

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

KENNETH McINTYRE, and Similarly :
Situating Persons, :
Petitioner :
v.

DEPARTMENT OF CORRECTIONS, :
AND ROBERT D. SHANNON :
SUPERINTENDENT, :

Respondents : No. 43 M.D. 2003

PER CURIAM

ORDER

NOW, February 10, 2003, because the courts have held that the denial of tobacco to an inmate does not state a cause of action for cruel and unusual punishment, Austin v. Lehman, 893 F. Supp. 448 (E.D. Pa. 1995), and because an inmate's dissatisfaction with the scope of the smoking cessation program provided does not amount to a constitutional violation, Reynolds v. Bucks, 833 F. Supp. 518 (E.D. Pa. 1993), Respondents' preliminary objections to the petition for review are sustained, and the petition for review is dismissed.

Petitioner's request for temporary restraining order, or in the alternative preliminary injunction is dismissed as moot.

Certified from the Record

FEB 11 2003

and Order Exit

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

KENNETH MCINTYRE, and Similarly
Situated Persons,
Petitioner

VS.

DEPARTMENT OF CORRECTIONS, AND
ROBERT D. SHANNON SUPERINTENDENT
Respondents

APPLICATION FOR REARGUMENT IN BANC

COMES NOW, Kenneth McIntyre Petitioner herein and
in Pro-Se fashion and Presents this Application For
Reargument In Banc, from the Order entered by this
Honorable Court of February 10, 2003 sustaining the
Respondents Preliminary Objections and Dismissing the
Petitioner's PETITION FOR REVIEW, at Docket No.43 M.D.
2003.

DATE: 2-18-2003

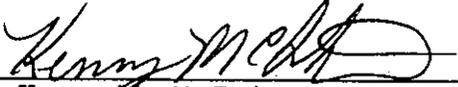

Kenneth McIntyre
Petitioner Pro-Se
AY-4190
SCI-FRACKVILLE
1111 Altamont Blvd.
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TABLE OF CONTENTS

TABLE OF CITATIONS.....	ii
ORDER IN QUESTION.....	1.
STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW.....	2.
STATEMENT OF THE CASE.....	3.
REASONS RELIED ON FOR ALLOWANCE OF REARGUMENT.....	5.
I. The Court has overlooked or misapprehended the facts of the record material to the outcome of the case where it did not consider or address all three issues which are distinct and separately if reviewed can award relief.....	5.
II. The Court used an incorrect standard in considering whether the Smoking Ban in the instant case does create an Eighth Amendment Violation, and that by not providing treatment the Respondents are acting with deliberate indifference.....	9.
CONCLUSION.....	14.
APPENDIX-A: FEBRUARY 10, 2003 ORDER OF THE COMMONWEALTH COURT	
APPENDIX-B: NOVEMBER 18, 2002 SMOKING BAN REGULATION	

ORDER IN QUESTION

This Court did not enter an Opinion Per-se, yet the Order in Question reads:

Now,, February 10, 2003, because the courts have held that the denial of tobacco to an inmate does not state a cause of action for cruel and unusual punishment, Austin v. Lehman, 893 F.Supp.448 (E.D. Pa. 1995), and because an inmate's dissatisfaction with the scope of the smoking cessation program provided does not amount to a constitutional violation, Reynolds v. Bucks, 833 F.Supp. 518 (E.D. Pa. 1993), Respondents' preliminary objections to the petition for review are sustained, and the petition for review is dismissed.

Petitioner's request for temporary restraining order, or in the alternative preliminary injunction is dismissed as moot.

SEE-ATTACHMENT-A.

TABLE OF CITATIONS.

PAGE

FEDERAL DISTRICT COURT:

AUSTIN VS. LEBMAN.....	893 F.SUPP. 448 (E.D. Pa.1995).....	1.
LAANMAN VS. HELGEGEMORE..	437 F.SUPP. 269 (D.N.H. 1977).....	7.
PALMIGIANO VS. GARRAHY...	443 F.SUPP. 956 (D.R.I. 1977).....	7.
REYNOLDS VS. BUCKS.....	833 F.SUPP. 518 (E.D. Pa.1995).....	1.

