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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 10/11/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

FOX SALERNO,) 1 CA-CV 10-0594
)
Plaintiff/Appellant,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
ARIZONA DEPARTMENT OF CORRECTIONS;) Rule 28, Arizona Rules of
CHARLES RYAN,) Civil Appellate Procedure)
)
Defendants/Appellees.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. LC2010-000349-001

The Honorable Crane McClennen, Judge

VACATED AND REMANDED

Fox Salerno, Florence
Appellant *In Propria Persona*

Thomas C. Horne, Attorney General Phoenix
by Michele L. Forney, Assistant Attorney General
Attorneys for Defendants/Appellees

O R O Z C O, Judge

¶1 Fox Salerno (Salerno) appeals from a judgment dismissing his complaint against the Arizona Department of Corrections (ADOC) and Director Charles Ryan (Ryan). Salerno's complaint challenged the ADOC's decision to classify him as a

maximum-custody inmate. We agree that the Arizona Administrative Review Act (the ARA), Arizona Revised Statutes (A.R.S) sections 12-901 to -914 (2003), provides no jurisdictional basis for the claim, but we reverse the judgment and remand to allow the superior court to exercise its discretion to consider treating Salerno's complaint as a special action.

FACTS AND PROCEDURAL BACKGROUND

¶12 Salerno is an inmate serving a sentence in the custody of ADOC. On February 9, 2009, ADOC reclassified Salerno and placed him in maximum custody. According to Salerno, Captain Bryan Dennis and others "lied" to increase Salerno's classification score after they discovered that Salerno was gay. As a result of the alleged wrongdoing, Salerno remains in isolation.

¶13 Salerno protested the reclassification by filing a complaint in superior court, purportedly based on the ARA. In addition to an award of costs, Salerno sought: (1) an order requiring ADOC to release Salerno's records, the classification manual, and ADOC Department Order 801 to the court for determination of his proper classification, and (2) orders directing ADOC to reduce Salerno's classification points and order he be placed in a single room within a medium-security unit.

¶4 On July 2, 2010, ADOC and Ryan moved to dismiss Salerno's complaint for lack of subject matter jurisdiction and the designation of an improper party. A few hours earlier, however, the superior court had *sua sponte* dismissed Salerno's complaint. The court's order stated it lacked jurisdiction under the ARA to review ADOC's classification decision, but addressed no other potential basis for jurisdiction.

¶5 Salerno moved to vacate the dismissal¹ on July 16, 2010, arguing that the superior court should have treated his complaint as a special action. He then filed a notice of appeal on July 21, 2010. Without explanation, the superior court denied Salerno's motion to vacate in a minute entry filed on September 3, 2010. Salerno did not appeal this ruling.

DISCUSSION

¶6 We review *de novo* the dismissal for lack of subject matter jurisdiction. *Mitchell v. Gamble*, 207 Ariz. 364, 367, ¶

¹ If Salerno's Motion To Vacate Court's Dismissal qualified as a time-extending motion, his subsequent appeal while that motion was pending would have been "ineffective" and "a nullity." See *Craig v. Craig*, 227 Ariz. 105, 107, ¶ 13, 253 P.3d 624, 626 (2011). We find, however, that Salerno's motion to vacate cannot be characterized as a Rule 59 motion for new trial because it does not cite Arizona Rule of Civil Procedure 59. See *Farmers Ins. Co. v. Vagnozzi*, 132 Ariz. 219, 221-22, 644 P.2d 1305, 1307-08 (1982) (holding that, for purposes of Arizona Rule of Civil Appellate Procedure 9, a motion is one for new trial if it (1) cites or refers to Rule 59 and (2) describes the grounds set forth in Rule 59); see generally ARCAP 9(b)(1)-(4) (listing time-extending motions). Accordingly, we have jurisdiction of Salerno's timely appeal from the July 2, 2010 judgment. See A.R.S. § 12-2101(B) (2003).

6, 86 P.3d 944, 947 (App. 2004). "Judicial review of an administrative decision is not a matter of right except in those situations in which the law authorizes review." *Rose v. Ariz. Dep't of Corrections*, 167 Ariz. 116, 118, 804 P.2d 845, 847 (App. 1991) (citation omitted) (holding that an inmate may obtain review by special action). The ARA provides statutory authority for and governs:

Every action to review judicially a *final decision of an administrative agency* except public welfare decisions pursuant to title 46, or if *the act creating or conferring power on an agency or a separate act provides for judicial review of the agency decisions* and prescribes a definite procedure for the review.

A.R.S. § 12-902.A.1 (2003) (emphasis added). An "administrative agency" includes "every agency, board, commission, department or officer authorized by law to exercise rule-making powers or to adjudicate contested cases, whether created by constitutional provision or legislative enactment." A.R.S. § 12-901.1 (2003). It is undisputed that ADOC is an administrative agency. Accordingly, the statute authorizes judicial review of Salerno's claim if the decision at issue is (1) a final decision in a contested case under the ARA, or (2) an appeal authorized by the acts creating or conferring power on the agency. See A.R.S. § 12-902.A.1.

