

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Steven S. Brown,	:	
Relator,	:	
v.	:	No. 10AP-332
Ohio Department of Rehabilitation and Correction,	:	(REGULAR CALENDAR)
Respondent.	:	
	:	

D E C I S I O N

Rendered on October 20, 2011

Steven S. Brown, pro se.

Michael DeWine, Attorney General, and *Jason Fuller*, for respondent.

IN MANDAMUS
ON OBJECTIONS TO MAGISTRATE'S DECISION

BRYANT, P.J.

{¶1} Relator, Steven S. Brown, commenced this original action requesting a writ of mandamus that not only orders respondent, Ohio Department of Rehabilitation and Correction, to send him certain documents he requested under Ohio's public records statute, but also awards him damages.

I. Facts and Procedural History

{¶2} Pursuant to Civ.R. 53 and Section (M), Loc.R. 12 of the Tenth Appellate District, this matter was referred to a magistrate who issued a decision, appended here, including findings of fact and conclusions of law. After denying the parties' cross-motions for summary judgment, the magistrate determined respondent replied to relator's public records request in a timely fashion. Moreover, the magistrate further noted relator failed to comply with the terms of R.C. 2969.25(C). Accordingly, the magistrate determined (1) relator is not entitled to a writ of mandamus, and (2) the action properly may be dismissed for relator's failure to comply with the mandatory provisions of R.C. 2969.25.

II. Disposition

{¶3} Relator's case suffers at least two fatal deficiencies.

A. R.C. 2969.25

{¶4} R.C. 2969.25(A) specifies that "[a]t the time an inmate commences a civil action or appeal against a government entity or employee, the inmate shall file with the court an affidavit" describing "each civil action or appeal of a civil action that the inmate has filed in the previous five years in any state or federal court." R.C. 2969.25(C) provides that "[i]f an inmate who files a civil action * * * against a government entity or employee seeks a waiver of the prepayment of the full filing fees assessed by the court in which the action or appeal is filed," then "the inmate shall file with the complaint * * * an affidavit that the inmate is seeking a waiver of the prepayment of the court's full filing fees and an affidavit of indigency." The affidavit of waiver and indigency must contain a statement setting forth (1) the balance in the inmate's account "for each of the preceding six months,

as certified by the institutional cashier," and (2) "all other cash and things of value owned by the inmate at that time."

{¶5} When relator filed his complaint, he also filed an "Affidavit of Prior Action," to which relator swore before a notary public. The affidavit lists by name and case number the actions relator filed against governmental entities or employees in federal or state court and states the outcome, though its description of the cases is minimal. The affidavit may comport minimally with the statutory requirements of R.C. 2969.25.

{¶6} Relator's affidavit of indigency does not. Relator's affidavit of indigency, though ultimately inadequate, satisfies a portion of R.C. 2969.25(C) in that he avers he has no means of financial support and no assets of value. R.C. 2969.25(C)(1), however, also requires that the affidavit include a statement setting forth the balance in the inmate's account for each of the preceding six months, along with the institutional cashier's certification of the statement. Relator's filings failed to include the necessary statement of his account and the cashier's certification.

{¶7} The Supreme Court of Ohio stated "[i]t is well settled that ' "[t]he requirements of R.C. 2969.25 are mandatory, and failure to comply with them subjects an inmate's action to dismissal." ' "*State ex rel. Manns v. Henson*, 119 Ohio St.3d 348, 2008-Ohio-4478, ¶4, quoting *State ex rel. Ridenour v. Brunsman*, 117 Ohio St.3d 260, 2008-Ohio-854, ¶5, quoting *State ex rel. White v. Bechtel*, 99 Ohio St.3d 11, 2003-Ohio-2262, ¶5. Even an attempt to later correct the deficiencies with the documents necessary to satisfy R.C. 2969.25(C) fails, documents must be filed at the time the complaint is filed. *Brown v. Ohio Adult Parole Auth.*, 10th Dist. No. 09AP-797, 2010-Ohio-872, ¶11.

Relator's failure to comply fully with the requirements of R.C. 2969.25 when he filed his complaint subjects his complaint to dismissal.

{¶8} Relying on *State ex rel. Holloman v. Collins*, 10th Dist. No. 09AP-1184, 2010-Ohio-3034, relator suggests this court determined R.C. 2969.25 does not apply to actions under R.C. 149.43. Contrary to relator's contentions, *Holloman* did not address the issue. The magistrate's decision determined Holloman complied with the requirements of R.C. 2969.25, so the magistrate determined dismissal was unwarranted. The court adopted the magistrate's decision and thus never reached the issue of whether a failure to comply with R.C. 2969.25 warrants dismissal in an action initiated pursuant to R.C.149.43. Moreover, relator points to no statutory provision excepting him from the requirements of R.C. 2969.25 in this action. Indeed, authority indicates to the contrary. See *State v. Norman*, 2d Dist. No. 23106, 2009-Ohio-165 and *Watson v. Foley*, 2d Dist. No. CA 20970, 2005-Ohio-2761.

