

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Commonwealth Ex Rel. Mr. Earl R. Vance, Jr.,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 592 M.D. 2006
	:	Submitted: February 8, 2008
Mr. Jeffrey A. Beard, Secretary for the PA. Department of Corrections,	:	
	:	
Respondent	:	

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SMITH-RIBNER

FILED: May 12, 2008

This matter is before the Court on remand from the Pennsylvania Supreme Court, which vacated this Court's previous order and remanded with instructions. The Department of Corrections (Department) has filed a preliminary objection in the nature of a demurrer to the action for declaratory judgment and injunctive relief filed by Earl R. Vance, Jr. (Vance), which the Court has treated as a petition for review filed in its original jurisdiction, challenging an amendment to a policy statement issued by the Department that restricted existing inmate access to pornographic materials or those involving nudity. The Department asserts that Vance has failed to state a claim upon which relief may be granted because the amendment to DC-ADM 803-1 (Policy 803-1) is a bulletin, rather than a regulation, and a rule of internal prison management, and it is not subject to the Act known as the Commonwealth Documents Law, Act of July 31, 1968, P.L. 769, *as amended*, 45 P.S. §§1102 - 1602.

Vance filed his action on November 15, 2006 alleging that on December 29, 2005, Respondent Jeffrey A. Beard (Secretary Beard) issued a bulletin amending Policy 803-1 "Inmate Mail and Incoming Publications," which stated that inmates would not be permitted to receive or to possess pornography as defined in the policy statement. Paragraphs 2 - 5. The amendment allegedly prohibited existing subscriptions to pornographic magazines and books, all nude photographs and new subscriptions and orders. Pornographic materials possessed after January 1, 2007 would be considered contraband and would be confiscated and destroyed. The complaint specifically asserted that under the Department's regulation at 37 Pa. Code §93.2, relating to inmate correspondence, pornography issues are not listed as stated in Policy 803-1 and further that obscenity law does not ban all nude publications. Paragraph 7. Section 93.2 prohibits only publications containing obscene material as defined under obscenity law. Paragraph 8. The Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. §§51 - 732 (Administrative Code), does not empower Secretary Beard to issue a policy inconsistent with state law. Paragraph 9. The amended Policy 803-1 was not issued according to the procedures under the Commonwealth Documents Law, and therefore it has no binding effect. Paragraph 10.

Vance contended that the Department's amendment was inconsistent with underlying regulation and violative of Vance's federal First Amendment rights and therefore was unconstitutional. Paragraph 11. The American Heritage College Dictionary (3d ed. 1997) defines "pornography" as sexually explicit material that sometimes equates sex with power and violence, but the term is not defined by the legislature or by the Department's regulations. Paragraphs 14 and 15. Secretary Beard is not empowered to broaden the construction of terms; only the judicial

branch has such authority. Paragraph 16. Vance requested orders declaring that the bulletin amending Policy 803-1 was unconstitutional and violative of his First Amendment rights and his Fourteenth Amendment due process rights; declaring that the amendment through a bulletin violates the procedures under the Commonwealth Documents Law, as it is inconsistent with underlying properly promulgated regulations and it violates the state's obscenity laws and therefore is null and void. He requested an injunction prohibiting confiscation of his property that does not violate the state's obscenity law. Finally, he requested a declaration that Secretary Beard issued the bulletin in bad faith, knowing that the Administrative Code prohibits him from issuing rules and regulations and policy statements inconsistent with law, and therefore constitutes fraud.

