

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio, ex rel., Brian Wickensimer

Court of Appeals No. L-09-1049

Relator

v.

Bill Bartleson

DECISION AND JUDGMENT

Respondent

Decided: December 28, 2009

* * * * *

Brian Wickensimer, pro se.

Richard Cordray, Ohio Attorney General, and
Melissa Montgomery, Assistant Attorney General, for respondent.

* * * * *

HANDWORK, P.J.

{¶ 1} Relator, Brian Wickensimer, an inmate at the Toledo Correctional Institution, has filed a petition for a writ of mandamus against respondent, Bill Bartleson. In the petition, relator requests that the court issue a writ of mandamus, pursuant to R.C.

Chapter 2731, ordering respondent to answer relator's grievances that were filed in the Toledo Correctional Institution. Respondent has filed a motion to dismiss.

{¶ 2} Respondent states three reasons why relator's petition should be dismissed: (1) the petition fails to state a claim upon which relief can be granted; (2) the petition is moot, as relator has already received responses to his grievances; and (3) relator has failed to comply with R.C. 2969.25(A).

{¶ 3} To establish the right to a writ of mandamus, a relator must demonstrate: (1) a clear legal right to the relief prayed for; (2) that the respondent is under a clear legal duty to perform the requested act; and (3) that the relator has no plain and adequate remedy in the ordinary course of the law. *State ex rel. Karmasu v. Tate* (1992), 83 Ohio App.3d 199, 202. A failure to show any of these factors will cause the petition to be denied. *Id.*

{¶ 4} Here, respondent seeks to have relator's petition dismissed for failure to state a claim upon which relief could be granted, pursuant to Civ.R. 12(B)(6). A petition in mandamus will be found to state a claim, for purposes of Civ.R. 12(B)(6), as long as it alleges the existence of a legal duty and the want of an adequate remedy at law. *State ex rel. Bush v. Spurlock* (1989), 42 Ohio St.3d 77, 80. A trial court determining whether a mandamus petition sets forth a cognizable claim must presume all factual allegations of the petition are true and make all reasonable inferences in favor of the nonmoving party. *Karmasu*, *supra*, at 202. Dismissal is proper only where it appears beyond doubt that the

relator can prove no set of facts in support of his claim that would merit the granting of relief. Id.

{¶ 5} Relator argues that he has a clear legal right to have his grievances addressed pursuant to Ohio Admin. Code 5120-9-31. Specifically, relator complains:

{¶ 6} "In the instant case, Respondent has constantly failed to meet [his] clear legal duties set forth in Administrative rules on eight (8) occasions related below:

{¶ 7} "1. On December 12, 2008, Relator filed NOG [Notification of Greivance]. * * * The Inspector of Institutional Services has failed to provide an [sic] disposition of this grievance. Respondent is egregiously past the time requirements provided for in AR 5120-9-31.

{¶ 8} "2. On June 15, 2009, relator filed seven (7) NOGs * * *. The Inspector of Institutional services is beyond the time-frame established by AR 5120-9-31.

{¶ 9} "3. On July 23, 2009, Relator filed an NOG * * *. The Inspector of Institutional Services is beyond the time-frame established by AR 5120-9-31.

{¶ 10} "In summary, Respondent has failed to provide disposition on eight (8) grievances filed by Relator * * *, contrary to the mandatory language set forth in AR 5120-9-31(K)(2). In all instances, Respondent has a clear, legal duty as set forth in mandatory language."

{¶ 11} Ohio Adm.Code 5120-9-31, captioned "The inmate grievance procedure," relevantly provides:

{¶ 12} "(A) The department of rehabilitation and correction shall provide inmates with access to an inmate grievance procedure. This procedure is designed to address inmate complaints related to any aspect of institutional life that directly and personally affects the grievant. This may include complaints regarding policies, procedures, conditions of confinement, or the actions of institutional staff.

{¶ 13} "(K) The inmate grievance procedure shall be comprised of three consecutive steps fully described below. * * *

{¶ 14} "(1) The filing of an informal complaint - step one:

{¶ 15} "Within fourteen calendar days of the date of the event giving rise to the complaint, the inmate shall file an informal complaint to the direct supervisor of the staff member, or department most directly responsible for the particular subject matter of the complaint. *Staff shall respond in writing within seven calendar days of receipt of the informal complaint.* If the inmate has not received a written response from the staff member within a reasonable time, the inmate should immediately contact the inspector of institutional services * * *. The inspector of institutional services shall take prompt action to ensure that a written response is provided to the informal complaint within four calendar days. *If a response is not provided by the end of the fourth day, the informal complaint step is automatically waived.* * * *

{¶ 16} "(2) The filing of the notification of grievance - step two:

{¶ 17} "If the inmate is dissatisfied with the informal complaint response, or the informal complaint process has been waived, the inmate may obtain a notification of grievance form from the inspector of institutional services. All inmate grievances must be filed by the inmate no later than fourteen calendar days from the date of the informal complaint response or waiver of the informal complaint step. The inspector of institutional services may also waive the timeframe for the filing of the notification of grievance, for good cause. *The inspector of institutional services shall provide a written response to the grievance within fourteen calendar days of receipt.* * * * The inspector of institutional services may extend the time in which to respond, for good cause, with notice to the inmate. The chief inspector or designee shall be notified of all extensions. Any extension exceeding twenty-eight calendar days from the date the response was due must be approved by the chief inspector or designee. * * *

{¶ 18} "(3) The filing of an appeal of the disposition of grievance - step three:

{¶ 19} "If the inmate is dissatisfied with the disposition of grievance, the inmate may request an appeal form from the inspector of institutional services. The appeal must then be filed to the office of the chief inspector within fourteen calendar days of the date of the disposition of grievance. For good cause the chief inspector or designee(s) may waive such time limits. *The chief inspector or designee(s) shall provide a written response within thirty calendar days of receipt of the appeal.* The chief inspector or

designee(s) may extend the time in which to respond for good cause, with notice to the inmate. The decision of the chief inspector or designee is final. * * *

{¶ 20} " * * *

{¶ 21} "(M) *Grievances against the warden or inspector of institutional services must be filed directly to the office of the chief inspector within thirty calendar days of the event giving rise to the complaint. Such grievances must show that the warden or inspector of institutional services was personally and knowingly involved in a violation of law, rule or policy, or personally and knowingly approved or condoned such a violation. The chief inspector or designee(s) shall respond in writing within thirty calendar days of receipt of the grievance. The chief inspector or designee(s) may extend the time in which to respond for good cause, with notice to the inmate. The decision of the chief inspector or designee is final.*" (Emphasis added.)

{¶ 22} Respondent points to the fact that Ohio Adm.Code uses the word "shall" when it directs representatives from the Department of Rehabilitation and Correction when and how to issue responses to inmate grievances. Although the word "shall" is generally construed as a command, as a mandatory act, *Dept. of Liquor Control v. Sons of Italy Lodge 0917* (1992), 65 Ohio St.3d 532, 534, it has been held that "seemingly mandatory time limitations 'imposed merely with a view to the prompt and orderly conduct of business, are directory and not mandatory.'" *State ex rel. Larkins v. Wilkinson*

(1997), 79 Ohio St.3d 477, 479, quoting *State ex rel. Smith v. Barnell* (1924), 109 Ohio St. 246, 258.

{¶ 23} In *Larkins*, the Supreme Court of Ohio considered the meaning of the word "shall" in connection with Ohio Adm.Code 5120-9-09(M), which provision deals with the procedure for Class II institutional rule violations. There, the court held that "[p]rison regulations like Ohio Adm.Code 5120-9-09 are primarily designed to guide correctional officials in prison administration rather than to confer rights on inmates." *Id.* at 479. The court additionally noted that Ohio Adm. Code 5120-9-09(M) does not mandate any particular result if the prison representative's decision is untimely. *Id.*

{¶ 24} We find that Ohio Adm.Code 5120-9-31(K) and (M) are likewise primarily designed to guide correctional officials in prison administration, rather than to confer rights on inmates. And, as with Ohio Adm.Code 5120-9-09, neither Ohio Adm.Code 5120-9-31(K) or (M) mandates any particular result if the prison representative's decision is untimely. Accordingly, we find that relator does not have any legal right to have his grievances addressed in accordance with procedural guidelines.

{¶ 25} Relator argues that respondent's inaction has prevented him from complying with the Prison Litigation Reform Act's requirement that he fully exhaust his administrative remedies prior to filing a lawsuit pursuant to 42 U.S.C 1997(e). To the contrary, respondent has a plain and adequate remedy in the event that the inspector of institutional services fails to answer relator's grievances in a timely fashion. Ohio

Adm.Code 5120-9-31(M) specifically provides for the filing of grievances against the inspector of institutional services. Such grievances go to the office of the chief inspector. Id.

{¶ 26} Pursuant to the inmate grievance mechanisms, an inmate "exhausts his administrative remedies" only when he receives a written resolution from the chief inspector. "Whether the inmate takes his grievance directly to the chief inspector (because the grievance names the inspector or the prison warden), or instead appeals his grievance to the chief inspector after initial resolution from the inspector, an inmate only exhausts his administrative remedies after the chief inspector passes on the grievance." *Hattie v. Hallock*, 8 F.Supp.2d 685, 687.

{¶ 27} For all of the foregoing reasons, we find that relator's petition fails to state a claim for relief and that respondent's motion to dismiss is appropriately granted. Costs assessed to relator.

{¶ 28} The clerk is directed to serve upon all parties, within three days, a copy of this decision in a manner prescribed by Civ.R. 5(B).

WRIT DENIED.

State of Ohio, ex rel., Brian Wickensimer
v. Bill Bartleson
L-09-1049

Peter M. Handwork, P.J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.