{¶9} Accordingly, we dismiss relator's complaint for failure to comply with the mandatory provisions of R.C. 2969.25.

B. Objections

{¶10} Even if we were to consider the merits of relator's complaint, we would not grant the relief he seeks. Relator sought an extension of time to file objections to the magistrate's decision, and this court granted his motion to the extent that any objections be filed no later than July 29, 2011. Relator sought a further extension, which this court denied. Relator nonetheless attempted to file untimely objections to the magistrate's decision on September 6, 2011, which we strike pursuant to respondent's motion. If no objections are timely filed, the court may adopt the magistrate's decision unless it

determines an error of law or other defect is evident from the face of the decision. Civ.R. 53(D)(4)(c). Because this magistrate's decision reflects no error of law or other defect evident on the face of the decision, we would not grant the requested relief.

{¶11} Accordingly, we dismiss relator's action for failure to comply with the requirements of R.C. 2969.25(C).

*Motion to strike granted;
action dismissed.*

FRENCH and DORRIAN, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Steven S. Brown,	:	
	:	
Relator,	:	
	:	
v.	:	No. 10AP-332
	:	
Ohio Department of Rehabilitation and Correction,	:	(REGULAR CALENDAR)
	:	
Respondent.	:	
	:	

MAGISTRATE'S DECISION

Rendered on June 30, 2011

Steven S. Brown, pro se.

Michael DeWine, Attorney General, and Jason Fuller, for respondent.

IN MANDAMUS

{¶12} Relator, Steven S. Brown, has filed this original action requesting that this court issue a writ of mandamus ordering respondent, Ohio Department of Rehabilitation and Correction ("ODRC"), to send him certain records which he requested pursuant to Ohio's public records statute and relator also seeks an award for damages.

Findings of Fact:

{¶13} 1. Relator is an inmate currently incarcerated at Southern Ohio Correctional Institution in London, Ohio. On April 12, 2010, relator filed his complaint seeking a writ of mandamus in this court. Although relator did file an affidavit of indigency, relator did not include: (1) a statement of the amount in his inmate account for the preceding six months as certified by the institutional cashier, and (2) a statement of all other cash and things of value owned by the inmate.

{¶14} 2. Relator filed a motion for judgment on the pleadings and a motion for summary judgment. Respondent filed a memorandum contra to relator's motion and a motion for summary judgment.

{¶15} 3. On October 6, 2010, the magistrate issued an order denying all three motions and succinctly setting forth the evidence currently before the magistrate. That order provides as follows:

* * * On October 27, 2009, and mailed October 28, 2009, relator made a public records request seeking the following documents:

[One] Contract with Westlaw for access to the data base provided to prisoners.

[Two] Contract with O.S.U. for providing medical care to prisoners.

[Three] Contract with any Jewish Religious Provider at Lucasville.

[Four] Contract with Access Corp for providing catalogue [sic] services.

[Five] Contract with all telephone service providers.

Accordingly to the affidavit of Stephen Young, legal counsel for respondent, Ohio Department of Rehabilitation and Correction * * *, he received relator's public records request in November 2009 and made inquiry to determine whether any or all of the requested contracts existed.

On December 17, 2009, Young contacted Lisa Davis, Contract Administrator for ODRC, and asked her to determine the number of pages encompassing relator's requests.

That same day, Davis contacted Larry Greene, Warden's Public Records Designee at Southern Ohio Correctional Facility, and advised him to inform relator that his request was being processed and that he would receive a bill for the copying costs of the requested records.

Nothing in relator's affidavit contradicts the above statements made by Young expect that relator simply stated that "[t]he Director refused to provide the records."

As further stated in Young's affidavit, he contacted Greene on January 13, 2009 advising him that: (1) the requested Jewish religion contract did not exist; (2) the other contracts subject to disclosure were available to be copied; (3) the requested records comprised of "834 pages and that at five cents per page, the copying cost would be \$41.70"; and (4) the records would be forwarded to relator upon receipt of payment in the form of a check/state warrant payable to the Treasurer of the state of Ohio.

According to relator, he indicated that he was "willing to pay for the copies."

According to Young's affidavit:

* * * Sometime after January 13, 2009, Mr. Greene informed me that inmate Brown told him that he did not have the money to pay for the copying fee and he would get the records later. To date, inmate Brown has not submitted the fee for copying cost.

* * * All of the public records have been compiled at the Office of Contracts located at 770 West Broad Street, Columbus, Ohio. These records will be copied and released to inmate Brown upon receipt of the fee of \$41.70. Inmate

Brown has not altered his request in light of the cost of the copies, nor has inmate Brown identified any designee to review the records.

