IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Gary Kozlowski, Petitioner	:	
v.	:	No. 691 M.D. 2004
Department of Corrections, of the Commonwealth of Pennsylvania; Sharon M. Burks, Chief Grievance Officer of the Department of Corrections, Respondents	:	Submitted: April 4, 2008

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY FILED: September 24, 2008

Before this Court, in our original jurisdiction, are Petitioner Gary Kozlowski's Application for Summary Relief in the Nature of Judgment on the Pleadings (the Application), and Respondent[1] Department of Corrections' (DOC) Motion for Summary Judgment (the Motion).

This matter was initiated by Kozlowski's filing, *pro se*, of a Petition for Review. At all times relevant hereto, Kozlowski was a prisoner housed as a

[1] Respondent Sharon Burks was dismissed from this action by order of this Court dated January 18, 2005.

general population inmate at the State Correctional Institution at Houtzdale (SCI-HOU).[2] In his Petition for Review (Petition),[3] Kozlowski seeks mandamus, declaratory, and injunctive relief.

Kozlowski is seeking a writ of mandamus to compel the prison officials at SCI-HOU to comply with state law and provide him with at least two hours of daily indoor physical exercise during inclement weather as mandated by Section 1 of the Act of June 14, 1923 (Act), P.L. 775, as amended, 61 P.S. §101. Section 1 of the Act governs physical exercise for prisoners and provides as follows:

> Every warden, board of prison managers, prison inspectors, or any other person in authority, in charge of any prison or penitentiary, who may or shall have in charge any person confined therein whether such person be a tried or an untried prisoner, shall provide that such person shall have at least two hours daily, physical exercise in the open, weather permitting, and upon such days on which the weather is inclement, such person shall have two hours, daily, of physical exercise indoors of such prison or penitentiary; Provided, however, The same is safe and practical, and the judges of the several courts are to be the judges thereof. Prisoners in segregation or disciplinary status shall receive a minimum of at least one hour of daily exercise five days per week.

[2] Kozlowski was transferred to the State Correctional Institution at Laurel Highlands on June 20, 2006, which transfer is of no moment to the instant proceedings.

[3] Kozlowski's original Petition for Review was amended pursuant to order of this Court dated November 22, 2005. We note that the procedural history of this case is extensive and somewhat convoluted. While this history includes a number of motions and applications by both parties – some of which were dismissed for various reasons of insufficiency – only those matters directly at issue herein are referenced in our recitation of the procedural history. A full procedural history of this matter is contained within the Original Record (O.R.).

61 P.S. §101.

Kozlowski alleges that whenever outdoor physical exercise (also referred to as “open yard”) is cancelled, no open gym indoor physical exercise is provided, and/or such exercise is only provided for one hour; alternatively, unit recreation, which is known as "blockout," is provided. However, Kozlowski alleges that "blockout" consists of television, card games and board games, and that prisoners are prohibited from exercising or performing calisthenics during blockout. Kozlowski alleges that the DOC has consistently refused to perform its duty under the Act by providing blockout in lieu of open gym, by not providing open gym in the afternoons and evenings during inclement weather, and by generally providing only one hour of indoor physical exercise to each side of the prison on inclement weather days.

Kozlowski is also seeking a declaratory judgment declaring, *inter alia*, the meaning of "physical exercise" in relation to the right under Section 1 of the Act that he be provided with at least two hours of daily physical exercise. Specifically, Kozlowski alleges that blockout is not physical exercise as contemplated by the Act.

Additionally, Kozlowski seeks permanent injunctive relief to enjoin the DOC from providing in-cell exercise during inclement weather. Kozlowski alleges that SCI-HOU has determined that prisoners may do their exercise in their cells when outdoor physical exercise is cancelled due to inclement weather, in violation of Section 2 of the Act, which states:

> Such physical exercise is not, under this act, to be taken by any person confined, as hereinbefore defined, within

> the confines of his cell or room in which he shall be confined.

