

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Lynn A. Padgett, :
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 Petitioner :
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 v. :
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 John Kerestas, Superintendent, :
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 SCI Mahanoy; and Joseph M. :
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 Dorzinsky, Business Manager, :
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 SCI Mahanoy; and Jeffrey Beard, Ph.D. :
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 Secretary, Pennsylvania :
 :
 Department of Corrections, : No. 321 M.D. 2009
 Respondents : Submitted: October 23, 2009

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE JOHNNY J. BUTLER, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY

FILED: January 5, 2010

Before this Court are the preliminary objections of John Kerestas, the superintendent at the State Correctional Institution-Mahanoy (SCI-Mahanoy), Joseph M. Dorzinsky, the business manager at SCI-Mahanoy, and Jeffrey A. Beard, Secretary of the Pennsylvania Department of Corrections (Respondents) to Lynn A. Padgett's (Padgett) motion for temporary restraining order and preliminary injunction. Also, before this Court is Respondents' motion to strike portions of Padgett's brief.

Padgett is incarcerated at SCI-Mahanoy. On June 18, 2009, Padgett commenced this action and sought a temporary restraining order and a preliminary injunction to prevent the Respondents from signing a contract with Corrections Cable Television (CCTV) to provide cable television service for SCI-Mahanoy.

Padgett alleged that the proposed contract violated his First Amendment rights to freedom of choice, association, and expression, his Fourteenth Amendment right to due process of law, constituted coercion, placed an undue financial burden on him, and served no penological interest. Padgett specifically alleges:

5. CCTV services will increase Plaintiff's [Padgett] monthly cable bill to \$15.75, an increase of \$1.00. . . .

7. CCTV will reduce Plaintiff's [Padgett] available channels to 49, a reduction of approximately 16 channels. . . .

9. CCTV will charge Plaintiff [Padgett] for 6 unused channels. . . .

10. CCTV will restrict Plaintiff's [Padgett] to world news and event to the providers [sic] choice which is CNN. . . .

11. Plaintiff [Padgett] will be denied access to channels to which Plaintiff [Padgett] prefers and currently has access to, such as, but not limited to:

a. The Pennsylvania Cable Network. . . .

b. National Geographic. . . .

c. CNBC. . . .

d. MSNBC. . . .

e. Other channels denied are: Fox Movie Cannel [sic], ABC, NBC, CBS (except for local programming), PBS . . ., WE. . ., FNX. . ., CMT. . ., the Disney channel, and all of the local Philadelphia and New York stations. . . .

16. A fair reading of this 'contract' reveals that Plaintiff [Padgett] stands all responsibility, and costs, including that of interrupted service unless, 'a pro-rated refund is required under the agreement between the cable service provider and the Department of Corrections'. . . .

17. And, that this 'inmate Subscriber Agreement' is NOT a contract between myself [sic] and the Department of Corrections'. . . .

.....

19. This alleged ‘contract’ is nothing more than a DOC regulation disguised as a voluntary submission to its terms, to which Plaintiff [Padgett] has had no input or prior notice.

20. Petitioner has no alternative but to sign this agreement in order to continue cable television service.

Motion for Temporary Restraining Order and Preliminary Injunction, June 18, 2009, Paragraph Nos. 5, 7, 9-11, 16-17, and 19-20 at 3-5.

The Respondents preliminarily object in the nature of a demurrer¹ and allege that Padgett erroneously relied on DC-ADM 002- Inmate Cable Television Service to support his belief that the contract between the Department of Corrections (DOC) and CCTV is not a contract but a regulation. The Respondents further allege that DC-ADM 002 does not meet the definition of a regulation because it was not promulgated to further the administration of a statute and it does not prescribe practice or procedure before the DOC. Rather, DC-ADM 002 is a statement of policy. The Respondents further allege:

11. Injunctive relief is only proper when the petitioner’s [Padgett] right to relief is clear, the injunction is needed to avoid an injury that cannot be compensated for in damages and a greater injury will result from refusing injunctive relief than granting it.

12. First, Petitioner [Padgett] has no clear right to relief because inmates have no constitutional right to watch television. . . .

¹ “To prevail on preliminary objections in the nature of a demurrer to a claim for injunctive relief, a court must find that the petition is clearly insufficient to establish a right to injunctive relief, and any doubt must be resolved in favor of overruling the demurrer.” Harding v. Stickman, 823 A.2d 1110, 1111 (Pa. Cmwlt. 2003) (citation omitted).

13. Second, Petitioner [Padgett] does not allege that there is any contract, between himself and the Department, and Page three #2 of his attachment indicates that there is not.

14. Third, even assuming, without conceding, that Petitioner [Padgett] had any legally cognizable right vis a vis the Department, there is an adequate damage remedy in the form of a monetary reimbursement for any overpayment of cable fees.

15. Finally, Petitioner [Padgett] has other avenues for entertainment and information including television placed in common areas of the prison, such as day room, and magazines, newspapers and books available in the library.

