IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael Tyler, Petitioner	:	
v.	:	
Pennsylvania Board of Probation and Parole, and Pennsylvania Department of Corrections, and Department of Corrections Community Corrections Center, Respondents	:	No. 449 M.D. 2009
	:	Submitted: August 27, 2010

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: December 6, 2010

Before this Court are the preliminary objections of the Commonwealth of Pennsylvania, Department of Corrections and the Department of Corrections Community Corrections Center (DOC) and the Pennsylvania Board of Probation and Parole (Board) to Michael Tyler's (Tyler) petition for review in this Court's original jurisdiction.

Tyler is incarcerated at the State Correctional Institution at Coal Hill (SCI-Coal Hill), serving a sentence for unlawful restraint. In a Board decision recorded July 11, 2007, Tyler was granted parole upon completion of Sex Offender Program Phase 2 to a community corrections residency. In a Board decision recorded February 18, 2009, the Board modified the July 11, 2007, decision to read, "You are paroled upon completion of Sex Offender Program Phase 2 (all

topics) to a specialized CCC [Community Corrections Center] with alcohol and other drug abuse component and with violence prevention programming." Board Decision, February 18, 2009, at 1.

I. Tyler's Petition.

On August 26, 2009, Tyler petitioned for review in this Court's original jurisdiction and alleged:

> 16. That the application of procedures relating to petitioner's [Tyler] release as interpreted by the Parole Board and The Department of 42 Pa.C.S.A. §9798 is arbitrary and capricious as it pertains to petitioner [Tyler] and has suspended petitioner's release from prison, and his parole that was granted to him by the Parole Board under statutory criteria, and regardless of the nature of the underlying charges.
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> 17. The application of the Recommendations in the changes required by the Goldkamp Report . . . will cause Petitioner's [Tyler] release to be stop [sic] for an indefinite period of time, for the sole purpose of not releasing petitioner [Tyler] to a CCC, as mandated by the Parole Board's decision dated July 11, 2007. . . .
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> . . . .
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> 20. As a result, the Parole Board and The Department have refused to release petitioner [Tyler] on parole and/or give petitioner [Tyler] a bed date[1] at a CCC, who has already been provided with official notice by the Parole Board of the grant of parole in his case.
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> 21. Because of [t]he Departments' [sic] refusing to give petitioner [Tyler] a bed date at a CCC, because of this arbitrary and capricious application of 42 Pa.C.S.A. §9798, [t]he Parole Board has refused to sign petitioner's

[1] A "bed date" refers to a date by which a prisoner is assigned a bed or spot in a CCC.

[Tyler] parole release order. The Department will not give petitioner [Tyler] a bed date without a home plan unless this Honorable Court orders appropriate relief to petitioner [Tyler].

22. On February 18, 2009, the Parole Board modified its original decision from paroling petitioner [Tyler] to a CCC, to now requiring petitioner [Tyler] to go to a Specialized CCC. Taking petitioner [Tyler] from one waiting list with an opportunity of placement in a CCC that consist [sic] of over 30 plus CCCs and over 5000 beds with only 50 beds allotted for sex offenders which petitioner [Tyler] believes is arbitrary and capricious to begin with. To now placing [sic] petitioner [Tyler] on a waiting list that consist [sic] of only 5 Specialized CCC with less than 750 beds and only 10 beds allotted for sex offenders, this is arbitrary and capricious. The Department will not give petitioner [Tyler] a bed date unless this Honorable Court orders appropriate relief to petitioner [Tyler].

. . . .

26. The Department has informed petitioner [Tyler] that because of the Goldkamp Report and the mandates it places on violent offenders and the requirements that they have to first go to a Specialized CCC before being release [sic]. That petitioner [Tyler] would have a hard time trying to secure his release, that Parole Violators and Non-Sex Offenders would be given priority and that sex offenders will be put at the bottom of the list and maybe will get a bed date when the Respondents deem that they would want to release a sex offender. Petitioner [Tyler] was told that here is [sic] the answers to you [sic] questions now do not write us no [sic] more. . . .

. . . .

