

[Cite as *State ex rel. Shepherd v. Croft*, 2010-Ohio-258.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Charles Shepherd, :
Relator, :
v. : No. 09AP-621
Gary Croft, Office of the Chief Inspector : (REGULAR CALENDAR)
of Ohio Department of Rehabilitation and :
Correction et al., :
Respondents. :

D E C I S I O N

Rendered on January 28, 2010

Charles Shepherd, pro se.

Richard Cordray, Attorney General, and Lawrence H. Babich, for respondents.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

FRENCH, J.

{¶1} Relator, Charles Shepherd ("relator"), an inmate, has filed an original action requesting this court to issue a writ of mandamus ordering respondents, Gary Croft ("Croft"), Chief Inspector for the Ohio Department of Rehabilitation and Correction, and Kim Frederick ("Frederick"), Inspector of Institutional Services for Trumbull Correctional Institution, to respond to his grievances within deadlines set forth in the

Ohio Administrative Code. Relator also asks this court to certify a class action. Respondents opposed the request for mandamus relief and class action certification and moved for summary judgment.

{¶2} This court referred the matter to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision, which includes findings of fact and conclusions of law and is appended to this decision, recommending that this court grant respondents' motion for summary judgment and deny relator's request for mandamus relief and class action certification. Relator objects, and we overrule his objections for the following reasons.

{¶3} In order to be entitled to a writ of mandamus, a relator has the burden of demonstrating that (1) he has a clear legal right to the relief requested, (2) the respondent is under a clear legal duty to perform the act requested, and (3) the relator has no plain and adequate remedy at law. *State ex rel. Fain v. Summit Cty. Adult Probation Dept.*, 71 Ohio St.3d 658, 1995-Ohio-149. We examine these factors in light of respondents' summary judgment motion, which, pursuant to Civ.R. 56(C), shall be granted if the record establishes that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Summary judgment is appropriate only under the following circumstances: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the non-moving party, reasonable minds can come to but one conclusion, that conclusion being adverse to the non-moving party. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66.

{¶4} Ohio Adm.Code 5120-9-31 sets deadlines for prison officials to respond to grievances and has a procedure for extending those deadlines. Ohio Adm.Code 5120-9-04(F)(1) requires an inspector of institutional services to "promptly interview" an inmate who filed a grievance. The magistrate concluded that these regulations do not give relator a clear legal right to relief. She relied on *State ex rel. Larkins v. Wilkinson*, 79 Ohio St.3d 477, 479, 1997-Ohio-139, which indicated that prison procedural regulations are primarily designed to guide correctional officials in prison administration, rather than to confer rights on inmates. Relator argues that the magistrate improperly relied on *Larkins* because it does not contain a syllabus. See *Masheter v. Kebe* (1976), 49 Ohio St.2d 148, 150, citing *Williamson Heater Co. v. Radich* (1934), 128 Ohio St. 124 (stating that "[t]he syllabus of a decision of this court states the law"). *Larkins* is a per curiam opinion, which also "represents a pronouncement of the law." *Kebe* at 150, citing *State ex rel. Canada v. Phillips* (1958), 168 Ohio St. 191. Thus, this court is bound by per curiam opinions of the Supreme Court of Ohio. See *Demetry v. Kim* (1991), 74 Ohio App.3d 180, 184.

{¶5} Relator attempts to distinguish *Larkins* because the prisoner in that case alleged that a prison official violated his constitutional rights. Although relator does not allege a constitutional claim, this distinction is immaterial, given that the inmate in *Larkins* and relator both complain about prison officials violating administrative regulations. In fact, in *State ex rel. Wickensimer v. Bartleson*, 6th Dist. No. L-09-1049, 2009-Ohio-6982, ¶24, the court relied on *Larkins* to deny a relator's request for a writ of mandamus to order prison officials to timely answer his grievances. Using language in *Larkins*, the court said that the Ohio Administrative Code deadlines for responding to

prison grievances are "primarily designed to guide correctional officials in prison administration, rather than to confer rights on inmates." *Bartleson* at ¶24. Therefore, according to the court, the relator did not have a legal right to compel prison officials to address his grievances "in accordance with procedural guidelines." *Id.*

