

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

André Gay, Pro Se,	:	
Petitioner	:	
	:	
v.	:	No. 332 M.D. 2010
	:	SUBMITTED: January 7, 2011
Jeffrey Beard Sec. of Dept of	:	
Corrections; Louis Folino Supt of	:	
S.C.I. Greene; Program Review	:	
Committee of S.C.I. Greene &	:	
Capt Walker,	:	
Respondents	:	

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge  
HONORABLE PATRICIA A. McCULLOUGH, Judge  
HONORABLE JOHNNY J. BUTLER, Judge**

**OPINION NOT REPORTED**

**MEMORANDUM OPINION BY  
PRESIDENT JUDGE LEADBETTER**

**FILED: April 13, 2011**

Before us for disposition in our original jurisdiction are the preliminary objections of Respondents Jeffrey Beard, former Secretary of Department of Corrections; Louis Folino, Superintendent of State Correctional Institution (SCI) Greene; the Program Review Committee (PRC) of SCI-Greene; and Captain Walker; to the amended complaint of *pro se* Petitioner André Gay (Petitioner) seeking injunctive and declaratory relief with regard to the conditions imposed on him as an inmate in administrative custody (AC) confinement status. We sustain Respondents' preliminary objections and dismiss Petitioner's amended complaint.

Petitioner alleged as follows in the amended complaint.<sup>1</sup> Currently in a Level 5 Restricted Housing Unit (RHU) at SCI-Greene, Petitioner has been in AC confinement status since 1998. He alleges that certain AC status conditions violate his rights, such as restrictions governing his ability to possess a scientific calculator, to exchange non-legal books from his personal property and to possess hardback books in his cell. Amended Complaint, ¶¶ 9-11, 13, 24, 26. Further, he alleges that he should be allowed to purchase certain commissary items that are available to death row inmates. *Id.* at ¶¶ 11-13, 28. In addition, he avers that the denial of access to adequate raingear during outdoor exercise when it rains constitutes cruel and unusual punishment, especially considering his sickle cell anemia. *Id.* at ¶¶ 19-23, 27. Finally, he alleges that “the length of time long[-]term and permanent [AC status inmates] must endure the conditions of [AC confinement constitutes] atypical and significant hardship (10, 15, 20 years or more) [in violation of] Pa. Const. Art 1 § 13 [prohibition against infliction of cruel punishment].” *Id.* at ¶ 30.

Based on these allegations, Petitioner requests that this Court 1) issue a temporary restraining order prohibiting his transfer until resolution of the instant matter; 2) grant declaratory relief declaring that the acts and omissions described in

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<sup>1</sup> The following standards apply when considering preliminary objections:

[T]he court must accept as true all well-pled allegations of material fact as well as all inferences reasonably deducible therefrom. However, the court need not accept conclusions of law or expressions of opinion. For preliminary objections to be sustained, it must appear with certainty that the law will not permit recovery, and any doubt must be resolved in favor of the non-moving party.

*Commonwealth v. Richmond Twp.*, 917 A.2d 397, 400 n.6 (Pa. Cmwlth. 2007).

the amended complaint violate his rights under the Pennsylvania Constitution and laws of the Commonwealth; and 3) enter preliminary and permanent injunctions ordering Respondents to allow him to exchange personal property when there is no security issue; to permit him to wear hats, boots and coats during inclement weather regardless of the season; to allow him to buy clear plastic ponchos from the commissary; and, like capital case prisoners, to have the option: to buy the same items at the commissary; to have the same cell contents; to purchase and/or receive holiday packages; to get “normal” haircuts; and to have restraints removed for non-contact visits.<sup>2</sup> Respondents filed preliminary objections in the nature of a demurrer, which we now address.

In order to obtain an injunction, a party must establish, *inter alia*, that his right to relief is clear, that an injunction is necessary to avoid an injury that cannot be compensated by damages, and that greater injury will result from refusing rather than granting the relief requested. *Harding v. Stickman*, 823 A.2d 1110 (Pa. Cmwlth. 2003). We may not grant such relief where an adequate remedy at law exists. *Id.* Further, having alleged that various regulations violate the Pennsylvania Constitution, Petitioner has the burden of establishing the invalidity of those regulations. *Brittain v. Beard*, 601 Pa. 409, 974 A.2d 479 (2009). A “regulation is valid if it is reasonably related to legitimate penological interests.” *Id.* at 420-21, 974 A.2d at 486 [quoting *Turner v. Safley*, 482 U.S. 78, 79 (1987)]. We turn now to Petitioner’s individual challenges.