36. Nothing in Megan's law gives these state administrative agencies the power to deny a parole home plan of a parolee the right to live within these areas, only that if they do live within these distances that these notifications must be given. Had the legislature wanted for [sic] no sex offenders to live within the city limits that they would [have] enacted that into law, and yet petitioner [Tyler] believes that this would be unconstitutional.

. . . .
43. The Parole Board's enforcement of a procedure that would for virtually every case including petitioner's [Tyler] case, not allow petitioner [Tyler] to live within the city limits of Philadelphia, as well as, Philadelphia County itself is punitive in nature and is arbitrary and capricious. . . .
. . . .
46. The Parole Board has granted petitioner [Tyler] parole pursuant to its statutory duties, and has made their discretionary decision to release petitioner [Tyler] in accord with the statute's provisions regarding the best interests of society and the petitioner [Tyler]. Having made these discretionary decisions under statutory criteria, The Parole Board has no discretion to release the petitioner [Tyler] based on a blanket parole decision to classify all sex offenders as an SVP [Sexually Violent Predator] in denying petitioner's [Tyler] home plans. . . .

47. It is also unconstitutional for the Parole Board to modify its original Parole decision in order to enforce the Newly Enacted mandates that were not in effect at the time petitioner [Tyler] received the Parole Board's original decision.
. . . .
51. The Department [DOC] has no authority to deny release on parole once the parole Board issues a granting of parole, based on new procedures that made changes in their procedures and policies pursuant to the Goldkamp Report, that were not in place when the original parole decision was issued. The legislature has empowered the Parole Board to make the parole release decision, and has not given any concurrent statutory authority to the Department [DOC].

52. Therefore, The Department [DOC] must implement a parole release decision from the Parole Board. They also must not implement their Newly Enacted Specialized Procedures . . . and Policies (the Goldkamp Report), which are applied in a way that allot beds to different type [sic] of offenders based on their crimes. But must issue bed dates in an orderly manner and not by the crimes for which one was incarcerated for, but by the

> date on which their original parole decision was rendered. The manner now being implement [sic] by the Department [DOC] is arbitrary and capricious as these Newly Enacted Procedures . . . and Policies (the Goldkamp Report) and how they apply to petitioner [Tyler] is an ex post facto violation as well as, arbitrary and capricious. (Citations omitted).

Petition for Review, August 25, 2009, Paragraph Nos. 16-17, 20-22, 36, 43, 46-47, and 51-52 at 4-5, and 8-12.

Tyler seeks relief in mandamus to compel the Board to hold a hearing, issue a bed date, and/or apply the proper law. He asserts that the Board is obligated to process him for release on Parole and that DOC must comply with any parole release orders. He also asserts that his right to due process was violated because parole violators and non-sex offenders receive priority for beds at CCCs and because the Board has granted parole but has not paroled him. Tyler also seeks a declaration from this Court that the procedures used by the Board and DOC to issue bed dates based on a person's crime is unconstitutional and unenforceable. He also asks this Court to order the Board and DOC to stop these practices, to order the Board and DOC to provide him with a waiting list of persons paroled and awaiting a bed date under both the old and new procedures and the dates on which each person paroled received his original notice of parole by the Board, order his release, order DOC to issue him a bed date, and direct the Board and DOC not to engage in retaliatory action against him.

III. DOC's Preliminary Objections.

DOC preliminarily objects in the nature of a demurrer. First, DOC preliminarily objects on the ground that there is no ex post facto violation because

ex post facto violations apply to penal statutes and Tyler has failed to show that he is entitled to an injunction. DOC also preliminarily objects in the nature of a demurrer on the ground that Tyler has no right in mandamus to the waiting list for bed dates and no right to have this Court compel DOC to issue a bed date. Additionally, DOC preliminarily objects in the nature of a demurrer because this Court may not order DOC to release him on parole until there is a release order from the Board and that his request for protection against retaliation is speculative.

Initially, DOC asks this Court to take judicial notice of the report entitled "Restoring Parole and Related Processing for Categories of Violent State Prisoners: Findings and Recommendations II" issued by John S. Goldkamp on December 1, 2008, (Goldkamp Report). DOC also requests that this Court take judicial notice that the Goldkamp Report is the result of a review requested by Governor Rendell when he imposed a temporary moratorium on parole releases. In Nieves v. Pennsylvania Board of Probation and Parole, 983 A.2d 236 (Pa. Cmwlth. 2009), this Court took judicial notice of the Goldkamp Report and the moratorium on parole releases. This Court again takes judicial notice of the Goldkamp Report and Governor Rendell's request for a review of parole procedures.

