

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

WILLIAM LEWIS,)	
)	
Petitioner,)	
)	
v.)	C.A. No. N21M-04-145 FJJ
)	
WARDEN ROBERT MAY, et al.,)	
)	
Respondents.)	

ORDER

Submitted: August 9, 2021
Decided: September 30, 2021

**Defendants’ Motion to Dismiss Plaintiff’s Petition
Decision GRANTED**

This is a motion (the “Motion”) filed by Warden Robert May, Captain Roland Willey, Lt. Justin Atherhold, and Lt. Kevin Lorick (collectively, “Respondents”) to dismiss Petitioner’s, William Lewis, Petition for a Writ of Mandamus (“Petition”). For the reasons set forth below, the Court grants this Motion under Superior Court Rule of Civil Procedure 12(b)(5), and alternatively, 12(b)(6).

Under Superior Court Civil Rule 12(b)(5), the Court may dismiss a claim for insufficiency of service of process. Petitioner has claimed a violation of his due process rights based on disciplinary sanctions imposed by Respondents who allegedly failed to follow Department of Corrections (“DOCC”) and Bureau of Prisons (“BOP”) policies and procedures during the disciplinary proceedings. Based

on Petitioner's claim he was required, under 10 *Del. C.* §3103(c), to serve Respondents *and* the Attorney General, the State Solicitor or the Chief Deputy Attorney General.¹ However, as Respondents correctly note, there is no indication that Petitioner served or attempted to serve any of those persons, and therefore, service is insufficient and provides grounds for the Petition to be dismissed.

Under Superior Court Civil Rule 4(j), the time limit for Petitioner to make effective service on the required parties is 120-days from the filing of the complaint. Petitioner filed the Petition on April 29, 2021 and had until August 27, 2021 to effect service. However, Petitioner failed to sufficiently effect service in that time frame and unless this Court, in its discretion, provides Petitioner with additional time pursuant to Rule 4(j), his Petition must be dismissed. While this Court does recognize its ability to provide Petitioner with additional time, and would have been willing to do so, the Court will decline to do so because the Petition would still require dismissal under Superior Court Rule of Civil Procedure 12(b)(6).

Under Superior Court Civil Rule 12(b)(6), the Court may only dismiss a claim if it determines with reasonable certainty that no set of facts can be inferred from the pleadings upon which the nonmoving party can prevail.² When analyzing a motion to dismiss under Rule 12(b)(6), the Court accepts the well-pled allegations of the

¹ "No service of summons upon the State, or upon any administrative office, agency, department, board or commission of the state government, or upon any officer of the state government concerning any matter arising in connection with the exercise of his or her official powers or duties, shall be complete until such service is made upon the person of the Attorney General or upon the person of the State Solicitor or upon the person of the Chief Deputy Attorney General." 10 *Del.C.* §3103

² *Central Mortgage Co. v. Morgan Stanley Capital Holdings, LLC*, 27 A.3d 531, 534 (Del. 2011).

complaint as true and draws all reasonable inferences that logically flow from those allegations in favor of the non-moving party.³

A writ of mandamus may be issued by this Court to compel performance of a nondiscretionary or ministerial duty by a lower court, agency, or public official.⁴ A writ of mandamus is not a matter of right but within the discretion of the Court. For a writ to be issued, a petitioner must show that he has a “clear legal right to the performance of the duty [and] no other adequate remedy is available.”⁵ Where the basis of a petitioner’s claim raises issue with prison policies, a court will not get involved unless a statutory or constitutional right is affected.⁶ “[A] writ of mandamus is not an appropriate tool to merely assure a prison policy is being adhered to.”⁷

In this case, Petitioner alleges four (4) violations of DOC Policy by Respondents: (1) Lorik, the hearing officer for Disciplinary Report 1124080 (“DR#1124080”), violated DOC Policy 4.2 and due process when he failed to provide a written summary of his rationale for revoking Petitioner’s good time; (2) Atherholt, the hearing officer for Disciplinary Report 1124086 (DR#1124086”), violated DOC Policy 4.2 when he failed to consider a disciplinary mental health assessment form in his decision to revoke Petitioner’s good time; (3) Atherholt should not have presided over the hearing on DR#1124086 because he was biased

³ *Clinton v. Enterprise Rent-A-Car*, 977 A.2d 892, 895 (Del. 2009).

⁴ *Long v. Jennings*, 2021 WL 2134854, at *2 (Del. Super., May 25, 2021).

⁵ *Id.*

⁶ *Walls v. Williams*, 2006 WL 1133563, at *1 (Del. Super., March 28, 2006).

⁷ *Id.*

against Petitioner, as established by the reversal on due process grounds of a different disciplinary decision that Atherholt previously issued; (4) Atherholt violated DOC Policy 4.2 by not complying with the “disciplinary matrix” when deciding the amount of good time to revoke for DR#1124086.

This Court finds that none of the alleged violations submitted by Petitioner show he has a clear legal right to the performance of a duty by Respondents. Additionally, Petitioner has available to him another adequate remedy. In fact, the proper remedy for Petitioner’s alleged constitutional violations is 42 U.S.C. §1983.⁸

Because Petitioner has failed to effect service of process on Responders under Superior Court Rule 12(b)(5) and 10 *Del.C.* §3103(c), his claims are barred. Even if this Court were to allow Petitioner to effect proper service, his claims would remain barred under Superior Court Rule 12(b)(6) because he has failed to show he has a clear legal right to compel performance of a duty by Respondents and he has available to him another adequate remedy at law.

IT S SO ORDERED.

Francis J. Jones, Jr.
Francis J. Jones, Jr., Judge

cc: *File & ServeXpress*
Nicholas D. Picollelli, Jr., Deputy Attorney General
Mr. William Lewis, 00569722, JTVCC

⁸ *Parker v. Kearney*, 2000 WL 1611119, at *5 (Del. Super., August 23, 2000).