61 P.S. §102. Kozlowski asserts that his right to a permanent injunction enjoining the DOC's in-cell conditioning program during inclement weather is clear as a matter of law to prevent a legal wrong where there is no other adequate redress available.

In response to Kozlowski's Petition, the DOC filed a preliminary objection in the nature of a demurrer. In support of its preliminary objection, the DOC argued that the Act clearly gives the DOC, subject to judicial review, the discretion to decide when indoor exercise is "safe and practical," and that this discretion rendered the decision an inappropriate subject of the issuance of a writ of mandamus. Further, the DOC argued that there is no requirement, statutory or otherwise, that prisoners are entitled to two hours of "meaningful" daily exercise, citing to DeHart v. Horn, 694 A.2d 16 (Pa. Cmwlth. 1997).

In Kozlowski v. Department of Corrections, (Pa. Cmwlth., No. 691 M.D. 2004, filed May 13, 2005) (hereinafter, Kozlowski I) we overruled the DOC's preliminary objection, concluding that a mandamus action is the proper vehicle to determine whether SCI-HOU is providing Kozlowski with two hours of indoor physical exercise on those days in which the weather is inclement, as mandated by Section 1 of the Act. Further, we rejected the DOC's argument that this Court's statement in a footnote in DeHart, that there is no requirement, statutory or otherwise, that the inmates are entitled to two hours of "meaningful" daily exercise," precludes Kozlowski's request for declaratory relief. Noting that

Kozlowski was not asking this Court to determine if he is entitled to "meaningful" daily exercise, we recognized that Kozlowski's declaratory relief count requested that this Court define, for the first time, "physical exercise" as that term is used in the Act.[4]

A motion for judgment on the pleadings in this Court's original jurisdiction is in the nature of a demurrer, and as such, all of the opposing party's allegations are viewed as true and only those facts which have been specifically admitted by that party may be considered against it. Bergdoll v. Kane, 694 A.2d 1155 (Pa. Cmwlth. 1997). The court may only consider the pleadings themselves and any documents properly attached thereto. Id. A grant of a motion for judgment on the pleadings is proper only when there exists no genuine issue of fact, and the moving party is entitled to judgment as a matter of law. Pennsylvania Association of Life Underwriters v. Foster, 608 A.2d 1099 (Pa. Cmwlth. 1992).

Pursuant to Pa.R.C.P. No. 1035(b), a motion for summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. We have previously held that summary judgment is appropriate in an action for mandamus, and for declaratory or injunctive relief. Bergdoll; Grim v. Borough of Boyertown, 595 A.2d 775 (Pa. Cmwlth. 1991).

[4] Kozlowski's injunctive relief request was added to his amended Petition following our opinion in Kozlowski I, and thusly was not addressed therein.

We will address Kozlowski's Application, and the DOC's Motion, in the context of each of the three forms of relief sought by Kozlowski within his Petition.

Mandamus

Mandamus is an extraordinary writ designed to compel performance of a ministerial act or mandatory duty where there exists: 1.) a clear legal right in the petitioner; 2.) a corresponding duty in the respondent, and: 3.) an absence of any other adequate and appropriate remedy. Wilson v. Pennsylvania Board of Probation and Parole, 942 A.2d 270 (Pa. Cmwlth. 2008). Mandamus is not available to establish legal rights, but is appropriate only to enforce rights that have been established. Id. We further note that a court, in considering a request for mandamus relief, cannot direct the manner in which an official performs a discretionary function. Mazin v. Bureau of Professional and Occupational Affairs, 950 A.2d 382 (Pa. Cmwlth. 2008). Mandamus is appropriate, however, where a legislative or regulatory scheme directs that an act be done within a prescribed time period. Id.

