

STATE OF MICHIGAN
COURT OF APPEALS

RONALD JORDAN,

Plaintiff-Appellant,

v

DEPARTMENT OF CORRECTIONS,

Defendant-Appellee.

UNPUBLISHED

March 16, 2010

No. 289667

Ingham Circuit Court

LC No. 08-001130-AW

Before: K. F. Kelly, P.J., and Jansen and Zahra, JJ.

PER CURIAM.

Plaintiff Ronald Jordan, a prisoner incarcerated at defendant's Alger Correctional Facility, appeals as of right from the trial court's order granting defendant's motion for summary disposition and dismissing plaintiff's complaint for a writ of mandamus. Although we do not fully agree with the trial court's reasoning, we conclude that it reached the right result in granting defendant's motion and, accordingly, affirm its decision.

I. BASIC FACTS

In his complaint, plaintiff alleged numerous violations by David Bergh, the warden of defendant's Alger Correctional Facility, and Gerald Hofbauer, the warden of defendant's Marquette Branch Prison. With respect to the Alger Correctional Facility, plaintiff alleged that defendant violated policy directives by (1) denying his request for writing pens, (2) failing to provide him with comprehensive bloodborne infection education and training programs, (3) not issuing him sufficient underpants, and (4) not providing him with seating and writing surfaces in his cell. With respect to the Marquette Branch Prison, plaintiff alleged that \$80 was wrongfully removed from his prison account and should be restored until a court order was issued directing the removal of the funds. Plaintiff also alleged that his claim regarding the educational and training programs applied equally to the Marquette Branch Prison.

Defendant moved for summary disposition under MCR 2.116(C)(8) and (10), arguing that the wardens had complied with departmental policy. In a written opinion and order, the trial court granted defendant's motion. It found that plaintiff failed to establish the necessary elements to support the issuance of a writ of mandamus. It further found that defendant was in compliance with its policy directives and had the legal authority to remove \$80 from plaintiff's prisoner account.

II. STANDARD OF REVIEW

A trial court's grant or denial of a motion for summary disposition is reviewed de novo. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 424; 751 NW2d 8 (2008). Although the trial court referred to both MCR 2.116(C)(8) and (10) in its decision, because it relied on affidavits and other documentary evidence submitted by the parties to grant the motion, review is appropriate under MCR 2.116(C)(10). See *Spiek v Dep't of Transportation*, 456 Mich 331, 338; 572 NW2d 201 (1998); *Healing Place at North Oakland Medical Ctr v Allstate Ins Co*, 277 Mich App 51, 55; 744 NW2d 174 (2007). We view the record in a light most favorable to plaintiff to determine whether the submitted evidence established a genuine issue of material fact, and whether defendant was entitled to judgment as a matter of law. *Allison*, 481 Mich at 424-425.

III. ANALYSIS

Plaintiff argues that the trial court erred in granting defendant summary disposition and declining to issue a writ of mandamus. We disagree, although for reasons other than relied upon by the trial court.

A trial court's decision regarding a writ of mandamus is discretionary. *Casco Twp v Secretary of State*, 472 Mich 566, 571; 701 NW2d 102 (2005). But mandamus relief is appropriate only where "(1) the plaintiff has a clear legal right to the performance of the duty sought to be compelled, (2) the defendant has a clear legal duty to perform, (3) the act is ministerial in nature, and (4) the plaintiff has no other adequate legal or equitable remedy." *White-Bey v Dep't of Corrections*, 239 Mich App 221, 223; 608 NW2d 833 (1999). A ministerial act is one where the law prescribes and defines the duty with such precision and certainty as to leave nothing to the exercise of judgment or discretion. *Keaton v Village of Beverly Hills*, 202 Mich App 681, 683; 509 NW2d 544 (1993). If the act requested by the plaintiff involves judgment or an exercise of discretion, a writ of mandamus is inappropriate. *Lickfeldt v Dep't of Corrections*, 247 Mich App 299, 302; 636 NW2d 272 (2001).

Here, plaintiff largely relies on defendant's policy directives to establish a clear legal right to performance. "In order for an agency regulation, statement, standard, policy, ruling, or instruction of general application to have the force of law, it must fall under the definition of a properly promulgated rule." *Danse Corp v Madison Hts*, 466 Mich 175, 181; 644 NW2d 721 (2002). Defendant's policy directives do not have the force of law and no sanction attaches to its violation. See *Boyd v Civil Service Comm*, 220 Mich App 226, 236; 559 NW2d 342 (1996). Rather, any sanction attaches to the underlying statute or properly promulgated rule. *Jordan v Dep't of Corrections*, 165 Mich App 20, 24-26; 418 NW2d 914 (1987). Thus, to the extent that plaintiff relies on policy directives to establish legal rights, his request for mandamus relief cannot succeed as a matter of law.

Plaintiff's reliance on the duties imposed on wardens under the Michigan Administrative Code (AC), R 791.2205(1)(h), to develop procedures to implement and ensure compliance with departmental policy, is also misplaced. This rule does not create legal rights for prisoners. But even if we were to consider the trial court's application of the policy directives underlying plaintiff's claims, we would find no basis for reversal.

With respect to plaintiff's claim based on PD 05.03.118, plaintiff failed to establish that this policy directive entitles each prisoner to receive writing implements upon request, even without consideration of financial need. The policy directive only requires that a facility "have available a reasonable quantity of free writing materials (i.e., pencils or pens; paper) for use by prisoners." It does not specify criteria to be used to distribute the "reasonable quantity" among prisoners. Even assuming that the policy directive has the force of law, plaintiff's failure to show a clear legal right to receive free pens, without a consideration of his financial resources, is dispositive of his claim for a writ of mandamus. Therefore, the trial court reached the right result in granting defendant's motion. *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000).