FEDERAL CIRCUIT COURT:

HICKS VS. FREY.....	992 F.2d 1450 (6th Cir. 1993).....	7.
PORAZA VS. MEYER.....	919 F.2d 317 (5th Cir. 1990).....	7.
UNITED STATES ex rel, WALKER VS. FAYETTE COUNTY PA.	595 F.2d 573 (3rd Cir. 1979).....	7.

UNITED STATES SUPREME COURT:

FURMAN VS. GEORGIA....	408 U.S. 239, 92 S.Ct. 2726 (1972).....	13.
RHODES VS. CHAPMAN....	452 U.S. 337,101 S.Ct. 2392 (1981).....	7.
TROP VS. DULLES.....	356 U.S. 86, 78 S.Ct. 509 (1956).....	9.
WILSON VS. SETITER....	501 U.S. 294,111 S.Ct. 2321 (1991).....	7.

PA. COMMONWEALTH COURT CASES:

CENT. DAUPHIN SCH. DIST. VS. DEPT. OF EDUC.	608 A.2d 576 (1992)..	4.
CHIMENTI VS. DEPARTMENT OF CORRECTIONS	720 A.2d 205 (1998).....	8.

OTHERS:

EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION.....		9.
PA. STATUTE 71 P.S. § 1701.1.....		8.
PA. STATUTE 71 P.S. § 1701.2(e).....		8.

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

Did the Court err in overlooking or misapprehending that there are two other issues presented besides the Eighth Amendment violation that could if addressed award the Petitioner relief, and that the facts of the particular case, (1) that the institution is still selling tobacco products to the inmates, (2) no cessation program is being offered to the inmates, (3) that if the inmates used the tobacco products they will be subjected to time in the R.H.U., and (4) that the Smoking Ban is a Regulation thus subjected to the Pa. Document Laws. are issues of the record which are material to the outcome of the case if reviewed.

(Suggested Answer-Yes)

Did the Court err and use an incorrect standard in relation to the Case Law and pertinent facts of the case which differ drastically from the cases cited by the court in regards to an Eighth Amendment violation and deliberate indifference.

(Suggested Answer-Yes)

STATEMENT OF THE CASE

On November 4th, 2002 the Superintendent at SCI-FRACKVILLE issued a Memorandum Regulation to SCI-FRACKVILLE that effective November 18, 2002, Housing Units A and C will become restricted areas for Smoking. SEE-ATTACHMENT-B, of Petition For Review. (Superintendent Shannon imposed the same Regulation a month's prior on Housing Units B and D.)

The Regulation restricts smoking on the Housing Units, but does not restrict Smoking in the entire Prison, and the Prison has not stopped selling Tobacco products, the Prisoners can only smoke in the Recreation Yard, yet due to bad weather the recreation yard is closed most of the time at days on end, and if a prisoner were to fall weak to his addiction to nicotine and smoke in his cell, the Regulation strictly provides that his is to receive a Misconduct that may result in a Sanction of time in the Restrictive Housing Unit, (R.H.U.).

The Regulation was not issued by the Department Of Corrections is a Policy Statement directed to all of the State Correctional Institutions, nor has the Department of Corrections issued a Policy Statement on the Smoking Ban in question directing such to be implemented at SCI-FRACKVILLE, this Smoking Regulation was solely implemented by the Superintendent at SCI-FRACKVILLE.

SCI-FRACKVILLE conducted a single Smoking Cessation seminar on November 18, 2002 that lasted from 10:50 A.M. to 11:00 A.M. and has provided no other assistance to the prisoners at SCI-FRACKVILLE since then, and during the Seminar, the SCI-FRACKVILLE Medical Department instructed the Prisoners that if they wanted a Smoking Patch it would be available at the Commissary for \$68.00 plus change. and then it ended.

After exhausting all Administrative Remedies, on January 17, 2003, the Petitioner filed a PETITION FOR REVIEW with this Honorable Court, couched under (1), An Eighth Amendment violation by creating cruel treatment and wanton and unnecessary infliction of pain and suffering for imposing the Smoking Ban Regulation on the General Population at SCI-FRACKVILLE, (2), that the Respondents have acted with deliberate indifference for not designing or implimenting a cessation program for the Persons who are addicted to nicotine, (No such program, as of this filing has been implemented at SCI-FRACKVILLE) and (3) That the Smoking Ban constitutes a Regulation, that includes severe consequences to anyone who violates it, and therefore is invalid for the Respondents faulure to properly promulgate under the Pa. Document Laws.