For purposes of our disposition of the instant Application and Motion, it is clear that the Act establishes Kozlowski's legal right to two daily hours of physical exercise when such exercise is safe and practical, and the DOC's corresponding duty to provide the same. See Kozlowski I; Inmates of B-Block v. Marks, 434 A.2d 211 (Pa. Cmwlth. 1981). Neither party disputes that Kozlowski does not have available to him any other adequate and appropriate remedy for the relief he requests herein. However, genuine issues of material facts are replete in

this matter, both when Kozlowski's and the DOC's allegations are viewed as true for purposes of their respective filings, and/or when only those admitted facts of the respective opposing parties are considered in relation to those filings. Additionally, the record as established to date does not resolve these issues of material facts, notwithstanding the parties' arguments to the contrary in support of their respective Application and Motion.

The gravamen of Kozlowski's claim seeking mandamus, stated most generally for purposes of the instant Application and Motion, is his request that the DOC be compelled to perform its duty to provide him[5] with two hours of physical exercise indoors at SCI-HOU on those occasions when inclement weather cancels the daily scheduled outdoor open yard. Kozlowski founds this argument on three broad factual assertions that can be read in consideration of his Petition as a whole, as supported by the record of pleadings and discovery, that each constitute a genuine issue of material facts: 1.) that blockout, as an indoor substitute for open yard, is not physical exercise as contemplated by the Act; 2.) that the indoor "structured activities"[6] potentially available to Kozlowski on those occasions that

[5] We note that, throughout Kozlowski's pleadings in this matter, he makes factual assertions, and requests for relief, couched in the language of the entire general population of SCI-HOU, and/or on behalf of various sections or units thereof. As the matter *sub judice* is not a class action, and has been initiated solely by Kozlowski as one individual, his allegations and assertions in relation to any prisoner, or group of prisoners, other than himself, are of no moment to the relief sought in his Petition on his own behalf, as one named individual and the sole petitioner in this action.

[6] Kozlowski alleges that "a variety of structured activities" are regularly available at SCI-HOU in the gymnasium and/or weight room, which activities appear to consist of physical exercise. Kozlowski Petition at Paragraph 27, Attachment D2. The DOC denies this allegation.

(Continued....)

open yard is cancelled are actually not available to Kozlowski, under the DOC's policies, as a reasonable substitute indoor physical exercise, and: 3.) that the DOC is able to provide sufficient indoor exercise that is both safe and practical[7] as required by the Act. Kozlowski Petition at Paragraphs 27, 29, 30, 34, 35, 57-59, 65, 70, 71, 79, 80, 81, 85, 86, 107, 123, 136. The DOC specifically denies each of the allegations, cited above, that can be read *in toto* as directed at establishing these three primary material facts supporting Kozlowski's Petition. DOC Answer with

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DOC Answer at Paragraph 27. Kozlowski further alleges, *inter alia*, that: structured activities preclude other indoor physical exercise on occasions when open yard is cancelled; inmate participation in structured activities is available only by request slip, and: some structured activity participation is limited by certain factors, and/or is not offered daily. Kozlowski Petition at Paragraphs 34, 71-80. The DOC denies each of the above-cited allegations. DOC Answer at Paragraphs 34, 71-80. The DOC alleges, *inter alia*, that Kozlowski's deposition indicates that he participates in some structured activities which allow him approximately 2½ hours of exercise on certain days, that he has been permitted to participate in other structured activities by a supervisor on some occasions, and that his participation in other SCI-HOU programs precludes his participation in some structured activities as a result of Kozlowski's purely voluntary choices. DOC Brief at 13-15. The DOC has not filed the referenced deposition with this Court. The docket to this matter shows that leave to depose Kozlowski was granted by order dated March 31, 2006, and notice thereof by the DOC was docketed on April 10, 2006. By order dated April 11, 2006, the DOC was directed to file a status report with this Court within 30 days of completing its deposition of Kozlowski. No docket entry exists noting the submission of the deposition to this Court, and no transcript of the deposition is contained within the record to this matter.