¶17 We conclude the ADOC decision at issue does not arise out of a contested case, nor is his action otherwise authorized by statutes governing ADOC. A "contested case" under the ARA is one in which "the legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for hearing." *Rose*, 167 Ariz. at 119, 804 P.2d at 848 (quoting A.R.S. § 41-1001.3)². The ARA does not permit review of inmate classification decisions, which are not required to be determined by an agency after a hearing. See *Stanhope v. State*, 170 Ariz. 404, 405-06, 825 P.2d 25, 26-27 (App. 1991); see also *Rose*, 167 Ariz. at 119-20, 804 P.2d at 848-49 (inmate disciplinary hearing is not a contested case for purposes of the administrative review statutes).

¶18 Likewise, Salerno is not entitled to review under the statutes creating or conferring power on the agency. The statutes governing ADOC, A.R.S. §§ 41-1601 to -1684 (2011), do not specifically authorize judicial review of ADOC decisions. *Stanhope*, 170 Ariz. at 405, 825 P.2d at 26.

¶19 Salerno nevertheless contends that the superior court erred by failing to treat his complaint as a petition for special action relief. We agree that Salerno's erroneous invocation of the ARA is not necessarily fatal to his claim.

² Section 41-1001.3 has since been renumbered as 41-1001.4 (Supp. 2010).

See Sheppard v. Ariz. Bd. of Pardons and Paroles, 111 Ariz. 587, 588, 536 P.2d 196, 197 (1975) (holding that the superior court should have permitted parolee to amend his pleading and proceed by special action in lieu of dismissal); *State ex rel. Ariz. State Bd. of Pardons and Paroles v. Superior Court*, 12 Ariz. App. 77, 82-83, 467 P.2d 917, 922-23 (1970) (holding that reliance on the ARA did not preclude all relief when the complaint's allegations were sufficient to vest special action jurisdiction in the superior court); see also *Clark v. State Livestock Sanitary Bd.*, 131 Ariz. 551, 555, 642 P.2d 896, 900 (App. 1982) (vacating dismissal and remanding because the superior court should have considered whether any of the complaint's claims could be reviewed as a special action). Indeed, the Arizona Supreme Court instructs courts to consider "any application" that states facts sufficient to justify relief, without regard to its technical denomination. *State v. Superior Court*, 103 Ariz. 208, 210, 439 P.2d 294, 296 (1968); but see *Stanhope*, 170 Ariz. at 406, 825 P.2d at 27 (affirming the dismissal of a complaint based on the ARA filed by an inmate involuntarily placed in a protective segregation unit and declining to consider the availability of other relief because the inmate's "only contention is that the ARA is applicable to his case").

¶10 Salerno argues his complaint qualifies in substance as a petition for special action even though the complaint does not characterize itself as such. A special action appropriately raises:

- (a) Whether the defendant has failed to exercise discretion which he has a duty to exercise; or to perform a duty required by law as to which he has no discretion; or
- (b) Whether the defendant has proceeded or is threatening to proceed without or in excess of jurisdiction or legal authority; or
- (c) Whether a determination was arbitrary and capricious or an abuse of discretion.

Ariz. R.P. Spec. Act. 3(a)-(c). On remand, the court shall determine whether Salerno's requested relief falls within the ambit of this rule.³ The superior court has already established that Salerno has no "equally plain, speedy, and adequate remedy by appeal" under the ARA. See Ariz. R.P. Spec. Act. 1(a).

CONCLUSION

¶11 The ARA provides no jurisdictional basis for Salerno's complaint. Because the record does not demonstrate that the superior court considered the complaint as a special action, or

³ Cf. *Sims v. Ryan*, 181 Ariz. 330, 332, 890 P.2d 625, 627 (App. 1995) (explaining that a petition for special action is the correct vehicle for a prisoner seeking to transfer from one type of custody to another).

on any other basis, we vacate the dismissal and remand to allow the superior court to consider whether it has jurisdiction under the Arizona Rules of Procedure for Special Actions. See *Rose*, 167 Ariz. at 120-21, 804 P.2d at 849-50 (remanding for superior court to exercise its discretion to consider whether it could review disciplinary proceeding as a special action); *Sheppard*, 111 Ariz. at 588, 536 P.2d at 197 (setting aside a dismissal order and remanding so that parolee could amend his pleading to proceed by special action, notwithstanding the fact that parolee's original jurisdictional statement was predicated on the ARA).

/S/

PATRICIA A. OROZCO, Judge

CONCURRING:

/S/

DIANE M. JOHNSEN, Presiding Judge

/S/

DONN KESSLER, Judge