STATE OF MICHIGAN

COURT OF APPEALS

DAVID J. SCOTT,

Plaintiff-Appellant,

v

DEPARTMENT OF CORRECTIONS,

Defendant-Appellee.

UNPUBLISHED
March 13, 1998

No. 196767
Montcalm Circuit Court
LC No. 95-000838-CV

Before: Gribbs, P.J., and Murphy and Gage, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting summary disposition to defendant. We affirm.

Plaintiff, a prisoner in a state correctional facility, filed a pro se complaint in which he alleged violations of his constitutional rights and requested injunctive relief. In his complaint, plaintiff asserted that he had been harassed and assaulted a number of times by correctional officers. After receiving information that certain officers were plotting against him, he requested protection from his living unit counselor. Plaintiff alleged that when his counselor ordered him back to his living unit plaintiff responded that if he were confronted with a threatening situation, he would be forced to employ deadly force. Specifically, plaintiff admitted saying that he would "cut someone's head off" if necessary. A misconduct report was prepared against plaintiff for exhibiting threatening behavior, and plaintiff was placed in administrative segregation on October 26, 1995. On October 31, 1995, the hearing on plaintiff's misconduct charge was delayed to obtain additional information from a staff witness who was not then available. The hearing was held on November 2, 1995, after which plaintiff was found guilty of threatening behavior and placed in administrative segregation for thirty days.

Plaintiff's complaint did not explicitly seek judicial review of the hearing officer's determination. Instead plaintiff labeled his complaint a civil rights action, which he brought under 42 USC § 1983. Plaintiff maintained that his treatment by prison officials violated his eighth amendment right against unreasonable fear of violence, his fourteenth amendment right to due process of law, his first and fourteenth amendment rights of access to the courts, state laws, defendant's own internal procedures,

and prior precedent of this Court. Plaintiff also filed a motion for a "temporary restraining order and/or preliminary injunction," in which he alleged that defendant failed to hold a hearing on his misconduct charge within four days as required by its own regulations, and no reasonable cause existed to extend the four-day limit.[1] Moreover, according to plaintiff, this Court's holding in *Tolbert v Department of Corrections*, unpublished opinion per curiam of the Court of Appeals, issued May 23, 1993 (Docket No. 137484), also dictated that defendant hold a hearing within four days of placing a prisoner in administrative segregation.[2] Plaintiff further alleged that an administrative appeal was not an adequate remedy because defendant had no jurisdiction to conduct a hearing beyond the four-day limit. Plaintiff requested an injunction ordering defendant to: immediately refrain from violating the "declaratory judgment" issued in *Tolbert v Department of Corrections*; expunge the finding against him of guilt of threatening behavior; refrain from holding him in segregation; refrain from assaulting, threatening, or harassing him in retaliation for this or other litigation; and refrain from denying him use of library and legal materials and limiting his access to the courts.

In its brief supporting its motion for summary disposition, defendant argued that plaintiff could not support his allegation of due process violations because he did not plead and could not prove the inadequacy of state remedies for redress of the alleged deprivation. Plaintiff failed to exhaust his administrative remedies through requesting a rehearing of the finding of guilt. Moreover, although plaintiff had a right to judicial review of his misconduct ticket, he did not avail himself of his due process rights but chose instead to file this lawsuit alleging constitutional violations. Plaintiff's complaint, furthermore, did not establish the requirements for the issuance of an injunction, and plaintiff is not entitled to injunctive relief. After granting plaintiff two extensions of time to respond to defendant's motion, the circuit court granted summary disposition on the merits of defendant's motion.

Plaintiff now argues that the circuit court erred in granting summary disposition to defendant. We note that defendant purportedly filed its motion pursuant to MCR 2.116(C)(7) and (C)(8) but maintained in its motion that plaintiff failed to state a claim upon which relief could be granted. The court did not indicate under which of the subrules it was granting summary disposition. However, exact technical compliance with MCR 2.116(C) is not required and it does not appear that either party was misled by defendant's motion or the court's ruling. See *Mollett v City of Taylor*, 197 Mich App 328, 332; 494 NW2d 832 (1992).