The Department's preliminary objection acknowledged that in ruling on a demurrer the Court must accept as true all well-pleaded allegations in the complaint, *Doxsey v. Pennsylvania Bureau of Corrections*, 674 A.2d 1173 (Pa. Cmwlth. 1996), but a demurrer does not admit to conclusions of law or unjustified inferences that may appear in the complaint. *Raynovich v. Romanus*, 450 Pa. 391, 299 A.2d 301 (1973). A demurrer will not be sustained unless the face of the complaint shows that the law will not permit recovery. *Doxsey*. The Department asserted that to prevail on his claim Vance had to prove that the proposed policy changes violated the United States Constitution or the Commonwealth Documents Law. In the case of *Small v. Horn*, 554 Pa. 600, 722 A.2d 664 (1998), the Supreme Court affirmed this Court's dismissal of a petition for review challenging the Department's modification of rules concerning inmate dress. The Supreme Court refused to apply the requirements of the Commonwealth Documents Law to the amendment of DC-ADM 815 by bulletins, stating:

[T]he Department must enforce reasonable rules of internal prison management to ensure public safety and prison security. These rules must be modified as conditions change, different security needs arise, and experience brings to light weaknesses in current security measures. Where, as here, the measure has at most an incidental effect on the general public, it is reasonable to conclude that the Legislature did not intend the measure to be subjected to the "normal public participation process."

Id. at 611, 722 A.2d at 670. Because the amendment here was a bulletin, it should not be subject to the Commonwealth Documents Law. As for claims of First and Fourteenth Amendment violations, the Department noted that the Constitution does not grant inmates access to all types of printed or published material. A petitioner must establish the existence of a liberty interest, *Sandin v. Conner*, 515 U.S. 472 (1995), and the extension of constitutional protection past the prison boundaries. *Hudson v. Palmer*, 468 U.S. 517 (1984). The Department asserted that Vance had failed to satisfy either requirement and that this required the Court to dismiss.

The Court in a per curiam memorandum order sustained the demurrer pursuant to 42 Pa. C.S. §6602(e)(2), which provides in regard to prison conditions litigation that a court shall dismiss at any time if it determines that the litigation is frivolous or fails to state a claim upon which relief may be granted. The Court stated that the amended Policy 803-1, as a rule of internal prison management, was not subject to the requirements of the Commonwealth Documents Law, that a prison regulation is constitutionally valid if it is reasonably related to legitimate penological interests, and that Policy 803-1's restrictions on obscene materials advance a variety of legitimate penological interests. Vance appealed, and the Supreme Court vacated this Court's order and remanded. *Commonwealth ex rel. Vance v. Beard*, 593 Pa. 447, 931 A.2d 646 (2007).

The Supreme Court stated that although this Court addressed amended Policy 803-1's "restrictions on obscene materials," the petition for review essentially conceded this point, challenging the policy only to the extent that it extends to non-obscene materials. Because this Court's order did not address the relevant challenge, it could not be upheld. In remanding, the Supreme Court offered no opinion as to whether the matter was otherwise amenable to disposition on preliminary objections, but it specifically directed as follows: "However, in its final disposition of the matter, the Commonwealth Court is directed to specifically address Appellant's contention that the Department of Corrections' policy amendment conflicts with an existing substantive regulation promulgated under the Commonwealth Documents Law which has the force and effect of law." *Id.* at 448, 931 A.2d at 646.

The Department's brief states the question as whether Vance's pleadings should be dismissed for failure to state a claim upon which the Court may grant relief, and it simply restates the positions advanced initially in the demurrer. It is notably unhelpful in that it does not address the question that the Supreme Court directed this Court to address. The Department omits any citation of or reference to 37 Pa. Code §93.2. Section 93.2(g), relating to incoming publications, provides in pertinent part:

(1) A publication review committee consisting of staff designated by and reporting to the facility manager or a designee shall determine whether an inmate may receive a publication.

....

(3) Publications may not be received by an inmate if they:

....

(iv) Contain obscene material as defined in 18 Pa.C.S. § 5903 (relating to obscene and other sexual materials and performances).

....
(4) An inmate under 18 years of age may not receive explicit sexual materials as defined in 18 Pa.C.S. § 5903.[¹]

¹18 Pa. C.S. §5903(b) defines "obscene" as any material or performance if:

(1) the average person applying contemporary community standards would find that the subject matter taken as a whole appeals to the prurient interest;

(2) the subject matter depicts or describes in a patently offensive way, sexual conduct of a type described in this section; and

(3) the subject matter, taken as a whole, lacks serious literary, artistic, political, educational or scientific value.

