

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

CHRISTOPHER R. DESMOND,)	
)	
Petitioner,)	C.A. No. N11M-10-126-DCS
)	
v.)	
)	
PERRY PHELPS, WARDEN)	
)	
Respondent.)	

Submitted: October 24, 2011
Decided: November 4, 2011

Upon Petitioners' Request for Writ of Mandamus
PETITION DISMISSED

ORDER

Christopher R. Desmond, Smyrna, Delaware, *Pro Se* Petitioner
Warden Perry Phelps, Smyrna, Delaware, Respondent

JUDGE DIANE CLARKE STREETT

On this 4th day of November, 2011, upon consideration of Petitioner's *Pro Se* Request for Writ of Mandamus, the Court finds that:

1) On October 24, 2011, Petitioner Christopher R. Desmond, ("Petitioner"), a prisoner at the James T. Vaughn Correctional Center, filed an application to proceed *in forma pauperis* as to a claim that his constitutional rights have been violated. On October 26, 2011, in conjunction with his application, he filed a Petition for Writ of Mandamus. In the petition he requests that the Court compel Warden Perry Phelps, (the "Warden"), to reclassify his prison housing from maximum security housing to less restrictive housing, remove a disciplinary report from his file, cease forced housing among inmates without pre-screening, and monitor any attempts at retaliation against Petitioner from Department of Corrections personnel as a result of this petition.

2) Petitioner's criminal history dates back to 1985 and includes two convictions for Arson, ten convictions for Robbery, ten convictions for Possession of a Deadly Weapon During the Commission of a Felony, two convictions for Conspiracy, three convictions for Possession of a Deadly Weapon By a Person Prohibited, three convictions for Theft, and three convictions for Escape.

3) Petitioner alleges that he was transferred from one prison cell to another cell in a different building where three prisoners of the Muslim faith prevented Petitioner from entering the cell. Petitioner asserts that in order to avoid

a confrontation he asked to be reassigned to another cell. Petitioner claims that his request was denied and he was moved to “disciplinary housing.” He states that after a hearing, he was again transferred to another prison cell.

4) Petitioner also states that he refused to enter this other cell despite directions from corrections officers, because the cell was occupied by a prisoner with whom Petitioner had a significant amount of conflict. Petitioner further states that corrections officers attempted to force him into the cell and he resisted their efforts. An altercation resulted during which Petitioner lunged toward an officer who found it necessary to spray Petitioner’s face with a “cap-stun.”¹ As a result of the incident, a disciplinary report for assault, disorderly behavior, and failure to obey an order was issued, and Petitioner was sent to the isolation unit.² At a disciplinary hearing, Petitioner was found guilty of disorderly behavior and failing to obey an order, and his appeal was denied.³ Petitioner was subsequently assigned to maximum security housing.⁴ Petitioner’s appeal of his housing classification was denied by the Warden.⁵

5) Petitioner alleges that because he was at risk of harm when corrections officers attempted to put him in a cell with another prisoner whom he feared, it was his constitutional right to protect himself by refusing to comply with

¹ Petitioner’s Request for Writ of Mandamus, Exh. A-1 (hereinafter “Petition”).

² Petition, Exh. A-1.

³ Petition, Exh. A-2, A-3.

⁴ Petition, Exh. A-3.

⁵ Petition, Exh. A-6.

the officers' request that he enter the cell. Petitioner cites *Freeman v. Snyder*⁶ to support this contention and his assertion that corrections personnel have a compelling duty to prevent harm to inmates by pre-screening them so that violent offenders are not housed with non-violent offenders.

6) In order to proceed with an action *in forma pauperis*, an applicant must file a sworn affidavit indicating his lack of ability to pay court costs and filing fees along with income information.⁷ An inmate must also file “a certified summary of the petitioner's inmate account which contains all account activity for the 6-month period immediately preceding the filing of the complaint, or for the entire time the prisoner has been incarcerated, whichever time is less.”⁸ After submission of the threshold information, the Court determines whether to proceed *in forma pauperis*.⁹ If the Court decides to so proceed, the Court shall review the petition to determine if it is factually frivolous, malicious, or legally frivolous so as “to determine whether service of process will issue or the complaint will be dismissed”¹⁰ A claim is legally frivolous if it is “based on an indisputably meritless legal theory.”¹¹

⁶ 2000 WL 1728278, *9 (D. Del. Mar. 29, 2000) (stating that “[a prison] system which houses inmates together virtually at random without regard to their criminal or institutional histories, physical stature, or mental state (while possibly one step shy of deliberate indifference) would seem to border on (if not cross the line over into) reckless disregard for inmate safety”).

⁷ *Cannon v. McCreanor*, 2003 WL 943247, *1 (Del. Super. Mar. 6, 2003).

⁸ *Cannon*, 2003 WL 943247 at *1.

⁹ *Cannon*, 2003 WL 943247 at *1.

¹⁰ 10 Del. C. § 8803; *Cannon*, 2003 WL 943247 at *1.

¹¹ 10 Del. C. § 8801.

7) In this matter, Petitioner, an inmate, has filed the necessary affidavit indicating his inability to pay the court costs and summary showing that the average daily balance in his inmate account is \$142.74. The Court will allow Petitioner to proceed *in forma pauperis* and authorizes the filing of the complaint without payment of court costs and filing fees.¹²

8) The Court may issue a writ of mandamus to compel performance of a duty by an administrative agency.¹³ Such a writ is an extraordinary remedy and is issued only where a petitioner can show “a clear legal right to the performance of a non-discretionary duty.”¹⁴ Where the act requested is discretionary, mandamus will not issue.¹⁵ Moreover, the duty must be specific such that no discretion is required for its performance.¹⁶ And, while a writ may require performance of a duty, it may not dictate the method of performance or the result.¹⁷ “When officials are granted discretionary power, the courts will not interfere with the rightful exercise of that discretion.”¹⁸ The petitioner must also demonstrate that no

¹² 10 *Del. C.* § 8803(a).

