

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

C.N., L.B., and minor child B.K.L.N.;
J.A.R., E.G.M., and minor child J.G.;
M.N., P.M., and minor child H.M.N.;
M.C., G.S.C., and minor children
G.R.S.C. and N.B.T.; M.E.L., E.O.E., and
minor child J.O.E.,

No. 268 M.D. 2020

Petitioners,

v.

Pennsylvania Department of Human
Services,

Respondent

**PETITIONERS' RESPONSE IN OPPOSITION TO THE
APPLICATION TO INTERVENE ON BEHALF OF BERKS COUNTY**

INTRODUCTION

The County of Berks' ("Berks County" or "County") attempt to intervene in this action should be rejected by this Court. Petitioners are five asylum-seeking families who are detained at the Berks County Residential Center ("BCRC"). They are parents and children ages 1, 1, 2, 3, 5, and 11. They are detained at an unprecedented moment, a moment during the novel coronavirus pandemic. They have been foreclosed access to in person visitation and legal services and orientation. They remain detained in a building which threatens their health and safety. They seek to compel the Pennsylvania Department of Human Services

(“Department”) to use its mandatory powers to ensure their health and safety, to issue an emergency removal order, and to remove them from the BCRC. Like those who were held at the BCRC before them, each and every family detained at the BCRC has family within the United States who can receive them.

Berks County has no interest in keeping asylum seeking families and children in detention during a pandemic. The County has no interest in risking the safety of families and their children. Stores and schools and courts have shuttered in Berks County, as the COVID-19 pandemic has swelled there. The County’s position is counter to the very interests they are charged to protect and is shockingly based as a property interest. That position is misplaced, as removing the five families from the BCRC would not affect the continued operation of the facility – it would just secure the removal of five families, half of whom are infants and toddlers.

The County cannot meet the threshold requirements for intervention. The County could not have joined as an original party because this action is a petition in mandamus asking the Court to compel the Department to act. The County has no ability or jurisdiction to effectuate such an action. Further, the County has no legally enforceable interest because the State has revoked the County’s license, and the issuance of an emergency removal order will not negatively impact the County’s contract with Immigration and Customs Enforcement (“ICE”) nor will it,

in and of itself, impede the County's ability to retain its staff. Moreover, the County's interests are adequately represented by the Department, which is vigorously opposing Petitioners' request for a Writ of Mandamus. Finally, by seeking to intervene, the County will unduly delay the adjudication of the rights of the Petitioners, who are detained asylum-seeking families seeking an expedited hearing based on the urgency created by the pandemic.

ARGUMENT

I. The County's Application to Intervene should be denied.

A. The County could not have been joined as a party in this action.

Berks County says it should be allowed to intervene because it could have been joined as a party in this action. Pa. R.C.P. 2327(3); *id.* at 46. This is false. This action is a petition in mandamus asking the Court to compel the Department to act. Berks County is nowhere involved. Furthermore, even if the County of Berks met the bases for intervention under Rule 2327, its Application to Intervene should be refused under Rule 2329. *Larock v. Sugarloaf Tp. Zoning Hearing Bd.*, 740 A.2d 308, 313 (Pa. Cmwlth. 1999). Its interest is already adequately represented by the Department, and the County's intervention would unduly delay the adjudication of the parties' rights.

B. The County's interest is already adequately represented by the Department.

The interest of the County is already adequately represented in this action. Pa. R.C.P. 2329(2). The County claims that it has “a direct, immediate, and substantial interest in this litigation because its interests in the Stipulations, its operations, and Intergovernmental Service Agreement (IGSA) will not be adequately represented by Department, whose interests are not wholly aligned with the County as evidenced by the past four years of litigation between the parties.” *Id.* at ¶ 41. But the interests of the Department and Berks County are aligned. The Department has entered into yearly stipulations allowing BCRC to continue to operate, even though the Department revoked BCRC's license for noncompliance. *See J.S.C. et al. v. Pa. Dep't of Human Services*, No. 678 M.D. 2019 (Pa. Cmwlth 2019) (in which the Department even argues for the County's due process rights). Rather than utilizing a neutral party, the Department allows the BCRC Director to facilitate its remote “inspection.” Most importantly, the Department has refused to issue an emergency removal order in the instant case, instead alleging that Berks County is providing an adequate standard of care. Indeed, the Department's Answer to Petitioners' Petition for Issuance of a Writ of Mandamus argues against the issuance of the emergency removal order, the same result desired by the County. This synergy was further reinforced by the Department's No Answer

response to Berks County's Application to Intervene. Clearly, the Department is adequately representing the County's interests.

B. The County does not have a property interest in the expired 2016-2017 license.

BCRC's 2016-2017 license expired on February 21, 2017. A property interest in a license generally extinguishes with the expiration of the license. *See, e.g., Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 578 (1972); *Lockhart v. Matthew*, 83 F. App'x 498, 500–501 (3d Cir. 2003); *Repogle v. Pa. Liquor Control Bd.*, 506 A.2d 499, 500 (Pa. Cmwlth. 1986), *aff'd*, 514 Pa. 209 (1987).

