

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Roger Buehl,	:	
	:	
Petitioner	:	
	:	
	:	
v.	:	No. 435 M.D. 2009
	:	Submitted: June 4, 2010
Jeffery A. Beard, Secretary,	:	
Pennsylvania Department	:	
of Corrections, Paul K. Smeal,	:	
Superintendent, State Correctional	:	
Institution at Smithfield and	:	
Pennsylvania Department of	:	
Corrections,	:	
	:	
Respondents	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FLAHERTY FILED: December 22, 2010

Before this court are the preliminary objections of Respondents, Jeffery A. Beard, Secretary, Pennsylvania Department of Corrections, Paul K. Smeal, Superintendent, State Correctional Institution at Smithfield and the Pennsylvania Department of Corrections, filed in response to the petition for review filed by Roger Buehl (Buehl) in this court’s original jurisdiction. Buehl has also filed preliminary objections. The preliminary objections filed by Buehl are overruled. Respondents’ preliminary objection raising lack of

subject matter jurisdiction is overruled. The preliminary objection filed by Respondents in the nature of a demurrer as to Buehl's alleged constitutional claim is sustained. Respondents' remaining preliminary objections, argued in the brief, but not raised in preliminary objections, are waived.

On August 19, 2009, Buehl, an inmate at SCI-Smithfield, filed a petition for review seeking mandamus, declaratory and injunctive relief, claiming that Respondents failed to carry out their mandatory duty of providing Buehl with two hours of physical exercise per day as is required by 61 Pa. C.S. § 5901.¹ The petition also sought a declaration that Respondents' actions violated Buehl's rights under the Equal Protection and Due Process Clauses of the Pennsylvania Constitution because similarly situated prisoners at other correctional facilities do not have yard cancelled as often as it is cancelled at SCI-Smithfield.

On November 23, 2009, Buehl served a notice of praecipe to enter judgment by default on Respondents, as Respondents had not responded to the petition. On November 30, 2009, Respondents filed preliminary objections to the petition. On December 31, 2009, Buehl filed preliminary objections to Respondents' preliminary objections on the basis that Respondents' preliminary objections were not timely filed.

In ruling on preliminary objections, this court must accept as true all well-plead facts and all inferences reasonably deducible therefrom. Stone and Edwards Insurance Agency, Inc. v. Department of Insurance, 616

¹Buehl originally maintained that the failure to provide exercise violated former Sections 1 and 2 of the Act of June 14, 1923, P.L. 75, as amended, 61 P.S. §§101-102. On October 13, 2009, the Act of August 11, 2009, P.L. 147 became effective and the provisions addressing exercise are now found in Section 5901 of the Prisons and Parole Code, 62 Pa. C.S. § 5901.

A.2d 1060 (Pa. Cmwlth. 1992). In order to sustain preliminary objections, it must appear with certainty that the law will not permit recovery, and any doubt should be resolved by a refusal to sustain them. Envirotest Partners v. Department of Transportation, 664 A.2d 208 (Pa. Cmwlth. 1995).

We first address the argument presented by Buehl that Respondents' preliminary objections should be stricken because they were filed beyond the response period provided for in Pa. R.A.P. 1516(b). In accordance with Pa. R.A.P. 1516(b), every pleading subsequent to the initial pleading in an original jurisdiction petition for review must be filed within thirty days of service of the preceding pleading.

Here, Respondents were served with the petition for review on August 20, 2009 and August 24, 2009. On November 23, 2009, Buehl's counsel initiated default proceedings by serving a notice of praecipe to enter judgment by default on Respondents. On November 30, 2009, Respondents filed preliminary objections to the petition. Buehl then filed preliminary objections on December 31, 2009, asserting that Respondents' preliminary objections should be stricken because they were filed outside the thirty day time period provided for by Pa. R.A.P. 1516(b).

Although Respondents' preliminary objections were not timely, it is within the sound discretion of a court to permit the late filing of a pleading where the opposing party will not be prejudiced and justice so requires. Mikkilineni v. Amwest Insurance Company, 919 A.2d 306, 314 (Pa. Cmwlth.), petition for allowance of appeal denied, 592 Pa. 682, 932 A.2d 1290 (2007). "[T]his court may accept a late pleading as justice requires and where the opposing party suffers no prejudice." Humphrey v.

