Approved by the Governor May 8, 1978.

Filed in Office Secretary of State May 8, 1978.

CHAPTER 78-28

Senate Bill No. 209

AN ACT relating to the Administrative Procedure Act; amending s. 120.52(10), Florida Statutes, redefining the term "party" for the purposes of the Administrative Procedure Act; providing that prisoners shall not be considered parties under the act for the purpose of obtaining specified proceedings; limiting prisoner input on rules of Department of Offender Rehabilitation to written statements; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (10) of section 120.52, Florida Statutes, is amended to read:

120.52 Definitions.--As used in this act:

(10) "Party" means:

(a) Specifically named persons whose substantial interests are being determined in the proceeding.

(b) Any other person who, as a matter of constitutional right, provision of statute, or provision of agency regulation, is entitled to participate in whole or in part in the proceeding, or whose substantial interests will be affected by proposed agency action, and who makes an appearance as a party.

(c) Any other person, including an agency staff member, allowed by the agency to intervene or participate in the proceeding as a party. An agency may by rule authorize limited forms of participation in agency proceedings for persons who are not eligible to become parties.

(d) Any county representative, agency, department or unit funded and authorized by state statute or county ordinance to represent the interests of the consumers of a county, when the proceeding involves the substantial interests of a significant number of residents of the county and the Board of County Commissioners has, by resolution, authorized the representative agency, department or unit to represent the class of interested persons. The authorizing resolution shall apply to a specific proceeding and to appeals and ancillary proceedings thereto, and it shall not be required to state the names of the persons whose interests are to be represented.

Prisoners as defined in s. 944.02(5) shall not be considered parties for the purposes of obtaining proceedings under s. 120.54(16) or s. 120.57.

Section 2. Section 120.54(3), Florida Statutes, is amended to read:

120.54 Rulemaking; adoption procedures.--

(3) If the intended action concerns any rule other than one relating exclusively to organization, procedure or practice, the agency shall, on the request of any affected person received within 14 days after the date of publication of the notice, give affected persons an opportunity to present evidence and argument on all issues under consideration appropriate to inform it of their contentions. Prisoners as defined in s. 944.02(5) may be limited by the Department of Offender Rehabilitation to an opportunity to submit written statements concerning intended action on any department rule.

Section 3. This act shall take effect upon becoming a law.

Approved by the Governor May 8, 1978.

Filed in Office Secretary of State May 8, 1978.

CHAPTER 78-29

Senate Bill No. 414

AN ACT relating to the regulation of bail bondsmen and runners; amending s. 648.27(3), Florida Statutes; requiring a law enforcement agency to inform the Department of Insurance of any criminal charge and the disposition of such charge filed against any applicant seeking to be licensed or to continue to be licensed as a bail bondsman or runner; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (3) of section 648.27, Florida Statutes, is amended to read:

648.27 Licenses; general.--

(3) The department may propound any reasonable interrogatories to an applicant for a license under this chapter or on any renewal thereof, relating to his qualifications, residence, prospective place of business, and any other matters which are deemed necessary or expedient in order to protect the public and ascertain the qualifications of the applicant. The department may also conduct any reasonable inquiry or investigation it sees fit, relative to the determination of the applicant's fitness to be licensed or to continue to be licensed. Upon the request of the department, a law enforcement agency shall inform the department of any specific criminal charge filed against any applicant and the final disposition of such charge.

Section 2. This act shall take effect October 1, 1978.

Approved by the Governor May 8, 1978.

Filed in Office Secretary of State May 8, 1978.

DATE: 1/10/78 Revised: 3/28/78

ANALYST	STAFF DIRECTOR
1. Hurley	Overstreet
2.	
3.	

COMMITTEE ACTION: 1. Fav. - 1/18/78
2.
3.

AMEND. OR CS ATTACHED

SENATE

STAFF ANALYSIS AND ECONOMIC STATEMENT

GOVERNMENTAL OPERATIONS COMMITTEE

BILL NO. AND SPONSOR:
SB 209 by Senator Ware

SUBJECT: Administrative Procedure Act

REFERENCES: GOVERNMENTAL OPERATIONS

I. SUMMARY:

Provides that prisoners shall not be deemed "parties" under the Administrative Procedure Act for the purpose of rule making, administrative determination of rules, or decisions which affect substantial interests under the Act.

II. PURPOSE:

A. Present Situation

"Party," as currently defined in §120.52(10), means any person: (1) who is specifically named in a proceeding in which his substantial interests are being determined; or (2) who is legally entitled to participate in a proceeding and who makes an appearance as a party, or whose substantial interests will be affected by proposed agency action, and who makes an appearance as a party; or (3) who is allowed by the agency to intervene or participate in a proceeding as a party.

B. Effect on Present Situation

This bill would specifically exclude prisoners, as defined in §944.02(5), F.S., from the meaning of the term "parties" for the purposes of obtaining administrative proceedings relating to rule making, administrative determination of rules, or decisions which affect substantial interests. Notwithstanding this bill, prisoners will still be entitled to due process as mandated by the Federal and State Constitutions, as judicially interpreted.

III. ECONOMIC CONSIDERATIONS:

A. Economic Impact on the Public: YES_____ NO X

B. Economic Impact on State or Local Government: YES X NO_____

This bill would allow state and local agencies to avoid costs of holding hearings on disciplinary rules. Mr. Ray Gearey, attorney for the Department of Offender Rehabilitation, reports that inmate disciplinary rulemaking is currently exempt from the APA; therefore, potential cost avoidance from a reduction in the number of hearings held cannot be quantified. Mr. Gearey anticipates extensive use of administrative hearings by inmates once the exemption expires in September, 1978.

IV. COMMENTS:

"Prisoner," as defined in §944.02(5), F.S., "means any person who is under arrest and in the lawful custody of any law enforcement official, or any person convicted and sentenced by any court and committed to any municipal or county jail or state prison, prison farm, or penitentiary, or to the custody of the department [of offender rehabilitation], as provided by law."

An identical bill, HB 420, has been filed in the House and referred to the Governmental Operations Committee.

COMMENTS, ctd

A bill with a similar intent, SB 481, was reported favorably with amendments by this committee during last session. That bill passed the Senate but died in the House Governmental Operations Committee.

Mr. Ken Oertel, Director of the Division of Administrative Hearings, Department of Administration advises that administrative hearings procedures have been open to prisoners but that prisoners have only utilized that remedy in a few instances.

The First District Court of Appeal, in an opinion filed January, 10, 1978, had an opportunity to address the applicability of the APA to the Department of Offender Rehabilitation in establishing disciplinary rules for inmates. However, the court found it unnecessary to deal with the applicability issue, basing its decision on other procedural grounds.

TO SPONSOR: 1/13/78

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA
JANUARY TERM, A. D. 1978

THE FLORIDA DEPARTMENT OF OFFENDER REHABILITATION, Petitioner, vs. LEROY JERRY and THE FLORIDA DIVISION OF ADMINISTRATIVE HEARINGS, Respondents.	NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND DISPOSITION THEREOF IF FILED. CASE NO. FF-303

Opinion filed January 10, 1978.

A Petition for Review of an Order of the Florida Division of Administrative Hearings - Original Jurisdiction

Earl H. Archer, III, for Petitioner.

John T. Chandler, for Respondents.

ERVIN, J.

