IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Romanus Miles,	:	
Petitioner	:	
	:	
v.	:	No. 157 M.D. 2010
	:	Submitted: October 8, 2010
Department of Corrections	:	
State Corrections Institution	:	
at Graterford and Jeffrey A.	:	
Beard, PH.D., Secretary	:	
Department of Corrections,	:	
Respondents	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE P. KEVIN BROBSON, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE BROBSON **FILED:** February 4, 2011

Petitioner Romanus Miles (Miles) filed a petition for review in this Court's original jurisdiction, seeking relief in the nature of an injunction and/or in mandamus. Miles seeks an order of this Court compelling the Department of Corrections (DOC) to: (1) discontinue an alleged practice of improperly denying applications of inmates' requests for prerelease furloughs;[1] (2) evaluate all such applications, including his own, under the standards set forth in 37 Pa. Code

[1] Sections 3701 – 3704 of the Prisons and Parole Code (Law), 61 Pa. C.S. §§ 3701-3704, relate to the Commonwealth's inmate prerelease plans. Section 3703 of the Law authorizes DOC to "establish rules and regulations for granting and administering release plans."

§§ 94.1 – 94.7; and (3) discontinue alleged retroactive application of purportedly revised eligibility requirements set forth in DOC's policy statement DC-ADM 805 (DC-ADM 805), in violation of the ex post facto clause of the United States Constitution.[2] DOC filed preliminary objections in the nature of a demurrer, and we now address those objections.[3]

For ease of discussion, we begin by reciting the pertinent provisions of DOC's prerelease regulations and DC-ADM 805. The regulation found at 37 Pa. Code § 94.3 is most significant to Miles' claim, and provides as follows:

> **Procedures for participation in prerelease programs.**
>
> (a) The criteria for eligibility for prerelease programs are as follows:
>
> (1) Inmates who have been sentenced to death or life imprisonment or other offenses specified by [DOC] in . . . DC-ADM 805—Policy and Procedures for Obtaining Pre-release—or any [DOC] document that is disseminated to inmates are not eligible.

[2] Article I, Section 10, Clause 1 of The United States Constitution provides that "[n]o state shall . . . pass any . . . ex post facto Law."

[3] In ruling on preliminary objections, we accept as true all well-pleaded material allegations in the petition for review and any reasonable inferences that we may draw from the averments. *Meier v. Maleski*, 648 A.2d 595 (Pa. Cmwlth. 1994). The Court, however, is not bound by legal conclusions encompassed in the petition for review, unwarranted inferences from facts, argumentative allegations, or expressions of opinion. *Id.* We may sustain preliminary objections only when the law makes clear that the petitioner cannot succeed on his claim, and we must resolve any doubt in favor of the petitioner. *Id.* We review preliminary objections in the nature of a demurrer under these guidelines and may sustain a demurrer only when a petitioner has failed to state a claim for which relief may be granted. *Clark v. Beard*, 918 A.2d 155 (Pa. Cmwlth. 2007).

(2) Time-served requirements are as follows:

(i) To be time-eligible for placement in a community corrections center or group home, the inmate shall have completed at least one-half of the inmate's minimum sentence, be within 1 year of completing his minimum sentence, have no outstanding detainers, and have served at least 9 months in a facility. Exceptions may be made with written approval of the Secretary or a designee, when early transfer is necessary to assist in the inmate's access to medical or mental health care or to provide a longer period of participation for an inmate who has been confined for an unusually long period of time. A contact may not be made with the court until the approval is obtained.

(ii) For other prerelease programs, the inmate is time-eligible after the inmate has completed one-half of the inmate's minimum sentence or one-half of the period ending with anticipated release date of an indeterminate sentence and has served at least 9 months in a facility. The inmate may have no detainers lodged against him for an untried offense or for a sentence with a maximum term in excess of 2 years. Inmates who are otherwise time-eligible who have detainers lodge against them for less than 2 years can be time-eligible for a prerelease program except community corrections center or group home upon written approval of the Secretary or a designee. No contact may be made with the court until the approval is obtained.