ON January 17, 2003 the Petitioner pre paid the required \$40.00 filing fees, and on January 24, 2003 this Honorable Court issued an Order excepting the matter as a Petition For Review under this Court's Original Jurisdiction.

On February 3, 2003 the Petitioner filed a REQUEST FOR TEMPORARY RESTRAINING ORDER, OR IN THE ALTERNATIVE PRELIMINARY INJUNCTION RELIEF.

On February 6, 2003 the Respondents filed PRELIMINARY OBJECTIONS TO THE PETITION FOR REVIEW, solely relying on REYNOLDS VS. BUCKS 833 F.Supp. 518 (E.D.Pa. 1993) to dismiss the Eighth Amendment and Deliberate Indifference Claims and CHIMENTI VS. PENNSYLVANIA DEPARTMENT OF CORRECTIONS 720 A.2d 205 Pa. Cmwltth. 1998) to dismiss the Failure to Promulgate Claim.

On February 10, 2003, and before the Petitioner could file a timely response, this Court issued an Order Sustaining the Preliminary Objections and thus dismissed the Petition For Review.

REASONS RELIED ON FOR ALLOWANCE OF REARGUMENT

I. The Court has overlooked or misapprehended the facts of the record material to the outcome of the case where it did not consider or address all three issues which are distinct and separately if reviewed can award relief.

In the instant case the Petitioner conceded that he does not have a constitutional right to smoke in a State Correctional Institution, SEE-PETITION FOR REVIEW at Pg. 7. No. 29.

" The Petitioner concedes that he does not have a Constitutional right to smoke in a State Correctional Institution, but that the State Agency, the Department of Corrections has caused the Petitioner to become addicted to Nicotine, supported the Petitioner's Nicotine addiction by selling tobacco products to the Petitioner for the past 26 years and now still sells tobacco products but restricts his use to a level that causes withdraw suffering, and further creates anxiety and further suffering by placing the Petitioner in a position where if he gives into his fostered addiction, he will be placed in the R.H.U. factoring in all of the above, the D.O.C. will not provide any meaningful treatment to assist the Petitioner in quitting or kicking his addiction, via the nicotine patch without cost, thus leaving the Petitioner to suffer under Cold Turkey."

The crux of the Petitioner's claim is that the D.O.C. started the Petitioner's Smoking (Nicotine) addiction over 26 years ago and has ever since fostered this addiction, SEE-PETITION FOR REVIEW at Pg. 7. No. 30.

That the D.O.C. Knew or should have Known that Nicotine is a highly addictive drug and that any sudden withdraws can cause severe pain and suffering.

That the D.O.C. never informed the Petitioner that one day the D.O.C. may place a Regulation into effect that would ban cigarette smoking thus causing the Petitioner to suffer withdraw pains, and that the only treatment the D.O.C. would provide the Petitioner would be Cold Turkey.

The Court failed to take into account that it was the D.O.C. who caused the Petitioner to become addicted to Nicotine and the D.O.C. has been supplying the Petitioner for over the last 26 years, and that as the supplier of the drug, the D.O.C. surely must have know of its addictive qualities, therein it must know that any sudden withdrawals would cause pain and suffering, and under the Constitution of the United States cause the Potential for an Eighth Amendment violation if a policy of Treatment was not implemented to assist those addicted, such as the Petitioner.

This is the Petitioner's case, the Superintendent at SCI-FRACKVILLE implemented a Regulation to ban smoking on C and B units, yet the Superintendent has not implemented a Program to help those addicted to Nicotine, therein the Superintendent and the D.O.C. has acted in deliberate indifference to a situation that they know will cause pain and suffering.

There was a single seminar on smoking held on November 18, 2002, the same day the Smoking ban was implemented, the seminar lasted from 10:50 A.M. to 11:00 A.M. and no other cessation program has ever been provided to the Prisoner's at SCI-FRACKVILLE.

It is not a case where the Petitioner is simply dissatisfied with the Treatment of cessation program, but rather the fact that the single seminar that lasted for 20 minutes can not be legally viewed as an attempt at providing treatment to those suffering from Nicotine addiction at SCI-FRACKVILLE.