Nowhere in his complaint or affidavit does relator indicate that he has attempted to pay the costs of copying and mailing the documents to him. Instead, relator began filing grievances, at least one of which tangentially refers to the documents at issue. The majority of the grievances filed by relator involve his claims that: staff at ODRC is retaliating against him and refusing to help him resolve some discovery issues regarding an action he filed in Federal Court; certain property of his is missing, including two CDs related to the discovery; various forms of abuse including placement in maximum security, and the denial of medical care to cover up beatings; denial of medications for diabetes; destroying his legal papers and his typewriter; and refusing to provide him with a kosher diet.¹

On June 1, 2010, relator filed a "motion for judgment on the pleadings[,] motion for summary judgment." Relator asserts that ODRC has refused to process his public records requests for seven months and that delay is unreasonable.

On July 22, 2010, respondent filed a memorandum contra relator's motion for summary judgment and a cross-motion for summary judgment. Respondent attached thereto the affidavit of Stephen Young, the pertinent facts of which were above noted. Respondent asserts that the documents relator requested were made available to him in a timely fashion and that the reason relator does not have these documents yet is that he continues to refuse to pay for them.

Relator filed a response to respondent's motion for summary judgment asserting that respondent has not established that they presented him with a bill for the copies and that respondent's refusal to honor his subpoenas concerning evidence in other cases is further evidence of respondent's failure to respond to any of his requests.

* * *

¹ To the extent that relator's documents concerning his grievances and respondent's responses thereto which are not related to the underlying public records requests were not raised in his complaint and are not addressed in this decision.

A motion for judgment on the pleadings is not appropriate for the party who filed the complaint since, in order to grant same, the court would have to find that relator could prove each and every fact entitling him to relief. As such, relator's motion for judgment on the pleadings should be denied.

Both relator's and respondent's motions for summary judgment will be addressed together.

* * *

In reality, there are only two facts which are undisputed: (1) relator made a public records request, and (2) at this time, relator does not have the documents he requested. Respondent, through Young's affidavit and evidence filed, avers that the documents were prepared timely and, as soon as relator pays for those documents, the documents will be delivered to him. By contrast, in his affidavit, relator avers that he is willing to pay for the documents.

Finding that disputes over facts that might affect the outcome of this action remain in dispute, the granting of summary judgment in favor of either party is inappropriate. As such, both relator's and respondent's motions for summary judgment are denied and the matter will proceed and relator will have the burden of proving facts entitling him to relief. If he cannot, then his request will be denied.

{¶16} 4. The record contains an affidavit from Larry Greene, the Warden's Administrative Assistant at the Southern Ohio Correctional Facility who is also the Warden's Public Records Designee. According to Greene's affidavit, after Greene spoke with Young in December 2009, Greene advised relator that Young would be handling his records request and that once the records were compiled, a bill for the requested records would be forwarded to relator. Greene's affidavit provides further that Young advised him:

* * * [A] Jewish Religion provider contract did not exist, the new telephone contract, which would be effective February 2009, was not a public record and the provider did not grant

permission to make a copy, however, the current contract was available to be copied. I provided a copy of that email to inmate Brown.

* * * Stephen Young advised me that the records requested by Inmate Brown consisted on 834 pages and that the cost of copying those records would be \$41.70. I informed Inmate Brown of the cost and advised him to forward a check/state warrant in that amount, payable to the Treasure of the State of Ohio to Stephen Young and once the fee was received, the records would be sent to him.

* * * Inmate Brown indicated to me that he did not have the money to pay for the records request at that time and he would pay for the records later. * * *

{¶17} 5. Relator has also provided a statement which, although titled an affidavit, does not meet the requirements of the law.² Contrary to the affidavits of both Young and Greene, relator states that the first time he spoke with anyone about his public records request was in January 2010—six weeks after he made his request for the records. Relator also states that he never indicated that he would not pay the cost of copies. According to relator, ordinarily prisoners are first permitted to view the public records they request before they fill out a cash slip to pay for those copies. Relator also indicates that

² R.C. 2319.02 defines an affidavit as a written declaration under oath and in *State ex rel. Watley v. Ohio Adult Parole Auth.*, 10th Dist. No. 05AP-1195, 2006-Ohio-2745, ¶11, this court stated:

In *Toledo Bar Assn. v. Neller*, 102 Ohio St.3d 1234, 2004-Ohio-2895, at ¶1, the Ohio Supreme Court addressed the issue of whether unsworn written statements that are signed under penalty of perjury may be substituted for affidavits in Ohio. The court found "that the language in [26 U.S.C. 1746] indicates that Congress intended to change *federal* law but leave the states free to set their own policies concerning affidavits." (Emphasis sic.) Id. at ¶19. The court stated that both before and after the enactment of Section 1746, Title 28, U.S.Code, Ohio "has never recognized an exception to the statutory requirement that a valid affidavit must be a 'written declaration under oath.' " Id. at ¶21. The court held that because Ohio has never enacted a provision recognizing the legal validity of unsworn declarations made under penalty of perjury, a written statement containing a Section 1746, Title 28, U.S.Code declaration does not replace an affidavit in Ohio. Id. at ¶24.

he met with an assistant attorney general who offered to give him the records but refused to pay for the costs of relator's mandamus action.

