

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

John Passmore,	:	
Petitioner	:	
	:	
v.	:	No. 578 M.D. 2009
	:	
Jeffrey Beard,	:	Submitted: April 1, 2010
Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
 HONORABLE ROBERT SIMPSON, Judge
 HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE SIMPSON**

FILED: May 26, 2010

Before the Court in our original jurisdiction are the preliminary objections in the nature of a demurrer of the Secretary of the Department of Corrections (DOC) to the petition for review (Petition) of John Passmore, an inmate at SCI-Albion. Also before the Court is Passmore's motion for summary relief (Motion). Passmore asks this Court to direct DOC to provide him with an issue of a pornographic magazine for which he had a subscription. Because Passmore fails to address controlling precedent, we sustain DOC's preliminary objections, dismiss Passmore's petition, and deny his motion for summary relief.

According to Passmore's petition, SCI-Albion received a Playboy magazine addressed to Passmore. The Institution's mail inspector supervisor notified Passmore the Publications Review Committee (Committee) would review the publication to determine its conformity with DOC policy. The Committee

informed Passmore two pages of the magazine contained nudity and, in accordance with DC-ADM 803, SCI-Albion would not deliver the magazine to him.

DOC policy DC-ADM 803 authorizes an institution to withhold delivery of magazines containing nudity.¹ An amendment to this policy, DC-ADM 803-1, prohibits inmates from possessing pornography.

Passmore's institutional appeals were denied. Thereafter, Passmore filed both a petition for review and a motion for summary relief with this Court. The substance and relief requested in both are identical. Passmore avers the manner in which prison officials applied DC-ADM 803 to him violated 37 Pa. Code §93.2 and 18 Pa.C.S. §5903. Passmore argues he has a "right/privilege under" these statutory and regulatory sections to possess "sexual explicit materials." Passmore's Br. at 6.

¹ The procedures manual for DC-ADM 803 reads, in relevant part:

3. Criteria

A request for and receipt of any publication, book, magazine, or photograph may be disapproved when the publication ... contains obscene, pornographic, or nude content, as follows:

b. Obscenity, Pornography, and Nudity Issues

Pictorial depictions containing any of the following content shall be denied (written narratives/language and visual/graphic representations/images containing any of the following content shall be denied to any inmate under the age of 18):

(9) the material contains nudity....

DC-ADM 803 Procedures Manual §3.E.3.

Passmore's argument is based on two subsections in 37 Pa. Code §93.2. The first limits inmates to receiving publications sent by a publisher or other commercial source. 37 Pa.Code §93.2(g)(2) (subsection 2). The second prohibits inmates under the age of 18 from receiving "explicit sexual materials as defined in 18 Pa.C.S. §5903." 37 Pa.Code §93.2(g)(4) (subsection 4). Passmore notes Section 5903 prohibits distributing pornographic materials to inmates under the age of 18.

Passmore argues subsection 2 provides a general rule that inmates may receive all publications if they come from a commercial source. He argues subsection 4 is a specific exception preventing delivery of obscene materials, but this limitation is directed only toward prisoners under the age of 18. As he is above the age of 18, and his magazine was sent from the publisher, Passmore argues subsection 2 gives him the right to receive this publication.

The DOC filed preliminary objections in the nature of a demurrer. DOC argues the policies at issue in this case have been reviewed and upheld by the Pennsylvania Supreme Court in several cases. Additionally, the DOC argues a DOC policy does not create an enforceable right.

In ruling on preliminary objections in the nature of a demurrer, we must accept as true all well plead facts, which are relevant and material, as well as all inferences reasonably deducible therefrom. Weaver v. Dep't of Corrs., 829 A.2d 750 (Pa. Cmwlth. 2003). A court will sustain preliminary objections only when they are free and clear from doubt. McGriff v. Bd. of Prob. & Parole., 809

A.2d 455, 458 (Pa. Cmwlth. 2002). Applying that standard, we conclude the precedent DOC cites is controlling.

The Pennsylvania Supreme Court recently upheld policies akin to those at issue here in Brittain v. Beard, 601 Pa. 409, 974 A.2d 479 (2009). In Brittain, as here, inmates sought delivery of Playboy magazines that prison officials withheld as violating DC-ADM 803-1. The Supreme Court rejected the inmates' requested relief, holding courts owe substantial deference to the professional judgment of prison administrators in setting policies to serve the legitimate goals of the correctional system. Among the concerns expressed by DOC was the protection of inmates and prison officials from sexual violence that could arise from distribution of pornography. The Supreme Court held the prisoners failed to meet their burden of disproving the validity of the policy. Accordingly, the Supreme Court upheld DOC's policy prohibiting prisoners from possessing pornography.

Similarly in Payne v. Department of Corrections, 582 Pa. 375, 871 A.2d 795 (2005), the Pennsylvania Supreme Court upheld the validity of the prior DC-ADM 803 policy, since promulgated as a regulation and codified at 37 Pa. Code §93.2. Id. at 396-97, 400-01, 871 A.2d at 808, 810-11. Also significant for the present case, the Supreme Court upheld the constitutionality of 18 Pa. C.S. §5903(a)(8), which prohibited prisoners from possessing obscene material while incarcerated. The Supreme Court explained prisoners do not enjoy the same level of constitutional protections afforded to non-incarcerated citizens. Additionally, the Court reasoned Section 5903 prohibits distribution of pornographic materials

into state correctional facilities. The Supreme Court explained this prohibition was not an improper restraint on publication because DOC reasonably believed its policy would serve legitimate penological interests, such as discouraging predatory sexual behavior.

Applied here, these cases foreclose Passmore’s premise that 18 Pa. C.S. §5903(a)(8) and 37 Pa. Code § 93.2 establish a right for prisoners above the age of 18 to receive pornography. This argument is also undermined by language in DC-ADM 803 which states that “[t]his policy does not create rights in any person....” DC-ADM 803 §VI. We previously found identical language to be “sufficient to dispel any reasonable expectation that an enforceable right is created by the DOC policy.” Weaver, 829 A.2d at 753.

Passmore makes no effort to address these cases.

Accepting Passmore’s averments as true, we conclude that Passmore fails to set forth a legal basis for his claim. Accordingly, we sustain the preliminary objections, dismiss Passmore’s petition for review, and deny Passmore’s motion for summary relief.

ROBERT SIMPSON, Judge

Senior Judge Friedman concurs in the result only.

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ORDER

AND NOW, this 26th day of May, 2010, the preliminary objections of the Respondent are **SUSTAINED**, and Petitioner's petition for review is **DISMISSED**. It is further ordered that Petitioner's motion for summary relief is **DENIED**.

ROBERT SIMPSON, Judge