Leroy Jerry, an inmate in the state correctional institution, was charged by the Department of Offender Rehabilitation (DOR) with unarmed assault in violation

of Florida Administrative Code Rule 33-3.08(2).[1] He was found guilty, placed in disciplinary confinement and served his penalty. He then attacked the above Rule in a Section 120.56,[2] Florida Statutes (Supp. 1976), proceeding. Rule 33-3.08 sets forth the procedure by which an inmate is subjected to disciplinary confinement and forfeiture of gain-time. Authority for the Rule is derived from Section 944.28, Florida Statutes (1975), which allows forfeiture of all or part of gain-time earned by a prisoner should he be guilty of certain specified acts,

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[1]Rule 33-3.08 provides a supervising officer shall investigate any apparent violation and any reports of the incident, and shall file his own report with the disciplinary team. The team meets and reviews the two reports. If the team finds a chargeable offense under Section 944.28(2)(a), the Rule provides a copy of the charges will be delivered to the inmate at least 24 hours in advance of a hearing before the team. The Rule states the hearing will not be open to the public and if the inmate is not properly able to represent himself, he should be provided a staff representative. No mention is made in the Rule of the right to counsel in such a disciplinary hearing. The Rule further provides (1) the chairman of the team "...may determine that the source of certain information should not be revealed to the inmate...", and (2) a witness need not be called if so doing would create a risk of reprisal or would undermine authority.

[2]Section 120.56(1) and (2), states in part:

> "(1) Any person substantially affected by a 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.
>
> (2) The petition seeking an administrative determination under this section shall be in writing and shall state with particularity facts sufficient to show the person seeking relief is substantially affected by the rule and facts sufficient to show the invalidity of the rule."

including assault.[3]

Jerry's petition for an administrative determination that Rule 33-3.08(2) was invalid alleged he was a person substantially affected since he had been charged with an infraction of the Rule, assault, and as a result his substantial interests in retaining accrued gain-time and freedom from disciplinary confinement were at issue. He also alleged he was substantially affected because the maximum penalty to which he could be exposed was disciplinary confinement for 60 days and 180 days loss of gain-time. The hearing examiner found Rule 33-3.08(2) invalid for failure to meet the procedural guidelines set forth in Section 120.57, Florida Statutes (Supp. 1976). He concluded that since Section 120.72(1), Florida Statutes (Supp. 1976), makes uniform the rulemaking and adjudicative procedures used by the administrative agencies of the state, there was no exemption to DOR from the requirements of the new APA as found in Chapter 120.[4] Consequently, the Department is an agency as defined by Section 120.52(1)(b). By juxtaposing certain

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[3] Section 944.28(2)(b) provides the method of forfeiture: A written charge is delivered to the prisoner giving notice of a hearing before a disciplinary committee. That committee, composed of prison officials, may or may not find him guilty. If he is found guilty, it may recommend to the superintendent of the prison forfeiture of any gain-time. If the superintendent approves the recommendation, it is then forwarded to the Department which may declare a forfeiture.

[4] Although the federal APA was held not applicable to federal disciplinary proceedings in Clardy v. Levi, 545 F.2d 1241 (9th Cir. 1976), there does not appear in Florida's APA any provision which expressly excludes DOR's disciplinary proceedings from APA control. Moreover, at least one scholar, and a member of the Law Revision Council responsible for drafting the 1974 APA, has opined that agency action extends to prison disciplinary matters. Levinson, The Florida Administrative Procedure Act: 1974 Revision and 1975 Amendments, 29 U. Miami L. Rev. 617, 628 (1975).

provisions of the Rule with Section 120.57,[5] he found the Rule conflicted with pertinent portions of the statute and could not stand.

The hearing officer's order involves matters of great substance; nevertheless, for the reasons stated infra, it is not necessary for us to address the primary question raised as to the validity of the Rule since Jerry has not met the threshold requirement of standing.

Our efforts to determine what occurred at the hearing before the disciplinary team are thwarted because there is no record of those proceedings. It was not established Jerry ever made a request for a Section 120.57 hearing during the disciplinary proceedings. We do know however that at the time of the hearing before the administrative examiner, Jerry had completely served his disciplinary confinement. But we do not know whether Jerry suffered any loss of gain-time. The only inescapable conclusion which can be reached from the administrative proceedings is that the hearing examiner found Jerry has standing because he is a member of the prison class, has been subjected to alleged invalid procedures in the past

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[5]For example a party to a Section 120.57 hearing is entitled to not less than 14 days notice under subsection (1)(b)(2), therefore sub-paragraph eight of the Rule violates the statute's notice requirements since it permits only 24 hours' notice. Additionally Section 120.57(1)(b)4 allows parties to be represented by counsel before administrative tribunals whereas sub-paragraph 13(d) of the Rule allows a staff representative to represent the inmate only if he is illiterate or where the complexity of the issues makes it unlikely the inmate is able to represent himself. Finally sub-paragraph (h) of the Rule gives the chairman of the disciplinary team the power to withhold the source of incriminating information from the inmate. Witnesses may not be called if doing so would create a risk of reprisal or would undermine authority. Section 120.57(1)(b)4, however, gives all parties the opportunity to respond, to present evidence and to conduct cross-examination.

and may possibly in the future be subjected to such procedures. Observe the following from the hearing officer's order:

> "Respondent argues that Petitioner has no standing to seek an administrative determination of the validity of the Rule because he had already been found guilty of an infraction under the Rule and been subjected to discipline prior to the final hearing in this cause and thus is not now affected by the Rule. The Hearing Officer specifically rejects this argument. The Rule applies to inmates in the correctional institutions of this state. Petitioner is such an inmate. Petitioner has been subjected to the procedures set forth in the Rule and may at any time in the future be again subjected to those procedures. Therefore, Petitioner's interest is certainly a timely and current interest and he should not be required, as argued by Respondent, to again violate the provisions of the Rule in order to gain the requisite interest necessary to challenge the validity of the Rule.
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> * * *
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> ...[I]t appears that petitioner's interest in loss of gain-time having real substance and being sufficiently embraced within the Fourteenth Amendment 'liberty' to entitle him to due process, is a substantial interest as that term is used in Section 120.57, F.S. It follows that a Rule such as that challenged herein, which sets forth the procedure by which Petitioner's substantial interest shall be determined and his rights protected, has substantial affect upon Petitioner entitling him to challenge its validity under Section 120.56, F.S."

Any attempt to comprehend in depth the meaning of standing involves a careful study of the pertinent provisions of the new APA, compared with the 1961 Act as well as a comparison with the federal APA and the cases interpreting it.

The relief Jerry seeks is in essence an administrative declaration of his rights as affected by the DOR Rule. Florida's APA provides two distinct types of declaratory statements: (1) A declaratory statement involving the

applicability of a statute, rule or order as provided by Section 120.565, and (2) a declaratory statement on the validity of a rule or proposed rule, provided by Sections 120.54 and .56.

Section 120.30, Florida Statutes (1973), repealed by Ch. 74-310, Section 4, Laws of Florida, effective January 1, 1975, permitted any "affected party" to obtain a judicial declaration of the validity of any rule of an administrative agency by bringing a declaratory judgment action in the circuit court of the county in which such party resides.[6]

The legislature in enacting Sections 120.54(4)(a) and 120.56, employed more restrictive language, "substantially affected", than it did in enacting Section 120.30. The legislature must be presumed to have intended a different result by employing language describing a more limited scope of persons affected in a given situation and less restrictive language in other situations. For example, Section 120.54(3) permits all "affected persons" an opportunity to present evidence and argument on all issues under consideration appropriate to inform the agency of their contentions within 14 days after date of publication of the notice of a proposed rule.

There are very few Florida cases which have addressed the question of standing under the 1974 APA. In A.S.I., Inc. v. Florida Public Service Commission, 334 So.2d 594 (Fla. 1976), our Supreme Court held that a competitor who filed a protest before the Public Service Commission to an air freight delivery company's application to transport delayed, misplaced and/or misrouted baggage from Jacksonville International Airport to specified points in northeast Florida had no standing as a substantially interested party within the meaning of Section 120.57, even assuming the competitor, A.S.I., would experience competition from the air freight delivery company's operation under its for hire permit.

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[6]In interpreting the effect of Sec. 120.30, we stated in D. & W. Oil Company, Inc. v. O'Malley, 293 So.2d 128 (Fla. 1st DCA 1974), that standing under the statute was broader than declaratory actions pursued under Ch. 87.