Summary disposition may be granted under MCR 2.116(C)(8) where plaintiff has failed to state a claim upon which relief can be granted. In reviewing such a motion, the court must accept all plaintiff's factual allegations as true and should only grant summary disposition if the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Simko v Blake*, 448 Mich 648, 654; 532 NW2d 842 (1995). The motion may not be supported with any documentary evidence as the court must rely solely on the pleadings. *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). MCR 2.116(C)(7) is the appropriate subrule for deciding whether to grant a motion for summary disposition for failure to exhaust available administrative procedures. See *Mollett*, *supra* at 332. In reviewing a motion for summary disposition under MCR 2.116(C)(7), this Court must accept as true all of the plaintiff's well-pleaded allegations and construe them most favorably

to the plaintiff. *Id.* at 332-333. Summary disposition should be granted only if no factual development could provide a basis for recovery. *Id.*

We address plaintiff's constitutional issue first. On appeal, plaintiff argues that defendant's proceedings denied him due process. He concedes that he can prove no due process deprivation apart from defendant's own regulations and state law but claims that these establish a liberty interest. We disagree. Plaintiff mistakenly relies upon the mandatory language of Michigan prison regulations concerning placement into administrative segregation to support his claim of a liberty interest. *Rimmer-Bey v Brown*, 62 F3d 789, 790 (CA 6 1995). As the U.S. Supreme Court ruled in *Sandin v Conner*, 515 US 472, 484; 115 S Ct 2293, 2298; 132 LEd2d 418 (1995), a state regulatory scheme does not create a liberty interest merely because the regulations incorporate "language of an unmistakably mandatory character." Apart from any mandatory language in a regulation, the plaintiff must also prove that he suffered restraint that imposed an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Id.* at 484. Confinement in disciplinary segregation is not an atypical and significant hardship. *Rimmer-Bey*, *supra* at 791. Plaintiff had no inherent constitutional right to remain free of administrative segregation. See *Hewitt v Helms*, 459 US 460, 468 (1983); 103 S Ct 864; 74 LEd2d 675. Moreover, defendant's failure to hold a hearing within four days does not implicate due process. "A state cannot be said to have a federal due process obligation to follow all of its procedures; such a system would result in the constitutionalizing of every state rule, and would not be administrable." *Levine v Torvik*, 986 F2d 1506, 1515 (CA 6, 1993). We find, therefore, that the circuit court did not err in granting summary disposition on plaintiff's claim that he was denied due process.

Plaintiff further argues that there are genuine issue of facts regarding the proofs at his hearing. We disagree. MCL 791.255(4); MSA 28.2320(55)(4) requires a reviewing court to determine whether the administrative decision is "supported by competent, material and substantial evidence on the whole record." While the evidence required to support the decision of a hearing officer is "more than a mere scintilla of evidence, it may be substantially less than a preponderance of the evidence." *Langworthy v Department of Corrections*, 192 Mich App 443, 444; 481 NW2d 726 (1992). The hearing officer's report reveals that she conducted a thorough investigation. Plaintiff was allowed to raise issues he wanted addressed, and he requested and received relevant documents. The appropriate corrections officers were also interviewed. Moreover, the hearings officer noted in her findings that the warden authorized the retention of plaintiff in administrative segregation beyond four working days and that she informed plaintiff that the hearing had been delayed by the volume of questions he had requested and because a staff witness requested by plaintiff was off duty and could not be contacted. We find that the evidence supporting the hearing officer's decision was "competent, material and substantial."

We further note plaintiff's argument that his claim should be treated by this Court as a petition for judicial review of the hearing officer's finding under the Administrative Procedures Act (APA), MCL 24.301 *et seq.*; MSA 3.560(201) *et seq*. We disagree. MCL 791.255; MSA 28.2320(55) provides in pertinent part:

> (1) A prisoner aggrieved by a final decision or order of a hearings officer shall file a motion or application for rehearing in order to exhaust his or her administrative remedies before seeking judicial review of the final decision or order.
>
> (2) Within 60 days after the date of delivery or mailing of notice of the decision on the motion or application for the rehearing, if the motion or application is denied or within 60 days after the decision of the department or hearing officer on the rehearing, a prisoner aggrieved by a final decision or order may file an application for direct review in the circuit court in the county where the petitioner resides or in the circuit court for Ingham county.