{¶6} Nevertheless, relator argues that he is entitled to mandamus relief under *State ex rel. McMaster Carr Supply Co. v. Indus. Comm.*, 10th Dist. No. 08AP-825, 2009-Ohio-4832, which was a mandamus action relying on administrative regulations pertaining to workers' compensation, but *McMaster* is inapplicable because it does not involve prison regulations. Relator also relies on *State ex rel. Husted v. Brunner*, 123 Ohio St.3d 119, 2009-Ohio-4805, ¶17, which held that a writ of mandamus is available to compel a public officer to perform duties imposed upon him by law. *Husted* is inapplicable because relator has failed to demonstrate a clear legal right to prison officials responding to his grievances within deadlines set forth in the Ohio Administrative Code.

{¶7} Next, relator challenges the magistrate's conclusion that the mootness doctrine precludes mandamus relief because respondents have performed the acts that he seeks to compel. Generally, a writ of mandamus will be denied when the relator's issues become moot. *State ex rel. The Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 518, 1997-Ohio-75. See also *State ex rel. Smith v. Fuerst*, 89 Ohio St.3d 456, 457, 2000-Ohio-218 (holding that a court will not issue a writ of mandamus to compel an act that has already been performed). Relator contends the mootness doctrine does not apply because he raises issues capable of repetition yet evading review, but we

need not reach this issue because his request for a writ also fails for want of clear legal right to relief. Therefore, we hold that relator is not entitled to a writ of mandamus.

{¶8} Relator additionally challenges the magistrate's decision not to certify a class action on behalf of all present and future inmates with prison grievances. Two requirements for class action certification are that there are questions of law or fact common to the class, and the claims or defenses of the representative parties are typical of the claims or defenses of the class. Civ.R. 23(A). The magistrate concluded that these circumstances do not exist in relator's case because not all inmate grievances would be similar to his, and different inmates would face different deadline issues due to the variety among grievances. Relator correctly notes that the magistrate only tied this analysis to his grievance to Croft, but we conclude that the analysis equally applies to his separate grievance to Frederick. Relator further argues that, in contravention of *Hill v. Moneytree of Ohio, Inc.*, 9th Dist. No. 08CA009410, 2009-Ohio-4614, ¶11, the magistrate improperly considered the merits of his case when deciding whether to certify the class action. Relator does not specify how the magistrate considered these merits when deciding the class action issue. We conclude that she did not do this; rather, she evaluated the lack of commonality among the proposed class pursuant to Civ.R. 23(A). And, relator, a pro se inmate unsuccessful in procuring appointed counsel, would not be an individual who would fairly and adequately protect the interest of the class as Civ.R. 23(A) also requires. See *Hurst v. Dept. of Rehab. & Corr.* (Jan. 21, 1993), 10th Dist. No. 92AP-666. Accordingly, we decline to certify a class action in this case.

{¶9} Relator objects to the magistrate's finding of fact that he untimely filed a motion to set aside her initial August 3, 2009 order denying class action certification. This motion is due "not later than ten days after the magistrate's order is filed." Civ.R. 53(D)(2)(b). To be sure, relator filed the set aside motion on August 13, 2009, within the deadline. In any event, the finding of fact caused no prejudice to relator because this court has concluded that class action certification is not warranted under Civ.R. 23(A).

{¶10} Lastly, relator accompanied his objections with a motion to set aside the magistrate's denial of his previous motions to set aside her intermediate orders. Relator argues that the magistrate's decisions are invalid because a judicial panel was required to rule on the set aside motions. We deny relator's motion as moot, however, and we decline to address the propriety of the magistrate's conduct, because relator is now getting the benefit of a judicial panel reviewing his case.

{¶11} In conclusion, we deny relator's motion to set aside the magistrate's intermediate orders. Having conducted an independent review of the record, we overrule his objections to the magistrate's final decision. Consequently, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law, in conformity with our amplification, and we grant respondents' motion for summary judgment and deny relator's request for a writ of mandamus and class action certification.