Later in Gadsden State Bank v. Lewis, 348 So.2d 343 (Fla. 1st DCA 1977), we held that Gadsden State Bank, a competitor of Quincy State Bank which had filed an application with the Comptroller for authority to establish a branch bank near Gadsden's existing facility, had standing as a party substantially interested in a Section 120.57(1) hearing. However, the opinion carefully pointed out that the potential competitive injury to Gadsden by a branch bank is not explicitly a matter of statutory concern under the APA, but it was made so by the Department's rule requiring, as a condition to branch banking, that local conditions assure reasonable promise of successful operation for the proposed branch. We thereby concluded that Gadsden was a party because it was made a party by agency rule defining party as a protestant in such agency proceedings.

Under the federal APA before a person may seek redress in the courts from agency action, he must be either "adversely affected or aggrieved by agency action...."[7] This is practically the same standard under Section 120.68 (1), permitting "[a] party who is adversely affected by final agency action ... to [seek] judicial review." "Adverse" is different in meaning from "substantial," the former defined as "acting against or in a contrary direction"; the latter defined as "consisting of or relating to substance, ... not imaginary or illusory ... considerably large."[8]

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[7] Section 10 of the Federal Administrative Procedure Act (5 USC §702) provides:

> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

[8] Webster's New Collegiate Dictionary (1976).

Despite the dissimilarities of the terms under the federal and Florida Acts, decisions involving standing in the federal courts often turn upon issues pertaining to whether a person seeking relief has shown that his interests are substantial and not illusory. The cases have no common thread running throughout and the facts must be analyzed on a case by case basis.[9]

In Sierra Club v. Morton, 405 U.S. 727 (1972), an environmental group challenged the United States Forest Service's proposed development of the Mineral King Valley, a part of the Sequoia National Forest. The group merely alleged "a special interest in conservation and sound maintenance of the national parks, game refuges and forests of the country." The Court held that standing to seek judicial review under the federal APA existed only to those who could show "that the challenged action had caused them 'injury in fact', and where the alleged injury was an interest 'arguably within the zone of interest to be protected or regulated' by the statutes that the agencies were claimed to have violated." 405 U.S. at 733. It stressed the importance that a party seeking judicial review must himself be among the injured for it is this requirement which gives a litigant a direct stake in the controversy and prevents the judicial process from becoming no more than a vehicle for the vindication of the value interests of concerned bystanders.

A year later, paradoxically, the United States Supreme

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[9]Professor Davis after analyzing the more recent United States Supreme Court opinions concluded that "the dozen efforts [by the Court] to locate the line [between injury and no injury] have produced some seemingly conflicting case law, and all the standing cases of the 1970s have been decided by a divided court." Davis, ADMINISTRATIVE LAW OF THE SEVENTIES, SUPPLEMENTING ADMINISTRATIVE LAW TREATISE 507 (1976).

Court in United States v. SCRAP, 412 U.S. 669 (1973), permitted standing to various environmental groups challenging the Interstate Commerce Commission's decision allowing railroads to increase freight rates. Petitioners contended the 2.5% surcharge on freight rates would cause their members "economic, recreational and aesthetic harm" by discouraging recyclable materials and promoting the use of raw materials that compete with scrap, thus adversely affecting the environment. The environmental group, SCRAP, claimed its members were harmed by the ICC action since (1) each of its members was caused to pay more for finished goods, and (2) each of its members used the forests, rivers, mountains and other natural resources in the Washington, D.C. area for recreational purposes and that this use was disturbed by the adverse environmental impact caused by the nonuse of recyclable goods brought about by a rate increase on such commodities.[10]

The majority opinion distinguished the case from Sierra Club since in the latter case there was no allegation that the party seeking review was among the injured whereas in SCRAP the litigants claimed that the alleged illegal action of the ICC would harm them in their use of natural resources in the Washington metropolitan area.

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[10]In footnote numbered fourteen to the opinion, the Court specifically rejected the government's contention that standing should be limited only to those who have been "significantly" affected by agency action. 412 U.S. 689. The Court stated that the standard which it applied, "injury in fact," reflects the statutory requirement that a person be "adversely affected," which distinguishes the interests of "a person with a direct stake in the outcome of a litigation - even though small - from a person with a mere interest in the problem." Ibid. Since the test suggested by the government, and rejected by the Court, was practically identical to the words used in Section 120.56, the Court's decision might conceivably have been different had it been presented with a statute worded in the same fashion as Section 120.56. Nevertheless, if the SCRAP decision were the final word on the federal question of standing, it would be highly persuasive authority for Jerry's position; however, there are other cases.

In Roe v. Wade, 410 U.S. 113 (1973), a woman was held without standing to challenge an anti-abortion statute in an action where she had alleged she suffered from a "neural-chemical" disorder, and that her doctor advised against pregnancy and also advised against birth control pills, and that her marital happiness was adversely affected by fear of pregnancy. The court interpreted the facts to mean only that the couple might suffer some future possible injury from the application of the anti-abortion statute, saying

> "Their alleged injury rests on possible future contraceptive failure, possible future pregnancy, possible future unpreparedness for parenthood, and possible future impairment of health. Any one or more of these several possibilities may not take place and all may not combine. In the Does' estimation, these possibilities might have real or imagined impact upon their marital happiness. But we are not prepared to say that the bare allegation of so indirect an injury is sufficient to present an actual case or controversy." 410 U.S. 128.

In O'Shea v. Littleton, 414 U.S. 488 (1974), plaintiffs brought a class action against law enforcement officers for injunctive relief alleging various patterns of conduct in the administration of criminal justice which deprived them of rights secured by the Constitution and statutes. It was specifically alleged that the magistrate and judge had deprived members of their class of their constitutional rights by setting bond without regard to the facts, imposing higher bond for blacks than for whites and requiring members of the class to pay for trial by jury. The court held that plaintiffs had not alleged an actual case or demonstrated injury and that abstract injury is not enough. "It must be alleged plaintiff 'has sustained or is immediately in danger of sustaining some direct injury' as a result of the challenged statute or official conduct." 414 U.S. at 494.

It continued that the injury or threat of injury must be both real and immediate, not conjectural or hypothetical. The Court observed that while there had been no allegation by plaintiffs that injury had occurred, counsel for plaintiffs had stated during argument that some of the plaintiffs had been defendants in proceedings before a magistrate and had suffered from unconstitutional treatment. The court continued:

> "Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief, however, if unaccompanied by any continuing, present adverse effects." 414 U.S. at 495 - 496 (Emphasis added.)[11]

The Court took pains to note there was no allegation that any of the named plaintiffs were then serving an allegedly illegal sentence or were on trial or awaiting trial, and concluded:

> "Of course, past wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury. But here the prospect of future injury rests on the likelihood that respondents will again be arrested for and charged with violations of the criminal law and will again be subjected to bond proceedings, trial, or sentencing before petitioners.
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> * * *

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[11] One may only speculate whether the opinion in O'Shea was intended to modify the broad language employed by the court in SCRAP to confer standing. Observe the following language from the latter opinion:

> "Of course, pleadings must be something more than an ingenious academic exercise in the conceivable. A plaintiff must allege that he has been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency's action." 412 U.S. at 688-689. (Emphasis added.)

> But it seems to us that attempting to anticipate whether and when these respondents will be charged with a crime and will be made to appear before either petitioner takes us into the area of speculation and conjecture.
>
> * * *
>
> We assume that respondents will conduct their activities within the law and so avoid prosecution and conviction as well as exposure to the challenged course of conduct said to be followed by petitioners.
>
> As in Golden v. Zwickler, [394 US 103, 22 L Ed 2d 113, 89 S Ct 956 (1969),] we doubt that there is '"sufficient immediacy and reality"' to respondents' allegations of future injury to warrant invocation of the jurisdiction of the District Court. There, 'it was wholly conjectural that another occasion might arise when Zwickler might be prosecuted for distributing the handbills referred to in the complaint.' Id., at 109. 22 L Ed 2d 113. Here we can only speculate whether respondents will be arrested, either again or for the first time, for violating a municipal ordinance or a state statute, particularly in the absence of any allegations that unconstitutional criminal statutes are being employed to deter constitutionally protected conduct." 414 U.S. at 496-7.