DOC also requests that this Court take judicial notice of Governor Rendell's directive that DOC and the Board adopt the recommendations of the Goldkamp Report and that Governor Rendell stated in a news release dated December 1, 2008, "I expect the Department of Corrections and the Board of Probation and Parole to use the [Goldkamp] report and make the necessary

changes offered here to better protect the public safety." A court may take judicial notice of a fact that is capable of accurate determination by using sources whose accuracy cannot reasonably be questioned. Pa.R.E. 201(b). This Court has reviewed the December 1, 2008, news release and takes judicial notice of it and Governor Rendell's directive.

The Goldkamp Report recommends a process to identify the most violent offenders, the creation of specialized Community Corrections Centers (CCC) to deal with them and development of intensive programming for the first ninety days of release from prison. Nieves, 983 A.2d at 239. Tyler is classified as a violent offender. As a violent offender, Tyler is subject to Recommendation 3 of the Goldkamp Report which includes placement in a specialized CCC with violence prevention programming.

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).

Initially, DOC asserts that the bed date procedure process does not violate Tyler's rights to due process and equal protection. In Nieves, this Court determined that Elias Nieves (Nieves), a prisoner, had neither a protected liberty

interest nor due process rights in a CCC bed for parolees until he was actually released on parole. Therefore, Nieves could not challenge the new bed procedure on due process grounds. Nieves, 983 A.2d at 239-240. Here, Tyler is in the same situation and has no due process rights to a CCC bed because he has not been released on parole.

DOC also argues that to the extent Tyler makes an equal protection claim that claim also fails. Tyler asserts in his petition that the changes and procedures recommended by the Goldkamp Report treat sex offenders differently from parole violators and non-sex offenders in the issuance of bed dates at CCCs. Tyler as a sex offender and violent offender is not a member of a suspect class.

Equal protection under the law means that like persons in like circumstances will be treated similarly. Curtis v. Kline, 542 Pa. 249, 666 A.2d 265 (1995). "[A] classification must rest upon some ground of difference which justifies the classification and [must have] a fair and substantial relationship to the object of the legislation." *Id.* at 255, 666 A.2d at 268. A classification does not violate equal protection rights if a court determines there are reasons to sustain the classification. Id.

There are three different types of classifications: (1) those which implicate a suspect class or fundamental right; (2) those which implicate an important though not fundamental right or a sensitive classification; and (3) those which involve none of these. *Id.* If a classification implicates a suspect class or fundamental right, the statute is strictly construed in light of the compelling

governmental purpose; if a classification implicates an important right, a heightened standard of scrutiny is applied to an important governmental purpose; and if there is no fundamental or important right, the statute is upheld if there is any rational basis for the classification. Id.

Federal Courts have held that prisoners do not constitute a suspect class. See Abdul-Akbar v. McKelvie, 239 F.3d 307 (3d Cir. 2001), *cert. denied*, 533 U.S. 953 (2001); see also, Martinez v. Flowers, 164 F.3d 1257 (10th Cir. 1998). Because there is no suspect class or an important right at issue, the rational basis analysis must be employed. DOC argues that there is a legitimate governmental interest to have inmates placed in CCC facilities appropriate for their needs and concomitant with the public right to safety, that no community should have to house large numbers of sex offenders at a particular time and that budget constraints limit the number of DOC owned CCCs that can be established to house sex offenders and violent offenders. According to DOC, the classification of Tyler bears a rational relationship to this legitimate interest. This Court agrees.

Next, DOC asserts that the CCC bed date procedures do not violate the Ex Post Facto Clause of the United States Constitution.[2] In Nieves, this Court determined the constitutional prohibitions are against ex post facto laws and DOC's bed procedure is not a law. Nieves, 983 A.2d at 240. The demurrer on this ground is sustained.

[2] Article I, Section 10 of the United States Constitution provides in pertinent part, "No State shall . . . pass any . . . ex post facto Law. . . ." Article I, Section 17 of the Pennsylvania Constitution contains a similar provision.

