

[Cite as *State ex rel. Carrion v. Nunez*, 2009-Ohio-3376.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91910

**STATE OF OHIO, EX REL.,
JOSE CARRION**

RELATOR

VS.

PHIL NUNEZ, ET AL.

RESPONDENTS

**JUDGMENT:
COMPLAINT DISMISSED**

WRIT OF MANDAMUS
MOTION NO. 414156 AND 422982
ORDER NO. 423408

RELEASE DATE: July 7, 2009

FOR RELATOR:

Jose Antonio Carrion, pro se
Inmate No. 1114032
Cuyahoga County Jail
P.O. Box 5600
Cleveland, Ohio 44101

**ATTORNEYS FOR RESPONDENT, PHIL NUNEZ
AND RO-ALLEN SINKEWICH**

Daniel Carter
Jeffrey W. Ruple
Alicia Whiting-Bozich
Buckely King LPA
1400 Fifth Third Center
600 Superior Avenue, East
Cleveland, Ohio 44114-2652

MELODY J. STEWART, J.:

{¶ 1} The relator, Jose Carrion, commenced this mandamus action against the respondents, Phil Nunez and Ro-Allen Sinkewich, whom Carrion identified as Program Managers at the Oriana House Community Corrections and Treatment Center. Carrion seeks to compel the respondents to (1) respond to his June 11, 2008 appeal/grievance, (2) provide him with written reasons why he was terminated from the programs at Oriana House, and (3) the name of the person who was in charge of sending out the mail. The respondents moved to dismiss on the grounds that Carrion's complaint for mandamus did not comply with R.C. 2731.01 and that he did not submit an affidavit specifying the details of the claim as required by Loc.

App.R. 45. On April 21, 2009, this court ordered Carrion to brief certain issues, including whether the respondents had the duty enforceable in mandamus to provide his requested relief. The court also granted him leave to amend his complaint to bring it in compliance with the statute and the local rule. On May 20, 2009, Carrion filed his amended complaint and submitted his brief. On June 10, 2009, the respondents filed a renewed motion to dismiss. For the following reasons this court grants the respondents' motions to dismiss.

Factual background

{¶ 2} In early 2008, Carrion was in prison and had filed an application for a writ of habeas corpus in the Supreme Court of Ohio.¹ On May 7, 2008, the Ohio Adult Parole Authority placed Carrion on parole and transferred and committed him to the Oriana House Community Corrections and Treatment Center in Cleveland. Oriana House is a private, nonprofit Ohio corporation which runs several community-based correctional facilities in Ohio.

{¶ 3} In the habeas corpus action, the Supreme Court of Ohio allowed the writ and ordered that the State of Ohio file a return of writ. The State of Ohio filed its return of writ on April 30, 2008. Carrion moved for an extension of time to file his response to the return of writ, and the Supreme Court of Ohio granted his motion and ordered him to file his response by May 22, 2008. On May 21, 2008, Carrion

¹ *Carrion v. Warden Maggie Beightler, et al.*, Supreme Court of Ohio Case No. 2008-0557.

had prepared his filing and gave it to his Oriana House caseworker with instructions that it must be mailed overnight to the Supreme Court of Ohio. Unfortunately, Oriana House did not mail the filing until May 27, 2008, and the Supreme Court of Ohio did not receive it until May 30. Accordingly, the Supreme Court of Ohio rejected the filing and returned it to Carrion, pursuant to Supreme Court of Ohio Rule XIV, Section 1(D).²

{¶ 4} On June 8, 2008, Carrion filed a grievance with Oriana House complaining that their actions had deprived him of access to the courts and from timely filing critical papers. He demanded: “What and where is the remedy now?” (Exhibit K of the Complaint.) In response, Oriana House personnel met with Carrion to resolve the grievance. It was agreed that the caseworker would write a letter explaining that Carrion was not at fault, but rather that the fault lay with Oriana House. On June 9, 2008, Carrion’s caseworker wrote a letter “To Whom It May Concern” that explained that Carrion had timely and responsibly submitted the filing to Oriana House, but that due to the negligence of the staff the filing was not mailed timely. (Exhibit H of the Complaint.) Sinkewich also contacted the Supreme Court of Ohio Clerk of Court who explained the deadline situation.