In *Repogle*, the court determined that the license holder did not have a property interest in his liquor license because such licenses are issued annually where the board “may decline to renew for a number of reasons.” 506 A.2d at 500. Despite the license holder's past record of seemingly automatic renewals, the court declined to find a property interest in his renewal given the state's system of requiring tavern owners to obtain one-year liquor licenses. *Id.* at 501.

Any property interest that BCRC has in its 2016-2017 license has now expired. Pennsylvania law explicitly states that “all licenses issued by the department under this act shall expire one year next following the day on which issued.” 62 P.S. § 1009. By submitting applications for subsequent years, BCRC itself recognized that once its 2016-2017 license expired, it could no longer continue to operate without a new Department-issued license.

A limited exception does exist for licenses that are automatically renewable. *See, e.g., Nicoletti v. State Bd. of Vehicle Mfrs., Dealers & Salespersons*, 706 A.2d 891, 893–94 (Pa. Cmwlth. 1998). In contrast, BCRC’s 2016-2017 license is not automatically renewable. Pennsylvania law confirms that such licenses for child residential facilities are valid for only one year and that subsequent licenses require a brand-new application. 62 P.S. § 1009; 55 Pa. Code § 20.22. Further, a license will only be issued if the Department determines that the qualifications for the certificate are met after inspection by an authorized agent. 55 Pa. Code § 20.51. As the Department must scrutinize BCRC’s operations each time it applies for a license, BCRC does not have a property interest in its renewal of the license.

Regardless, a facility’s private interest in a license pales in comparison to the health, safety, and well-being of residents. *See, e.g., Saucon Valley Manor*, 2019 U.S. Dist. LEXIS 94969, at *36 (finding the protection of personal care residents to be more important than the license holder’s revenue stream).

C. Any purported property interests of the County would not be adversely affected.

The County says it should be allowed to intervene because “the determination of such action may affect any legally enforceable interest of such person whether or not such person may be bound by a judgment in the action.” The County asserts it must intervene “to protect its legally enforceable interests in its

license, operability, and the ISGA which may be adversely affected by Petitioner’s requested relief as described herein.” *Id.* at ¶ 61. It then claims that it should be permitted to intervene “[b]ecause Petitioners are seeking declaratory and injunctive relief that will materially and negatively impact the County, whose operations at the BCRC would be wholly upended, including the potential loss of 61 jobs” *Id.* at ¶ 62. This claim fails on multiple fronts. Petitioners are not seeking declaratory or injunctive relief, but a writ of mandamus. Their requested relief would not “wholly upend[]” the County’s operations at BCRC or lead to the loss of 61 jobs. Upon information and belief, staffing at BCRC has become greatly reduced during the COVID-19 pandemic. This is consistent with the staffing fluctuations based on the ebb and flow in the number of detainees over the facility’s history and the County’s own response to the COVID-19 pandemic. If the Court compels the Department to issue an emergency removal order based on the urgency of this moment and the risk to Petitioners’ life and health, that order *also protects County staff*. Petitioners are not requesting relief beyond this, and the County makes misrepresentations to this Court in stating otherwise. In seeking to intervene, the County is saying, essentially, that its business interests in a facility from which it is unable to profit is more valuable than the lives of the County employees or the detained parents and children in their daily care.

D. The County’s intervention will unduly delay the adjudication of the rights of the parties.

The County’s application should be denied because its intervention would unduly delay, embarrass or prejudice the trial or the adjudication of the rights of the parties. Pa. R.C.P. 2329(3). Here, the Petition is being heard by this Court on an expedited basis. The Supreme Court also recognized the urgency and potential irreparable harm to Petitioners. *See C.N. et al. v. Pa. Dep’t of Human Services*, No. 76 MM 2020 (instructing that if Petitioners filed an action in Commonwealth Court, the court should set an expedited schedule “and shall move expeditiously to resolve the matter so as to prevent further potential harm to Petitioners”). In this situation, undue delay comes with inherent risks. Each day that passes there are more COVID-19 infections and deaths in Berks County and in Pennsylvania ICE detention centers. BCRC staffers come and go from both of those places, increasing the risk to Petitioners.

In addition, the County failed to attach proposed pleading to its Application pursuant to Pennsylvania Rule of Civil Procedure 2328(a) (“The petitioner shall attach to the petition a copy of any pleading which the petitioner will file in the action if permitted to intervene or shall state in the petition that the petitioner adopts by reference in whole or in part certain named pleadings or parts of pleadings already filed in the action.”). The County has not done so. Given the urgency of the matter, allowing the County additional time to submit what should

have been submitted with its application will cause additional undue delay in the adjudication of the rights of Petitioners in violation of Pa. R.Civ.P. Rule 2329(3).

CONCLUSION

For the foregoing reasons, Berks County's Application to Intervene should be denied.

Dated: April 29, 2020

Respectfully submitted,



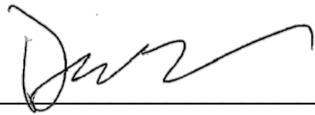
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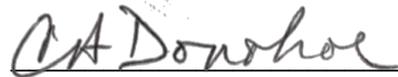


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