¹³ 10 *Del. C.* § 564; *Sanders v. Danberg*, 2010 WL 2280614, *1 (Del. June 8, 2010); *Clough v. State*, 686 A.2d 158,159 (Del. 1996).

¹⁴ *Sanders*, 2010 WL 2280614 at *1; *Darby v. New Castle Gunning Bedford Ed. Ass'n*, 336 A.2d 209, 210 (Del. 1975).

¹⁵ *Gattis v. Danberg*, 2009 WL 752680, *2 (Del. Super. Mar. 19, 2009) *aff'd sub nom. Gattis v. Danburg*, 976 A.2d 171 (Del. 2009).

¹⁶ *Sanders*, 2010 WL 2280614 at *1; *Darby*, 336 A.2d at 211.

¹⁷ *Sanders*, 2010 WL 2280614 at *1; *Darby*, 336 A.2d at 211.

¹⁸ *Riley v. Taylor*, 1999 WL 41279, *2 (Del. Super. Jan. 6, 1999).

alternative remedy exists—“[m]andamus may not be invoked as a substitute for appellate review.”¹⁹

9) Furthermore, a petition for writ of mandamus is not valid where the action complained of has yet to occur.²⁰ The petition is untimely where a petitioner asks for relief “should certain . . . future events come to pass.”²¹

10) The law is clear that since the internal administration of state prisons falls under the auspices of the executive branch of state government, the courts do not usually intervene.²² Only where an inmate’s complaint adequately pleads the arbitrary abuse of discretion by prison officials or the violation of constitutional rights, will the Court hear the complaint.²³ [I]nmates in Delaware’s penal system have no protected liberty interest in a particular classification or in a particular housing unit.”²⁴ The transfer of a prisoner from one type of housing to another falls within the ambit of discretionary duties of prison officials.²⁵

11) Here, Petitioner is asking the Court to compel the Warden to change Petitioner’s prison housing classification from maximum security to a less-restrictive classification. Since the Warden’s decision to place Petitioner in

¹⁹ *Shockley v. Danberg*, 979 A.2d 1111, *1 (Del. Sept. 10, 2009) (TABLE); *Clough*, 686 A.2d at 159; *In re Herring*, 925 A.2d 503 (Del. 2007).

²⁰ *Pleasanton v. Hugg*, 2010 WL 5313228, *2 (Del. Super. Nov. 29, 2010); *Cason v. State*, 1999 WL 743491, *2 (Del. Super. July 20, 1999).

²¹ *Cason*, 1999 WL 743491, at *1.

²² *Riley v. Taylor*, 1999 WL 41279, *3 (Del. Super. Jan. 6, 1999).

²³ *Riley*, 1999 WL 41279 at *3.

²⁴ *Sanders v. Danberg*, 2009 WL 3531803, *4 (Del. Super. Oct. 21, 2009) *aff’d*, 2010 WL 2280614 (Del. June 8, 2010).

²⁵ *Sanders*, 2009 WL 3531803 at *4.

maximum security housing is a discretionary duty, however, the court will not compel the Warden to act differently. Notwithstanding Petitioner's argument that he has a constitutional right to protect himself by refusing to comply with orders that he enter a cell, Petitioner does not have a constitutional right to any particular type of housing.²⁶ Thus, his claim that his constitutional rights were violated "is not properly brought in a petition for a writ of mandamus."²⁷ Similarly, Petitioner's request for removal of a disciplinary report from his record is also a request that the Court mandate the Warden to act in a particular manner with a particular result. The Court will not do so. Petitioner has neither demonstrated a clear right to such an action nor has he shown the act to be non-discretionary.

12) Furthermore, Petitioner's request for the cessation of forced housing without pre-screening is untimely. Petitioner is requesting mandamus for a future event regarding his housing without pre-screening. Since mandamus does not lie where the action complained of has yet to occur, Petitioner's request is invalid. Also, Petitioner fails to demonstrate that he has a clear right to the cessation of housing without pre-screening or that such a cessation is a non-discretionary duty. Similarly, Petitioner's request for monitoring of any potential retaliation against him is also untimely. Since petitioner has not demonstrated the actual existence of

²⁶ See *Ali v. Phelps*, 2011 WL 4824156, *1 (Del. Oct. 11, 2011).

²⁷ *Ali*, 2011 WL 4824156 at *1.

any attempts to retaliate against him, his request for mandamus is not valid.

Mandamus will not issue for relief of a future attempt at retaliation.

13) Therefore, since petitioner has not provided any demonstration that he has a clear legal right to a non-discretionary duty, the Petitioner's request for mandamus is legally frivolous and does not stand.

ACCORDINGLY, Petitioner's request to proceed *in forma pauperis* is **GRANTED**, and his request for writ of mandamus is **DISMISSED as legally frivolous**.²⁸

IT IS SO ORDERED.

/s/ Diane Clarke Streett
J. Streett

Original to Prothonotary

cc: Christopher Desmond, *Pro Se* Petitioner
Warden Perry Phelps, Respondent

²⁸ See 10 Del. C. § 8803(b); *Cannon*, 2003 WL 943247.