

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

James Cibula,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 315 M.D. 2014
	:	Submitted: December 26, 2014
Pennsylvania Board of Probation	:	
and Parole,	:	
	:	
Respondent	:	

**BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge  
HONORABLE P. KEVIN BROBSON, Judge  
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge**

***OPINION NOT REPORTED***

**MEMORANDUM OPINION  
BY JUDGE BROBSON**

**FILED: April 10, 2015**

Before the Court are Respondent Pennsylvania Board of Probation and Parole’s (Board) preliminary objections to the petition for review filed in this Court’s original jurisdiction by Petitioner James Cibula (Cibula), a parolee under the supervision of the Board, seeking mandamus relief. In his petition for review, Cibula seeks an order directing the Board to permit him to drive a truck cross-country as part of his duties as a truck driver and to discharge him from parole.<sup>1</sup> We now sustain the Board’s preliminary objections and dismiss Cibula’s petition for review.

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<sup>1</sup> Cibula titled his pleading as a “Petition for Injunctive Relief, Discharge from Parole and Full Hearing on the Merits.” In addition to the relief requested above, he sought a preliminary **(Footnote continued on next page...)**

In his petition for review, Cibula avers that he was incarcerated in January 2005, was convicted in 2006 by plea of nolo contendere on two counts of terroristic threats (relating to events that occurred in 1996), was paroled in August 2011, and will remain on parole through 2015.<sup>2</sup> After his release, he obtained what he referred to as a veteran's grant, which allowed him to pursue a Commercial Driver's License (CDL). He received his CDL and applied for a truck driving job with Knight Trucking Company (Knight), which required him to pass a background and criminal record check. Knight offered him the job and informed him that he would be required to participate in a cross-country drive while under the supervision of a trainer at all times. Cibula then requested "unlimited driving privileges" from the Board, and an "agent" refused his request.<sup>3</sup> (Pet. for Review at 3.) Cibula avers that he then "appealed" to the Board on June 3, 2014, and that a "member" of the Board denied the appeal that same day via telephone and recommended that he drive locally. (*Id.*) Knight is not a short haul carrier and,

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**(continued...)**

order enjoining the Board from disallowing him to drive his assigned route. By order dated July 11, 2014, the Court, construing Cibula's pleading as a petition for review filed in this Court's original jurisdiction, directed the Board to file a responsive pleading. The Court also struck without prejudice Cibula's request for relief in the form of a preliminary injunction. Cibula subsequently filed a motion for special relief, again requesting injunctive relief, which the Court denied by order dated June 23, 2014.

<sup>2</sup> The Board, in its brief, explains that it has jurisdiction over Cibula based on his sentence of one-to-ten years for his convictions on two counts of terroristic threats. The Board contends that his minimum sentence expiration date was January 11, 2007, and his maximum sentence expiration date is January 11, 2016. The Board has supervised Cibula "in the field since" his parole on August 22, 2011. (Resp't's Br. at 2.)

<sup>3</sup> Cibula avers that the Board's denial of his request was final and appealable on June 2, 2014.

thus, Cibula avers he will lose his job if he is unable to participate in the cross-country training drive. Cibula alleges that the Board had no justification for denying his request and that he is not a flight risk or a threat. Cibula requests an order directing the Board to permit him to drive a truck cross-country as part of his duties as a truck driver and to discharge him from parole.

The Board, in its preliminary objections, avers that the petition is deficient due to improper service and a lack of verification. The Board further avers that Cibula has not stated a claim upon which relief can be granted. Thus, the Board contends that Cibula's petition for review should be dismissed.<sup>4</sup>

We first address the Board's argument that Cibula's petition must be dismissed for failure to conform to Pennsylvania Rule of Civil Procedure No. 1024(a), which provides, in part:

Every pleading containing an averment of fact not appearing of record in the action or containing a denial of fact shall state that the averment or denial is true upon the signer's personal knowledge or information and belief and shall be verified.