Jerry, like the plaintiffs in O'Shea v. Littleton, supra, has failed to show injury which is accompanied by any continuing, present adverse effects. He has failed to demonstrate, either at the time his petition for administrative relief was filed or at the time of the hearing, that he was then serving disciplinary confinement or that his existing prison sentence had been subjected to loss of gain-time. He has not alleged the Rule is unconstitutionally invalid, rather that the procedure afforded him by the Rule does not comport with the procedure provided by Chapter 120. True, the loss of gain-time is a Fourteenth

Amendment liberty entitling a prisoner to due process. Wolff v. McDonald, 418 U.S. 539 (1974). Were we confronted with a situation in which loss of gain-time had in fact occurred there would be no question but that injury in fact resulted and that Jerry had appropriate standing to challenge the Rule. Here there is nothing in the record so demonstrating. Finally we note that Jerry has not been made a party by agency rule as in Gadsden State Bank v. Lewis, supra.

As in O'Shea, Jerry's prospects of future injury rest on the likelihood that he will again be subjected to disciplinary confinement because of possible future infractions of Rule 33-3.08(2). Whether he will do so, however, is a matter of speculation and conjecture and we will not presume that Jerry, having once committed an assault while in custody, will do so again. To so presume would result only in illusory speculation which is hardly supportive of issues of "sufficient immediacy and reality" necessary to confer standing.

Petition for review is granted and the order of the hearing examiner is reversed.

BOYER, Acting Chief Judge and MILLS, J., CONCUR.

DATE: 1/10/78

COMMI[illegible] ACTION: 1. Fav. - 1/18/78

ANALYST	STAFF DIRECTOR
✓1. Hurley	Overstreet
2.	
3.	

2. _____

3. _____

SENATE

STAFF ANALYSIS AND ECONOMIC STATEMENT

GOVERNMENTAL OPERATIONS COMMITTEE

AMEND. OR CS ATTACHED _____

BILL NO. AND SPONSOR:
SB 209 by Senator Ware

SUBJECT: Administrative Procedure Act

REFERENCES: GOVERNMENTAL OPERATIONS

I. SUMMARY:

Provides that prisoners shall not be deemed "parties" under the Administrative Procedure Act for the purpose of rule making, administrative determination of rules, or decisions which affect substantial interests under the Act.

II. PURPOSE:

A. Present Situation

"Party," as currently defined in §120.52(10), means any person: (1) who is specifically named in a proceeding in which his substantial interests are being determined; or (2) who is legally entitled to participate in a proceeding and who makes an appearance as a party, or whose substantial interests will be affected by proposed agency action, and who makes an appearance as a party; or (3) who is allowed by the agency to intervene or participate in a proceeding as a party.

B. Effect on Present Situation

This bill would specifically exclude prisoners, as defined in §944.02(5), F.S., from the meaning of the term "parties" for the purposes of obtaining administrative proceedings relating to rule making, administrative determination of rules, or decisions which affect substantial interests. Notwithstanding this bill, prisoners will still be entitled to due process as mandated by the Federal and State Constitutions, as judicially interpreted.

III. ECONOMIC CONSIDERATIONS:

A. Economic Impact on the Public: YES_____ NO X

B. Economic Impact on State or Local Government: YES X NO_____

This bill offers a potential savings of time and money since exclusion of prisoners as parties under the Administrative Procedure Act would reduce the potential number of proceedings and hearings which might have to be conducted by the Division of Administrative Hearings of the Department of Administration and state and local authorities.

IV. COMMENTS:

"Prisoner," as defined in §944.02(5), F.S., "means any person who is under arrest and in the lawful custody of any law enforcement official, or any person convicted and sentenced by any court and committed to any municipal or county jail or state prison, prison farm, or penitentiary, or to the custody of the department [of offender rehabilitation], as provided by law."

An identical bill, HB 420, has been filed in the House and referred to the Governmental Operations Committee.

COMMENTS, ctd

A bill with a similar intent, SB 481, was reported favorably with amendments by this committee during last session. That bill passed the Senate but died in the House Governmental Operations Committee.

Mr. Ken Oertel, Director of the Division of Administrative Hearings, Department of Administration advises that administrative hearings procedures have been open to prisoners but that prisoners have only utilized that remedy in a few instances.

Mr. Ray Gearey, attorney for the Department of Offender Rehabilitation, advises that the department anticipates extensive use of the administrative hearings procedures by inmates. The department is currently exempt from application of the APA to the establishment of inmate disciplinary rules; however, that exemption, granted by the Administration Commission, expires in September, 1978.

The First District Court of Appeal, in an opinion filed January, 10, 1978, had an opportunity to address the applicability of the APA to the Department of Offender Rehabilitation in establishing disciplinary rules for inmates. However, the court found it unnecessary to deal with the applicability issue, basing its decision on other procedural grounds.

TO SPONSOR: 1/13/78

BILL ACTION REPORT

:3-75: File with Secretary of Senate) (S)~~(H)~~ BILL NO. 209

OMMITTEE ON GOVERNMENTAL OPERATIONS

ATE January 18, 1978 Date Reported 1/18/78

IME 9:00 a.m. - 12:00 Noon

LACE Room H

THER COMMITTEE REFERENCES:
(In order shown)

No Other References

FINAL ACTION:

X Favorably with 0 amendments

____ Favorably with Committee Substitute

____ Unfavorably

OTHER: ____ Temporarily Passed

____ Reconsidered

____ Not Considered

HE VOTE WAS:

FINAL BILL VOTE		SENATORS											
Aye	Nay		Aye	Nay	Aye	Nay	Aye	Nay	Aye	Nay	Aye	Nay
X		Castor, Betty										
		Dunn, Edgar M. Jr.										
		Firestone, George										
X		Gallen, Tom										
X		Gorman, Bill										
X		Henderson, Warren S.										
X		Tobiassen, Thomas J.										
		Wilson, Lori										
		Winn, Sherman S.										
X		Zinkil, William G. Sr./ VC										
X		Barron, Dempsey J., Ch.										
7	0	TOTAL										
Aye	Nay		Aye	Nay	Aye	Nay	Aye	Nay	Aye	Nay	Aye	Nay

(Attach additional page if necessary)

Please Complete: The key sponsor appeared (X) Sen. Ware
A Senator appeared ( )
Sponsor's aide appeared ( )
Other appearance ( )

SB 209

A bill to be entitled

An act relating to the Administrative Procedure Act; amending s. 120.52(10), Florida Statutes, providing that prisoners shall not be considered parties under the act for the purpose of obtaining specified proceedings; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (10) of section 120.52, Florida Statutes, is amended to read:

120.52 Definitions.--As used in this act:

(10) "Party" means:

(a) Specifically named persons whose substantial interests are being determined in the proceeding.

(b) Any other person who, as a matter of constitutional right, provision of statute, or provision of agency regulation, is entitled to participate in whole or in part in the proceeding, or whose substantial interests will be affected by proposed agency action, and who makes an appearance as a party.

(c) Any other person, including an agency staff member, allowed by the agency to intervene or participate in the proceeding as a party. An agency may by rule authorize limited forms of participation in agency proceedings for persons who are not eligible to become parties.

Prisoners as defined in s. 944.02(5) shall not be considered parties for the purposes of obtaining proceedings under s. 120.54(3)-(6) or (16), s. 120.56, or s. 120.57.

Section 2. This act shall take effect upon becoming a law.

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HOUSE SUMMARY

Provides that prisoners shall not be deemed "parties" under the Administrative Procedure Act for the purpose of rule making and the administrative determination of rules, nor shall such prisoners be considered parties in "decisions which affect substantial interests" under the

March 3, 1978

STAFF ANALYSIS

Governmental Operations Committee
House of Representatives

Staff Analysis by:

Bruce McDonald

BILL NO: HB 420 SPONSOR: Rep. Moffitt

COMPANION/SIMILAR BILL: SB 209(I) COPY TO SPONSOR:

SUBJECT: APA; non-consideration of prisoners as parties

OTHER COMMITTEE REFERENCES:

I. BILL SUMMARY:

Exempts all state, county and municipal prisoners from the definition of "party" for purposes of proceedings under Chapter 120.