Conditions do not violate the Eight Amendment unless they amount to " Unquestioned and serious deprivation of basic human needs " SEE- RHODES VS. CHAPMAN 452 U.S. at 337, 347, 101 S.Ct. 2392 (1981), And that the deprivation of basic needs must be serious enough to amount to the " Wanton and unnecessary infliction of pain " RHODES Supra. 452 U.S. at 347, also SEE- WILSON VS. SETITER 501 U.S. 294, 111 S.Ct. 2321 (1991) at 2324.

However, the Federal Courts have held that the deprivation need not inflict physical injury, or cause lasting or permanent harm. HICKS VS. FREY 992 F.2d 1450 (6th Cir. 1993) at 1457. The Federal Courts have further held that Prisons and jails across the United States are constitutionally required to provide some form of treatment for drug withdraws. PORAZA VS. MEYER 919 F.2d 317, 318-319 (5th Cir. 1990), this holding applies to the Third Circuit as well, SEE-UNITED STATES ex rel, WALKER VS. FAYETTE COUNTY PA. 559 F.2d 573, 575-576 (3rd Cir. 1979). and in PALMIGIANO VS. GARRAHY 443 F.Supp. 956, 989, ((D.R.I. 1977) the District Court held that the United States Constitution requires treatment other than " abrupt denial or Cold Turkey " remanded on other grounds, at 599 F.2d 17, (1th Cir.1979).

The single seminar held on November 18, 2002 can not be said to provide treatment of nicotine addicted persons where the District Courts have repeatedly held that " Symptoms such as withdrawal pains are serious medical needs " LAAMAN VS. HELGEMORE 437 F.Supp. 269, (D.N.H. 1977).

The Present case also presents a claim that the November 18, 2002 Smoking Regulation is not a Policy Statement issued by the D.O.C. but is in fact a Regulation with stick Attachment of sanction in the R.H.U. if violated therein under a " Regulation " as defined in 71 P.S. § 1701.2(e) the November 18, 2002 Smoking Ban is invalid for failure to proumlgate said Regulation.

A Regulation is binding on a reviewing court if it conforms to the grant of delegated power, is issued in accordance with proper procedures, and is reasonable. CENT. DAUPHIN SCH. DIST. VS. DEPT. OF EDUC. 608 A.2d 576, 580-581, (Pa. Cmwltth.1992).

Given the fact that the November 18, 2002 Smoking Ban does not appear in any of the D.O.C. Policy Statement published by the Department of Corrections, or in either the Inmate Handbook or title 37 of the Pennsylvania Code, further still that the Department of Corrections has not issued this Smoking Ban itself Per-Se, it can be fairly assumed that this is a Regulation and therefore falls under what is commonly known as Administrative Agency Law. Act of June 4, 1945, P.L. 1388, as amended, formerly codified in 71 P.S. §§ 1701.1 et seq, (1962) as Amended by Act of June 26, 1963 P.L. 180.

Wherefore for all of the above reasons this Court is asked to rescind the Court's Order of February 10, 2003 Sustaining the preliminary Objections of the Respondents and dismissing the Petition For Review.

II. The Court used an incorrect standard in considering whether the Smoking Ban in the instant case dose create an Eight Amendment Violation, and that by not providing treatment the Respondents are acting with deliberate indifference.

To prevail on an Eighth Amendment claim, a Prisoner must establish that the claim challenged is either cruel or unusual, however this standard has grown since it was written as part of the Bill of Rights in 1791, wherein the Supreme Court of the United States has stated in TROP VS. DULLES, 356 U.S. 86, 78 S.Ct. 509, 630 (1956) "the word of the Amendment are not precise and their scope is not static. The Amendment draws is meaning from the evolving standards of decency that marks the progress of a maturing society."

In this case the Petitioner provided the Court with a copy of the Smoking Ban Regulation issued by the Superintendent at SCI-FRACKVILLE, SEE-ATTACHMENT-B., Copies of responses from the Secretary's Office of the Department Of Corrections stating that the Smoking Ban is not D.O.C. Policy Per-Se, and Affidavits from other Prisoners who are suffering because the Smoking Ban Regulation is sending Mixed Massages (The Institution sells cigarettes but will sanction you if you use, them, and that there is no treatment for persons addicted to Nicotine at SCI-FRACKVILLE) none of which seemed to have been considered by the Court.

