[Cite as *State ex rel. Wickensimer v. Croft*, 2010-Ohio-1320.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Brian Wickensimer, Relator,	:	
v.	:	No. 09AP-415
Gary Croft, Respondent.	:	(REGULAR CALENDAR)
State of Ohio ex rel. Sean Swain, Relator,	:	
v.	:	No. 09AP-483
Gary Croft, Respondent.	:	(REGULAR CALENDAR)
State of Ohio ex rel. Lambert Dehler, Relator,	:	
v.	:	No. 09AP-535
Gary Croft, Office of the Chief Inspector of the Ohio Department of Rehabilitation and Correction et al., Respondents.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on March 30, 2010

Brian Wickensimer, pro se.

Sean Swain, pro se.

Lambert Dehler, pro se.

Richard Cordray, Attorney General, and *Lawrence H. Babich*, for respondents in case Nos. 09AP-415 and 09AP-535.

Richard Cordray, Attorney General, and *Ryan G. Dolan*, for respondent in case No. 09AP-483.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISIONS

FRENCH, J.

{¶1} Relators, Brian Wickensimer ("Wickensimer"), Sean Swain ("Swain"), and Lambert Dehler ("Dehler"), are inmates who have filed original actions requesting this court to issue writs of mandamus ordering prison officials to respond to their grievances in accordance with deadlines, and procedures for the extension of those deadlines, set forth in the Ohio Administrative Code. Wickensimer and Swain seek writs against respondent, Gary Croft ("Croft"), Chief Inspector for the Ohio Department of Rehabilitation and Correction, and Dehler seeks a writ against respondents Croft and Kim Frederick ("Frederick"), Inspector of Institutional Services for Trumbull Correctional Institution. Respondents oppose the requests for mandamus relief and moved for summary judgment, and Wickensimer also moved for summary judgment.

{¶2} This court referred these matters to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued decisions, which include findings of fact and conclusions of law and are appended to

this decision, recommending that this court grant respondents' motions for summary judgment, deny Wickensimer's motion for summary judgment, and deny relators' requests for mandamus relief. For the following reasons, we adopt the magistrate's decisions.

{¶3} In order to be entitled to a writ of mandamus, a relator has the burden of demonstrating the following: (1) he has a clear legal right to the relief requested; (2) the respondent is under a clear legal duty to perform the act requested; and (3) the relator has no plain and adequate remedy at law. *State ex rel. Fain v. Summit Cty. Adult Probation Dept.*, 71 Ohio St.3d 658, 1995-Ohio-149. We examine these factors in light of the summary judgment motions, which, pursuant to Civ.R. 56(C), shall be granted if the record establishes that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Summary judgment is appropriate only under the following circumstances: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the non-moving party, reasonable minds can come to but one conclusion, that conclusion being adverse to the non-moving party. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66.

{¶4} Relators claimed in their mandamus complaints that respondents must answer their grievances in compliance with Ohio Adm.Code 5120-9-31, which sets deadlines for prison officials to respond to grievances and has procedures for extending those deadlines. The magistrate concluded that this regulation does not give relators a clear legal right to relief, however. He relied on *State ex rel. Larkins v. Wilkinson*, 79 Ohio St.3d 477, 479, 1997-Ohio-139, which indicated that prison procedural regulations

are primarily designed to guide correctional officials in prison administration, rather than to confer rights on inmates. He also concluded that Wickensimer and Dehler's requests for relief are moot because prison officials responded to their grievances. We now address each relator's case separately.

{¶5} Wickensimer has filed objections to the magistrate's decision against his writ request. "In ruling on objections, the court shall undertake an independent review as to the objected matters to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law." Civ.R. 53(D)(4)(d). Wickensimer challenges the magistrate's conclusion that he has no clear legal right to relief. This court recently decided *State ex rel. Shepherd v. Croft*, 10th Dist. No. 09AP-621, 2010-Ohio-258, ¶4-6, however, which relied on *Larkins* to conclude that an inmate has no clear legal right to prison officials responding to grievances pursuant to deadlines or the procedures for extending those deadlines set forth in Ohio Adm.Code 5120-9-31. He also argues that his request for a writ is not moot because Croft has failed to respond to all of his grievances, but we need not reach this issue because the request fails for want of a clear legal right to relief. Consequently, we overrule Wickensimer's objections to the magistrate's decision.