II. PURPOSE:

A. PRESENT SITUATION:

Proceedings of the Department of Offender Rehabilitation (DOOR) are subject to the provisions of Chapter 120 (DOOR v. Jerry, No. FF - 303, 1st District Court of Appeal, 1978, at footnote 4). The Administration Commission on May 3, 1977, granted DOOR an exemption from the requirements of s. 120.57, Florida Statutes, in all matters dealing with the administration of prisoners and from s. 120.54(3) - (6) and (16) and s. 120.56, Florida Statutes, as they relate to prisoners. The 1977 exemption either expired 90 days following sine die of the 1977 Legislative Session or will expire 90 days following sine die of the 1978 Session, depending on whether Chapter 77-453, as amending s. 120.63 (2)(b), Florida Statutes, is retroactive or not. The exemption can be renewed once.

In general the Florida Corrections Code does not provide any procedural detail or safeguards for those DOOR actions that arguably determine substantial interests, e. g.:

--disciplinary confinement and other punishments
--acceptance into work programs
--exemptions from payment of supervisory cost
--transfers
--classification

Procedures are established in s. 944.28, Florida Statutes, for loss of gain-time or loss of the right to earn gain-time (copy attached). Section 944.28(1) is in apparent conflict with Chapter 120 in that it eliminates any hearing for forfeiture following escape or revocation of parole.

B. EFFECT ON PRESENT SITUATION:

The exemption granted by the Administration Commission in 1977 would be made statutory. All state, county and municipal prisoners would be prevented from obtaining proceedings under:

s. 120.54(3) - rulemaking "input" opportunity
s. 120.54(4) - administrative determination of proposed rule
s. 120.54(5) - petition for rulemaking
s. 120.54(6) - relates to s. 120.54(3)
s. 120.56 - administrative determination of rule
s. 120.57 - proceeding to determine substantial interests

This exemption would leave constitutional requirements as the minimum procedural safeguards for decisions determining substantial interests, except for s. 944.28, Florida Statutes, concerning gain-time. Constitutionally, a prisoner in a disciplinary proceeding is entitled to: written notice of the charges; written statement as to the evidence relied on by the factfinders; the right to call witnesses and present evidence short of jeopardizing institutional safety; and an adjudicator free from partiality or arbitrariness. He is not entitled to confrontation, cross-examination or counsel. Wolff v. McDonnell (1974). A prisoner is not entitled to a hearing prior to transfer from medium security to maximum security. Meachum v. Fano (1976).

III. COMMENTS:

In the Jerry case, the District Court of Appeal reversed the hearing officer's order invalidating DOOR's disciplinary rule on the ground that Jerry did not have standing since he had served his confinement period and did not show any loss of gain-time. Thus the court did not reach the question of the rule's validity.

IV. APPROVED BY STAFF DIRECTOR: _____

March 3, 1978

Mr. Earl Archer
General Counsel
Department of Offender Rehabilitation
1311 Winewood Boulevard
Tallahassee, Florida 32301

Dear Earl:

As you probably know, HB 420 by Representative Moffitt relating to prisoners has been scheduled for consideration bygthe APA Subcommittee on Wednesday, March 29, at 10:30 a.m. in Room 24 House Office Building.

As standard procedure I have prepared the following staff analysis on the bill, and I would appreciate your looking it over to see that I have fairly and completely presented the current situation and the effect of the bill. Any comments or suggestions would be welcome.

Sincerely,

Bruce McDonald
Legislative Analyst

BMC:jp

Enclosure

POSITION OF THE DEPARTMENT OF OFFENDER REHABILITATION ON EXEMPTING PRISONERS FROM THE ADMINISTRATIVE PROCEDURES ACT

This paper examines the reasons why the Department of Offender Rehabilitation believes the Department should be granted an exemption from the Administrative Procedures Act as it relates to state prisoners.

The history of administrative procedures acts is relatively short. As the result of increased regulation in every sector of the lives of the citizens by administrative agencies, the federal government and many state governments have passed administrative procedures acts. These acts give the citizen who is being regulated an opportunity to contest the manner in which he is being regulated to an administrative tribunal, which acts similar to a judge in a court. Administrative procedures acts have come into being within the last 20 to 30 years with the purpose of protecting the private citizens from unreasonable or arbitrary regulations.

Thus, citizens as well as special interest groups such as real estate and insurance brokers and salesmen, cemetery owners, persons regulated by the departments of business regulations and environmental regulations, were provided a means by which they could contest regulations imposed upon their businesses or upon their property by state and federal agencies so that the agencies would be accountable for the regulations.

The Florida Act has only recently been discovered by the inmates of the state correctional system who allege that they should be able to avail themselves of the hearing procedures in order to challenge decisions of prison administrators on a myriad of issues touching their every-day lives in prison. While it is nearly impossible to predict all of the sorts of decisions that could be challenged, the major areas would be: discipline, inter-institutional transfers, classification, work and housing assignments, and grievance decisions. Although the Supreme Court of the United States has already ruled on what elements of due process are required in prison disciplinary hearings and that hearings are not constitutionally required in transfer, classification, work, job and other areas of administrative decision, that does not prevent inmates from using the Administrative Procedures Act to challenge such decisions.

Let us consider the law. The Florida Administrative Procedures Act gives the right of a trial-type proceeding to dispute an agency decision or a proposed or existing agency rule which "substantially affects" them. A Federal Circuit Court of Appeals ruled earlier this year that the Federal Administrative Procedures Act was not intended to cover federal prisoners. The Court reasoned that the courts are

presently engaged in fashioning the due process rights of prisoners in a way that does not impair the ability to administer prisons and that this process is still evolving and not finished; the most casual reading of the Administrative Procedures Act will indicate that it is not written with prison disciplinary proceedings in the forefront of the draftsman's mind; and tacitly acknowledges that the Supreme Court had found that procedures similar to those found in the Administrative Procedures Act will damage the ability of the State to manage prisoners. Clardy vs. Elvi 545 2d 1241 (1976).

The U. S. Supreme Court held that due process does not require that prisoners be given an unrestricted right to call witnesses, the assistance of counsel, or the right of confrontation and cross-examination in prisoner disciplinary proceedings because one cannot automatically apply procedural rules designed for free citizens in an open society, or even for parolees or probationers under only limited restraints, to the very different situation presented by disciplinary proceedings. Clardy vs. Elvi, supra; Wolff vs. McDonnell 418 U. S. 539 41 2d 935, 94 Supreme Ct. 2963 (1974). The Supreme Court has acknowledged that providing prisoners with the identity of other prisoners who have given information against them, and the right to confront and cross-examine all witnesses will create a situation which will handicap prison administration. Inmates will retaliate against those testifying against them and this will result in physical harm or death of the cooperating prisoner or a drying up of sources of information that the Department uses in preventing escapes. The U. S. Supreme Court has recognized that if prisoners are given the unrestricted right to call witnesses, institutional security will be jeopardized. The Court has recognized that if the prisoner has a right to counsel, the processes of disciplining inmates and maintaining order in prisons will become unmanageable and that "there would be considerable potential for havoc inside the prison walls." Wolff vs. McDonnell, supra.

The Division of Administrative Hearings had ruled in one case that prisoners are entitled to a hearing under the Administrative Procedures Act when they are charged with a violation of prison rules which could result in the loss of gain time or disciplinary confinement, and when the inmate pleads not guily. Over 8,000 such situations occur per year in the Department of Offender Rehabilitation. Although that case was overturned by the District Court of Appeals due to a lack of proper standing on the part of that particular inmate plaintiff, similar cases are now sure to be brought by proper inmate parties.

