

STATE OF MICHIGAN
COURT OF APPEALS

AMERICAN BROADCASTING COMPANIES,
INC., a/k/a ABC,

UNPUBLISHED
June 1, 2001

Plaintiff-Appellee,

v

No. 228757
Genesee Circuit Court
LC No. 99-065300-AW

MICHIGAN DEPARTMENT OF
CORRECTIONS, BILL MARTIN and DAN
BOLTON,

Defendants-Appellants.

Before: McDonald, P.J., and Murphy and Meter, JJ.

PER CURIAM.

Defendants appeal as of right from the circuit court's July 19, 2000 order that granted in part plaintiff's request for a writ of mandamus and compelled defendants to allow plaintiff to conduct an on-camera interview with Michigan Department of Corrections (MDOC) inmate Jack Kevorkian. We reverse.

"Mandamus is a writ issued by a court of superior jurisdiction to compel a public body or public officer to perform a clear legal duty." *Lee v Macomb Co Bd of Comm'rs*, 235 Mich App 323, 331; 597 NW2d 545 (1999) lv gtd 617 NW2d 332 (2000). It is an extraordinary remedy and is proper only when the plaintiff is without an adequate legal remedy. *Keaton v Village of Beverly Hills*, 202 Mich App 681, 683; 509 NW2d 544 (1993). Issuance of a writ of mandamus requires that (1) the plaintiff have a clear legal right to performance of the specific duty sought to be compelled; (2) the defendant have a clear legal duty to perform such act; and (3) the act must be ministerial, "where the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Id.* (citations omitted). The burden of proving entitlement to the writ is on the party seeking it. *McDonald's Corp v Canton Twp*, 177 Mich App 153, 156; 441 NW2d 37 (1989). We review a circuit court's grant of a writ of mandamus for an abuse of discretion. *In re MCI Telecommunications Complaint*, 460 Mich 396, 443; 596 NW2d 164 (1999).

Defendant Martin denied plaintiff's request to conduct an on-camera interview of inmate Kevorkian based on defendant MDOC's administrative rule, R 791.6605, which governs prisoner access to the media and, in its form at the time at issue, provided:

(1) A prisoner in general population shall be allowed uncensored correspondence with, and telephone access to, media representatives, subject to reasonable regulation as to time and frequency. A prisoner in segregation status shall be allowed to send sealed correspondence to representatives of the media as set forth in R 791.6603(1).

(2) A prisoner in general population may submit uncensored manuscripts to publishers and may serve as a literary reviewer for newspapers or other publications.

(3) Prisoners permitted outside an institution for rehabilitative or public service purposes may participate in news interviews when approached by media representatives.

(4) A prisoner shall not be interviewed, filmed, or photographed by the media in a department institution or facility without the prisoner's prior written consent. The consent of both the department and the prisoner shall be required before granting a personal interview. *The department shall grant requests for personal interviews of a prisoner if the number and duration of the interviews are reasonable and the granting of the request does not create a threat to security, order, or rehabilitation.* The department shall take appropriate steps in evaluating interview requests to ensure that the prisoner is not coerced into consenting to an interview.

(5) The warden may temporarily suspend all prisoner access to the media during emergencies or disorders. Such suspension shall end with the return to normalcy. [Emphasis added.]¹

¹ In response to this litigation, the MDOC secured amendment of the administrative rule at issue. R 791.6605, as amended and effective April 6, 2000, now provides:

[(1)] A prisoner shall be allowed uncensored correspondence with a news media representative subject to R 791.6603.

(2) A prisoner shall be allowed telephone access to a news media representative subject to reasonable regulation. Access by a prisoner in a facility also is subject to R 791.6638.

(3) A prisoner in a facility may be personally interviewed by a news media representative only during a visit conducted under R 791.6607 to R 791.6611 and R 791.6614, except that a prisoner on community status under R 791.4410 shall not be personally interviewed in a community corrections center. *A news media representative shall not be allowed to use or possess a camera or other audio or visual recording device while on a visit with a prisoner.*

(continued...)

We must first address whether defendants, pursuant to the language of the rule effective at the time at issue, possessed discretion in granting permission for on-camera interviews of inmates. See *Hessee Realty, Inc v Ann Arbor*, 61 Mich App 319, 323; 232 NW2d 695 (1975). Mandamus may compel the exercise of discretion, but may not compel its exercise in a particular manner. *Teasel v Dep't of Mental Health*, 419 Mich 390, 409-410; 355 NW2d 75 (1984); *Vorva v Plymouth-Canton Community School Dist*, 230 Mich App 651, 655-656; 584 NW2d 743 (1998). In other words, mandamus is neither appropriate to review or control the exercise of discretion vested in an administrative body, nor appropriate where the act sought to be compelled is discretionary. *Dowerk v Oxford Twp*, 233 Mich App 62, 75; 592 NW2d 724 (1998); *Tuscola Co Abstract Co, Inc v Tuscola Co Register of Deeds*, 206 Mich App 508, 511; 522 NW2d 686 (1994); *South Haven v South Haven Twp*, 204 Mich App 49, 52; 514 NW2d 176 (1994).