DOC next contends that Tyler has no right to obtain via mandamus the list of all inmates awaiting CCC bed dates. A proceeding in mandamus is an extraordinary action and is available only to compel the performance of a ministerial act or mandatory duty where (1) there exists no other adequate or appropriate remedy; (2) there is a clear legal right to the performance of the act; and (3) there is a corresponding duty in the defendant to perform the act. McCray v. Pennsylvania Department of Corrections, 582 Pa. 440, 872 A.2d 1127 (2005).

In Nieves, Nieves made the same request. This Court determined that mandamus did not apply because Nieves asserted a clear right to the waiting lists pursuant to the Right to Know Law.[3] Because Nieves had not pursued a right to know request, he ignored his remedy. Further, this Court noted that if Nieves did not have a right to the waiting lists under the Right to Know Law, he did not have a clear right to relief. Nieves, 983 A.2d at 240 n.3. Here, Tyler does not indicate that he has a clear right to obtain the information he requests. Mandamus does not lie. The demurrer to this request is sustained.

Next, DOC asserts that Tyler has no right in mandamus to compel DOC to issue him a bed date. In Nieves, this Court held that the regulation, 37 Pa. Code §63.1, gives the Board the authority to postpone a bed date until a satisfactory plan is arranged for the parolee and approved by the Board. Therefore, DOC had no duty to provide Nieves with a bed date until he had an approved plan. Nieves, 983 A.2d at 240. Tyler is in the same situation as Nieves. The demurrer is sustained.

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[3] Act of February 14, 2008, P.L. 6, 65 P.S. §§67.101-67.3104.

DOC next contends that Tyler's demand that this Court order DOC to release him upon the Board's issuance of a parole release order is premature and contravenes the presumption of administrative regularity. In Nieves, Nieves made a similar request which this Court determined was not "ripe because the Board has not yet issued such an order and because this court must presume that the Department [DOC] will comply with a Board release order." Nieves, 983 A.2d at 241. Once again, this Court is faced with the same facts as in Nieves. This Court sustains the demurrer to this demand.

Finally, DOC contends that Tyler's request for an order to enjoin DOC from retaliating against him is premature and speculative. Tyler has not pled any facts to show that he is the subject of any sort of retaliation. To state a retaliation claim, a prisoner must plead facts which indicate he was engaged in a constitutionally protected activity, that he was the subject of an adverse action by prison officials and that the protected activity was a substantial or motivating reason for the retaliation. Yount v. Department of Corrections, 600 Pa. 418, 966 A.2d 1115 (2009). Nieves claimed that DOC retaliated against him because he was a convicted sex offender. Nieves, 983 A.2d at 241. Here, as in Nieves, Tyler fails to allege any facts to support the conclusion that he is or will be subjected to any retaliation and does not plead facts in accordance with Yount. This Court sustains the demurrer to this demand.

III. The Board's Preliminary Objections.

The Board preliminarily objects on the basis that this Court lacks jurisdiction because Tyler seeks a release from prison which means he seeks a writ

of habeas corpus. Because this Court does not have jurisdiction over such requests, the Board preliminarily objects in the nature of demurrer:

> 5. Petitioner's [Tyler] allegation that he was not released after receiving a decision that authorized his release on parole does not state a claim against the Pennsylvania Board of Probation and Parole because a grant of parole by itself does not vest a prisoner with any protected liberty interest on parole. . . .
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> 6. A prisoner does not attain the status of a 'parolee' until a grant of parole is actually executed. . . .
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> 7. A grant of parole is not executed until a prisoner signs the acknowledgement of parole conditions and the Pennsylvania Board of Probation and Parole issues a parole release order. . . .
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> 8. Petitioner [Tyler] has failed to state a claim because he does not allege that he signed the acknowledgement of his parole conditions or that the Pennsylvania Board of Probation and Parole issued a parole release order in his case.
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> . . . .
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> 10. Petitioner [Tyler] alleges that he is on a waiting list for a community corrections residency placement.
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> 11. Petitioner's [Tyler] actual date of release on parole may be postponed until he is placed in a community corrections residency. . . .
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> 12. To the extent Petitioner [Tyler] claims that the Board was not permitted to modify the July 11, 2007 grant of parole, he fails to state a claim upon which relief may be granted because, as set forth above, the grant of parole by itself did not create a liberty interest.
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> 13. To the extent Petitioner [Tyler] claims the Board misinterpreted 42 Pa.C.S. §9798 in June of 2003, he fails to state a claim upon which relief can be granted. (Citations omitted).