*Objections overruled, writ of mandamus
and class action certification denied.*

BROWN and CONNOR, JJ., concur.

A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Charles Shepherd, :

Relator, :

v. : No. 09AP-621

Gary Croft, Office of the Chief Inspector : (REGULAR CALENDAR)
of Ohio Department of Rehabilitation and
Correction and Kim Frederick, Inspector of :
Institutional Services, Trumbull
Correctional Institution, :

Respondents. :

M A G I S T R A T E ' S D E C I S I O N

Rendered on September 25, 2009

Charles Shepherd, pro se.

Richard Cordray, Attorney General, and Lawrence H. Babich, for respondents.

IN MANDAMUS
ON MOTION FOR SUMMARY JUDGMENT

{¶12} Relator, Charles Shepherd, has filed this original action requesting that this court issue a writ of mandamus ordering respondents Gary Croft ("Croft"), Chief Inspector for the Ohio Department of Rehabilitation and Correction, and Kim Frederick

("Frederick"), Inspector of Institutional Services for Trumbull Correctional Institution, to respond to grievances filed by relator.

Findings of Fact:

{¶13} 1. Relator is an inmate currently incarcerated at Trumbull Correctional Institution ("TCI").

{¶14} 2. In his complaint, relator alleges that, on April 2, 2009, he sent a copy of an informal complaint resolution to Frederick. Relator attached said document as exhibit A.

{¶15} 3. Exhibit A is an informal complaint resolution wherein relator alleged that Correction Officer Williams used abusive language with him.

{¶16} 4. Relator also alleges that on April 20, 2009, he filed a notification of grievance with Croft against Frederick for her failure to respond to his informal complaint resolution. Relator attached said document as exhibit B.

{¶17} 5. Upon review of exhibit B, it is noted that relator had filed a complaint against TCI Inspector Frederick and he sent his informal complaint resolution to "Captain Miller." Relator also alleged that Frederick informed him that she would speak with him by April 10, 2009.

{¶18} 6. On April 30, 2009, Croft acknowledged that the grievance against Frederick had been received and indicated that the matter would be investigated and reviewed within 30 calendar days.

{¶19} 7. Because his grievances had yet to be addressed, relator filed the instant mandamus action in this court to compel respondents to respond.

{¶20} 8. In his complaint, relator requested that this matter be certified as a class action on grounds that respondents habitually refuse to address inmate grievances in a timely manner.

{¶21} 9. Relator's request to certify this matter as a class action was denied.

{¶22} 10. Relator attempted to seek review of the magistrate's order denying class certification to the court. Because that request was untimely, it was denied.

{¶23} 11. On August 21, 2009, respondents filed a motion for summary judgment. The affidavit of Croft accompanied the motion. Croft authenticated documents which were also attached to the motion for summary judgment. Those documents included: relator's informal complaint resolution; a response to that informal complaint resolution indicating that it would be passed to the office this week; relator's notification of grievance; the April 30, 2009 response from Croft informing relator that the grievance was received on February 20, 2009 and would be investigated and reviewed within 30 calendar days; a May 21, 2009 response from Croft advising relator that additional time was required before a decision could be made concerning his grievance; and Croft's response to his notification of grievance.

{¶24} 12. The August 18, 2009 decision of Croft on relator's grievance provides:

In your complaint you state that on 4/2/09 you sent an informal complaint to Captain Miller regarding Officer Williams. You state that the inspector told you that she would investigate and talk to you by 4/10/09 and she did not do so.

Upon my review and communication with Inspector Frederick, I find that she informed you that a notice had been sent to Captain Miller requesting that your informal complaint be responded to and she would also send you a pass to her office. Inspector Frederick states that you informed her that you did not wish to file a complaint as of yet. Inspector Frederick states that she informed you that when problems

arise, she needed you to document them and not wait to compile several issues into one complaint. Inspector Frederick states that she told you that she would monitor the officer's actions and you should notify her if you had any problems in the future.