This statute plainly provides that a prisoner, prior to seeking review in circuit court, must file a motion for rehearing and that judicial review must be sought within sixty days after the date of delivery or mailing of the notice of the decision on the motion for rehearing. *Seaton-El v Department of Corrections*, 184 Mich App 454, 455-456; 458 NW2d 910 (1990). As a complaint for judicial review, therefore, the filing of plaintiff's complaint was untimely because plaintiff failed to wait for a determination on his request for a rehearing before filing his circuit court action on November 28, 1995. Although plaintiff claims that he filed a motion for rehearing on November 11, 1995, a review of the document in the circuit court file reveals that it was actually dated November 30, 1995. Pursuant to the Administrative Procedures Act (APA), MCL 24.301; MSA 3.506(201), where an administrative grievance procedure is provided, exhaustion of that remedy, except where excused, is necessary before review by the courts. *Bonneville v Michigan Corrections Organization*, 190 Mich App 473, 476; 476 NW2d 411 (1991).

Plaintiff alternatively argues that exhaustion of his administrative remedies was not necessary on several grounds. First, he notes the rule that exhaustion of administrative remedies is not required where to do so would be a vain or useless act because the decision maker is likely to rule against the aggrieved party. *Trojan v Taylor Tp*, 352 Mich 636, 638-639; 91 NW2d 9 (1958). He contends that defendant routinely ignores its own rule requiring that a disciplinary hearing on a major misconduct charge must be held within four working days if the prisoner has been placed in administrative segregation. Second, he contends that exhaustion of administrative remedies is not required where a prisoner is raising a constitutional or dispositive issue. We disagree with plaintiff's arguments. As we noted above, defendant's own regulations creates no liberty interest that would grant plaintiff due process rights. Moreover, the exhaustion of administrative remedies requirement is displaced by raising a constitutional issue only when there are no issues in controversy other than constitutional challenges. *Michigan Supervisors Union OPEIU Local 512 v Department of Civil Service*, 209 Mich App 573, 578; 531 NW2d 790 (1995). Because plaintiff has raised nonconstitutional issues, the requirement that he exhaust all administrative procedures before seeking judicial review was not waived.[3] Plaintiff also contends that his complaint was an independent action for violation of civil rights, and therefore he did not need to exhaust his administrative remedies. However, to the extent that plaintiff pleads an independent action, he has no statutory right to a judicial review of defendant's administrative decision. Therefore, the circuit court did not err in granting defendant summary disposition on plaintiff's claim that the evidence did not support the hearing officer's determination.

Next, we note plaintiff's argument that the circuit court abused its discretion in denying his third motion for an extension of time to file a response to defendant's motion for summary disposition. Plaintiff's argument mistakenly assumes that the circuit court dismissed his action for failing to timely file his response. However, the court merely reinstated its original order granting summary disposition to defendant on the merits. Therefore, plaintiff's arguments as to the severity of the sanction of dismissal are irrelevant because the court did not impose such a sanction on him. Moreover, we note that the "prison mailbox rule" relied upon by plaintiff has been specifically abrogated by this Court. See *Walker-Bey v Department of Corrections*, 222 Mich App 605, 606; 564 NW2d 171 (1997).

Finally, we also briefly note plaintiff's argument that we should disregard an affidavit attached to defendant's motion for summary disposition. Because defendant's motion was brought pursuant to MCR 2.116(C)(7) and (C)(8), documentary materials may not be considered in deciding the motion. Plaintiff has presented no indication that the circuit court considered this document in rendering its decision. This argument is, therefore, without merit.

Affirmed.

/s/ Roman S. Gribbs
/s/ William B. Murphy
/s/ Hilda R. Gage

[1] Plaintiff's assertion was based on 1987 AACS, R 791.5501, which provides in pertinent part:

> (2) Unless delayed for reasonable cause, a prisoner charged with major misconduct has a right to a formal hearing as provided in R791.3315 within the following time limits:
>
> (a) If the prisoner is confined to segregation or placed on toplock as a result of the major misconduct charge, a hearing shall be held within 7 business days of the placement in confinement unless the prisoner is released from confinement before that time period expires.
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> * * *
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> (4) Notwithstanding the time limits set forth in subrule (2) of this rule, the warden shall ensure that a prisoner is not confined to segregation or placed on toplock without a hearing for more than 4 business days.

[2] The panel that heard this case determined that "the only reasonable reading of R 791.5501 is that subrule (4) imposes on the warden an obligation to ensure that a prisoner is not confined to segregation or placed on toplock without some type of hearing for more than four days." This unpublished Court of Appeals opinion has, of course, no precedential effect on our review of the present case.

[3] We further note that plaintiff has filed an impressive number of prior appeals in this Court and can only contemplate the larger number of complaints that plaintiff has filed in circuit court in order to generate so many appeals. Plaintiff by this time must certainly be aware of the requirement that he exhaust all of his administrative remedies before seeking judicial review of an agency's action.