of Florida, based on the cost of continuing to house inmates that had

reached their established parole date but were determined to be ineligible for parole;

b) that Petitioner's marriage to an inmate is insufficient to confer standing to challenge a rule pertaining to the release date of an inmate; and

c) that section 120.81, Florida Statutes, precludes a challenge of the type at issue here.

On April 26, 2012, the undersigned entered an Order to Show Cause requiring Petitioner to explain how her expectation of having her husband live with her was sufficient to confer standing on her to challenge the rule, and why section 120.81(3) did not serve to prevent her, as a surrogate of the person directly affected by the rule, from challenging the rule. The Order to Show Cause required a response by May 7, 2012.

On May 3, 2012, Petitioner filed a Motion for Extension of Time to File Response to Show Cause Order, in which she requested an extension to allow the response to be filed on or before May 14, 2012. The Motion was granted.

On May 11, 2012, Petitioner filed her Response to Show Cause Order.

The undersigned has carefully reviewed the Petition, the Motion to Dismiss, the Response to Show Cause Order, the cases cited therein, and the file of this proceeding. The facts alleged by Petitioner have been accepted as true, and the

undersigned has applied every reasonable inference in Petitioner's favor. Curd v. Mosaic Fertilizer, LLC, 39 So. 3d 1216, 1222 (Fla. 2010); Fla. Bar v. Greene, 926 So. 2d 1195, 1199 (Fla. 2006); Dep't of HRS v. S.A.P., 835 So. 2d 1091, 1094 (Fla. 2002); Ralph v. City of Daytona Beach, 471 So. 2d 1, 2 (Fla. 1983).

FINDINGS OF FACT

1. On October 10, 1995, Petitioner married Anthony Ray Peek, an inmate housed in a Department of Corrections facility. Mr. Peek is serving a parole-eligible sentence pursuant to chapter 987, Florida Statutes.

2. On September 1, 2010, Petitioner appeared and spoke at a Commission hearing convened to determine whether to authorize Mr. Peek's presumptive parole date of September 29, 2010. By order dated September 2, 2010, the Commission decided not to authorize Mr. Peek's presumptive parole date, and referred the case for extraordinary review pursuant to rule 23-21.0155.

3. On November 9, 2010, the Commission entered an order by which it determined that it would not authorize an effective parole date for Mr. Peek, that his presumptive parole release date remained suspended, and established May, 2017, as the date for Mr. Peek's next extraordinary review interview. The Commission's action applied the standards for placing an inmate on parole established in section 947.18, Florida Statutes. In

taking its action, the Commission utilized the procedures for extraordinary review established in rule 23-21.0155, which provides, in its entirety, that:

> 23-21.0155 Extraordinary Review Procedures.
>
> (1) When an inmate's case is referred for extraordinary review by the Commission, an order shall be prepared outlining the reason(s) for the Commission's decision. The order shall be acted upon by the Commission within 60 days of the decision declining to authorize the effective parole release date. The Commission's order shall specifically state the reasons for finding the inmate to be a poor candidate for parole release pursuant to Section 947.18, F.S., and shall identify the information relied upon in reaching this conclusion. Additionally, the order shall suspend the established presumptive parole release date until such time that the inmate is found to be a good candidate for parole release. The determination, on extraordinary review, that an inmate is not a good candidate for parole release shall have the effect of overriding his presumptive parole release date however, the inmate shall continue to receive extraordinary interviews, which shall be scheduled pursuant to Rule 23-21.013, F.A.C.
>
> (2) If upon extraordinary review, a majority of the Commission finds the inmate to be a good candidate for parole release pursuant to Section 947.18, F.S., the Commission shall enter a written order authorizing the effective parole release date and outlining the term and conditions of parole.
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> *Specific Authority 947.002, 947.07 FS. Law Implemented 947.002, 947.07, 947.18 FS. History–New 8-1-83, Formerly 23-21.155, Amended 8-17-06.*

4. Had he been released from prison on parole, Mr. Peek would have had the opportunity to live with Petitioner. As a result of the Commission's action, Petitioner is not able to live and cohabitate with Mr. Peek as a married couple.

CONCLUSIONS OF LAW

5. The Division of Administrative Hearings has jurisdiction over this matter. §§ 120.56(1)(c), 120.569, and 120.57(1), Fla. Stat.

Standing

6. Section 120.56(1)(a) 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.

7. The Division's jurisdiction to reach the merits of a challenge to an agency rule depends upon an initial determination that the person challenging the rule as an invalid exercise of delegated legislative authority is substantially affected by the rule so as to meet the elements of standing.