Preliminary Objections, October 2, 2009, Paragraph Nos. 5-8 and 10-13 at 1-3.

The Board contends that Tyler has failed to state a claim in mandamus that the Board be ordered to release him on parole pursuant to an unexecuted grant of parole. In Nieves v. Pennsylvania Board of Probation and Parole, 995 A.2d 412 (2010) (Nieves II), Nieves had made a similar argument that the Board violated his substantive due process rights by arbitrarily modifying its parole decision after it determined on May 30, 2008, that a release on parole would pose no risk to society. This Court held that a prisoner has no protected liberty interest or due process right to parole until he is actually released on parole. Nieves II, 995 A.2d at 418. Tyler faces the same predicament as Nieves. The demurrer is sustained.

The Board next argues that the Ex Post Facto Clause does not apply to compel him to be granted parole. This Court has made that determination in Nieves and Nieves II. The demurrer on this issue is sustained.

The Board also argues that Tyler fails to state a claim to the extent that he asserts that he is entitled to release by virtue of Section One of the Act of May 28, 1913, P.L. 363., 61 P.S. §315, because 61 P.S. §315 was repealed by the Act known as the Parole Act.[4] This Court rejected this same argument previously advanced by Nieves concerning 61 P.S. §315 in Nieves II, 995 A.2d at 417. This Court adheres to the reasoning enunciated there.

[4] Act of August 6, 1941, P.L. 861, *as amended*, formerly 61 P.S. §§331.1-331.34a, repealed by Section 11(b) of the Act of August 11, 2009, P.L. 147. A similar act to the Parole Act is now found in 61 Pa.C.S. §§6101-6153.

The Board next contends that Tyler's allegation that the Board is somehow violating his rights because it applied 42 Pa.C.S. §9798 to him even though he is not a sexually violent predator has no merit. The Board asserts that to the extent Tyler claims that the Board misinterpreted 42 Pa.C.S. §9798, he fails to state a claim upon which relief may be granted. The Board asserts that it has never claimed that Tyler is a sexually violent predator and, even if it had, he fails to state a claim because 42 Pa.C.S. §9798 does not place any residency restrictions on anyone.

In Nieves II, Nieves argued that the Board's policy restricting where paroled sex offenders may reside is contrary to Section 9798 of Megan's Law, 42 Pa.C.S. §9798, which does not restrict where sex offenders or sexually violent predators may reside. This Court reviewed the statutory framework of Megan's Law and determined:

> From this statutory scheme, it is clear that the legislature contemplated the Board's release of sex offenders and sexually violent predators on parole. To assist the Board in determining whether an inmate is likely to engage in predatory sexually violent offenses while on parole, the legislature made available the expertise of the State Sexual Offenders Assessment Board. However, the legislature did not mandate that the Board utilize that resource. The only duties imposed on the Board are the duty to notify the Pennsylvania State Police of a parolee's residence and the duty to inform parolees of their duty to register their residences. The Board has no duty under Megan's Law to approve, without restriction, the location of the residence of a sex offender or sexually violent predator.

Nieves II, 995 A.2d at 419.

Based on Nieves II, this Court sustains the Board's preliminary objection.

Accordingly, the preliminary objections of DOC and the Board are sustained, and this case is dismissed.

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BERNARD L. McGINLEY, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael Tyler, Petitioner	:	
v.	:	
Pennsylvania Board of Probation and Parole, and Pennsylvania Department of Corrections, and Department of Corrections Community Corrections Center, Respondents	:	No. 449 M.D. 2009

O R D E R

AND NOW, this 6th day of December, 2010, the preliminary objections of the Pennsylvania Board of Probation and Parole and the Pennsylvania Department of Corrections are sustained, and this case is dismissed.

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BERNARD L. McGINLEY, Judge