STATE OF MICHIGAN

COURT OF APPEALS

LAWRENCE GISTOVER

Plaintiff-Appellant,

v

MICHIGAN DEPARTMENT OF CORRECTIONS

Defendant-Appellee.

UNPUBLISHED
August 6, 1996

No. 174291
LC No. 93-75892-AA

Before: White, P.J., and Sawyer, and R.M. Pajtas,* JJ.

PER CURIAM.

Plaintiff appeals the circuit court's order remanding the matter to defendant Michigan Department of Corrections because there was no record of its final decision determining that plaintiff is a homosexual predator and for defendant to follow the procedures of Director's Officer Memorandum (DOM) 1993-35. We affirm.

Plaintiff is a state prisoner in the State Prison of Southern Michigan in Jackson. On August 17, 1983, plaintiff was placed in the Michigan Training Unit to serve his ten to fifteen year sentence for CSC III. On November 3, 1983, plaintiff was issued a notice of intent to conduct an administrative hearing on an allegation that he had been "identified as one of several prisoners who has attempted to organize an extortion and strong arming operation in E-unit." This administrative hearing report indicated that plaintiff would be transferred to "close custody - Michigan Reformatory." Under "reason for disposition," the administrative hearing report stated:

> There are numerous statements from other residents after Mr. Gistover was removed from the housing unit that implicate him in strongarming activities, assault, threatening behavior, and attempts to exhort money and sexual favors from other residents. Therefore we are requesting permanent placement at the Michigan Reformatory, close custody.

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* Circuit judge, sitting on the Court of Appeals by assignment.

Plaintiff was transferred to the Michigan Reformatory on November 10, 1983.

Subsequently, plaintiff was transferred to Muskegon Correctional Facility, a security level-III facility. On July 5, 1983, plaintiff was transferred to the State Prison of Southern Michigan in Jackson.

Later, plaintiff was paroled but again returned to prison. Upon his return to prison, he was classified as security level-IV on November 28, 1991, based on the determination that he is a "homosexual predator." This determination was based on the November 9, 1983 hearing disposition. Apparently, the assistant superintendent of the Michigan Training Unit, Jim Sandborn, held a classification hearing on or about November 28, 1991 and determined that plaintiff was a homosexual predator. Plaintiff alleged that he was not notified of the November 28, 1991 hearing.

Plaintiff requested review of his designation as a homosexual predator. In a memorandum dated August 3, 1993, Jerry Hofbauer, acting warden of the State Prison of Southern Michigan in Jackson, noted that "Prisoner Lawrence Gistover #167983 has recently challenged his classification as a homosexual predator pursuant to DOM 1993-35." Hofbauer continued:

> A review of his records show [sic] that he was originally classified as a homosexual predator on 12-3-91. The classification was based on an incident which must have taken place while serving on his A-File. There is no evidence in his B-file to support why he is labeled as a homosexual predator.
>
> Since that time, [the] prisoner has not exhibited any predatory behavior. His conduct since the incident has been satisfactory.
>
> He is not presently viewed as presenting a threat as a predatory homosexual.
>
> Based on my review of this prisoner's records, I would at this time recommend the removal of his classification as a homosexual predator.
>
> Please advise me of your final determination on this matter.

In a memorandum dated August 26, 1993, Warden Hofbauer informed plaintiff that plaintiff's request for the removal of this classification had been denied:

> This is to notify you that my office has recently received a final determination from the Deputy Director of Correction Facilities Administration in reference to the removal of your classification as a homosexual predator. Please be advised that the Deputy Director has <u>denied</u> the removal of this classification.

In a letter dated September 3, 1993, plaintiff requested that Kenneth McGinnis, director of defendant, issue a declaratory ruling, pursuant to MCL 24.263; MSA 3.560(163), regarding plaintiff's designation as a homosexual predator. In a letter dated September 21, 1993, Richard McKeon,

executive assistant to the director, noted that plaintiff's request for a declaratory ruling was received on September 7, 1993 and informed him:

> If you do not receive a ruling within 30 days of the date we received your request, you may consider it as denied, pursuant to Administrative Rule 791.1115.

On October 18, 1993, plaintiff filed a petition for judicial review, seeking review of his security classification. Plaintiff brought the petition pursuant to MCL 24.263; MSA 3.560(163) of the Administrative Procedures Act (APA), claiming that defendant wrongly denied his request for a declaratory ruling. Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(8).

