

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Com ex rel.	:	
Gregory Dunbar,	:	
Petitioner	:	
	:	
v.	:	
	:	
Jeffrey Beard, Secretary for the Pa.	:	
Dept. of Corrections, and	:	
Tracy Williams (Chief Grievance	:	
Officer),	:	No. 601 M.D. 2010
Respondents	:	Submitted: December 23, 2010

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE BUTLER

FILED: February 1, 2011

Gregory Dunbar (Dunbar) filed a pro se petition for review of the July 1, 2010 Final Appeal Decision of the Pennsylvania Department of Corrections (Department)¹ denying Dunbar’s claim that the Department’s Inmate Mail and Incoming Publication policy DC-ADM 803 (policy) is invalid. The Department filed preliminary objections to the petition for review.² For reasons set forth in this opinion, we sustain the Department’s preliminary objections.

¹ Dunbar is suing Jeffrey Beard, Secretary for the Department of Corrections, and Tracy Williams, Chief Grievance Officer for the Department of Corrections, in their official capacities under the color of law, and lists them as respondents in the present case. The respondents will be referred to as “the Department” for purposes of this opinion.

² Dunbar also filed a document entitled “preliminary objections” but, because the statements contained therein are, in effect, responses to the Department’s preliminary objections, they will be treated accordingly.

Dunbar is an inmate currently incarcerated by the Department. On June 7, 2010 and June 25, 2010, the Department issued Notices of Incoming Publication Denial for three magazines sent to Dunbar which violated the Department's anti-pornography regulation. Dunbar filed grievances with the Department claiming that pursuant to a December 15, 2009 order by this Court in *Vance v. Beard* (No. 592 M.D. 2006, filed December 15, 2009), that the Department is enjoined from enforcing its anti-pornography policy since the *Vance* case is pending before the Pennsylvania Supreme Court. Dunbar's petition for review seeks an order directing the Department to return his three magazines; declaring that his First and Fourteenth Amendment rights had been violated by the Department; declaring that the Department had acted in bad faith in violation of 18 Pa.C.S. § 5301 and this Court's orders in *Vance*; and, directing the Department to stop enforcing its anti-pornography policy and Section 93.2 of the Department's Regulations, 37 Pa. Code § 93.2,³ to the extent that it prohibits nudity or restricts materials that are not obscene.

The Department's preliminary objections raise the following issues: 1) whether Dunbar has standing to enforce the orders issued in *Vance*, since he was not a party in that case; 2) whether Dunbar's claim that the Department's anti-pornography policy continues to be invalid is legally flawed because the policy is now a published regulation; and 3) whether the Department's anti-pornography policy passes First Amendment muster and its rationale is constitutionally sufficient under *Turner v. Safley*, 482 U.S. 78 (1987).

Preliminary objections to a petition for review filed within this Court's original jurisdiction are permissible under Pa.R.A.P. 1516(b). Our review of matters

³ Section 93.2(g)(3)(iv) of the Department's Regulations, 37 Pa.Code § 93.2(g)(3)(iv), prohibits an inmate from receiving publications that "[c]ontain nudity, obscene material or explicit sexual materials as defined in subsection (i)."

before this Court on preliminary objections is limited to the pleadings. *Pennsylvania State Lodge, Fraternal Order of Police v. Dep't of Conservation & Natural Res.*, 909 A.2d 413 (Pa. Cmwlth. 2006), *aff'd*, 592 Pa. 304, 924 A.2d 1203 (2007).

[This Court is] required to accept as true the well-pled averments set forth in the [pleadings⁴], and all inferences reasonably deducible therefrom. Moreover, the [C]ourt need not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion. In order to sustain preliminary objections, it must appear with certainty that the law will not permit recovery, and, where any doubt exists as to whether the preliminary objections should be sustained, the doubt must be resolved in favor of overruling the preliminary objections.

Id., 909 A.2d at 415-16 (citations omitted).