DC-ADM 805 includes a chart, identified at the end of the document as Attachment 1-A, which provides that an inmate seeking pre-release for work/education/vocational training release, temporary home furlough, community

corrections center (CCC)/community contract facility (CCF) furlough[4] must satisfy the following time eligibility requirements: (1) the inmate must have been in a state facility for at least nine months; (2) the inmate must have served at least one-half of his minimum sentence; and (3) the inmate must have served a period within eighteen months of his minimum sentence.

The pertinent facts, as alleged in Miles' petition for review, are as follows. In 1993, Miles was sentenced to a term of incarceration of twenty-five to fifty years. In January 2005, Miles filed an application to participate in DOC's prerelease furlough program. Miles filed a second application in December 2007, at which time Miles had served approximately fifteen years and three months of his sentence. In January 2008, DOC interviewed Miles regarding his application and denied the application on the same date.

Miles submitted a third application in November 2009. Miles' counselor in his state correctional facility told Miles that he was not eligible for the program because he had more than eighteen months remaining on his minimum sentence. The counselor also responded to Miles' "inmate request to staff member," through which Miles submitted his request, by stating that Miles did "not meet the new DC-805 requirements for a furlough." (Petition for Review,

[4] We assume here that the reference to a CCC or CCF furlough means a release from a state correctional facility *to* a CCC or CCF, rather than a furlough *from* a CCC or CCF to another prerelease program.

Exhibit D-1.) Miles submitted a second inmate request to his counselor, asserting that he wanted an appointment to discuss his prerelease furlough request and that he believed he had been eligible for the furlough program since 2005. The counselor stated in his response: "I understand but as of March 2009 the DC-805 has changed [] come see me." (Petition for Review, Exhibit D-2.)

Miles filed a grievance asserting that he was eligible for the prerelease program under DC-ADM 805. DOC rejected the grievance, noting that although DOC may consider exceptions to the eighteen-month pre-minimum requirement, Miles did not meet any of the standards for the exception.

Miles also asserts that DOC has elected to deny furloughs across the board to all inmates. Based upon these factual averments, Miles raises three "legal issues" relating to DOC's actions involving the prerelease furlough regulations and policy.

In "Issue One," Miles contends that DOC is acting unlawfully and unconstitutionally by allegedly denying inmates' properly filed prerelease applications on an "across the board" basis. In other words, Miles is asserting that DOC is violating not only his, but all other inmate-applicants' requests to be considered for prerelease opportunities. Miles' legal argument is that he and other inmates have an expectation that they may participate in the program based upon the regulations promulgated by DOC. Miles contends that, under procedural due

process concepts, a state cannot arbitrarily ignore its responsibilities under the regulations because DOC's adoption of the regulations created a "justifiable and legitimate expectation to partake" in the very privilege the regulations created.[5]

DOC's preliminary objections appear to target two aspects of this claim: (1) that Miles is asserting the claim on behalf of himself and other inmates; and (2) that Miles cannot succeed in his challenge on constitutional grounds.

With regard to those aspects of Miles' claim that appear to advocate on behalf of other inmates, DOC contends that Miles lacks standing. "[I]t is well-settled that, with a few exceptions . . . non-attorneys may not represent parties before the Pennsylvania courts and most administrative agencies." *The Spirit of the Avenger Ministries v. Commonwealth*, 767 A.2d 1130 (Pa. Cmwlth. 2001). In *The Spirit of Avenger Ministries*, we concluded that this Court did not have *jurisdiction* over a claim in which a non-lawyer sought to represent a corporation. We also cited a decision of the United States Court of Appeals for the Fifth Circuit Court of Appeals in *Thomas v. Estelle*, 603 F.2d 488 (5th Cir. 1979), where that court held that it lacked jurisdiction over a claim in which one prisoner sought to assert civil rights claims on behalf of other prisoners. Based upon these decisions,

[5] Miles includes various arguments within his pleading under "Issue One," including that (1) DOC's continued posture to offer furloughs, but to deny all applications constitutes cruel and unusual punishment; (2) political agendas are responsible for DOC's alleged refusal to consider applications; (3) the General Assembly continues to fund pre-release programs, but DOC has not explained where the funding goes; and (4) permitting participation by inmates in the prerelease programs would reduce the financial burden on the state correctional system.

we conclude that we do not have jurisdiction over the claims Miles has asserted on behalf of other inmates. Consequently, we will sustain DOC's preliminary objection as to any advocacy Miles is seeking to assume with regard to the interests of other inmates.