In addition, Section 5903(b) defines "sexual conduct" as:

Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, including sexual intercourse, anal or oral sodomy and sexual bestiality; and patently offensive representations or descriptions of masturbation, excretory functions, sadomasochistic abuse and lewd exhibition of the genitals.

18 Pa. C.S. §5903(c) provides that no person shall knowingly disseminate to minors "explicit sexual materials," which is defined to mean materials that are obscene or:

(1) any picture, photograph, drawing, sculpture, motion picture film, video tape or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct, or sadomasochistic abuse and which is harmful to minors; or

(2) any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in paragraph (1), or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct, or sadomasochistic abuse and which, taken as a whole, is harmful to minors.

(Footnote continued on next page...)

Vance counter-states the questions as whether Secretary Beard used an unpublished regulation to amend an underlying regulation and whether he is empowered under the Administrative Code to issue rules inconsistent with the law. On the first question Vance argues that all amendments to regulations must be promulgated according to procedures in Sections 201 - 208 of the Commonwealth Documents Law, 45 P.S. §§1201 - 1208. Section 201 provides: "Except as provided in section 204 [45 P.S. §1204] an agency shall give ... public notice of its intention to promulgate, amend or repeal any administrative regulation." It specifies the requirements of such notice, including preparation showing words added or deleted, statement of statutory authority, brief explanation of the proposed regulation or change in regulation and request for written comments. Otherwise, any amendment would be invalid under Section 208, which provides: "An administrative regulation or change therein promulgated after the effective date of this act shall not be valid for any purpose until filed by the Legislative Reference Bureau...." He cites *Meyer v. Pennsylvania State Horse Racing Commission*, 456 A.2d 1164 (Pa. Cmwlth. 1983), where the Court noted that the commission's

(continued...)

Neither Vance's original action nor the Department's preliminary objection includes a copy of the disputed provisions of the December 2005 amendment to Policy 803-1. A separate challenge to the same amendment is involved in *Brittain v. Beard*, 932 A.2d 324, 326 n1 (Pa. Cmwlth. 2007), which quotes the complaint as specifying that material would be considered as pornographic and subject to confiscation after January 1, 2007 if:

the material contains nudity which means showing the human male or female genitals, pubic area or buttocks with less than a fully opaque covering, or showing the female breast with less that [sic] a fully opaque covering of any portion thereof below the top of the nipple (exposure through "see through" materials is considered nudity for the purposes of this definition).

failure to comply with the Commonwealth Documents Law nullified a commission amendment to a regulation adopted shortly after a disputed race.

Vance contends that the Department has conceded that the procedures under the Commonwealth Documents Law were not followed by arguing that they were not required to be followed because the Department regards this subject as a rule of internal prison management. As explained in *Payne v. Department of Corrections*, 582 Pa. 375, 871 A.2d 795 (2005) (affirming grant of summary judgment in part), the Department redrafted its administrative directive governing prisoners' access to sexually oriented material after the legislature amended 18 Pa. C.S. §5903(a) to provide that it was a criminal offense for an inmate to possess obscene material or for any person to deliver or to permit the entry of obscene material into a correctional facility; it then promulgated those changes as regulations. Vance states that Section 93.2(g) places restrictions only on "obscene" materials directed at prisoners under age eighteen. He notes that "pornography" is not defined in the obscenity law at 18 Pa. C.S. §5903. Vance argues that photographs of "nudity" are not obscene and therefore are legal to possess, citing *Commonwealth v. Lebo*, 795 A.2d 987, 992 (Pa. Super. 2002) (holding that "[i]t is well-established that mere nudity is not obscenity" (citing *Osborne v. Ohio*, 495 U.S. 103 (1990))) and that to fit the definition of obscenity there must be something more, namely, sexual conduct as defined in 18 Pa. C.S. §5903).