The Respondents filed Preliminary Objection to the Petition For Review, yet before the Petitioner could file a response, the Court issued an Order Sustaining the Preliminary Objections and subsequently dismissed the Petition For Review.

In the Respondents Preliminary Objections, the Respondents cite and rely on a single case. REYNOLDS VS. BUCKS 833 F.Supp. 518 (E.D. Pa. 1993) yet the Petitioner's case is distinguishable from BUCKS.

In BUCKS, that Court held that " the stated purpose of the prohibition is to eliminate health, safety and sanitation hazards and to protect electronic equipment in the priosn. " BUCKS at 520,

No such rationale has been proffered by the Respondents in their Preliminary Objections, nor has any been presented in the Superintendents Smoking Ban Regulation of November 18, 2002: which states only:

" Effective November 18, 2002, Housing Units A and C will become a restricted area for smoking.

Inmates will still be permitted to purchase tobacco products from the commissary, but their use will be restricted to designated outdoor areas only.

Staff will strictly enforce this new policy, and inmates violating the smoking policy will be subjected to discipline. Initially, inmates found smoking will be given a warning. Repeat offenders will result in Informal Resolution sanctions imposed by the Unit Manager, such as loss of commissary privileges and misconduct sanctions by the Hearing Examiner.

Staff and inmate cooperation in this matter is both expected and appreciated. "

The court in BUCKS upheld the Smoking Regulation because it was couched under " Legitimate governmental interest " BUCKS at 520. yet no such " Legitimate governmental interest " has been proffered in the SCI-FRACKVILLE November 18, 2002 Smoking Regulation, Supra. to the contrary the only office was additional punishment if the Regulation is violated. therein the Regulation is designed to inflict arbitrary

punishment and condemnation for violating a Regulation that is not grounded or offered under any government interest, as was the Ban on Smoking in BUCKS. (Bucks was a new prison).

Unlike the present case, the Smoking Ban in BUCKS was thought out and authorized by the Bucks County Prison Board, and local Prison Authorities, in the present case the sole Author is the Superintendent at SCI-FRACKVILLE. The Regulation in BUCKS was actioned to effect the entire County Prisons, and was composed with a specific intent,

" [t]he policy is designed to promote the health and safety of those individuals living and working at Berks County Prison " and is on a determination that " smoking and other forms of tobacco use pose a significant risk to both the user's and non-user's health. it damages sensitive equipment and presents safety and sanitation hazards." BUCKS Supra at 519.

Further still in BUCKS there was a policy implemented to " help habitual smokers adjust to the Ban." SCI-FRACKVILLE has not as of this filing implement any such policy.

Finally contra to BUCKS SCI-FRACKVILLE has not stopped the sales of tobacco products in the Institution. Cigarettes and other Tobacco products are sold in the Prison Commissary, yet this Ban prohibits the use of such in the Cell Blocks.

This would not be a factor if the Petitioner and other similarly situated Persons were allowed out of the Prison cell blocks to use these products they are addicted to, but due to bad whether they are forced to remain on the Cell Block all day and days at a time without being allowed to quash the addictive cravings which due to the Smoking Ban due cause Pain and suffering. thus this can be viewed as an arbitrarily infliction of severe punishment, which has been porhibited by the United States Supreme Court.

In FURMAN VS. GEORGIA 408 U.S. 239, 92 S.Ct. 2726, at 2742-2447 (1972) the Supreme Court stated " that the state must not arbitrarily inflict a severe punishment " The very words " cruel and unusual punishments " imply condemnation of the arbitrary infliction of severe punishments. A punishment is excessive under this principle if it is unnecessary.

The infliction of known withdrawal suffering without assistance cannot comport with human dignity when it is nothing more than the pointless infliction of suffering, the punishment by the Smoking Ban implemented by the Superintendent solely is unnecessary and therefore excessive.

The Courts do not draw a distinction between cruel and unusual punishment. A punishment that qualifies as cruel does not need to be unusual to be prohibited. Likewise a sanction that is unusual but not cruel may be covered by the Eighth Amendment. The phrase is treated as a single legal " term of art ".