16. Petitioner [Padgett] has established no right to equitable relief. (Citations omitted).

Respondents' Preliminary Objections, July 14, 2009, Paragraph Nos. 11-16 at 4-5.

The Respondents also allege that Padgett failed to state a cause of action under the Commonwealth Procurement Code (Code), 62 Pa.C.S. §§101-3302, and preliminarily object in the nature of a demurrer:

17. To the extent that the Petitioner [sic] can be read to suggest that because non-competitive bidding was used to procure the current television contract, the contract is in some fashion illegal; Petitioner [Padgett] has failed to state a cause of action.

18. First, Petitioner [Padgett] does not allege that he is a taxpayer so as to vest him with standing to challenge the award of the contract. . . .

19. More fundamentally, the Commonwealth Procurement Code procedures apply 'to every expenditure of funds . . . **by Commonwealth agencies . . .**'

20. Petitioner [Padgett] does not aver that the **Commonwealth** has expended funds for the cable services. . . .

21. Therefore, Petitioner [Padgett] has not stated a cause of action for any violation of the Commonwealth Procurement Code. (Footnote and citations omitted). (Emphasis in original).

Respondents' Preliminary Objections, July 14, 2009, Paragraph Nos. 17-21 at 5-6. The Respondents also object on the basis that Padgett has not exhausted his administrative remedies.

When considering preliminary objections this Court must consider as true all well-pleaded material facts set forth in the petitioner's petition and all reasonable inferences that may be drawn from those facts. Mulholland v. Pittsburgh National Bank, 405 Pa. 268, 271-272, 174 A.2d 861, 863 (1961). Preliminary objections should be sustained only in cases clear and free from doubt that the facts pleaded are legally insufficient to establish a right to relief. Werner v. Zazyczny, 545 Pa. 570, 681 A.2d 1331 (1996).

The Respondents also move to strike portions of Padgett's brief. Specifically, the Respondents assert the following:

1. On page nine of his 'Response to Preliminary Objections,' which is set up as a brief, Petitioner states, 'A portion of Petitioner's [Padgett] monthly cable bill payment to SCI Mahanoy goes to the local municipality, the local Public Utilities Commission, and sales tax to the Commonwealth. Petitioner [Padgett] has taxpayer standing to challenge the award of the contract if the project is being carried out by an entity created by a governmental body of which Petitioner [Padgett] is a taxpayer.' (Citations omitted).

2. There are no underlying averments in the Petition relating to this allegation and Petitioner [Padgett] cannot enhance his factual averments in a Brief, which does provide for a responsive pleading.

3. On page fifteen of his brief, Petitioner [Padgett] discusses ‘soul’ source contracts.

4. Nothing in Petitioner’s [Padgett] Petition raises any issue concerning the sole source provision appearing in Section 515 of the Commonwealth Procurement Code, 62 Pa.C.S. § 515.

5. Petitioner [Padgett] cannot enhance his factual averments in a Brief, which does not provide for a responsive pleading.

Respondents’ Motion to Strike Portions of Petitioner’s Brief, October 1, 2009, Paragraph Nos. 1-5 at 1-2.

In their first preliminary objection, the Respondents argue that Padgett erroneously relies on DC-ADM 002 for the proposition that the contract between DOC and CCTV is not a contract but a regulation.

Section 102 of the Commonwealth Documents Law² defines a regulation as “any rule or regulation, or order in the nature of a rule or regulation, promulgated by an agency under statutory authority in the administration of any statute administered by or relating to the agency, or prescribing the practice or procedure before such agency.”

² Act of July 31, 1968, P.L. 769, *as amended*, 45 P.S. §1102.

DC-ADM 002 is a policy statement issued February 2, 2005, and effective March 1, 2005. The purpose of DC-ADM 002 is “to establish policy and procedure for the procurement and cancellation of cable television service by the inmate population and to set forth inmate financial responsibilities.” DC-ADM 002 at 1.

The Respondents assert that neither the contract between DOC and CCTV nor DC-ADM 002 itself constitute a regulation because neither was promulgated by DOC in the administration of any statute administered by or relating to the agency, nor did they prescribe practice or procedure before DOC.

In Chimenti v. Department of Corrections, 720 A.2d 205 (Pa. Cmwlth. 1998), *affirmed*, 559 Pa. 379, 740 A.2d 1139 (1999), this Court resolved a similar issue. Salvatore Chimenti, Susan L. Borish, and Hans Vorhauer (collectively, Chimenti) petitioned for review in this Court’s original jurisdiction and sought equitable and declaratory relief. Chimenti asked that this Court enjoin DOC from implementing policy statement DC-ADM 818 which allowed DOC to implement an automated computer based inmate telephone system that enabled DOC to control the telephone use of inmates. Chimenti alleged that the because the stated purpose of policy statement DC-ADM 818 was to promulgate rules, regulations, and procedures governing inmate telephone privileges and the electronic surveillance of inmate phone calls, it was a regulation for which DOC had failed to lawfully promulgate in accordance with the act commonly known as the Commonwealth Documents Law and the Regulatory Review Law.³ Chimenti

³ Act of June 25, 1982, P.L. 633, *as amended*, 71 P.S. §§745.1 – 745.15.

alleged that DOC had implemented regulations that affect the substantial rights of the members of the public without notice or an opportunity to be heard.⁴

DOC preliminarily objected and asserted that Chimenti failed to state a claim for which relief could be granted because DC-ADM 818 was not a regulation but was a statement of policy⁵ which did not have to go through the regulatory review process set forth in the Commonwealth Documents Law and the Regulatory Review Law.