Vance notes that all pornographic material is not necessarily obscene and that sexual expression that is "indecent but not obscene is protected by the First Amendment." *Reno v. American Civil Liberties Union*, 521 U.S. 844, 874 (1997) (quoting *Sable Commc'ns of California, Inc. v. Federal Communications Commission*, 492 U.S. 115, 126 (1989)). Further, in *Brittain v. Beard*, 932 A.2d

324 (Pa. Cmwlth. 2007), which involves a challenge to the same bulletin amending Policy 803-1, the Court stated that photographs of Michaelangelo's "David" would be banned under the Department's ban on all materials depicting nudity. Vance refers to Section 1922(1) and (3) of the Statutory Construction Act of 1972, 1 Pa. C.S. §1922(1) and (3), for the conclusive presumptions that the legislature does not intend a result that is absurd, unreasonable and impossible of execution and that it does not intend to violate the federal or state Constitution.

In Vance's second argument he refers to Section 506 of the Administrative Code, 71 P.S. §186, providing that the heads of all administrative departments, the independent boards and commissions, the several departmental administrative boards and commissions are empowered to prescribe rules and regulations, "not inconsistent with law," for governance of the respective bodies, conduct of their employees and performance of their business. Therefore, the legislature is the final authority as to Secretary Beard's rulemaking power, and it has prescribed the only method by which a properly promulgated regulation may be amended in the Commonwealth Documents Law. Vance submits that he has stated a claim for which relief may be granted because he has alleged that Secretary Beard violated his federal constitutional rights under color of state law.²

The Court concludes that the preliminary objection in the nature of a demurrer must be overruled because Vance has not failed to state a claim upon which relief may be granted. Vance has argued forcefully, with statutory and case

²In *Owens v. Shannon*, 808 A.2d 607 (Pa. Cmwlth. 2002), the Court held that an allegation that prison officials gave an inmate a demotional transfer to a facility much farther from his home in retaliation for exercising a federal constitutional right to write letters to newspapers stated a claim under 42 U.S.C. §1983, even though he did not plead Section 1983. Further, a respondent cannot be immunized by state law against a Section 1983 claim.

citation in support, that an amendment to the provisions of the Department's policy that were formally promulgated as regulations in 37 Pa. Code §93.2(g) in accordance with the procedures of the Commonwealth Documents Law, may be accomplished only in accordance with the same procedures under the statute. If he were to succeed in litigation on the merits of this claim, the effect would be to render the challenged provisions null and void.

The Court has held: "When the [Commonwealth Documents Law] is applicable, regulations issued without following the procedures contained in that statute are invalid and unenforceable." *Giant Food Stores, Inc. v. Department of Health*, 713 A.2d 177, 181 (Pa. Cmwlth. 1998). Secretary Beard's reliance upon *Small* appears to be misplaced. The case concerned bulletins amending policies relating to prisoner dress, restricting the type of apparel that inmates might purchase to garments more like prison uniforms than civilian attire. The court noted at the outset that the official regulations governing state correctional institutions and facilities are silent on inmate clothing. Here, in contrast, the Department already has determined that the type of publications that inmates may receive is a matter established by formal regulation.

In addition, Vance has stated a colorable claim of a constitutional violation. As noted above, *Brittain* involves a challenge to the same provisions. The Court denied motions for summary judgment by both sides because genuine issues of fact remained. In this matter, the Court cannot conclude that Secretary Beard has proved that the law will not permit recovery. Therefore, the preliminary objection of Secretary Beard is overruled, and he is required to file an answer.

DORIS A. SMITH-RIBNER, Judge

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PA. Department of Corrections,	:	
Respondent	:	

ORDER

AND NOW, this 12th day of May, 2008, the preliminary objection in the nature of a demurrer filed by Respondent Jeffrey A. Beard, Secretary of Corrections, is overruled. Secretary Beard is directed to file an answer within thirty days of the date of this order.

DORIS A. SMITH-RIBNER, Judge