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<sup>2</sup> Petitioner additionally requests a jury trial on all issues triable by jury, costs, nominal and punitive damages and any additional relief that we deem just, proper and equitable. Because we dismiss this action for failure to state a claim for relief, we need not address his request for such relief.

## I

Petitioner maintains that he has stated a claim for relief regarding a lack of adequate attire in inclement weather. Noting Respondents' assertion that he failed to allege that exposure to cold rain in the absence of adequate attire caused him to suffer any health episode relating to his sickle cell anemia, he emphasizes that remedies for unsafe conditions need not wait for tragic events. *Helling v. McKinney*, 509 U.S. 25 (1993). In addition, he challenges Respondents' allegations of unawareness concerning his assertions in light of the fact that he filed two prior grievances raising the same concerns.

Respondents contend that Petitioner has no clear right to relief under Article 1, Section 13 of the Pennsylvania Constitution because his allegations do not rise to the level of cruel and unusual punishment. In so arguing, they point out that “[t]he guarantee against cruel and unusual punishment contained in the Pennsylvania Constitution provides no greater protections than that afforded under the Eighth Amendment to the United States Constitution.” *Jochen v. Horn*, 727 A.2d 645, 649 (Pa. Cmwlth. 1999). In that regard, they note that “conduct that does not purport to be punishment at all must involve more than ordinary lack of due care for the prisoner’s interests or safety.” *Whitley v. Albers*, 475 U.S. 312, 319 (1986). To establish a deliberate indifference claim, a petitioner “must, at a minimum, allege that [Respondents] knew of and disregarded an excessive risk to [his] health or safety.” *Jochen*, 727 A.2d at 649.

In emphasizing the insufficiency of Petitioner’s allegations, Respondents reiterate that he failed to aver that exposure to the elements without adequate attire actually caused him to suffer a serious health crisis. In addition, they note that he failed to allege that any of the Respondents were aware of or

consciously disregarded his health or safety, pointing out that there are no allegations, for example, that they left him in the rain for punitive reasons. Respondents assert that Petitioner at most has alleged only an ordinary lack of due care for his interests or safety, which falls short of deliberate indifference or cruel and unusual punishment.

Additionally, Respondents allege that Petitioner has failed to state a claim under Section 5901 of the Prisons and Parole Code (Code), 61 Pa. C.S. § 5901, which mandates that a superintendent must offer a certain amount of outdoor exercise, weather permitting. They contend that Section 5901 of the Code does not mandate the provision of raingear or the cancellation of yard time when precipitation is falling. Accordingly, Respondents contend that Petitioner has failed to state a claim for relief regarding outdoor exercise and weather-appropriate attire. We agree.

While the filing of grievances concerning inadequate attire for outdoor exercise may indicate an awareness of Petitioner's concerns, it does not necessarily mean that subsequent allegations concerning that topic are sufficient to state a claim that any of the named Respondents exhibited deliberate indifference for his interests or safety or cruel or unusual punishment. In addition, Petitioner has not alleged that he is physically unable to take the required exercise so as to trigger Section 5901(c) of the Code, 61 Pa. C.S. § 5901(c), which provides that "[t]his section shall not apply to inmates who are confined and not physically able to take the required physical exercise."

## II

Petitioner next asserts that he has stated a claim for relief concerning his alleged inability to purchase the same items at the commissary as capital

inmates. Acknowledging that the Equal Protection clause requires only that similarly situated people should be treated alike, he argues that the two prison populations at issue in the present case, AC status inmates and capital case inmates, are similarly situated. He attempts to distinguish *Iseley v. Beard*, 841 A.2d 168 (Pa. Cmwlth. 2004), holding that where an inmate is placed in a long-term segregation unit due to his behavior in prison, he is not similarly situated to lower-level security inmates. In addition, Petitioner argues that Respondents' disparate treatment of capital inmates and AC status inmates cannot pass muster under *Turner*, holding that a regulation that impinges on an inmate's constitutional rights is valid only if it is reasonably related to legitimate penological interests.

In response, Respondents assert that capital case inmates and AC status inmates are not similarly situated because they are in the RHU for different reasons. To wit, capital case inmates are in the RHU due to the nature of their criminal sentences and AC status inmates are there due to special security concerns. Respondents maintain, therefore, that Petitioner has failed to state a clear right to relief under Article 1, Section 26 of the Pennsylvania Constitution, prohibiting the Commonwealth and its political subdivisions from discriminating against any person in the exercise of any civil right.