Upon my review of the grievance log at TCI, I find that you did not file a grievance with the inspector as you certainly had the opportunity to do so at that time.

Administrative Rule 5120-9-31, Inmate Grievance Procedure, states in part that grievances in which the Warden or Inspector of Institutional Services has been made a party must show that the Warden or Inspector of Institutional Services was personally and knowingly involved in a violation of law, rule, or policy and approved it or did nothing to prevent it. You have failed to clearly indicate how Inspector Frederick was personally and knowingly involved in a violation of law, rule, or policy and approved it or did nothing to prevent it.

Accordingly this grievance is DENIED. This office will take no further action on this matter at this time.

(Emphasis sic.)

{¶25} 13. Relator has filed a response to respondents' motion for summary judgment asking this court to stay further action on respondents' motion for summary judgment until such time as relator can pursue an appeal of the denial of his request to certify his action as a class action to the Supreme Court of Ohio. That motion was denied.

{¶26} 14. The matter is before this court upon respondents' motion for summary judgment.

Conclusions of Law:

{¶27} The Supreme Court of Ohio has set forth three requirements which must be met in establishing a right to a writ of mandamus: (1) that relator has a clear legal right to the relief prayed for; (2) that respondent is under a clear legal duty to perform

the act requested; and (3) that relator has no plain and adequate remedy in the ordinary course of the law. *State ex rel. Berger v. McMonagle* (1983), 6 Ohio St.3d 28.

{¶28} A motion for summary judgment requires the moving party to set forth the legal and factual basis supporting the motion. To do so, the moving party must identify portions of the record which demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280. Accordingly, any party moving for summary judgment must satisfy a three-prong inquiry showing: (1) that there is no genuine issue as to any material facts; (2) that the parties are entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, which conclusion is adverse to the party against whom the motion for summary judgment is made. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64.

{¶29} For the reasons that follow, it is this magistrate's conclusion that this court should grant summary judgment in favor of respondents.

{¶30} First, because it is clear that respondents have now performed the acts which relator sought to compel by filing this mandamus action, relator's request is now moot and summary judgment in favor of respondents is appropriate.

{¶31} Second, relator argues that the Ohio Administrative Code provides him with a clear legal right to have his grievances responded to within a certain period of time. This magistrate disagrees.

{¶32} Respondents have cited *Parrett v. Harrison* (C.A.6, 1998), 172 F.3d 49, wherein the *Parrett* court stated that there is no inherent constitutional right to an effective prison grievance procedure. Further, the Supreme Court of Ohio has stated that state regulatory schemes do not create a constitutionally protected liberty interest

simply because the regulations incorporate what appears to be mandatory language. *State ex rel. Larkins v. Wilkinson* (1997), 79 Ohio St.3d 477. The court indicated that prison regulations "are primarily designed to guide correctional officials in prison administration rather than to confer rights on inmates." *Id.* at 479.

{¶33} As such, relator does not have a clear legal right to the relief he requests.

{¶34} Further, while relator asserts that his action should have been certified as a class action because the issue he presented is capable of repetition yet evading review, this magistrate disagrees. Based upon the affidavit of Croft, the chief inspector personally investigates and responds to approximately 450 to 500 direct grievances each year from inmates. Those grievances are prioritized and investigated based, in part, upon the severity of the complaint. He stated further that, in some instances, responses may be delayed for 90 to 180 days and that inmates are notified when a delay is needed in order to make a fair resolution.

{¶35} In the present case, relator's grievance involved his assertions that a correctional officer used abusive language towards him. Obviously, not all inmate grievances would be of this or a similar nature and, as such, it is impossible to mandate a certain time frame in which respondent will be required to respond to grievances in the future. As such, certifying this action as a class action would have been inappropriate.

{¶36} Based on the foregoing, it is this magistrate's conclusion that respondent has performed the act which relator sought to compel and that summary judgment in favor of respondents should be granted.

/s/ Stephanie Bisca Brooks
STEPHANIE BISCA BROOKS
MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).