In the instant case the Superintendent is acting with callous indifference by not providing any treatment to the Petitioner other than the single 20 minute seminar that was only held on November 18, 2002 and not offered to the entire General Population and that the full design of the Smoking Ban at SCI-FRACKVILLE is a violation of the contemporary standards of decency.

The Court added the case of AUSTIN VS. LEHMAN 833 F.Supp. 518 (E.D. Pa. 1993) which is a case arising from SCI-FRACKVILLE, but the AUSTIN case is off point as it relates to the distribution of cigarettes to an indigent prisoner, and that the Prisoner had no standing because of his indigence.

In AUSTIN Supra the inmate was in the R.H.U. and the Court held that the deprivation of free Bi-Weekly cigarette allotment to indigent R.H.U. inmate does not rise to level of Eight Amendment violation, that he lacked standing because if he had the funds he could purchase cigarettes for the Commissary, and that the restriction of tobacco in AUSTIN was grounded in legitimate penological interest where it was found that AUSTIN was using the cigarettes as a form of currency and there was a need to stop distribution of contraband. SEE-AUSTIN at 452 [5,6].

AUSTIN is Off Point in relation to the facts of the present case, in the present case there was a single session held for 20 minutes that talked about smoking, and was provided to only 40 inmates and not the general population which consists of over 1,000 prisoners 700 of which are smokers, and no other program has been offered.

This de minimus treatment to those addicted to Nicotine can not be said to be sufficient by any standard, and so the smoking ban was not designed with a the concerns that mark the progress of a maturing society, but rather with callous indifference on the part of the Superintendent at SCI-FRACKVILLE.

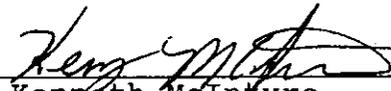
Since there has not been an offer on the part of the respondents that the Smoking Ban is grounded in any penological interest, and that the Smoking Ban is written as an act of oppression with severe sanctions if violated, SEE-ATTACHMENT-B. it can be viewed as a pointless infliction of suffering, as the conduct employed is unnecessary, and is a display of deliberate and callous indifference on the part of the Superintendent at SCI-FRACKVILLE, and should not be allowed to continue without a legitimate interest, and only de minimus concerns.

CONCLUSION

Wherefore for all of the above reasons the Petitioner moves this Honorable Commonwealth Court to vacate its Order entered on February 10, 2003, and deny the Respondents Preliminary Objections and find in favor of the Petitioner.

Respectfully Submitted

DATE: 2-18-2003


Kenneth McIntyre
Petitioner Pro-Se.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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Petitioner's request for temporary restraining order, or in the alternative preliminary injunction is dismissed as moot.

Certified from the Record

FEB 11 2003

and Order Exit

Attachment-A

READ!

November 4th

COMMONWEALTH OF PENNSYLVANIA
STATE CORRECTIONAL INSTITUTION
FRACKVILLE, PA 17931
Superintendent's Office
November 4, 2002

SUBJECT: Change to Institution Smoking Policy

TO: Housing Units A and C Inmates

FROM: *R. Shannon*
R. Shannon
Superintendent

CC

Effective November 18, 2002, Housing Units A and C will become a restricted area for smoking.

Inmates will still be permitted to purchase tobacco products from the commissary, but their use will be restricted to designated outdoor areas only.

Staff will strictly enforce this new policy, and inmates violating the smoking policy will be subject to discipline. Initially, inmates found smoking will be given a warning. Repeat offenders will result in informal resolution sanctions imposed by the Unit Manager, such as loss of commissary privileges and misconduct sanctions by the Hearing Examiner.

Staff and inmate cooperation in this matter is both expected and appreciated.

RS:cac

- Cc: Administrative Staff
- Captains (7)
- Lt. Popson
- Lt. Shade
- Lt. Brown
- Commissioned Officers Clipboard
- Unit Managers (3)
- Daily Roster - Read at 5 Roll Calls
- Housing Units A & C Inmate Bulletin Boards
- File

"Our mission is to protect the public confining persons committed to our custody in safe, secure facilities, and to provide opportunities for inmates to acquire the skills and values necessary to become productive law-abiding citizens; while respecting the rights of crime victims".

Attachment - B.

