

[Cite as *State ex rel. Richard v. Mohr*, 2013-Ohio-676.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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|----------------------------|---|--------------------|
| State of Ohio ex rel. | : | |
| Donald Richard et al. | : | |
| | : | |
| Relators, | : | No. 12AP-873 |
| | : | |
| v. | : | (REGULAR CALENDAR) |
| | : | |
| Gary Mohr and Rob Jeffrey, | : | |
| | : | |
| Respondents. | : | |

D E C I S I O N

Rendered on February 26, 2013

Donald Richard, pro se; Victor Hartness, pro se; Modesto Garcia, pro se; and Ralph Garduno, pro se.

Michael DeWine, Attorney General, and Peter L. Jamison, for respondents.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

McCORMAC, J.

{¶ 1} Relators, Donald Richard, Victor Hartness, Modesto Garcia, and Ralph Garduno, have filed this original action requesting that this court issue a writ of mandamus ordering respondents, Gary Mohr and Rob Jeffrey, in their official capacity as director and chief of the Bureau of Classifications for the Ohio Department of Rehabilitation and Correction ("ODRC") to restore relators to their "pre-7-1-96 position which allowed for security reductions to 'minimum' and/or 'honor' status where otherwise permitted." The case was referred to a magistrate of this court pursuant to Civ.R. 53(D) and Loc.R. 13(M) of the Tenth District Court of Appeals.

{¶ 2} On October 16, 2012, respondents filed a motion to dismiss, arguing: (1) relators' complaint fails to state a claim upon which relief can be granted; (2) relators'

argument is inherently contradictory; (3) relators have no clear legal right to the relief they seek; (4) relators Richard, Hartness, and Garduno have failed to comply with the filing requirements of R.C. 2969.25(A); and (5) relators have failed to comply with the requirements of R.C. 2929.26 by failing to complete the steps of ODRC's grievance process before filing this action.

{¶ 3} The matter first came before the magistrate on relators' motions for class certification and appointment of class counsel and respondents' motion to dismiss.

{¶ 4} The magistrate's decision was rendered on October 31, 2012. It is appended to this decision and includes findings of fact and conclusions of law. For the reasons stated in the magistrate's decision, the magistrate recommends that this court should grant respondents' motion to dismiss, that relators' complaint should be dismissed, and that relators' motion for class certification and appointment of class counsel should be denied.

{¶ 5} In summary, the magistrate analyzed the parties' arguments concerning the issues set forth in the case and concluded that relators had filed a complaint which failed to state a claim upon which relief could be granted.

{¶ 6} On November 13, 2012, relators filed written objections to the magistrate's decision. Relators assert that their memorandum contra respondents' motion to dismiss (which they refer to as their "Loc.App.R. 12(E) Brief in Opposition") should be considered as timely filed due to difficulties they had in mailing it from the prison so that it would arrive at the clerk's office on time. They therefore urge that we consider their memorandum contra as timely filed. In consideration of these problems experienced by relators, we will consider their memorandum contra.

{¶ 7} We have analyzed relators' objections to the magistrate's decision, which are stated in the form of findings of fact, additional facts, and findings of fact and conclusions of law to the magistrate's decision. It is our conclusion that the sole debatable issue is that the magistrate's decision recommending dismissal of their complaint was premature. Relators ask this court to order that the magistrate's decision be stricken or denied in order for the magistrate to consider the arguments raised in their memorandum contra respondents' motion to dismiss.

{¶ 8} Rather than referring the case back to the magistrate, we have directly and independently considered their memorandum contra respondents' motion to dismiss. In

doing so, we find nothing contained therein that would have resulted in a different outcome than that found by the magistrate. Therefore, we overrule relators' objections, adopt the magistrate's decision granting respondents' motion to dismiss and denying relators' motions, and dismiss this action in mandamus as recommended by the magistrate.

Objections overruled; respondents' motion to dismiss granted; relators' motions denied; action dismissed.

TYACK and BROWN, JJ., concur.