DOC also argues that Miles cannot succeed with his due process claim. Miles asserts that DOC violated his due process rights by refusing to grant furloughs across the board since 1995 and that DOC applied impermissible criteria in rendering its decision with regard to his own application.

"In order to determine whether a constitutional violation has occurred, a determination must initially be made that a protected liberty interest exists, and, if so, what process is due. Protected liberty interests may be created by either the Due Process Clause itself or by state law." *Wilder v. Dep't of Corr.*, 673 A.2d 30, 32 (Pa. Cmwlth.), *appeal denied*, 545 Pa. 673, 681 A.2d 1344 (1996) (citations omitted).

In *Wilder*, DOC had revoked an inmate's pre-release status, and the inmate sought mandamus relief to require DOC to reinstate his pre-release status. The inmate argued that the revocation violated his due process rights. The Court, citing two United States Supreme Court decisions, *Meachum v. Fano*, 427 U.S. 215, 224 (1976), and *Sandin v. Conner*, 515 U.S. 472 (1995), held that the Due Process Clause does not create a liberty interest in a prisoner's participation in a

pre-release program. *Wilder*, 673 A.2d at 32. Further, the Court opined "[t]here is no state-created liberty interest in the pre-release status that is protected by the Due Process Clause because revocation is not the type of deprivation of freedom from restraint required by the Court in *Sandin*."[6] *Id*. at 32-3.

Based upon this Court's holding in *Wilder*, where we held that an inmate's *continued* participation in a pre-release program did not implicate a liberty interest, we cannot conclude here that Miles' claim presents a liberty interest subject to the protections of the Due Process Clause.[7] In summary,

---

[6] In *Sandin*, the United States Supreme Court, in a five-to-four decision, limited the identification of state-created liberty interests in the prisoner context to "freedom from restraint which . . . imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." 515 U.S. at 484. As an example of such an atypical hardship, the Court offered instances such as the involuntary administration of psychotropic drugs and transfers to mental hospitals.

[7] Miles refers to the decision of the Federal District Court for the Eastern District of Pennsylvania in *Rowe v. Cuyler*, 534 F. Supp. 297 (E.D. Pa. 1982), which suggested that, if the inmate in that case had contended that DOC failed to follow the procedures described in its regulations, he might have established a due process violation. We hasten, however, to note that that decision arose before the United States Supreme Court decided *Sandin*. Also, the Court in *Rowe*, while relying upon the decision by the United States Court of Appeals in *Winsett v. McGinness*, 617 F.2d 996 (3rd Cir. 1980), failed to identify distinctions observed earlier by another judge of the same District Court in *Wright v. Cuyler*, 517 F. Supp. 637 (E.D. Pa. 1981). The Federal District Court in *Cuyler* noted factual differences between Pennsylvania's pre-release program and those of the State of Delaware. Ultimately, we are bound by the more recent analysis in *Sandin* and *Wilder*.

We do acknowledge, however, that, after its decision in *Sandin*, the United States Supreme Court specifically addressed the question of whether an inmate admitted to a pre-release program had a liberty interest in that status. In *Young v. Harper*, 520 U.S. 143 (1997), the Supreme Court held that Oklahoma's Preparole Conditional Supervision Program constituted a type of release that was factually no different from parole. Thus, based on the specific characteristics of that program, the Supreme Court concluded that an inmate *enrolled* in

because we are bound by precedent holding that an inmate has no liberty interest in Pennsylvania's furlough or pre-release programs, we need not examine Miles' claim under a due process analysis. Further, Miles' assertion that DOC is refusing to grant furloughs across the board does nothing to alter our consideration of the issue from a constitutional perspective. Whether DOC is denying furloughs to one inmate or to all inmates does not change the initial question of whether the denial relates to a liberty interest. As stated above, if there is no liberty interest in furloughs, there is no need to engage in a due process analysis. Accordingly, we will sustain DOC's preliminary objection to Miles' claims under the Due Process Clause.[8]