The Department will make many other "determinations" which could be held to affect a prisoner's "substantial interest," thereby entitling them to an Administrative Procedures Act trial-type proceeding. For instance, the Department will transfer approximately hundreds of inmates to more restrictive confinement this year. The U. S. Supreme Court found that prisoners were not entitled to hearings of any kind, much less trial-type proceedings, when they were transferred. Meachum vs. Fano 46 2d 451 (1976). A Florida court held likewise on the issue of transfers. McNamara vs. Cook, Case No. 75-1474

(4th DCA, Florida 1976). The Department will remove prisoners from work release centers when there are sound reasons to believe that the prisoner endangers the safety of the public or has become a security risk. However, these decisions would be subjected to a great many of needless administrative-type proceedings if the Act applies to prisoners. The Department cannot predict how many prisoners will petition for administrative hearings. However, considering only the above-mentioned two categories, it can be seen that the number to be anticipated is substantial.

Prisoners would be entitled to conduct pre-trial discovery, present evidence, argument, conduct cross-examination, submit rebuttal evidence, submit proposed findings of facts and orders, file exceptions to orders, be represented by attorneys, and petition the district courts of appeal to review the order. The agency is obligated to pay the cost of preserving a record of the entire proceedings, and per diem and travel costs of state employees who are subpoenaed. Application of the Act to prisoners will create some situations where additional transfers will be required. The Department has 64 prison sites and many transfers of prisoners are made each year. At times, witnesses to an incident will have been transferred to another location for their safety and that of others, and will have to be transported back to the hearing site, exposing them to undue risk. Transporting prisoners is a weak point in security and an additional expense.

Application of the Act to prisoners will impede efficient management of prisons. Disciplining prisoners, transferring prisoners who are an escape or safety risk, or removing prisoners from community work centers will be a more difficult process if such decisions are subjected to trial-type proceedings. It may also adversely affect the safety of prisoners themselves. Prisoners have a code that no prisoner informs on another prisoner and often retaliate against informants. This is one reason why the United States Supreme Court refused to apply trial-type proceedings to prison disciplinary proceedings. Inmates who are victimized either have to submit to the victimization or ask the Department to protect them. If the Department disciplined or transferred the offending prisoner, he could obtain an administrative proceeding and learn the identity of the informant through discovery and cross-examination procedures.

The United States Supreme Court considered whether to apply procedures indentical to those found in the Administrative Procedures Act to disciplinary proceedings and in its judgment, such procedures would affect the ability to manage prisons, the safety of prisoners and staff, and there "would be considerable potential for havoc inside the prison walls." Instead of requiring trial-type proceedings, that Court, and others, have developed special proceedings that apply to prisons. These provide sufficient accountability for decisions regarding prisoners. It is significant that federal courts have exempted federal prisoners from the federal Administrative Procedures Act.

The Department does not seek to be completely exempted from the Act. It seeks an exemption for prisoners only. The Department will be required to comply with the Act in all respects except in prisoner matters. Private citizens and organizations remain entitled to bring administrative proceedings against the Department. The Department would still have to promulgate rules pursuant to the Act and hold public hearings upon request. The requested exemption of prisoners from the Administrative Procedures Act is both limited to scope and reasonable.

DEPARTMENT OF OFFENDER REHABILITATION

APRIL 5, 1978

Proposed CS/HB 420

House Bill 420 by Representative Moffitt "provides that prisoners shall not be deemed 'parties' under the Administrative Procedures Act for the purpose of rule making and the administrative determination of rules, nor shall such prisoners be considered parties in 'decisions which affect substantial interests' under the act."

Proposed Committee substitute for HB 420 by Representative Sheldon listed specific matters which would and would not be defined as "substantial interests" for purposes of the APA. Subcommittee Chairman Sheldon requested that DOR furnish whatever statistics are available on the "substantial interest" items listed in the proposed CS for HB 420. Therefore, questions (attachment 1) were posed to all facilities within the Department in order to obtain as detailed information as possible. The results of that survey are reflected in attachment 2, with the exception of four Road Prisons and Stockades, seven Community Correctional Centers and three Contract Drug Facilities. Information from those facilities was not available at publication time.

Items which would be defined as "substantial interests"

1. A. "Classification and location of prisoners according to security risk."

ans: Estimated custody breakdown of inmates is:

Maximum	99
Close	8,783
Medium	4,675
Minimum	4,966

The number of APA hearings that would be requested based on this item are unknown. Some requests could be based on a dispute over their security classification alone, but it is felt most requests would be

tied to other matters listed as "substantial interest" which will be covered in later sections of this report. For example, an inmate must be minimum custody to be considered for work release. The issues of security classification, transfer to a work release center (item 1 (C) below), and approved for the work release program (item 1 (I) below) would all be considered at the same time in one hearing. Some potential for hearings may develop if a certain security classification is required for cell assignments or job assignments in an institution. Whereas these matters are defined in the CS as matters which are not "substantial interests", an inmate could effectively gain an APA hearing on these matters by requesting a hearing on his security classification.

1. B. Disciplinary Confinement and F. Loss of Gain Time or Right to Earn Gain Time

ans: During August, 1977, by actual count, there were 1,228 disciplinary reports written and processed for violations which resulted in loss of gain time and/or disciplinary confinement. APA hearings would only be required in cases where the inmate pleads not guilty. Estimating that approximately half of these cases plead not guilty would result in approximately 614 APA hearings a month. Projected over a year, this would produce approximately 7,368 APA hearings a year.

1. C. Transfers or Denials of Transfers to Different Institutions

ans: During August, 1977, the Population Movement and Control Administrator received 561 requests for transfer from the various institutional classification teams. Each of these requests was individually evaluated and recorded from the standpoint of actions that

would be construed unfavorably by the inmate including transfers effected which the inmate did not want as well as transfers they wanted which were denied. Of the 561 transfer requests, 225 were placed in the category of transfers or denials of transfers unfavorable to the inmate. Mutiplied by 12 months, this totals 2,700 actions per year which could result in requests by inmates for APA hearings. The above count was done in the DOR Central Office only and does not include transfer requests denied at the institutional level which were not submitted to Tallahassee by the institutional classification teams. Neither does the above figure of 2,700 include the initial transfer of a new inmate from the Reception and Medical Center to his first institutional location. Many of the inmates are from the populous areas of south Florida and would like to be located close to home but the bulk of institutions are in northeast Florida. Both of these situations could result in an undetermined number of additional requests for APA hearings.

1. D. Transfers or Denials of Transfers to the Department of Health and Rehabilitative Services

ans: DOR currently has 65 inmates in mental hospitals, but all are committed pursuant to the Baker Act and thus it is not felt additional APA hearings would be required.

It is unknown whether or not transfers or denial of transfers to other HRS facilities would generate APA hearings but the number would probably be negligable.

1. E. Denail of Community-based or Institutional Drug or Medical Programs

ans: It is estimated that in one year approximately 428 inmates requested and were denied participation in drug programs either because of their custody grade or lack of demonstrated adjustment permitting approval. All of these denials would lead to possible APA hearings.

1. G. Denial of Visiting Privileges or Rejection of Visiting Lists

ans: A one year review suggests that 3,171 requests from inmates for additions to their visiting lists were denied and 1,012 approved visitors were denied entry.

As a standard procedure all members of an inmates immediate family are approved for visiting. Exception would be in the case of exfelons which would be individually reviewed.

Examples of those denied addition to the visiting list would be girlfriends when the inmate is married, more than one girlfriend for the unmarried inmate, and excessive friends and distant relatives when the inmate is receiving significant visits. Special requests are considered for one time visits in some cases.

Approved visitors are disapproved entry in such cases as arriving with intoxicants on their breath, in possession of contraband or when the inmate is on disciplinary confinement. In such cases the inmate has had an opportunity to notify his family of his housing status.

1. H. Denials of Furloughs

ans: Figures are not available on the number of furlough recommendations denied by the DOR Central Office, or the number of denials at the institutional and community center level. Approximately 1,200 inmate furlough per month are being granted.