Although the two groups at issue in the present case seem less disparate than those at issue in *Iseley*, we agree with Respondents that they are not similarly situated for equal protection purposes. For numerous reasons, prison officials in their discretion may determine that AC confinement status is necessary for certain inmates who warrant closer supervision, control and/or protection. The prison officials' ability to exercise discretion with regard to the placement and removal of prisoners in AC confinement is just one factor differentiating AC status

prisoners from capital case prisoners such that the two groups are not similarly situated.

### III

Next, Petitioner asserts that he has stated a claim for relief under Article 1, Sections 1, 7 and 9 of the Pennsylvania Constitution regarding his challenges to his inability to exchange books and magazines from his personal property and to possess hardback books. Respectively, those constitutional provisions address the inherent right to possess and protect property, freedom of speech and the rights of accused in criminal prosecutions. Specifically, Petitioner contends that the existing property policies result in long-term and permanent AC status prisoners experiencing a permanent dispossession of their property. Also, Petitioner makes allegations concerning the quantity and type of property that he should be allowed to possess in his cell. In general, he maintains that Respondents have not claimed that there is a rational legitimate penological interest in the imposed property restrictions.

Respondents counter that there is nothing in the above-referenced constitutional provisions guaranteeing inmates the right to exchange non-legal materials from their personal property when legitimate penological interests limit the amount of property that inmates may possess in their cells. They point out that the Pennsylvania Supreme Court has upheld the limitations set forth in the administrative directive governing the limitation on inmates' personal property, DC-ADM 815. *See, e.g. Small v. Horn*, 554 Pa. 600, 722 A.2d 664 (1998); *Bronson v. Cent. Office Review Comm.*, 554 Pa. 317, 721 A.2d 357 (1998). In addition, they note the case law supporting the wide-ranging deference to be afforded prison administrators "in adopting and carrying out policies that in their

reasonable judgment are necessary to preserve order, discipline, and security.” *DeHart v. Horn*, 694 A.2d 16, 19 n.9 (Pa. Cmwlth. 1997). To that end, they maintain that the PRC is vested with the discretion to determine the types of property Petitioner may keep in his cell and that the “limitations ... on materials, including legal materials, that may be kept in an inmate’s cell are reasonably related to the legitimate penological goals of safety, security, and fire hazard concerns.” *Hackett v. Horn*, 751 A.2d 272, 275 (Pa. Cmwlth. 2000). We agree with their position and conclude that Petitioner has failed to establish a clear right to relief with regard to property-related restrictions.

#### IV

Petitioner next alleges that the length of time long-term AC status inmates must endure the conditions of AC confinement constitutes atypical and significant hardship in violation of 37 Pa. Code § 93.11(b), the housing regulation, and Article 1, Section 13 of the Pennsylvania Constitution. The United States Supreme Court first articulated the “atypical and significant hardship” standard in *Sandin v. Conner*, 515 U.S. 472, 484 (1995), noting that a liberty interest requiring due process may be implicated in situations where prison conditions constitute an “atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.” Maintaining that the housing regulation creates a liberty or property interest in that it limits the discretion of correction officials by prohibiting confinement for punitive purposes “other than under procedures established for inmate discipline,” 37 Pa. Code § 93.11(b), Petitioner seems to be arguing that his continued AC confinement rises to a level of deliberate indifference or cruel and unusual punishment in that the conditions he must endure

in that capacity, e.g., not being allowed to exchange non-legal books, cause his confinement to be for punitive purposes.

Respondents acknowledge that an inmate's prolonged presence in AC status confinement can constitute an atypical and significant hardship, but maintain that the Department's procedures under DC-ADM 802, which provides for the PRC's regular review of an inmate's AC status, satisfy the due process requirement. *Shoats v. Horn*, 213 F.3d 140 (3d Cir. 2000). They point out that Petitioner did not dispute the reasons for his continued placement in AC status, request to be removed from AC status or allege that he did not receive adequate due process. In addition, they note that his amended complaint is replete with references to his many appearances before the PRC.

Moreover, Respondents note that an inmate possesses no inherent federal constitutional liberty interest in "avoiding transfer to more adverse conditions of confinement," *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005), and that, in the Commonwealth, "[a]n inmate does not have a right to be housed in a particular facility or in a particular area within a facility." 37 Pa. Code § 93.11(a). The housing regulation requires only that a prisoner housed in the RHU must be afforded certain due process protections.