McCORMAC, J., retired, formerly of the Tenth Appellate District, assigned to active duty under the authority of the Ohio Constitution, Article IV, Section 6(C).

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

| | | |
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| State of Ohio ex rel. | : | |
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| Gary Mohr and Rob Jeffrey, | : | |
| Respondents. | : | |

MAGISTRATE'S DECISION

Rendered on October 31, 2012

Donald Richard, pro se; Victor Hartness, pro se; Modesto Garcia, pro se; and Ralph Garduno, pro se.

Michael DeWine, Attorney General, and Peter L. Jamison, for respondents.

IN MANDAMUS
ON MOTION TO DISMISS

{¶ 9} Relator's Donald Richard, Victor Hartness, Modesto Garcia, and Ralph Garduno, have filed this original action requesting that this court issue a writ of mandamus ordering respondents Gary Mohr and Rob Jeffrey, in their official capacity as director and chief of the Bureau of Classifications for Ohio Department of Rehabilitation and Correction ("ODRC") and ordering respondents to restore relators to their "pre-7-1-96 position which allowed for security reductions to 'minimum' and/or 'honor' status where otherwise permitted."

Findings of Fact:

{¶ 10} 1. All four relators are inmates currently incarcerated at Grafton Correctional Institution.

{¶ 11} 2. All four relators were convicted, sentenced, and committed to the custody of ODRC before July 1, 1996.

{¶ 12} 3. All four relators have had security review hearings over the course of their imprisonment.

{¶ 13} 4. Relators argue that, pursuant to R.C. 2967.21 as it existed at the time they were sentenced and originally imprisoned, if they are transferred from one correctional facility to another correctional facility, the second facility is required to assign them to the same security status which they held at the previous institution. Relators argue that they are entitled to have their security classifications reduced in the same manner in which their security classifications would have been reduced under pre- July 1, 1996 laws and maintain that their security status would be reduced but for the fact that ODRC is applying post-July 1, 1996 security review procedures which, in relators' argument, has changed the conditions of the terms of their respective sentences.

{¶ 14} 5. Relators have also filed motions for class certification and for appointment of class counsel.

{¶ 15} 6. On October 16, 2012, respondents filed a motion to dismiss arguing: (1) relators' complaint fails to state a claim upon which relief can be granted; (2) relators' argument is inherently contradictory; (3) relators have no clear legal right to the relief they seek; (4) relators Richard, Hartness, and Garduno have failed to comply with the filing requirements of R.C. 2969.25(A); and (5) relators have failed to comply with the requirements of R.C. 2969.26 by failing to complete the steps of ODRC's grievance process before filing this action.

{¶ 16} 7. The matter is currently before the magistrate on relators' motions for class certification and appointment of class counsel and respondents' motion to dismiss.

Conclusions of Law:

{¶ 17} For the reasons that follow, it this magistrate's decision that this court should grant respondents' motion to dismiss relators' complaint and further deny relators' motions for class certification and appointment of class counsel.

{¶ 18} A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545 (1992). In reviewing the complaint, the court must take all the material allegations as admitted and construe all reasonable inferences in favor of the nonmoving party. *Id.*

{¶ 19} In order for a court to dismiss a complaint for failure to state a claim upon which relief can be granted, it must appear beyond doubt from the complaint that relator can prove no set of facts entitling him to recovery. *O'Brien v. University Community Tenants Union*, 42 Ohio St.2d 242 (1975). As such, a complaint for writ of mandamus is not subject to dismissal under Civ.R. 12(B)(6) if the complaint alleges the existence of a legal duty by the respondent and the lack of an adequate remedy at law for relator with sufficient particularity to put the respondent on notice of the substance of the claim being asserted against it, and it appears that relator might prove some set of facts entitling him to relief. *State ex rel. Boggs v. Springfield Local School Dist. Bd. of Edn.*, 72 Ohio St.3d 94 (1995). For the following reasons, respondent's motion should be granted and relator's complaint should be dismissed.