Clarification would have to be sought as to whether this means any inmate being denied a furlough, or if it would only apply to inmates who meet all current eligibility criteria for the furlough program who are denied furloughs.

1. I. Denial of Work Release Program

ans: Approximately 5,000 inmates per year are placed in the work release program. An estimated 500 recommendations for work release are

denied by the Central Office. During calendar year 1977, there were 1,022 terminations from this program (85 monthly average). Again, clarification would have to be given as to the question of whether this applies to any inmate who requests work release or only to those who meet current eligibility standards.

Items which would be defined not to be "substantial interests"

2. A. Cell Assignments or Transfers Within Institutions

ans: Although not listed as "substantial Interest" it is estimated that approximately 89,000 housing changes are made each year with an undetermined portion being possibly open for unfavorable designation.

2. B. Job Assignments

ans: Within one year there are approximately 49,000 job changes with an unspecified number being unfavorable to the desires of the inmates involved.

2. C. Educational and Vocational Training Assignments

ans: There are approximately 16,000 placements as well as changes in Educational and Vocational Training assignments each year. It is impossible to determine the number that would be considered unfavorable by the inmates involved.

2. D. Administrative Confinement Pending an Investigation

ans: A one day survey revealed 954 inmates maintained on Administrative Confinement. This includes inmates pending investigations, at the request of the inmate or other such administrative reasons. It is impossible to estimate how many inmates would be so confined in one year that would be considered unfavorable by the inmates involved.

2. E. Determination and Confiscation of Contraband

ans: It is estimated that in one year 3,216 disciplinary reports are

issued for institutional offenses involving contraband items. Information is not available as to how many are found guilty of these charges each year.

ATTACHMENT 1

1. Give a custody breakdown by totals in each custody grade.

2. Estimated number of inmates denied at the institutional level for communtiy based or institutional drug programs. This estimate should be for the past year.

3. Estimate number of denied additions to visiting lists for the past year. Additionally, estimated number of denied visits from approved visitors during the past year.

4. Estimated total number of cell, dorm, or bed changes each month.

5. Estimated total number of job changes each month.

6. Estimated total number of changes in educational and vocational training assignments per month.

7. Number of inmates in administrative confinement on the date of your TWX response.

INSTITUTIONAL ACTION THAT MAY

April 4, 1978

REQUIRE HEARINGS UNDER APA

INSTITUTION	CUSTODY MIN	MED	CLOSE	# DENIED DRUG PROGRAMS PER YR	# DENIED ADDITIONS TO VISITING LIST	# VISITS DENIED	# CELL, DORM, BED CHANGES PER YR	# JOB CHANGES PER YR.	# ED. & VOC CHANGES PER YEAR	# IN ADM CONF.
ACI	632	498	0	10	104	6	1,920	2,160	720	43
APCI	608	251	425	5	13	11	4,356	4,044	1,476	24
BREVARD CI	77	345	253	2	15	25	3,000	4,140	1,164	9
BROWARD CI	12	76	117	0	16	0	300	276	300	10
CCCI	43	85	310	15	400	10	1,584	1,200	336	10
DADE CI	170	234	127	5	350	12	840	600	600	10
DESOTO CI	45	124	438	186	360	62	4,512	720	864	21
FCI	225	254	47	67	240	65	1,200	1,080	780	2
FSP	125	186	1,049 99 (Max)	20	175	550	12,960	9,420	216	215 (ADM) 123 (Close) 99 (Death)
GCI	165	264	375	10	8	10	540	540	300	14
HCI	67	287	0	5	60	4	960	2,400	600	11
IRCI	173	110	0	48	72	60	360	900	900	10
LAKE CI	124	126	179	0	108	15	840	1,380	125	3
LANTANA CI	86	106	0	20	10	5	720	720	960	1
LAWTEY CI	391	0	0	0	160	6	1,080	2,784	456	7
MCI	270	433	98	2	72	6	2,640	1,500	900	16
RJCI	123	236	1	1	135	20	780	240	192	5
RMC	137	115	1,581	5	111	6	24,000	972	0	108
SCI	115	154	820	14	54	17	8,040	4,320	2,412	22
UCI	130	335	2,200	0	286	36	15,708	5,748	2,040	154
ZCI	110	130	96	6	80	30	1,644	1,296	168	7
REGION I	464	85	39	3	62	11	300	696	108	16
REGION II	426	110	30	0	30	2	480	1,020	0	4
REGION III	226	28	22	2	109	13	96	336	12	3
REGION IV										
REGION V	22	103	576	2	141	30	39	83	12	7
TOTAL	4,966	4,675	8,783 99 (Max)	428	3,171	1,012	88,899	48,575	15,641	954

March 3, 1978

STAFF ANALYSIS

Governmental Operations Committee
House of Representatives

Staff Analysis by:

Bruce McDonald

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B. EFFECT ON PRESENT SITUATION:

The exemption granted by the Administration Commission in 1977 would be made statutory. All state, county and municipal prisoners would be prevented from obtaining proceedings under:

s. 120.54(3) - rulemaking "input" opportunity
s. 120.54(4) - administrative determination of proposed rule
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This exemption would leave constitutional requirements as the minimum procedural safeguards for decisions determining substantial interests, except for s. 944.28, Florida Statutes, concerning gain-time. Constitutionally, a prisoner in a disciplinary proceeding is entitled to: written notice of the charges; written statement as to the evidence relied on by the factfinders; the right to call witnesses and present evidence short of jeopardizing institutional safety; and an adjudicator free from partiality or arbitrariness. He is not entitled to confrontation, cross-examination or counsel. Wolff v. McDonnell (1974). A prisoner is not entitled to a hearing prior to transfer from medium security to maximum security. Meachum v. Fano (1976).

III. COMMENTS:

In the Jerry case, the District Court of Appeal reversed the hearing officer's order invalidating DOOR's disciplinary rule on the ground that Jerry did not have standing since he had served his confinement period and did not show any loss of gain-time. Thus the court did not reach the question of the rule's validity.

IV. APPROVED BY STAFF DIRECTOR: _____

944.28 Forfeiture of gain-time and right to earn gain-time in the future.—

(1) If a prisoner is convicted of escape, or if the clemency or parole granted to him is revoked, the Department of Offender Rehabilitation may, without notice or hearing, declare a forfeiture of all gain-time earned and extra gain-time allowed such prisoner, if any, prior to such escape or his release under such clemency or parole, as the case may be.

(2)(a) All or any part of the gain-time earned by a prisoner and extra gain-time allowed him, if any, shall be subject to forfeiture if such prisoner shall unsuccessfully attempt to escape, or assault another person, or threaten or knowingly endanger the life or person of another person, or by action or word refuse to carry out any instruction duly given to him, or neglect to perform the work, duties, and tasks assigned to him in a faithful, diligent, industrious, orderly, and peaceful manner, or violate any law of the state or any rule or regulation of the department or institution.

(b) The method of forfeiting gain-time which is subject to forfeiture under paragraph (a) of this subsection shall be as follows: A written charge shall be prepared, which shall specify the misconduct upon which it is based and the approximate date thereof. A copy of such charge shall be delivered to the prisoner and he shall be given notice of a hearing before the disciplinary committee created under the authorization of the rules and regulations heretofore or hereafter adopted by the department for the institution in which he is confined. He shall be present at such hearing. If at such hearing the prisoner pleads guilty to the charge or such committee determines from the proof presented that he is guilty thereof, it shall find him guilty; and, if it considers that all or a part of the prisoner's gain-time and extra gain-time should be forfeited, it shall so recommend in its written report, which shall be presented to the superintendent of the institution. If such superintendent approves such recommendation in whole or in part, he shall so indicate over his signature on the report, and forward the report to the department. The department may thereupon, at its discretion, declare the forfeiture thus approved by the superintendent, or any part thereof.

(3)(a) A prisoner's right to earn gain-time during all or any part of the remainder of the sentence or sentences under which he is imprisoned may be declared forfeited because of the seriousness of a single instance of misconduct for which all of his earned gain-time and extra gain-time, if any, have been forfeited or because of the seriousness of an accumulation of instances of misconduct, each of which has resulted in the forfeiture of all or a part of his earned gain-time and extra gain-time.