To be verified, a pleading must be "supported by oath or affirmation or made subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities." Pa. R.C.P. No. 76; *see also* Pa. R.C.P. No. 1024 (explanatory

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<sup>4</sup> In ruling on preliminary objections, we accept as true all well-pleaded material allegations in the petition for review and any reasonable inferences that we may draw from the averments. *Meier v. Maleski*, 648 A.2d 595, 600 (Pa. Cmwlth. 1994). The Court, however, is not bound by legal conclusions, unwarranted inferences from facts, argumentative allegations, or expressions of opinion encompassed in the petition for review. *Id.* We may sustain preliminary objections only when the law makes clear that the petitioner cannot succeed on his claim, and we must resolve any doubt in favor of the petitioner. *Id.*

comment). An oath or affirmation in a writing is understood to mean that “the signer of the writing has either sworn or pledged to the truth of the statements in the writing before an official authorized to administer oaths or hear affirmations.” *In re 2003 General Election for Office of Prothonotary*, 849 A.2d 230, 238 (Pa. 2004).

Here, the factual averments in the petition are not verified at all and, thus, fall far short of the requirements set forth in Rule 1024(a). *See In re Johnson*, 516 A.2d 1290, 1292 (Pa. Cmwlth. 1985) (“[T]here was no timely verification at all; hence, . . . there was nothing to confer jurisdiction since the pleading . . . containing an averment of fact ‘shall be verified.’”). Although Cibula asserts that the Board was served with verified pleadings on September 26, 2014, there is no evidence of record that this ever occurred.<sup>5</sup> Thus, the Board’s preliminary objection concerning the unverified pleadings is sustained.

Next, we address the Board’s argument that Cibula’s petition must be dismissed because it was served via first-class mail instead of certified mail as required by Pa. R.A.P. 1514(c), thus depriving this Court of jurisdiction. “Rule 1514(c) governs the service of original jurisdiction petitions for review on government units.” *Howard v. Commonwealth*, 957 A.2d 332, 335 (Pa. Cmwlth. 2008). Rule 1514(c) provides: “A copy of the petition for review shall be served by the petitioner in person or by certified mail on the government unit that made the determination sought to be reviewed.” Service via first-class mail instead of

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<sup>5</sup> It appears that Cibula may have attempted to amend his petition for review, and this petition could have included a verification. The amended petition, however, was stricken from the record by order dated November 10, 2014. Thus, it is inappropriate for us to consider any verification that may have been attached to the amended petition.

certified mail constitutes a failure to comply with Rule 1514(c). *Awkakewakeyes v. Dep't of Corr.*, 597 A.2d 210, 211 (Pa. Cmwlth. 1991). There is no question that Cibula served his petition on the Board via first-class mail. (Pet. for Review, Certificate of Service at 1.) Thus, Cibula's failure to serve the Board via certified mail constitutes improper service. The Board's preliminary objection regarding improper service is sustained.

Finally, we address the Board's preliminary objection in the nature of a demurrer. "The law is clear that a court, when ruling on preliminary objections in the nature of a demurrer, may sustain the preliminary objections and dismiss the complaint only in cases which are clear and free from doubt that the law will not permit recovery by the plaintiff." *A.E.V., Inc. v. Liquor Control Bd.*, 641 A.2d 30, 31 (Pa. Cmwlth. 1992).

Cibula filed this action in mandamus, seeking an order directing the Board to grant him unlimited driving privileges and to discharge him from parole. Cibula has failed to make a cognizable claim for mandamus relief. Mandamus is an extraordinary remedy available only to compel the performance of a ministerial act or mandatory duty on the part of a governmental body. *Barndt v. Dep't of Corr.*, 902 A.2d 589, 592 (Pa. Cmwlth. 2006). "A writ of mandamus may be issued only where there is a clear legal right in the petitioner, a corresponding duty in the respondent, and a lack of any other appropriate and adequate remedy." *McGriff v. Pa. Bd. of Prob. and Parole*, 809 A.2d 455, 458 (Pa. Cmwlth. 2002), *aff'd*, 838 A.2d 564 (Pa. 2003). "[M]andamus will not be used to direct the Board to exercise its judgment or discretion in a particular way or direct the retraction or reversal of an action already taken." *Nickson v. Pa. Bd. of Prob. and Parole*, 880 A.2d 21, 23 (Pa. Cmwlth. 2005).