{¶ 5} Carrion further asserts that on June 11, 2008, he filed another grievance or an appeal of his first grievance to Program Manager Nunez. As shown by his

² In Carrion’s habeas action, the Warden moved to dismiss on the grounds of mootness, because Carrion had been released on parole. On July 9, 2008, the Supreme Court of Ohio granted that motion to dismiss and dismissed Carrion’s case.

attached copy of this grievance (Exhibit M) he demanded to know what exceptional circumstances, policy, rule, law, statute or constitutional provision exempted Oriana House from mailing his legal papers. He also insinuated that Sinkewich had threatened him by saying, “You do not know what you are getting into by filing this grievance.” Carrion further states in his compliant that Nunez did not answer his grievance and evaded his questions. Finally, Carrion alleges that on June 16, 2008, Sinkewich terminated him from Oriana House without notice and without a meaningful opportunity to be heard or to present evidence. On June 18, 2008, Carrion says he wrote letters to Nunez and Sinkewich asking for a resolution of his grievance and for written reasons for his termination. When they provided no answers, he filed this mandamus action.

Discussion of Law

{¶ 6} The requisites for mandamus are well established: (1) the relator must have a clear, legal right to the requested relief, (2) the respondent must have a clear, legal duty to perform the requested relief and (3) there must be no adequate remedy at law. *State ex rel. Ney v. Niehaus* (1987), 33 Ohio St.3d 118, 515 N.E.2d 914. Moreover, mandamus is an extraordinary remedy which is to be exercised with caution and only when the right is clear. It should not issue in doubtful cases. *State ex rel. Taylor v. Glasser* (1977), 50 Ohio St.2d 165, 364 N.E.2d 1; *State ex rel. Shafer v. Ohio Turnpike Comm.* (1953), 159 Ohio St. 581, 113 N.E.2d 14; *State ex*

rel. Connoles v. Cleveland Bd. of Edn. (1993), 87 Ohio App.3d 43, 621 N.E.2d 850; and *State ex rel. Dayton-Oakwood Press v. Dissinger* (1940), 32 Ohio Law Abs. 308.

{¶ 7} Additionally, “the issuance of a writ of mandamus rests, to a considerable extent at least, within the sound discretion of the court to which application for the writ is made. The writ is not demandable as a matter of right, or at least is not wholly a matter of right; nor will it issue unless the relator has a clear right to the relief sought, and makes a clear case for the issuance of the writ. The facts submitted and the proof produced must be plain, clear and convincing before a court is justified in using the strong arm of the law by way of granting the writ.” *State ex rel. Pressley v. Industrial Commission of Ohio* (1967), 11 Ohio St.2d 141, 161, 228 N.E.2d 31.

{¶ 8} Carrion argues that respondents, like any other prison officials, have the clear, legal duty to answer any grievance filed and to provide written reasons for any discipline inflicted: in this case, summary termination from the program. The strongest authorities he cites for these propositions are *Lewis v. Smith* (C.A. 11, 1988), 855 F.2d 736 and *King v. Higgins* (C.A. 10, 1983), 702 F.2d 18. Specifically, he argues that if there is an appeals process, the officers who handle the appeals may be liable for failure to correct due process violations, if they are obvious on the record. He sees Nunez’ failure to answer his grievance as a failure to complete the appeal process.

{¶ 9} Additionally, he refers to the Oriana House rules as providing him a right to the requested relief. He states that Rules 18 and 19 provide respectively: “The right to exercise one’s own rights without reprisal;” and “The right to file a grievance in accordance with program procedures.”³ Alternatively, he argues that Article I, Section 16 of the Ohio Constitution, that every person shall have a remedy for an injury done to him, provides the clear, legal right and the clear, legal duty to provide him with an answer to his grievance, written reasons for his termination, and the name of the person responsible for sending out the mail.