[7] We note that inasmuch as the DOC seems to impliedly argue that Kozlowski's Petition has not made sufficient allegations regarding the safety and practicality of providing, or failing to provide, sufficient indoor exercise on those occasions when open yard is cancelled, we disagree. Taken as a whole, Kozlowski's Petition can be fairly read to address the suitability, and implied lack of prohibitive safety and practicality concerns, of the programs offered by the DOC on those occasions when open yard is cancelled. It is well established within our jurisprudence that the allegations of a *pro se* complainant, such as Kozlowski in the instant matter, are to be held to a less stringent standard than that applied to pleadings filed by attorneys. Danysh v. Department of Corrections, 845 A.2d 260 (Pa. Cmwlth. 2004). We further note that the burden to prove the existence of prohibitive safety and/or practicality concerns related to physical exercise under the

(Continued....)

New Matter (Answer) at Paragraphs 27, 29, 30, 34, 35, 57-59, 65, 70, 71, 79, 80, 81, 85, 86, 107, 123, 136.

Whether the respective pleadings, party admissions and denials, and the limited record hereto, are measured by the standard of Kozlowski's Application, or by that of the DOC's Motion, both parties dispute the three primary factual issues articulated above as fairly read in Kozlowski's Petition. Given the existence of these issues of material fact, *inter alia*,[8] both Kozlowski's Application, and the DOC's Motion, must be denied in regards to Kozlowski's mandamus claim. Bergdoll; Foster.

Declaratory Relief

Under Section 7533 of the Declaratory Judgments Act, 42 Pa.C.S. §7533, any person whose rights or other legal relations are affected by a statute may have determined any question of construction or validity, and obtain a declaration of rights or legal relations thereunder.[9] In order to sustain an action under the Declaratory Judgments Act, a party must demonstrate an "actual controversy" indicating imminent and inevitable litigation, and a direct, substantial

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Act is a burden born by the DOC. See Kozlowski I; Inmates of B-Block.

[8] We emphasize that our review of the parties' pleadings, and supporting materials, reveal further material facts that are at issue in this matter, and that our above recitation shall not be read to articulate the sole existing material facts at issue herein. For purposes of the disposition of the instant Application and Motion, we need not address every material fact at issue.

[9] The Declaratory Judgments Act is remedial in nature and its purpose is to provide relief from uncertainty and to establish various legal relationships. Curtis v. Cleland, 552 A.2d 316 (Pa. Cmwlth. 1988).

and present interest. Unified Sportsmen of Pennsylvania v. Pennsylvania Game Commission, 950 A.2d 1120 (Pa. Cmwlth. 2008). The satisfaction of this burden in seeking declaratory relief is founded upon the axiom that this Court will not issue advisory opinions, which lie beyond our jurisdiction. Rendell v. Pennsylvania State Ethics Commission, 938 A.2d 554 (Pa. Cmwlth. 2007).

Kozlowski's Petition seeks declaratory relief in regards to four distinct issues: A.) the meaning of the phrase "physical exercise" as used in the Act; B.) the purpose of the Act with respect to indoor physical exercise; C.) whether blockout is physical exercise under the Act; and D.) whether the Act requires indoor physical exercise to be provided in whatever indoor exercise facilities are available to a particular prison. We need not, however, address these four distinct issues independently at this stage of the matter before the Court.

Within our declaratory relief jurisprudence, it is well established that, generally, our courts should refuse to grant requests for declaratory judgment where such a grant would not resolve the controversy or uncertainty which spurred the request. Section 7537 of the Declaratory Judgments Act states: "[t]he court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding[.]" 42 Pa.C.S. §7537; accord Mazin (the granting of declaratory relief is within the sound discretion of a court of original jurisdiction; declaratory relief will not be granted when such a grant will not resolve the controversy at issue.).

In the instant matter, a grant of declaratory relief on any, or all, of the four issues advanced by Kozlowski would not terminate the controversy giving rise to these proceedings; namely, a grant of declaratory relief would not end the primarily factual determination to be made herein as to whether the DOC is providing, or is able to provide, a safe and practical indoor exercise alternative under the Act. As such, we will not, at this stage of the proceedings, address the merits of the declaratory relief sought herein. Such relief, if merited, would be best granted within the context of resolving the essential factual determinations to be made in this matter that would end the controversy in total.[10]

Accordingly, we deny Kozlowski's Application, and the DOC's Motion, in relation to the declaratory judgment sought by Kozlowski.