This Court sustained the preliminary objections and determined that DC-ADM 818 was a statement of policy:

DC-ADM 818 clearly sets forth the department's statutory interpretation of the mandatory provisions of section 5704 of the Wiretapping Act. The policy statement notifies the inmates of general access to the system and the procedure for obtaining telephone privileges as well as the restrictions. Policy Statement DC-ADM 818 does not replace or extend the authority of the department under section 5704 of the Wiretapping Act to monitor, record, intercept or divulge telephone calls from or to an inmate in a state correctional facility.

⁴ There were other counts of the petition which are not relevant to the discussion here.

⁵ Section 102 of the Commonwealth Documents Law, 45 P.S. §1102, defines a statement of policy as

Any document, except an adjudication or a regulation, promulgated by an agency which sets forth substantive or procedural personal or property rights, privileges, immunities, duties, liabilities or obligations of the public or any part thereof, and includes, without limiting the generality of the foregoing, any document interpreting or implementing any act of Assembly enforced or administered by such agency.

Moreover, DC-ADM 818 does not establish a standard of conduct, which has the force of law nor does it establish a binding norm. The department has the ability when applying DC-ADM 818 to a particular situation to support the policy just as if the policy statement had never been issued.

Chimenti, 720 A.2d at 211-212. This Court also stated that prisoners have no constitutional right to use the telephone. Chimenti, 720 A.2d at 213.

This Court agrees with DOC that DC-ADM 002 is a statement of policy and not a regulation. Consequently, the contract between DOC and CCTV is not a regulation either. As in Chimenti, DC-ADM 002 was not promulgated by DOC in the administration of any statute administered by or relating to DOC and does not prescribe practice or procedure before DOC. The stated purpose of DC-ADM 002 is to “establish policy and procedure for the procurement and cancellation of cable television service by the inmate population and to set forth inmate financial responsibilities.” DC-ADM 002 at 1. The contract between DOC and CCTV was executed pursuant to this policy statement. Padgett has no clear right to relief under a theory that the contract between DOC and CCTV is a regulation. Therefore, he is not entitled to injunctive relief.⁶

DOC preliminarily objects to Padgett’s claim for relief under the Code because Padgett lacks standing, as he does not allege that he is a taxpayer, to challenge the contract between DOC and CCTV. See On-Point Technology Systems, Inc. v. Department of Revenue, 753 A.2d 911 (Pa. Cmwlth. 2000),

⁶ Further, as DOC notes, an inmate does not have a constitutional right to watch television. See Murphy v. Walker, 51 F.3d 714, 718 n. 8 (7th Cir. 1995).

reversed and remanded on other grounds, 569 Pa. 236, 803 A.2d 1175 (2002). Under the contract between DOC and CCTV, CCTV is allowed access to state correctional institutions to install cable television hookups for inmates. DOC agrees to collect fees from inmates as CCTV makes cable television service available to the inmates. This contract is clearly between DOC and CCTV. Padgett is not involved.

Also, the inmate subscriber agreement is a contract between the inmate and CCTV. CCTV agrees to provide cable television service and in return the inmate agrees to pay CCTV a monthly fee. Even though DOC collects the money and sends a check to CCTV there is no consideration paid to DOC under the inmate subscriber agreement. DOC is not a party to this contract.

Further, the procedures of the Code apply to every expenditure of funds by Commonwealth agencies. Padgett fails to assert in his petition any facts that DOC has expended any funds for the cable services in question. Therefore, he fails to state a cause of action under the Code. Further, Padgett does not allege that he is a taxpayer in his petition. Therefore, he has no standing to challenge the award of the contract through non-competitive bidding.⁷

With respect to the motion to strike, this Court dismisses the motion as moot because this Court sustains the preliminary objections.

⁷ DOC also preliminarily objects on the basis that Padgett has failed to exhaust his administrative remedies. In his brief, Padgett indicates that he has now gone through the administrative process.

Accordingly, this Court sustains the Respondents' preliminary objections and dismisses Padgett's petition with prejudice. This Court dismisses the Respondents' motion to strike portions of Padgett's brief as moot.

BERNARD L. MCGINLEY, Judge

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Secretary, Pennsylvania	:	
Department of Corrections,	:	No. 321 M.D. 2009
Respondents	:	

ORDER

AND NOW, this 5th day of January, 2010, the preliminary objections of John Kerestas, Joseph M. Dorzinsky, and Jeffrey A. Beard are sustained and Lynn A. Padgett's petition is dismissed with prejudice. The motion to strike portions of Lynn A. Padgett's brief is dismissed as moot.

BERNARD L. MCGINLEY, Judge