As for Petitioner's allegations that the length of time that AC status inmates must endure AC confinement conditions constitutes atypical and significant hardship, Respondents note that the housing regulation limits the discretion of prison officials with regard to *placement* in a RHU, not with regard to the imposition of *conditions* in that unit. In any event, Respondents note that Petitioner did not allege that prison officials subjected him to the protested conditions for punitive purposes, that AC status endangered his health or safety or

that his placement in AC status was punitive in nature. Further, they maintain that none of Petitioner's allegations relating to his prolonged presence in AC status confinement and endurance of conditions pertinent to that status rise to the level of deliberate indifference or cruel and unusual punishment. Accordingly, Respondents contend that Petitioner's allegations are insufficient to establish a deprivation of due process or a violation of the housing regulation or the Pennsylvania Constitution.

While we agree with Respondents that Petitioner has failed to state a claim for relief regarding his allegations of an atypical and significant hardship, we note that he did make an allegation of cruel and unusual punishment concerning a lack of access to adequate attire. Having already determined, however, that he failed to state a claim for relief regarding the alleged lack of attire, we decline to address the issue further here. In any event, given the absence of allegations indicating that Petitioner lacks due process while housed in AC confinement, we find no merit to his allegation that the length of time long-term AC status inmates must endure the conditions of AC confinement constitutes an atypical and significant hardship.

## V

Next, we briefly address Respondents' concerns that Petitioner's requests for relief appear to be requests for an order in mandamus even though they are characterized as requests for injunctive relief. *See Garber v. Pa. Dep't of Corr. Sec'y*, 851 A.2d 222 (Pa. Cmwlth. 2004) (examine requested relief in order to determine standards to apply to demurrer). Although Petitioner emphatically asserts that he is not seeking mandamus relief, we agree that at least some of his

requested relief is to compel Respondents to take certain actions.<sup>3</sup> As Respondents assert, Petitioner has not stated a claim for relief regarding those claims sounding in mandamus in that AC status prisoners have no established rights to compel prison officials: 1) to grant them privileges commensurate with those afforded capital case prisoners; 2) to permit them to purchase rain ponchos; 3) to provide them with the types of property requested; 4) to provide them with “normal” haircuts; and 5) to remove restraints during non-contact visitation.<sup>4</sup> Further, as Respondents note, where the inmate grievance system provides an adequate and meaningful legal remedy, mandamus is rendered unavailable. *Waters v. Dep’t of Corr.*, 509 A.2d 430 (Pa. Cmwlth. 1986). We agree, therefore, that Petitioner’s requests for relief sounding in mandamus must fail.

Having concluded that Petitioner failed to state a claim for relief, we sustain Respondents’ preliminary objections in the nature of a demurrer and dismiss his amended complaint.

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**BONNIE BRIGANCE LEADBETTER,**  
President Judge

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<sup>3</sup> Mandamus is the proper remedy only where the plaintiff demonstrates that he has a clear right to the performance of a purely ministerial non-discretionary act, the defendant has a corresponding mandatory duty to perform the act and there is no other appropriate or adequate remedy. *Nieves v. Pa. Bd. of Prob. & Parole*, 995 A.2d 412 (Pa. Cmwlth. 2010). Mandamus is appropriately used to enforce legal rights which have already been established, not to establish those rights. *Rummings v. Pa. Bd. of Prob. & Parole*, 814 A.2d 795 (Pa. Cmwlth. 2002). It is “based upon a duty by an agency to follow a law and is available only when, under a correct interpretation of that law, the agency has an absolute ministerial duty—no choice—to act in a certain way.” *Weaver v. Pa. Bd. of Prob. & Parole*, 688 A.2d 766, 777 (Pa. Cmwlth. 1997). Finally, we note that “[m]andamus does not lie to compel a body vested with discretion to exercise that discretion in a certain manner or to arrive at a particular result.” *Id.* at 776.

<sup>4</sup> Petitioner’s requests concerning “normal” haircuts and the removal of restraints appear only in his relief clause.

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	:	
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**ORDER**

AND NOW, this 13th day of April, 2011, Respondents' preliminary objections in the nature of a demurrer in the above-captioned matter are hereby SUSTAINED and Petitioner's amended complaint is DISMISSED.

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**BONNIE BRIGANCE LEADBETTER,**  
President Judge