

STATE OF MICHIGAN
COURT OF APPEALS

GLENN J. FENNER,

Plaintiff-Appellant,

v

PAROLE BOARD,

Defendant-Appellee.

UNPUBLISHED

March 21, 2006

No. 257869

Genesee Circuit Court

LC No. 04-079286-AW

Before: Davis, P.J., and Cavanagh and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right the summary dismissal of his complaint for a writ of mandamus which alleged that his request for parole was improperly denied. We affirm.

In his complaint, plaintiff alleged that (1) at his interview, the parole board member advised that she would never vote for his parole and that he would not be released from prison until he served his maximum sentence, contrary to MCL 791.233e; (2) the parole board failed to provide substantial and compelling reasons for its decision to deny him parole; and (3) the parole board failed to provide recommendations for corrective action after denying his request for parole. Upon defendant's motion for summary dismissal, the case was dismissed pursuant to MCR 2.116(C)(8) and (10) on the grounds that parole decisions are discretionary and the reasons for denying parole were satisfactory and verifiable. After review de novo, considering both the legal sufficiency of the claims and the factual support for the claims, we agree with the trial court. See *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 25-26; 703 NW2d 822 (2005).

Plaintiff first argues that the trial court improperly relied on *Taylor v Ottawa Circuit Judge*, 343 Mich 440; 72 NW2d 146 (1955), to conclude that a writ of mandamus will not be granted if the action sought to be compelled involves the exercise of judgment. According to plaintiff, more recent decisions support the rule that mandamus is available where some degree of discretion is involved. But, the law is, and has been, clear and consistent on this point—mandamus is available where the act involved is ministerial and does not involve the exercise of discretion or judgment. This Court, in *Morales v Parole Bd*, 260 Mich App 29, 41-42; 676 NW2d 221 (2003), recently discussed the standard for granting mandamus as follows:

We find it important to point out that the issuance of a writ of mandamus is proper only where (1) the party seeking the writ has a clear legal right to performance of the specific duty sought, (2) the defendant has the clear legal duty

to perform the act requested, (3) the act is ministerial and involves no exercise of discretion or judgment, and (4) no other remedy exists, legal or equitable, that might achieve the same result. We stress that mandamus is an extraordinary remedy and it will not lie to review or control the exercise of discretion vested in a public official or administrative body. In any event, where there has been a ministerial error or omission, the remedy of mandamus is available to prisoners. [citations omitted.]

Clearly a writ of mandamus is only available where the act involved is ministerial. See, also, *Citizens for Protection of Marriage v Bd of State Canvassers*, 263 Mich App 487, 492; 688 NW2d 538 (2004); *Deleeuw v Bd of State Canvassers*, 263 Mich App 497, 500; 688 NW2d 847 (2004). Plaintiff refers us to the case of *LundBerg v Corrections Comm*, 57 Mich App 327, 329; 225 NW2d 752 (1975), for the proposition that mandamus may be available when some measure of discretion is involved in the exercise of the ministerial act. But, in *Teasel v Dep't of Mental Health*, 419 Mich 390, 409-410; 355 NW2d 75 (1984), our Supreme Court further explained that “mandamus will lie to compel the exercise of discretion, but not to compel its exercise in a particular manner.”

Here, the trial court relied on *Taylor, supra*, to conclude that “[m]andamus will not be granted when the action which is sought to be compelled, involves the exercise of judgment.” This statement of law is accurate because mandamus cannot be used to compel an agency or official to exercise judgment in a certain manner. But even if the trial court failed to recognize that mandamus is available to compel an official to perform certain actions that involve some exercise of discretion, but not to compel its exercise in a particular manner, appellate relief is not warranted because, on de novo review, we conclude that mandamus was properly denied.

Plaintiff argues that he is entitled to a writ of mandamus because the parole board did not provide substantial and compelling reasons for denying him parole. In order to obtain a writ of mandamus, plaintiff must show that (1) he has a clear legal right to the performance of the duty sought to be compelled, (2) defendant is under a clear legal duty to perform, (3) the act is ministerial in nature and involves no exercise of discretion or judgment, and (4) he has no other adequate legal or equitable remedy available. *Morales, supra* at 41. As discussed previously, mandamus is not available to review or control the exercise of discretion vested in a public official or administrative body. *Teasel, supra*; *Morales, supra* at 41-42. The burden is on plaintiff to prove his entitlement to the extraordinary remedy of a writ of mandamus. *Citizens for Protection of Marriage, supra* at 492.