With respect to plaintiff's claim based on the educational and training programs specified in PD 03.04.120, no evidence was offered to rebut defendant's evidence that the Alger Correctional Facility is not a reception facility. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999). Whether the Alger Correctional Facility was required to provide a "multi-media education program" depends on the interpretation of PD 03.04.120(N). In construing administrative rules, the rules of statutory construction apply. *Jordan*, 165 Mich App at 28. Applying these same standards to the policy directive, both the plain meaning of critical words and their placement and purpose in the policy directive must be considered. *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999). If the policy directive is unambiguous, it must be applied as written. *Id.* at 236. We conclude that PD 03.04.120(N) is not ambiguous. The phrase "for use in reception facilities" modifies "multi-media education program." Cf. *Fluor Enterprises, Inc v Dep't of Treasury*, 477 Mich 170, 176; 730 NW2d 722 (2007). The phrase does not apply to the conjunctive phrase "at each institution's program orientation" Assuming that this provision has the force of law, it follows that plaintiff cannot rely on the multi-media provision to establish a clear legal right owned to him at the Alger Correctional Facility because it is not a reception facility. Therefore, the trial court reached the correct result in granting defendant's motion for summary disposition with respect to this claim.¹

Similarly, plaintiff failed to meet his burden of setting forth specific facts showing a genuine issue of material fact with regard to the laundry schedule in PD 04.07.110(D). Even assuming that the policy directive has the force of law, plaintiff's hypothetical example using Monday as the start date for the laundry cycle is unsupported by any evidence. *Maiden*, 461 Mich at 120-121. Thus, plaintiff failed to rebut defendant's evidence that laundry is collected on Sundays and returned on Thursdays, which thereby established the availability of a sufficient

¹ We note that plaintiff also challenged Lesatz's authority to respond to his grievance regarding the educational program, but are not persuaded that the trial court's failure to address this claim warrants reversal. Because the evidence showed that Lesatz responded in his capacity as acting warden, and plaintiff failed to offer evidence that Lesatz was not empowered to act as warden, plaintiff failed to show a genuine issue of material fact regarding his authority. *Maiden*, 461 Mich at 121. Regardless, given the evidence that plaintiff pursued a step-three grievance appeal from Lesatz's decision, without challenging Lesatz's authority, we are not persuaded that this claim would aid plaintiff in establishing a basis for mandamus relief. In general, a writ of mandamus will not be issued if there is a right to appeal. *Keaton*, 202 Mich App at 683.

daily supply of clean state-issued underpants. Further, no genuine issue of material fact was shown with respect to plaintiff's claim that his cell did not contain a "writing surface" and "seating surface," as required by PD 04.07.110(F). As indicated in the trial court's decision, plaintiff's television stand satisfied the "writing surface" requirement. Although the trial court did not address the "seating surface" requirement, contrary to plaintiff's argument, the policy directive does not preclude use of a bed as the "seating surface." Thus, there is no factual support for plaintiff's position that his cell lacked writing and seating surfaces.

Finally, we have reviewed plaintiff's claim regarding defendant's removal of \$80 from his prison account at the Marquette Branch Prison in light of AC, R 791.6639(8), which provides that funds shall not be taken from a prisoner's account, except in five circumstances, one of which is "[p]ursuant to an order of a court." We disagree with plaintiff's argument that the rule requires a court order specifically directing the removal of the funds from the prisoner account. Such a court order might be issued in a civil action where a prisoner's claim of indigency triggers judicial review under MCL 600.2963 of the prisoner's account and how filing fees and costs should be paid. But the record in this case contains no evidence that plaintiff was granted relief based on indigency in the civil case when the court ordered the taxation of costs. Further, R 791.6639(8)(b) does not require such an order. It is sufficient under the rule that defendant's action be "pursuant to an order of a court." We conclude that R 791.6639(8)(b) unambiguously permitted defendant to remove funds from plaintiff's prison account based on the court order entered in the civil case and, therefore, apply it as written. *Jordan*, 165 Mich App at 28.

Plaintiff's reliance on *Wojnicz v Dep't of Corrections*, 32 Mich App 121; 188 NW2d 251 (1971), is misplaced. Unlike *Wojnicz*, this case does not involve evidence of any need for fact-finding to justify the removal of the funds, or that a due process error otherwise occurred that would require the restoration of the funds pending further proceedings. Here, plaintiff already had an opportunity to object to taxable costs in the civil case, see MCR 2.625(F)(3), but the record contains no indication that he did so. The evidence also established that plaintiff pursued a grievance with defendant to challenge the removal of the funds from his account, raising the same claim raised in this case.

Due process is a flexible concept that requires consideration of the particular situation at hand. *In re Brock*, 442 Mich 101, 111; 499 NW2d 752 (1993). Based on the circumstances of this case, plaintiff's claim of a due process right to a restoration of the \$80 to his prisoner account lacks factual support. Further, in light of the court order for taxation of costs in the civil action, plaintiff failed to show a clear legal right, or a clear legal duty owed by defendant, to restore the \$80 to his prisoner account under R 791.6639(8)(b). Therefore, the trial court reached the right result in granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10).

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Kathleen Jansen
/s/ Brian K. Zahra