Department of Corrections, 939 A.2d 987, 991 (Pa. Cmwlth. 2007). We thus overrule Buehl’s preliminary objections.

Next, we address the preliminary objections filed by Respondents. In their first preliminary objection, Respondents claim that this court lacks subject matter jurisdiction. This issue is not addressed in Respondents’ brief. However, subject matter cannot be waived and may be raised at any time. Alexander v. Department of Transportation, Bureau of Driver Licensing, 583 Pa. 592, 880 A.2d 552 (2005). The petition in this case is a request for mandamus. In accordance with 42 Pa. C.S. § 761(a)(1) the Commonwealth Court shall have original jurisdiction of all civil actions or proceedings “[a]gainst the commonwealth government, including any officer thereof, acting in his official capacity” As such, the objection to subject matter jurisdiction is overruled.

In their second preliminary objection, Respondents demur to Buehl’s claims of constitutional deprivation, including equal protection and due process. “[W]here a preliminary objection to the complaint in the nature of a demurrer is filed, there is no burden on the plaintiff to prove the cause of action. The issue then before the court, and the only issue is, whether the facts in the complaint itself are sufficient to entitle the plaintiff to relief.” International Union of Operating Engineers v. Linesville Construction Company, 457 Pa. 220, 223, 322 A.2d 353, 356 (1974). When ruling on a demurrer, a court must confine its analysis to the complaint. Torres v. Beard, 997 A.2d 1242 (Pa. Cmwlth. 2010).

As to Buehl's claim that his due process and equal protection rights were violated because outdoor yard periods were cancelled at SCI-

Smithfield more often than at other state correctional facilities, Respondents argue that Buehl has failed to state a claim because such requires that persons who are similarly situated be treated alike. Jae v. Good, 946 A.2d 802 (Pa. Cmwlth.), petition for allowance of appeal denied, 598 Pa. 790, 959 A.2d 930 (2008), cert. denied, __ U.S. __, 129 S.Ct. 1042 (2009).

In Feigley v. Department of Corrections, 872 A.2d 189 (Pa. Cmwlth. 2005), Feigley alleged that inmates at SCI-Frackville were treated in an inferior way to other state prisoners because Frackville's commissary carried a smaller range of items and charged more for its merchandise. This court observed that the situation did not necessarily result from an unreasonable classification of inmates. Rather, such may have resulted from the institutions location relative to the suppliers location, the overall nature of the prison population and individual management decisions. Similarly, in this case, the location of other institutions exposes them to differing weather conditions. Thus, we conclude that Buehl has failed to state a cause of action of any violation of his rights to due process and equal protection.

We further observe that in their brief, Respondents argue that Buehl has not established a right to relief in mandamus and has not stated a claim for injunctive relief or for declaratory relief. However, mandamus, injunctive relief and declaratory relief were not raised in Respondents' preliminary objections, only in the brief to this court, and as such, we will not consider them. Commonwealth v. Peoples Benefit Services, Inc., 895 A.2d 683, 693, n.19 (Pa. Cmwlth. 2006).

In their brief, Respondents further argue that they have complied with the statutory provisions of 61 Pa. C.S. § 5901, which

mandates that prisoners shall be provided with two hours of open exercise or, if the weather is inclement, shall be provided with two hours of indoor exercise. Although Respondents briefed this issue, such was not raised in their preliminary objections to this court and, as such, we will not consider it. Id.

In accordance with the above, the preliminary objections filed by Buehl are overruled. Respondents' preliminary objection as to subject matter jurisdiction is overruled. Respondents' preliminary objection in the nature of a demurrer as to Buehl's alleged constitutional deprivation claim is sustained. Respondents' remaining preliminary objections, argued in the brief, but not raised in preliminary objections, are waived.

JIM FLAHERTY, Senior Judge

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ORDER

Now, December 22, 2010, the preliminary objections filed by Roger Buehl are overruled. The preliminary objection filed by Respondents in the nature of a demurrer as to Buehl’s alleged constitutional claim is sustained. Respondents’ preliminary objection as to subject matter jurisdiction is overruled. Respondents’ remaining preliminary objections, argued in the brief, but not raised in preliminary objections, are waived.

Respondents are directed to file an answer to the petition for review within thirty days.

JIM FLAHERTY, Senior Judge