---

the program had a liberty interest protected by the Due Process Clause. Although *Wilder* also involved an inmate who had already been admitted to a pre-release program, there is no indication that Pennsylvania's program is significantly similar to parole as the Supreme Court concluded in *Young.*

[8] Also, to the extent that Miles may be seeking mandamus relief based upon the allegation that DOC is denying or refusing furlough applications across the board, we conclude that he has failed to state a cause of action. Although a party may be entitled to mandamus if he alleges and proves that an official or agency has elected not to exercise discretionary power, *Chester Community Charter School v. Department of Education*, 996 A.2d 68, 75 (Pa. Cmwlth. 2010), in this case, Miles essentially has asserted that DOC *has* exercised its powers of discretion in refusing or denying applications.

We also observe that the exhibits Miles has attached to his complaint indicate that, at least with respect to Miles, DOC appears to have complied with its own procedural regulation regarding how it should act on an application for a furlough. DC-ADM 805, Section 1, D, provides the procedural mechanism for furlough or pre-release applications, which provides for initial review of such applications by an inmate's "Counselor." Exhibits D1 and D2 appear to be Miles' request to his Counselor, Mr. Grenevich, to review his formal request for a furlough. At the bottom of the page, Mr. Grenevich responded that Miles did not meet the requirements for

"Issue Two" of Miles' Petition for Review raises the question of whether DOC has improperly considered factors outside the time-eligibility requirements set forth in DOC's promulgated regulations. Miles primarily contends that DOC has improperly relied upon DC-ADM 805, arguing that the policy exceeds the pertinent regulation, 37 Pa. Code § 94.3(a)(2)(ii). As Miles points out, this regulation includes no requirement that an inmate must have served his sentence to within a specific period of his minimum sentence, *i.e.*, eighteen months. Miles asserts that DC-ADM 805 is inconsistent with this regulation, and that, therefore, DOC cannot rely upon that policy statement in addressing applications for prerelease furloughs. Miles requests that the Court direct DOC to apply only 37 Pa. Code § 94.3(a)(2)(ii) in considering his applications for the prerelease program.

DOC's prerelease regulations represent a comprehensive scheme to address the circumstances and procedures under which an inmate can seek to participate in the prerelease program.[9] Consequently, we do not believe that DOC

---

furlough based upon the change in DC-ADM 805. Thus, DOC does not appear to have refused to act on Miles' application, but rather, based on Mr. Grenevich's interpretation of the policy, refused to proceed further because the application was premature.

[9] We cannot help but wonder, however, whether this apparent discrepancy between the regulation and DC-ADM 805 relates to a misunderstanding on the part of DOC regarding the statutory authorization permitting participation in prerelease *programs*, such as education, work, or technical training, for "[a]n inmate transferred to and confined in a pre-release center." Section 3702(b) of the Law, 61 Pa. C.S. § 3702(b). This statutory provision gives the impression, confirmed by the applicable regulations, that the General Assembly may have

has the authority through its DC-ADM 805 policy statement to impose additional time-eligibility restrictions on prerelease that are not set forth in the promulgated regulation. *State College Manor Ltd. v. Dep't of Pub. Welfare*, 498 A.2d 996, 998 (Pa. Cmwlth. 1985) ("It is well-established that duly authorized and promulgated regulations of an administrative agency have the force of law and are binding on the agency."). Accordingly, we will overrule DOC's preliminary objection asserting that Miles has failed to state a cause of action based upon his allegations that DOC is not applying properly its prerelease regulations.[10]

In "Issue Three," Miles asserts that DOC's use of DC-ADM 805 to effectuate changes in the application of its prerelease regulations relating to the amount of time an approved inmate may be furloughed post-date previous regulations and policy that were effective when Miles submitted his first two applications for the prerelease program. The effect of the changes, he claims, constitutes a violation of the United States Constitution's ex post facto clause. Miles contends that the consequences of DOC's changes in the policy deprive him of consideration for prerelease and create a disadvantage similar in effect to an upward change in his minimum sentence. Miles asserts that the changes result in a

---

anticipated that inmates would be admitted to a prerelease center before being able to apply for temporary furloughs or other program releases. DOC has not raised this argument, and, consequently, we will address this question no further.