Plaintiff alleges that he received a score of at least seven points under the parole guidelines, which indicates that he had a high probability of receiving parole. Under MCL 791.233e(6), a prisoner who scores at that level may not be denied parole unless there are substantial and compelling reasons provided in writing by the parole board:

The parole board may depart from the parole guideline by denying parole to a prisoner who has a high probability of parole as determined under the parole guidelines or by granting parole to a prisoner who has a low probability of parole as determined under the parole guidelines. A departure under this subsection shall be for substantial and compelling reasons stated in writing. The parole

board shall not use a prisoner's gender, race, ethnicity, alienage, national origin, or religion to depart from the recommended parole guideline.

Plaintiff was given the following reasons, in writing, for why the parole board denied his request for parole:

Departure due to prisoner was terminated from Sex Offender treatment program while on Parole for being disruptive & argumentative. This behavior indicates prisoner is not amendable to parole supervision. Deviation is warranted.

Plaintiff argues that the trial court erroneously granted summary disposition for defendant because the parole board's reasons for denying his request for parole were not substantial and compelling. We disagree because mandamus would only be appropriate to require the board to issue a decision whether to grant or deny parole and to provide its reasons in writing. Here, the parole board complied with its ministerial obligations by issuing a decision and identifying in writing the reasons for its decision to deviate from the guidelines recommendation. The crux of plaintiff's argument is that the parole board's reasons for denying his request for parole were not substantial and compelling. Whether the board cited substantial and compelling reasons involves an exercise of discretion and judgment. In this regard, the parole board's decision is not a basis for granting mandamus. See *Teasel, supra*.

Plaintiff relies on *In re Parole of Scholtz*, 231 Mich App 104; 585 NW2d 352 (1998), to argue that the parole board's reasons for denying him parole are not substantial and compelling. When *In re Scholtz* was decided, however, prisoners were allowed to appeal decisions of the parole board. That case involved a direct appeal of the parole board's decision, which this Court reviewed for an abuse of discretion. After *In re Scholtz* was decided in 1998, the law was changed to eliminate the ability of prisoners to appeal decisions of the parole board. See *Morales, supra* at 33-40. As a result, since 2000, prisoners may only seek relief from a decision of the parole board by an appropriate complaint for habeas corpus or mandamus. *Id.* at 40-42. Because this case does not involve a direct appeal of the parole board's decision, *In re Scholtz* is not controlling and plaintiff's reliance on that case is misplaced.

Plaintiff also argues that mandamus relief is warranted because the board member who interviewed him was predisposed to vote against his request for parole. Plaintiff submitted an affidavit from his mother who averred that the board member who interviewed both plaintiff and herself told plaintiff at the beginning of the interview, "I gave you a parole once and I'm not giving you another parole and you can always try another member."

Generally, the parole board is required to interview a prisoner before it makes a decision on a parole request and it may not deny parole before one member of the board conducts an interview unless the prisoner has a low probability of receiving parole under the guidelines. MCL 791.235(1) and (2). MCL 791.235(5) provides:

Except for good cause, the parole board member conducting the interview shall not have cast a vote for or against the prisoner's release before conducting the current interview. Before the interview, the parole board member who is to conduct the interview shall review pertinent information relative to the notice of intent to conduct an interview.

To the extent that MCL 791.235(5) prohibits parole board members who previously voted on a prisoner's request for parole from interviewing that prisoner on a subsequent request, plaintiff has not established that relief in the form of a writ of mandamus is warranted. Even if the board member previously voted on a request for parole, she was not barred from interviewing plaintiff in connection with his most recent request for good cause. Whether there was good cause to assign the same board member to conduct the interview is a matter of the parole board's discretion and judgment. For this reason, the trial court properly determined that this was not a basis for granting a writ of mandamus. See *Teasel, supra*.

Plaintiff also argues that the parole board failed to provide specific recommendations for corrective action when denying him parole. MCL 791.235(12) provides:

When the parole board makes a final determination not to release a prisoner, the prisoner shall be provided with a written explanation of the reason for denial and, if appropriate, specific recommendations for corrective action the prisoner may take to facilitate release.

MCL 791.235(12) imposes a mandatory duty on the parole board to provide its reasons in writing when it denies parole to a prisoner. In this case, plaintiff appears to agree that this duty was met. Instead, he argues that there was a clear legal duty on the part of the board to provide more specific reasons for corrective action in the future. We disagree.

MCL 791.235(12) provides that the board must provide specific reasons for corrective action only "if appropriate." The use of the phrase "if appropriate" clearly vests with the parole board the discretion to decide whether specific recommendations should be provided in each individual case. Therefore, a court may not compel the performance of this duty by a writ of mandamus. *Teasel, supra*. Thus, the trial court properly granted summary disposition for defendant on this issue.

Affirmed.

/s/ Alton T. Davis
/s/ Mark J. Cavanagh
/s/ Michael J. Talbot