(b) The method of declaring such a forfeiture shall be as follows: A written charge shall be prepared, which shall specify each instance of misconduct upon which it is based, the approximate date thereof, and the amount of gain-time forfeited on account thereof. A copy of such charge shall be delivered to the prisoner and he shall be given notice of a hearing before the disciplinary committee created under the authorization of rules and regulations heretofore or hereafter adopted by the department, for the institution in which he is confined. Such notice shall specify that such hearing will be held for the purpose of determining whether such committee shall recommend a forfeiture of the prisoner's right to earn gain-time during all or a part of the remainder of his sentence or sentences. If at such hearing the prisoner pleads guilty to the charge or such committee determines that he is guilty thereof upon the basis of proof presented at such hearing, it shall find him guilty; and, if it considers that the misconduct of which the prisoner is thus found guilty is serious enough, it may recommend in its written report the forfeiture of the prisoner's right to earn gain-time during all or some specified part of the remainder of his sentence or sentences. Such report shall be presented to the superintendent of such institution, who may approve such recommendation in whole or in part by endorsing such approval on such report. In the event of such an approval, the superintendent shall forward such report to the department. Thereupon, the department may, in its discretion, declare the forfeiture thus approved by the superintendent or any specified part thereof.

(4) Upon the recommendation of the superintendent, the department may, in its discretion, restore all or any part of any gain-time forfeited under this section.

(5) In order to facilitate the speedy administration of the gain-time program, the department may delegate its functions, duties, and powers under this section to one of its agents.

History.—s. 26, ch. 57-121; s. 18, ch. 61-530; s. 2, ch. 63-243; s. 1, ch. 65-197; ss. 19, 35, ch. 69-106; s. 20, ch. 74-112; s. 48, ch. 77-120.

DEPARTMENT OF OFFENDER REHABILITATION

APRIL 5, 1978

Proposed CS/HB 420

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Medium	4,675
Minimum	4,966

The number of APA hearings that would be requested based on this item are unknown. Some requests could be based on a dispute over their security classification alone, but it is felt most requests would be

tied to other matters listed as "substantial interest" which will be covered in later sections of this report. For example, an inmate must be minimum custody to be considered for work release. The issues of security classification, transfer to a work release center (item 1 (C) below), and approved for the work release program (item 1 (I) below) would all be considered at the same time in one hearing. Some potential for hearings may develop if a certain security classification is required for cell assignments or job assignments in an institution. Whereas these matters are defined in the CS as matters which are not "substantial interests", an inmate could effectively gain an APA hearing on these matters by requesting a hearing on his security classification.

1. B. Disciplinary Confinement and F. Loss of Gain Time or Right to Earn Gain Time

ans: During August, 1977, by actual count, there were 1,228 disciplinary reports written and processed for violations which resulted in loss of gain time and/or disciplinary confinement. APA hearings would only be required in cases where the inmate pleads not guilty. Estimating that approximately half of these cases plead not guilty would result in approximately 614 APA hearings a month. Projected over a year, this would produce approximately 7,368 APA hearings a year.

1. C. Transfers or Denials of Transfers to Different Institutions

ans: During August, 1977, the Population Movement and Control Administrator received 561 requests for transfer from the various institutional classification teams. Each of these requests was individually evaluated and recorded from the standpoint of actions that

would be construed unfavorably by the inmate including transfers effected which the inmate did not want as well as transfers they wanted which were denied. Of the 561 transfer requests, 225 were placed in the category of transfers or denials of transfers unfavorable to the inmate. Mutiplied by 12 months, this totals 2,700 actions per year which could result in requests by inmates for APA hearings. The above count was done in the DOR Central Office only and does not include transfer requests denied at the institutional level which were not submitted to Tallahassee by the institutional classification teams. Neither does the above figure of 2,700 include the initial transfer of a new inmate from the Reception and Medical Center to his first institutional location. Many of the inmates are from the populous areas of south Florida and would like to be located close to home but the bulk of institutions are in northeast Florida. Both of these situations could result in an undetermined number of additional requests for APA hearings.

1. D. Transfers or Denials of Transfers to the Department of Health and Rehabilitative Services

ans: DOR currently has 65 inmates in mental hospitals, but all are committed pursuant to the Baker Act and thus it is not felt additional APA hearings would be required.

It is unknown whether or not transfers or denial of transfers to other HRS facilities would generate APA hearings but the number would probably be negligable.

1. E. Denail of Community-based or Institutional Drug or Medical Programs

ans: It is estimated that in one year approximately 428 inmates requested and were denied participation in drug programs either because of their custody grade or lack of demonstrated adjustment permitting approval. All of these denials would lead to possible APA hearings.

1. G. Denial of Visiting Privileges or Rejection of Visiting Lists

ans: A one year review suggests that 3,171 requests from inmates for additions to their visiting lists were denied and 1,012 approved visitors were denied entry.

As a standard procedure all members of an inmates immediate family are approved for visiting. Exception would be in the case of exfelons which would be individually reviewed.

Examples of those denied addition to the visiting list would be girlfriends when the inmate is married, more than one girlfriend for the unmarried inmate, and excessive friends and distant relatives when the inmate is receiving significant visits. Special requests are considered for one time visits in some cases.

Approved visitors are disapproved entry in such cases as arriving with intoxicants on their breath, in possession of contraband or when the inmate is on disciplinary confinement. In such cases the inmate has had an opportunity to notify his family of his housing status.

1. H. Denials of Furloughs

ans: Figures are not available on the number of furlough recommendations denied by the DOR Central Office, or the number of denials at the institutional and community center level. Approximately 1,200 inmate furlough per month are being granted.

Clarification would have to be sought as to whether this means any inmate being denied a furlough, or if it would only apply to inmates who meet all current eligibility criteria for the furlough program who are denied furloughs.

1. I. Denial of Work Release Program

ans: Approximately 5,000 inmates per year are placed in the work release program. An estimated 500 recommendations for work release are

denied by the Central Office. During calendar year 1977, there were 1,022 terminations from this program (85 monthly average). Again, clarification would have to be given as to the question of whether this applies to any inmate who requests work release or only to those who meet current eligibility standards.

Items which would be defined not to be "substantial interests"

2. A. Cell Assignments or Transfers Within Institutions

ans: Although not listed as "substantial Interest" it is estimated that approximately 89,000 housing changes are made each year with an undetermined portion being possibly open for unfavorable designation.

2. B. Job Assignments

ans: Within one year there are approximately 49,000 job changes with an unspecified number being unfavorable to the desires of the inmates involved.

2. C. Educational and Vocational Training Assignments

ans: There are approximately 16,000 placements as well as changes in Educational and Vocational Training assignments each year. It is impossible to determine the number that would be considered unfavorable by the inmates involved.

2. D. Administrative Confinement Pending an Investigation

ans: A one day survey revealed 954 inmates maintained on Administrative Confinement. This includes inmates pending investigations, at the request of the inmate or other such administrative reasons. It is impossible to estimate how many inmates would be so confined in one year that would be considered unfavorable by the inmates involved.

2. E. Determination and Confiscation of Contraband

ans: It is estimated that in one year 3,216 disciplinary reports are

issued for institutional offenses involving contraband items. Information is not available as to how many are found guilty of these charges each year.

ATTACHMENT 1

1. Give a custody breakdown by totals in each custody grade.

2. Estimated number of inmates denied at the institutional level for communtiy based or institutional drug programs. This estimate should be for the past year.

3. Estimate number of denied additions to visiting lists for the past year. Additionally, estimated number of denied visits from approved visitors during the past year.

4. Estimated total number of cell, dorm, or bed changes each month.

5. Estimated total number of job changes each month.

6. Estimated total number of changes in educational and vocational training assignments per month.

7. Number of inmates in administrative confinement on the date of your TWX response.