

The Supreme Court of Ohio

CASE ANNOUNCEMENTS

July 22, 2020

[Cite as *07/22/2020 Case Announcements #2, 2020-Ohio-3714.*]

MOTION AND PROCEDURAL RULINGS

2019-0562. McDougald v. Greene.

In Mandamus. On respondent’s motion to purge. Motion granted. Relator’s motion for relief from judgment, motion directing this court to find that respondent engaged in frivolous conduct and issue sanctions, motion for contempt of court, motion for court sanctions, motion requesting to file supplemental motion, motion to deny purge denied. Relator’s motion directing this court to issue relator \$1,000 plus court costs granted in part and denied in part.

Kennedy, J., concurs in part and dissents in part, with an opinion joined by Stewart, J.

KENNEDY, J., concurring in part and dissenting in part.

{¶ 1} I concur in the judgment of the majority on all the motions addressed by this entry. However, I view relator Jerone McDougald’s request for statutory damages that was part of his original complaint in mandamus to be unaddressed to this point. It was not until this court learned that the public record at issue in this case—an incoming legal-mail log maintained by the Southern Ohio Correctional Facility (“SOCF”)—actually exists that it could properly determine whether McDougald should receive an award of statutory damages. On August 20, 2019, this court granted McDougald a peremptory writ and ordered respondent, Larry Greene, the public-records custodian at SOCF, to provide McDougald “copies of the requested pages of the legal-mail log, *if they exist.*” (Emphasis added.) *State ex rel. McDougald v. Greene*, 157 Ohio St.3d 315, 2019-Ohio-3309, 136 N.E.3d 453, ¶ 5. Since we now know that the incoming legal-mail log exists and that it took over

11 months for it to be produced, I would hold that statutory damages are appropriate and would award McDougald the statutory maximum of \$1,000. Therefore, I dissent in part.

{¶ 2} McDougald first sought the incoming legal-mail log from Greene on or about March 3, 2019. Pursuant to R.C. 149.43(C)(2), a person who makes a public-records request “shall be entitled to recover * * * statutory damages * * * if a court determines that the public office or the person responsible for public records failed to comply with an obligation in accordance with” R.C. 149.43(B). R.C. 149.43(B)(1) states that “a public office or person responsible for public records shall make copies of the requested public record available to the requester at cost *and within a reasonable period of time.*” (Emphasis added.) Greene finally provided SOCF’s incoming legal-mail log to McDougald on February 11, 2020, after this court found Greene in contempt of court. *See State ex rel. McDougald v. Greene*, 158 Ohio St.3d 533, 2020-Ohio-287, 145 N.E.3d 296, ¶ 11. Taking 11 months to provide a one-page record is unreasonable.

{¶ 3} Pursuant to R.C. 149.43(C)(2), a requester may be awarded statutory damages only if he transmits a written request “by hand delivery, electronic submission, or certified mail.” McDougald made his request to Greene through the SOCF kite system. “A ‘kite’ is written by an inmate to a member of the prison staff and is ‘a means for inmates to contact staff members inside [an] institution.’” *State ex rel. Martin v. Greene*, 156 Ohio St.3d 482, 2019-Ohio-1827, 129 N.E.3d 419, ¶ 3, fn. 1, quoting *State v. Elmore*, 5th Dist. Richland No. 16CA52, 2017-Ohio-1472, ¶ 15. Because I would hold that a public-records request made by kite constitutes hand delivery, I would hold that McDougald is eligible to receive statutory damages. *See State ex rel. McDougald v. Greene*, ___ Ohio St.3d ___, 2020-Ohio-3686, ___ N.E.3d ___, ¶ 60 (Kennedy, J., dissenting).

{¶ 4} Statutory damages are calculated at the rate of \$100 “for each business day during which the public office or person responsible for the requested public records failed to comply” with an obligation under R.C. 149.43(B), starting from the date on which the requester filed a complaint for a writ of mandamus, with a maximum award of \$1,000. R.C. 149.43(C)(2). McDougald filed his complaint for a writ of mandamus in this court on April 23, 2019, and did not receive SOCF’s incoming legal-mail log until February 11, 2020. Consequently, he should be awarded the statutory maximum, \$1,000.

{¶ 5} A court may reduce or decline to award statutory damages if it finds that based on law as it existed at the time that the public office allegedly failed to comply with R.C. 149.43, “a well-informed public office * * * reasonably would believe that the conduct * * * did not

constitute a failure to comply * * * with [R.C. 149.43(B)],” R.C. 149.43(C)(2)(a), and that “a well-informed public office * * * reasonably would believe that the conduct * * * of the public office * * * would serve the public policy that underlies the authority that is asserted as permitting that conduct,” R.C. 149.43(C)(2)(b). The reduction factors are not relevant here, especially given that this court had to find Greene in contempt before he produced SOCF’s incoming legal-mail log. *See McDougald*, 158 Ohio St.3d 533, 2020-Ohio-287, 145 N.E.3d 296, at ¶ 11. Therefore, I would award McDougald \$1,000 in statutory damages. Accordingly, I dissent in part.

STEWART, J., concurs in the foregoing opinion.