Permanent Injunctive Relief

In order to obtain permanent injunctive relief, a party must establish the following elements relative to their claims: (1) the right to relief is clear, (2) the injunction is necessary to avoid an injury that cannot be compensated by damages, and (3) that greater injury will result if the court does not grant the injunction than if it does. Mazin.

[10] We additionally note that, most generally speaking, an order in a declaratory judgment action constitutes an immediately appealable final order. Section 7532 of the Declaratory Judgments Act, 42 Pa.C.S. §7532; Pa.R.A.P. 341(b)(2); accord Nationwide Mutual Ins. Co. v. Wickett, 563 Pa. 595, 763 A.2d 813 (2000). As a matter of judicial economy, therefore, an immediately appealable grant or denial of declaratory relief in this matter would not serve, most efficiently, the ultimate disposition of the entirety of the matters put before this Court in Kozlowski's Petition.

In his Petition, Kozlowski alleges, in material part, that the DOC has determined that prisoners "can do exercise in their cells when [open] yard is cancelled due to inclement weather." Kozlowski Petition at Paragraph 110. Kozlowski further alleges that he has appealed that DOC determination, and that the determination, along with the SCI-HOU in-cell exercise program, is contrary to the express language of the Act. Id. at Paragraphs 111-113. The DOC denies the cited allegations within Kozlowski's Petition, with the proviso that the documents attached in support of the Petition's allegations speak for themselves. DOC Answer at Paragraphs 110-113. Kozlowski seeks a permanent injunction enjoining the DOC from providing in-cell exercise.

In support of his allegations, Kozlowski has attached the DOC's response to Kozlowski's grievance on this issue, which states, in relevant part:

> On days when inclement weather exists, blockout is held in lieu of [open] yard. You have the opportunity to sign up for scheduled activities in addition to the scheduled yard periods; and you may do exercises in your cell at your convenience.
>
> Ample opportunity exists for physical exercise. Your grievance is denied.

Kozlowski Petition at Attachment P4. Given the DOC's denial of Kozlowski's allegation that the DOC is providing the option for in-cell exercise as a direct

substitute for the Act's mandated daily exercise, we do not agree with Kozlowski's characterization of the above-referenced DOC grievance response as an admission of that material fact.

Section 2 of the Act does expressly and unambiguously prohibit in-cell exercise as a means by which to fulfill the Act's qualified duty for the DOC to provide the required daily exercise:

> Such physical exercise is not, under this act, to be taken by any person confined, as hereinbefore defined, within the confines of his cell or room in which he shall be confined.

61 P.S. §102. However, in-cell exercise is not, *per se*, forbidden as an offered form of exercise by the DOC, but is only forbidden under the Law's express language as a means of providing the Act's required daily physical exercise component.

Whether the respective pleadings, party admissions and denials, and the limited record hereto, are measured by the standard of Kozlowski's Application, or by that of the DOC's Motion, both parties dispute the material fact of whether the DOC is offering in-cell exercise as an intended substitute for the Law's mandate. Given the existence of this issue of material fact, both Kozlowski's Application, and the DOC's Motion, must be denied in regards to Kozlowski's permanent injunction claim. Bergdoll; Foster

Accordingly, we deny Kozlowski's Application, and deny the DOC's Motion, in regards to all claims as advanced by the parties, in accordance with the foregoing analyses.

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JAMES R. KELLEY, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Gary Kozlowski, Petitioner	:	
v.	:	No. 691 M.D. 2004
Department of Corrections, of the Commonwealth of Pennsylvania; Sharon M. Burks, Chief Grievance Officer of the Department of Corrections, Respondents	:	

O R D E R

AND NOW, this 24th day of September, 2008, it is hereby ordered:

(1.) Petitioner Gary Kozlowski's Application for Summary Relief in the Nature of Judgment on the Pleadings is denied;

(2.) Respondent Department of Corrections' Motion for Summary Judgment is denied.

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JAMES R. KELLEY, Senior Judge