8. A determination of whether a person is substantially affected exists independently of whether the person has alleged sufficient facts to prevail on the merits. Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co., 18 So. 3d 1079, 1082-85 (Fla. 2d DCA 2009); Palm Beach Cnty. Envtl. Coal. v. Dep't of Envtl. Prot., 14 So. 3d 1076 (Fla. 4th DCA 2009).

9. Petitioner's allegation as to her standing to challenge rule 23-21.0155 is that the rule infringes with the legitimate expectation of her husband being released on parole . . . to enjoy her marital right to an intimate association with her husband by associating with him as a family." Petitioner does not allege any other basis for her standing to initiate this proceeding.

10. In the context of a rule challenge proceeding, "[i]n order to meet the substantially affected test . . . , the 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.'" (citations omitted) Lanoue v. Fla. Dep't of Law Enf., 751 So. 2d 94, 96 (Fla. 1st DCA 1999).

11. The issue of standing to challenge a rule affecting inmate rights and privileges based on the status of being the spouse of an inmate appears to have been squarely addressed by the Final Orders in Theresa Burns v. Dep't of Corr., Case No. 97-4538RP (Fla. DOAH Dec. 8, 1997), and Albert Figueroa v. Dep't of Corr., Case No. 11-3852RP (Fla. DOAH Sept. 22, 2011). As stated by Judge Arrington in the Final Order in Case No. 97-4538RP, "it is the inmate's privilege to receive the visitor, not the visitor's right to see the inmate. If, for example, Petitioner's husband did not care to visit with her, Petitioner

would have no legal right to force a visit." Likewise, in this case it is the inmate's privilege to receive parole, and if paroled, he could go where he pleased, subject to the conditions of his parole. Petitioner could not force Mr. Peek to engage in an "intimate association," or to cohabitate with her upon his release. The undersigned can find no distinction in Judge Arrington's or Judge Boyd's reasoning in those cases and the case at issue.

12. Furthermore, Petitioner's interests in rule 23-21.0155 are not within the "zone of interest to be protected or regulated" by the rule. The purpose of the rule is establish procedures by which the Commission determines whether an inmate is or is not a good candidate for parole release. Pursuant to the law implemented, section 947.18, that determination includes a finding of whether "if the person is placed on parole, he or she will live and conduct himself or herself as a respectable and law-abiding person, and that the person's release will be compatible with his or her own welfare and the welfare of society." Thus, the "zone of interest" of rule 23-21.0155 is to protect society from the actions and consequences resulting from an inmate's premature release. The "zone of interest" of the rule is not to facilitate Petitioner's "intimate association," or cohabitation with the inmate.

13. Petitioner's allegation that the challenged rule affects her expectation of having her husband live with her is insufficient to meet either of the two prongs for standing. For the reasons set forth herein, Petitioner lacks standing to challenge rule 23-21.0155.

120.81(3), Florida Statutes

14. Section 120.81(3), Florida Statutes, provides that:

> (3) PRISONERS AND PAROLEES.—
>
> (a) Notwithstanding s. 120.52(13), prisoners, as defined by s. 944.02, shall not be considered parties in any proceedings other than those under s. 120.54(3)(c) or (7), and may not seek judicial review under s. 120.68 of any other agency action. Prisoners are not eligible to seek an administrative determination of an agency statement under s. 120.56(4). Parolees shall not be considered parties for purposes of agency action or judicial review when the proceedings relate to the rescission or revocation of parole.

15. Through her challenge to the Commission's rule regarding conditions of parole for inmates, Petitioner is effectively circumventing that act of the legislature by acting as a surrogate for her husband's interest in his parole date. Again, Judge Arrington squarely addressed the issue when he held that:

> the intent of the Legislature should not be eroded by permitting others to litigate in the stead of a prisoner:

> However, there are a myriad of circumstances in which the direct regulation of prisoners in the custody of the Respondent 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.

Theresa Burns v. Dep't of Corr., Case No. 97-4538RP (Fla. DOAH Dec. 8, 1997), citing Fla. Prisoner's Legal Aid Org., Inc. and Theresa Burns v. Dep't of Corr., Case No. 96-2943RX (Fla. DOAH Sept. 19, 1996). The reasoning expressed by Judge Arrington and Judge York is directly applicable to this case, and is accepted by the undersigned. Petitioner's challenge to rule 23-21.0155 is precluded by reasonable application of section 120.81(3), Florida Statutes.

CONCLUSION

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the petition initiating this case is hereby DISMISSED.

DONE AND ORDERED this 17th day of May, 2012, in Tallahassee, Leon County, Florida.

E. GARY EARLY
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of May, 2012.

COPIES FURNISHED:

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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 one copy of a Notice of 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 Appeal must be filed within 30 days of rendition of the order to be reviewed.