We find that mandamus was inappropriate because defendants' decision to deny plaintiff's request involved the exercise of discretion vested in the MDOC. See *Tuscola Co Abstract Co, supra* at 512. According to the rule, defendants must grant requests for personal interviews as long as (1) the number and duration are reasonable and (2) the granting of the request does not create a threat to security, order, or rehabilitation. Although the language of the rule uses the mandatory term "shall," defendants still have discretion to deny requests for interviews if the request is unreasonable or poses a threat to security, order, or rehabilitation. Because defendants' decision to deny plaintiff's request for an on-camera interview involved the exercise of discretion and was not a purely ministerial act, the circuit court improperly granted the extraordinary writ ordering defendants to exercise that discretion in a particular fashion. See *Dowerk, supra* at 75. We accordingly hold that the circuit court abused its discretion in ordering defendants, by writ of mandamus, to grant plaintiff's request. See *In re MCI Telecommunications Complaint, supra* at 443.²

(...continued)

(4) Except if housed in a facility, a parolee or a probationer may be personally interviewed by a news media representative unless interviews are not permitted by an order of probation or parole.

(5) The warden may temporarily suspend prisoner access to the news media during emergencies or disorders. Such suspension shall end with the return to normalcy.

(6) Nothing in this rule creates an enforceable right of a prisoner, the news media, or a news media representative. [Emphasis added.]

Given our resolution of the instant matter, we need not address defendants' additional argument that the circuit court erred in its July 19, 2000 final order by failing to retrospectively apply this amended version of rule.

² We note, however, that in its June 16, 1999 order regarding this matter the circuit court appropriately issued a writ of mandamus compelling defendants to exercise their discretion as provided by the rule. The court, at that stage of the proceedings, had determined that defendants had refused plaintiff's request based on an unwritten "iron-clad" policy against allowing on-camera interviews. The order rightfully required defendants to reconsider the specific request

(continued...)

Plaintiff continues to insist that the court appropriately issued the writ of mandamus, contending that the court correctly found that none of the exceptions listed in the rule apply to this situation and that, accordingly, defendant Martin had a clear legal duty to grant plaintiff's request.³ However, it is the presence of the exceptions within the rule that vests the discretion that renders mandamus inappropriate as a form of relief from defendants' decision. The court's reasoning and ruling, while perhaps appropriate had it been considering an appeal by plaintiff of defendants' decision,⁴ ignored the fundamental principle on which we base our resolution of this matter.

Reversed.

/s/ Gary R. McDonald
/s/ William B. Murphy
/s/ Patrick M. Meter

(...continued)

pursuant to the standards established by administrative rule, R 791.6605, and to provide justification for their final decision. See *Teasel, supra* at 411-412. It was having subsequently demonstrated the exercise of discretion, providing the court with particularized reasons for denial of plaintiff's request, that defendants were then compelled to permit a contrary result by the writ of mandamus now appealed. Only in its latter order did the circuit court overstep its prerogative.

³ The circuit court found that defendants' asserted justification for the denial of plaintiff's request amounted to little more than a cataloguing of generalized determinations reflecting the factors illustrated in the rule. Essentially deeming this a sham, the court found that defendant Martin had failed to exercise discretion in good-faith because he had failed to make a fact-specific assessment of the request. After applying defendant Martin's proffered reasons for the denial to the specific circumstances surrounding inmate Kevorkian, and upon finding each of these reasons invalid, the court concluded "So, I find that in a legitimate exercise of discretion that Director Martin shall allow ABC to conduct an on-camera interview with Dr. Jack Kevorkian." The court's own language indicates that decisions under the rule are discretionary, gutting plaintiff's argument.

⁴ The opportunity for judicial review of decisions by administrative agencies is guaranteed by Const 1963, art 6, § 28. *Martin v Stine*, 214 Mich App 403, 407; 542 NW2d 884 (1995). Here, no review procedure is specified by a statute applicable to decisions, on the part of defendants, interpreting or applying MDOC administrative rules. Nor does this matter present a contested case under the Administrative Procedures Act, for which a generalized method of review is provided. Nevertheless, plaintiff could have appealed defendant Martin's decision pursuant to MCL 600.631; MSA 27A.631. See *Id.* at 407-408. Plaintiff's failure to so appeal, and its persistence in pursuing mandamus, renders it unnecessary for us to reach either the issue of what standards would be applicable to appellate review of the decision herein presented, or the question whether the circuit court's determination to the contrary of defendants' ruling would be the correct result of such an appeal.