The circuit court remanded the issue to defendant, stating:

> The file in this matter contains no record for the Court to review. For this reason alone, the Court must remand the matter to the Department of Corrections (MDOC) for further proceedings. MDOC has, however, issued Director's Office Memorandum (DOM) 1993-35, which provides new procedures for the homosexual predator labeling and review process. In the Court's opinion, this matter should be handled by MDOC pursuant to DOM 1993-35. In that process, Petitioner should address to MDOC all defects in the DOM's procedure, which he now directs to the Court. Petitioner retains the right to appeal MDOC's decision.
>
> Therefore, IT IS ORDERED that this matter is REMANDED to the Michigan Department of Corrections for processing in accordance with DOM 1993-35. This Court does not retain jurisdiction.

Plaintiff moved for reconsideration, arguing that he had established the record based on the appendices to his brief in answer to defendant's motion. Plaintiff also argued that judicial review was proper because defendant had failed to hold a hearing pursuant to MCL 791.251 *et seq.*; MSA 28. 2320(51) *et seq.*; (¶ 3). The circuit court denied plaintiff's motion for reconsideration.

Where there is an incomplete record from the Department of Corrections, the circuit court may have no way of ascertaining the merits of a prisoner's claims. *See Jones v Dep't of Corrections*, 185 Mich App 134, 138; 460 NW2d 575 (1990). Plaintiff argued that the trial court could review the declaratory ruling, citing *Bentley v Dep't of Corrections*, 169 Mich App 264; 425 NW2d 778 (1988). However, in *Bentley*, this Court held that since judicial review of an agency decision is limited to the record, where there is no record of the agency decision it may be necessary for the circuit court to remand the case to the agency for a hearing. *Id.* at 272. The circuit court did not err in remanding to defendant for further proceedings.

The trial court also remanded to enable plaintiff to bring his challenge under DOM 1993-35. DOM 1993-35 provided:

> Hearing:
>
> > A prisoner shall be given the opportunity for a hearing as provided in R 791.3310 which shall be conducted by the institutional Security Classification Committee (SCC). The SCC has the authority to apply the homosexual predator label. A Notice of Intent to Conduct an Administrative Hearing (CSJ-282) shall be completed by a staff member whenever a prisoner is labeled a homosexual predator. This notice shall be reviewed with the prisoner at least 24 hours prior to the hearing. The notice shall set forth the facts which are believed to warrant the homosexual predator label. The decision of the SCC shall be recorded using the Administrative Hearing Report (CSJ-144), a copy of which shall be provided to the prisoner.

There is no indication that this procedure was followed. Further, the DOM provided:

> Appeal: A prisoner may appeal the decision of the SCC through the prisoner grievance process. . . .

Finally, the policy directive allowed the prisoner to request review by the warden:

> Review:
>
> > After five years, a prisoner who has been labeled as a homosexual predator may request a review and removal of the label by the Warden. The Warden shall review the seriousness of the incident, conduct since the incident and whether the prisoner continues to present a threat as a predator. Based on this review, the Warden shall either deny the request or recommend removal of the label. If the Warden recommends that the label be removed, the request shall be forwarded to the Deputy Director, CFA, for determination.

Apparently in accordance with the review procedure, plaintiff did ask the acting warden to review his classification. Warden Hofbauer recommend[ed] the removal of his classification as a homosexual predator, but the deputy director denied this request.

Although plaintiff exhausted the avenue of review by the warden and deputy director, plaintiff presented no evidence to the circuit court that he had completed the "Appeal" part of DOM 1993-35 by following the prisoner grievance process which is governed by 03.02.130. However, plaintiff attached appendices to his reply brief on appeal that do not appear in the trial court record. These documents indicate that plaintiff may have exhausted the appeal remedy.

In any event, the circuit court properly remanded this action to defendant because there was no record of defendant's decision designating plaintiff as a homosexual predator and because it is questionable whether DOM 1993-25 was followed. We further observe that the circuit court noted in its opinion that "[plaintiff] retains the right to appeal MDOC's decision."

Affirmed.

/s/ Helene N. White
/s/ David H. Sawyer
/s/ Richard M. Pajtas