{¶18} 6. The matter is currently before the magistrate for determination on the merits.

Conclusions of Law:

{¶19} For the reasons that follow, it is this magistrate's decision that this court should deny relator's request for a writ of mandamus and/or his mandamus action should be dismissed.

{¶20} 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.

{¶21} R.C. 149.43 requires that public records shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours. Further, upon request, a copy of requested public records shall be transmitted to any person requesting them within a reasonable period of time provided that the public office may require the person making the request to pay in advance for the cost(s). See R.C. 149.43(B)(1) and (7).

{¶22} In the event the public office does not promptly prepare the public records and make it available, the person requesting the records shall be entitled to recover the amount of statutory damages set forth in division (C)(1) of R.C. 149.43 up to a maximum

of \$1,000 if a court determines that the public office failed to comply with any obligation under R.C. 149.43(B).

{¶23} In the present case, relator contends that respondent did not promptly respond to his public records request. However, according to the affidavits in the record, Young received relator's public records request for various unrelated documents in November 2009 and began contacting staff at ODRC to determine whether any or all of the requested contracts existed. Thereafter, Young contacted Greene who, as previously indicated, is the Warden's Public Records Designee at the Southern Ohio Correctional Facility, and asked him to inform relator that Young was handling his request for records and would send him a bill for the copying costs. According to Greene's affidavit, he notified relator of that information and, as soon as all the documents were identified (834 pages), relator was informed of the cost of those documents. It is undisputed that relator has not paid for the documents and nowhere in relator's brief or other statements has he indicated that he has attempted to pay for those documents. Inasmuch as relator's statements have not been properly attested to in affidavit form, the magistrate finds that relator's evidence is not credible and instead relies on the affidavits of Young and Greene to find that the documents are available for relator to inspect as soon as relator pays for them.

{¶24} To the extent that relator argues that respondent did not promptly respond to his public records request, the magistrate finds that the record clearly establishes that several people were involved in efforts to determine which of the records relator requested were available, what records actually existed, whether or not those records or any portions thereof should not be released to relator and determining the number of

pages and the cost of copying those pages. Records can only be promptly prepared when the request is submitted to the proper agency. In the present case, relator's public records request was addressed to Director Collins, the former director of ODRC. Thereafter, Young, who is legal counsel for ODRC, received relator's public records request sometime in November 2009 (the exact date is not provided). After determining what documents were available, Young contacted Greene who thereafter notified relator of the state of his public records request. Further, as indicated in the findings of fact, relator has filed numerous grievances after he made his original public records request. To the extent that any of those grievances involved, even tangentially, his public records request, the record reveals that relator received prompt responses to those grievances. Further, pursuant to *State ex rel. Steckman v. Jackson* (1994), 70 Ohio St.3d 420, to the extent that relator desires to inspect the records before he decides to pay for them, relator is free to designate someone to inspect those records for him. Relator has not done so. Further, R.C. 149.43(B)(1) requires respondent to promptly prepare and make records available. The evidence here demonstrates that various individuals have worked diligently to prepare the documents relator requested and make them available.

{¶25} Based on the record, the magistrate finds that in this particular instance, respondents have responded to relator's public records request in a timely fashion and this court should deny relator's request for a writ of mandamus.

{¶26} There is an additional reason why relator's request for a writ of mandamus should be denied. As indicated in the findings of fact, relator failed to comply with R.C. 2969.25(C).

{¶27} Compliance with the provisions of R.C. 2969.25 is mandatory and the failure to satisfy the statutory requirements is grounds for dismissal of the action. *State ex rel. Washington v. Ohio Adult Parole Auth.* (1999), 87 Ohio St.3d 258; *State ex rel. Zanders v. Ohio Parole Bd.* (1998), 82 Ohio St.3d 421; *State ex rel. Alford v. Winters* (1997), 80 Ohio St.3d 285.

{¶28} Based on the foregoing, it is this magistrate's decision that this court should either dismiss relator's mandamus action for his failure to comply with R.C. 2969.25(C), or find that relator has not demonstrated that he is entitled to a writ of mandamus and deny his request for a writ of mandamus.

/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).