{¶ 20} Relators have attached the version of R.C. 2967.21 which was in effect at the time they were sentenced and incarcerated. That statute provides:

Any prisoner sentenced or committed to a state correctional institution may be transferred from that institution to another state correctional institution, but he shall continue to be subject to the same conditions as to term of sentence, diminution of sentence, and parole as if confined in the institution to which he was originally sentenced or committed.

{¶ 21} The current version of R.C. 2967.21 is essentially the same, and provides:

Any prisoner sentenced or committed to a state correctional institution may be transferred from that institution to another state correctional institution, but the prisoner shall continue to be subject to the same conditions as to the stated prison term, parole, and release as if the prisoner were confined in the institution to which the prisoner originally was sentenced or committed.

{¶ 22} Just as prisoners have no constitutional or inherent right to be conditionally released before the expiration of a valid sentence, "prisoners have no constitutional right

to any particular security classification. *Bloomer v. Holland* (C.A. 6, 1999), 198 F.3d 244, citing *Olim v. Wakinekona* (1983), 461 U.S. 238, 103 S.Ct. 1741, 75 L.Ed.2d 813. See also [*Moody v. Daggett*, 429 U.S. 78 (1976)] at 88, 279 (prisoners have no legitimate statutory or constitutional entitlement regarding security classification sufficient to invoke due process)." *Semenchuk v. Ohio Dept. of Rehab. and Corr.*, 10th Dist. No. 10AP-19, 2010-Ohio-5551, ¶ 16.

{¶ 23} Further, R.C. 2967.21 has never been interpreted as pertaining to security classifications. Just as prisoners have no right to be imprisoned at a particular institution, prisoners have no right to receive a particular security classification. Relators are incorrect to assert that security classification is a condition as to their term of sentence, diminution of sentence, or parole.

{¶ 24} Furthermore, to the extent that relators may be arguing that prisoners who are classified as either "minimum" or "honor" security status earn days of credit as a deduction from their minimum sentence, all four relators have served more than the minimum sentence imposed on them. Therefore, to be classified as either "minimum" or "honor" will not reduce their sentences as they have already served more than the minimum sentence. See *Blackshear v. Ohio Dept. of Rehab. and Corr.*, 10th Dist. No. 01AP-659, 2002-Ohio-581.¹

{¶ 25} Respondents are also correct to argue that dismissal is warranted here where relators' petition fails to satisfy the requirements of R.C. 2969.26 demonstrating that they complied with ODRC's grievance process before filing this action. This court has specifically held that a plaintiff's failure to exhaust his administrative remedies as to his security classification argument also justifies the dismissal of the action. *Semenchuk*. Specifically, this court stated:

As for appellant's claim that his failure to exhaust administrative remedies should warrant a 180-day stay pursuant to R.C. 2969.26(B), rather than a dismissal on summary judgment, this argument is without merit. Compliance with R.C. 2969.26 is mandatory and the failure to satisfy this statutory requirement is grounds for dismissal. See *State ex rel. Spurlock v. Sevrey*, 10th Dist. No. 06AP-

¹ As a matter of law, any diminution of sentence granted as a result of earned days credit shall not exceed one-third of the minimum or definite sentence. An inmate serving an indefinite sentence becomes eligible for parole at the expiration of his (diminished) minimum term. All four relators are currently incarcerated well past their minimum terms.

1291, 2007-Ohio-3550; and *Hamilton v. Wilkinson*, 10th Dist. No. 04AP-502, 2004-Ohio-6982.

Id. at ¶ 28.

{¶ 26} The magistrate finds that relators' complaint fails to state a claim upon which relief can be granted. Relators' are not entitled to any particular security classification, cannot show that R.C. 2967.21 applies to security classifications, and Donald Richard, Victor Hartness, Modesto Garcia have not demonstrated that they pursued their administrative remedies through ODRC's grievance system. As such, it is this magistrate's decision that this court should grant respondents' motion to dismiss. Furthermore, finding that relators' complaint should be dismissed, the magistrate also finds that relators' motion for class certification and appointment of class counsel should be denied.

/s/ Stephanie Bisca Brooks
STEPHANIE BISCA BROOKS

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).