The Department's first objection is that Dunbar is improperly attempting to obtain some personal benefit from enforcement of the orders entered by this Court in *Vance* when he was not a party to that case.⁵ We agree. This Court has held that a person who is not a party to a case does not have standing to enforce an order issued in that case. *See Christian v. Sch. Dist. of Phila.*, 722 A.2d 236 (Pa. Cmwlth. 1998) (a teacher did not have individual standing to seek enforcement of a Labor Relations Board order although her union was a party). If Dunbar was aggrieved by the Department's policy, he should have joined *Vance* as a party or directly challenged the policy himself. Although he could use the *Vance* order for whatever persuasive value it may provide in support of his own challenge to the policy if he had been

⁴ “[T]he pleadings are limited to the petition for review, an answer thereto, a reply if the answer contains new matter or a counterclaim, a counter-reply if the reply to a counterclaim contains new matter, a preliminary objection, and an answer thereto.” Pa.R.A.P. 1516(b).

⁵ Dunbar claims that he is the “jailhouse lawyer” who assisted Vance in Vance’s action against the Department. Petition for Review at 1-2.

similarly aggrieved, he does not have standing to have that order enforced in a separate case. Therefore, the Department's first preliminary objection is sustained.

Next, the Department objects to Dunbar's petition for review on the basis that, since the time the *Vance* order was issued, the Department has promulgated an anti-pornography regulation which effectively revoked the policy, and makes Dunbar's claim legally flawed. We agree. The order in *Vance* referred to by Dunbar is not applicable to his claims. The *Vance* order, issued on December 15, 2009, enjoined the Department's enforcement of the policy. In direct response to Vance's challenge to the policy, the Department properly promulgated amendments to Section 93.2 of its Regulations on May 29, 2010. *See* 40 Pa. B. 2759 (2010); *Germantown Cab Co. v. Phila. Parking Auth.*, 993 A.2d 933, 937 (Pa. Cmwlth. 2010) (“[W]hen promulgating a regulation, an agency must comply with the requirements set forth in the Commonwealth Documents Law, the Commonwealth Attorneys Act^[6] and the Regulatory Review Act.^[7] Regulations promulgated in accordance with these requirements have the force and effect of law”). Dunbar stated in his petition for review that the Department refused to give him his magazines on June 7 and 25, 2010, which is after the effective date of the amended regulations.⁸ Petition for Review at 2. Thus, regardless of this Court's prior order in a separate case pertaining to the Department's policy, the Department's properly promulgated regulation serves

⁶ Act of October 15, 1980, P.L. 950, *as amended*, 71 P.S. §§ 732-101-732-506.

⁷ Act of June 25, 1982, P.L. 633, *as amended*, 71 P.S. §§ 745.1-745.15.

⁸ It should be noted that the Department's documentation denying Dunbar his magazines, i.e., the final appeal decision and the notices of incoming publication denial, are on forms that reference the policy this Court enjoined the Department from enforcing in *Vance*. Petition for Review, Ex. 4. Since, however, there is no question that the Department confiscated Dunbar's magazines pursuant to its amended regulation, rather than the former policy, the reference to the policy made on the various forms is of no consequence in the instant matter.

as the basis for the decision in the case *sub judice*. Therefore, the Department's second preliminary objection is sustained.

The Department's final objection is that Dunbar's First Amendment challenge to the anti-pornography policy fails to state a cause of action. We agree. In Dunbar's response to the Department's preliminary objections, Dunbar argues that the case law the Department uses to support its first amendment argument is not applicable because it applies to published regulations not unpublished policy statements. Dunbar Prelim. Obj. at 7. Since we have concluded that the Department's properly promulgated regulation serves as the basis for this Court's decision, given that the regulation was in effect when the Department denied Dunbar's magazines, Dunbar has failed to state a cause of action for which he is entitled to relief. Therefore, the Department's final preliminary objection is also sustained.

For the reasons stated above, the Department's preliminary objections are sustained, and Dunbar's petition for review is dismissed.

JOHNNY J. BUTLER, Judge

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	:	Respondents

ORDER

AND NOW, this 1st day of February, 2011, the Preliminary Objections filed by the Pennsylvania Department of Corrections are sustained and Gregory Dunbar's Petition for Review is dismissed.

JOHNNY J. BUTLER, Judge