As to Cibula's request for unlimited driving privileges, the imposition of conditions is a "lesser included power" within the Board's general power to grant parole. *Wheeler v. Pa. Bd. of Prob. & Parole*, 862 A.2d 127, 130 (Pa. Cmwlth. 2004). Here, the Board imposed a "standard" condition on Cibula's ability to travel by prohibiting him from "travel[ing] outside the district without prior written permission." (Prelim. Objections at 1.) The Board was well within its authority to impose a condition on Cibula's parole that would effectively prohibit him from seeking employment outside the Commonwealth. Thus, Cibula has failed to state a claim for mandamus regarding his driving privileges, and the Board's preliminary objection is sustained.

As to Cibula's request that he be "discharge[d] from further parole and reporting requirements," (Pet. for Review at 4), the Board has the exclusive power "[t]o parole and reparole, commit and recommit for violations of parole and to discharge from parole all persons sentenced by any court at any time to imprisonment in a correctional institution," 61 Pa. C.S. § 6132(a)(1)(i). "The Board has been granted broad discretion in parole matters and what the Board decides, and why, being wholly a matter of the Board's discretion, is simply not subject to judicial review." *Myers v. Ridge*, 712 A.2d 791, 794 (Pa. Cmwlth. 1998), *appeal denied*, 742 A.2d 173 (Pa. 1999). The decision to discharge Cibula from parole is entirely within the discretion of the Board, and we will not direct the Board to exercise its discretion in a particular way. *See McGinley v. Pa. Bd. of Prob. & Parole*, 90 A.3d 83, 93 (Pa. Cmwlth. 2014). Thus, Cibula has failed to state a claim for mandamus regarding his request to be discharged from parole, and the Board's preliminary objection is sustained.

Accordingly, we sustain the Board's preliminary objections and dismiss Cibula's petition for review with prejudice.<sup>6</sup>

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P. KEVIN BROBSON, Judge

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<sup>6</sup> This Court has held that failure to comply with Pennsylvania Rule of Civil Procedure No. 1514(c), requiring service in person or by certified mail, is an amendable defect. *Awkakewakeyes*, 597 A.2d at 211; *Nat'l Solid Wastes Mgmt. Assoc. v. Casey*, 580 A.2d 893, 897 (Pa. Cmwlth. 1990), *aff'd*, 619 A.2d 1063 (Pa. 1993). Also, failure to comply with the verification requirement of Pa. R.C.P. No. 1024(a) is an amendable defect. *See Lewis v. Erie Ins. Exchange*, 421 A.2d 1214, 1217 (Pa. Super. 1980). "Except where an amendment is allowed as of course under Pa. R.C.P. No. 1028, or granted as of right under other provisions of the Rules of Civil Procedure, the . . . court has discretion of whether to allow amended pleadings" when sustaining preliminary objections. *Weaver v. Franklin Cnty.*, 918 A.2d 194, 203 (Pa. Cmwlth. 2007). While "[a]mendments are liberally permitted in order to allow full development of a party's theories and averments, . . . an amendment is properly refused where it appears amendment is futile." *Id.* Here, we have granted the Board's preliminary objections based upon Cibula's failure to state a claim, and Cibula has not presented or argued that additional facts exist that could support an action in mandamus. Thus, even if we were to grant Cibula leave to file and serve an amended petition for review in order to cure the deficiencies of lack of verification and improper service, amendment would still be futile.

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Pennsylvania Board of Probation	:	
and Parole,	:	
	:	
Respondent	:	

**ORDER**

AND NOW, this 10th day of April, 2015, the Pennsylvania Board of Probation and Parole’s preliminary objections are SUSTAINED, and Petitioner’s petition for review is dismissed with prejudice.

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P. KEVIN BROBSON, Judge