[10] To the extent that Miles seeks to assert this claim on behalf of other inmates, we sustain the preliminary objection for the reasons expressed above in our discussion of Issue One.

practical difference in the amount of time an inmate would be permitted to be furloughed, changing from a possible 588 days over the seven-year period remaining on Miles' minimum sentence to 126 days, based upon the eighteen-month pre-minimum time eligibility requirement.

DOC is correct in asserting that the prerelease furlough provisions do not implicate the ex post facto clause. In *Sheffield v. Department of Corrections*, 894 A.2d 836 (Pa. Cmwlth. 2006), *aff'd*, 594 Pa. 56, 934 A.2d 1161 (2007), this Court rejected an inmate's claim that the Pennsylvania Board of Probation and Parole had violated the ex post facto clause by applying a new parole law retroactively. Although laws relating to parole may violate the ex post facto clause, "[t]he controlling inquiry in determining if an ex post facto violation has occurred is whether retroactive application of the change in the law 'creates a significant risk of prolonging . . . incarceration.'" *Cimaszewski v. Pa. Bd. of Probation and Parole*, 582 Pa. 27, 45, 868 A.2d 416, 426 (2005). Further, in *Evans v. Pennsylvania Board of Probation and Parole*, 820 A.2d 904 (Pa. Cmwlth. 2003), *appeal denied*, 580 Pa. 550, 862 A.2d 583 (2004), we observed that a statute is not penal in nature unless the legislature (1) intended for the law to be used for punishment, (2) the purpose of the law is objectively punitive, or (3) the law operates in such a harsh manner that it constitutes punishment. *Evans*, 820

A.2d at 912 (quoting *Commonwealth v. Gaffney*, 557 Pa. 327, 331, 733 A.2d 616, 618 (1999)).

The prerelease furlough provisions at issue are neither aimed at providing corrections authorities with any means of punishing an inmate, nor are they intended to enable the authorities to increase an inmate's initial sentence. The furlough provisions do not affect an inmate's initial minimum or maximum sentences, but merely provide the potential for an inmate's actual sentence to be reduced.[11] Consequently, we will sustain DOC's preliminary objection to Miles' claim that DOC's application of its DC-ADM 805 policy violates the ex post facto clause.

P. KEVIN BROBSON, Judge

[11] In *Lee v. Governor of New York*, 87 F.3d 55, 59 (2d Cir. 1996), the United States Court of Appeals for the Second Circuit reasoned that a change in a New York State pre-release program that resulted in a denial of pre-release did not violate the ex post facto clause because the retroactive application of a law that rendered prisoners ineligible for certain temporary release programs did not constitute an increase in the prisoners' punishment based on the conclusion that the purpose was to limit early community contact and not to add punishment.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Romanus Miles, Petitioner	:	
v.	:	No. 157 M.D. 2010
Department of Corrections State Corrections Institution at Graterford and Jeffrey A. Beard, PH.D., Secretary Department of Corrections, Respondents	:	

O R D E R

AND NOW, this 4th day of February, 2011, the preliminary objections filed by Respondent Department of Corrections are sustained as to (1) Petitioner's attempt to advocate on behalf of other inmates; (2) Petitioner's procedural due process claim; and (3) Petitioner's ex post facto clause claim. Respondent's preliminary objection to Petitioner's claim asserting that Respondent has not complied with its regulations relating to Petitioner's prerelease furlough application is overruled. Respondent is directed to file an answer to the Petition for Review in accordance with this order and the accompanying opinion. To the extent that any of Petitioner's factual averments or requests for relief seeks to assert the rights of other inmates, Respondent may supply answers to the averments or causes of action in a manner that responds solely to Petitioner's

personal claims. Respondent shall file its answer within thirty (30) days of this order.

P. KEVIN BROBSON, Judge