{¶ 10} Although it may seem intuitive that respondents should answer the grievance and provide written reasons for the termination, Carrion has not produced controlling or persuasive authority to convince this court that the respondents have a clear, legal duty, enforceable in mandamus, to do so. There is uncertainty as to the exact nature and status of a community-based correctional facility, and Oriana House specifically. Oriana House is a private, independent, nonprofit corporation. The Supreme Court of Ohio has ruled that Oriana House is not a public office or a public institution subject to the Ohio Public Records Act. *State ex rel. Oriana House, Inc. v. Montgomery*, 110 Ohio St.3d 456, 2006-Ohio-4854, 854 N.E.2d 193. Furthermore, R.C. 5120.112(D)(3) provides that none of the persons who staff and operate a community-based correctional facility are to be considered employees of the Ohio Department of Rehabilitation and Correction; rather, they are considered

³ Carrion did not provide a copy of the Oriana House rules or procedures.

employees of the facility, even if state financial assistance pays for part or all of their salaries. Thus, this court is not convinced that Oriana House and its employees are public entities subject to mandamus. Generally, mandamus will not lie to enforce a private right against a private person. *State ex rel. Longacre v. Penton Publishing Co.*, 77 Ohio St.3d 266, 1997-Ohio-276, 673 N.E.2d 1297; *State ex rel. Russell v. Duncan* (1992), 64 Ohio St.3d 538, 597 N.E.2d 142; and *Pressley*.

{¶ 11} In order to prevail, Carrion needed to provide this court with specific, explicit statutory, regulatory, or common law authority that stated that an Ohio community-based correctional facility had the duty to answer grievances and to provide written reasons for termination. Carrion did not do this. *Lewis and Higgins* are Title 42 United States Code Section 1983 actions for deprivations of civil rights arising out of prison disciplinary hearings. As explained above, it is doubtful that community-based correctional facilities can be characterized as Ohio prisons and be required to follow the same rules as state prisons. Moreover, the elements and remedies of a mandamus action are very different from those of a Section 1983 action.

{¶ 12} Carrion's reliance on Article I, Section 16 of the Ohio Constitution is also misplaced. As the court explained in *Building Service & Maintenance Union Local No. 47. v. St. Luke's Hospital* (C.P. 1967) 11 Ohio Misc. 218, 227 N.E.2d 265, paragraph seven of the syllabus: "The provision of Article I, Section 16, Ohio Constitution, that every person shall have a remedy for an 'injury *** done him' refers

only to wrongs that are recognized as such by law.” Moreover, “[i]n mandamus proceedings, the creation of the legal duty that a relator seeks to enforce is the distinct function of the legislative branch of the government, and courts are not authorized to create the legal duty enforceable in mandamus.” *State ex rel. Lecklider v. School Emp. Retirement Sys.*, 104 Ohio St.3d 271, 2004-Ohio-6586, ¶23, 819 N.E.2d 289. Again, Carrion cites no statute which specifically requires Oriana House or its employees to provide the requested relief. Thus, reference to the constitutional provision is unpersuasive.

{¶ 13} Carrion’s third claim, that the respondents have a clear, legal duty to disclose the name of the person in charge of the mail, is ill-founded. Even under the Ohio Public Records Act, there is no duty to provide information, such as a worker’s name. *State ex rel. Lanham v. Ohio Adult Parole Authority* (1997), 80 Ohio St.3d 425, 687 N.E.2d 283 and *State ex rel. Kerner v. State Teachers Retirement Bd.*, 82 Ohio St.3d 273, 1998-Ohio-242, 695 N.E.2d 256. Thus, asking for information from persons not subject to the Public Records Act is necessarily meritless.

{¶ 14} This court also notes that Carrion’s affidavit, submitted on May 20, 2009, after being given leave to cure, is not notarized.

{¶ 15} In summary, mandamus is to issue only when there is a clear, legal duty to enforce, and it should not issue in doubtful cases. In the present case, Carrion has not convinced this court that the respondents have the clear, legal duty to answer his grievance or provide written reasons for his termination. The uncertainty

as to Oriana House’s actual status as a public institution creates further doubt as to whether such duties exist.

{¶ 16} Accordingly, this court grants the respondents’ motions to dismiss and dismisses this application for a writ of mandamus. Costs assessed against relator. The clerk is directed to serve upon the parties notice of this judgment and its date of entry upon the journal. Civ.R. 58(B).

MELODY J. STEWART, JUDGE

CHRISTINE T. MCMONAGLE, P.J., and
ANN DYKE, J., CONCUR