{¶6} Swain filed untimely objections to the magistrate's decision against his writ request, and, therefore, this court declines to consider them. See Civ.R. 53(D)(3)(b)(i). Instead, we need only determine if "there is an error of law or other defect evident on the face of" that decision. See Civ.R. 53(D)(4)(c). We conclude that the magistrate correctly determined that Swain has no clear legal right to relief given our decision in *Shepherd*.

{¶7} Lastly, Dehler filed no objections to the magistrate's decision against his writ request, and we find no error of law or other defect evident on the face of that decision. The magistrate concluded that Dehler's writ request is moot because it is undisputed that Croft and Frederick responded to the grievances subject to his mandamus complaint. Generally, a writ of mandamus will be denied when the relator's issues become moot. *State ex rel. The Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 518, 1997-Ohio-75. See also *State ex rel. Smith v. Fuerst*, 89 Ohio St.3d 456, 457, 2000-Ohio-218 (holding that a court will not issue a writ of mandamus to compel an act that has already been performed). To be sure, the mootness doctrine does not apply when issues are capable of repetition, yet evading review. *State ex rel. Cincinnati Enquirer v. Heath*, 121 Ohio St.3d 165, 2009-Ohio-590, ¶11. But we need not reach this issue because, pursuant to *Shepherd*, the magistrate correctly concluded that Dehler has no clear legal right to relief.

{¶8} In conclusion, we adopt the magistrate's decisions as our own, including the findings of fact and conclusions of law, in conformity with our amplification. Therefore, we grant respondents' motions for summary judgment, deny Wickensimer's motion for summary judgment, and deny relators' requests for writs of mandamus.

Objections overruled;
relator's motion for summary judgment denied in case No. 09AP-415;
respondents' motions for summary judgment granted;
writs of mandamus denied.

TYACK, P.J., and SADLER, J., concur.

A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Brian Wickensimer,	:	
Relator,	:	
v.	:	No. 09AP-415
Gary Croft,	:	(REGULAR CALENDAR)
Respondent.	:	

M A G I S T R A T E ' S D E C I S I O N

Rendered on November 5, 2009

Brian Wickensimer, pro se.

Richard Cordray, Attorney General, and *Lawrence H. Babich*, for respondent.

IN MANDAMUS
ON MOTIONS FOR SUMMARY JUDGMENT

{¶9} In this original action, relator, Brian Wickensimer, an inmate of the Toledo Correctional Institution, requests a writ of mandamus ordering respondent, Gary Croft, Chief Inspector for the Ohio Department of Rehabilitation and Correction ("ODRC"), to provide him written responses to ten appeals and three original grievances allegedly

filed with the office of chief inspector pursuant to the inmate grievance procedure set forth at Ohio Adm.Code 5120-9-31.

Findings of Fact:

{¶10} 1. On April 27, 2009, relator filed this mandamus action against respondent.

{¶11} 2. According to the complaint, between January 20 and March 5, 2009, relator filed ten appeals to the office of chief inspector. Relator has attached to his complaint as exhibits purported copies of each of the alleged ten appeals.

{¶12} 3. According to the complaint, between January 21 and February 20, 2009, relator filed three original grievances with the office of chief inspector. Relator has attached to his complaint as exhibits purported copies of each of the alleged three original grievances.

{¶13} 4. According to the complaint, as of the filing date of this action, respondent had failed to provide written responses to any of the appeals or original grievances allegedly filed with the office of chief inspector.

{¶14} 5. On May 22, 2009, respondent filed his answer to the complaint.

{¶15} 6. On June 9, 2009, respondent moved for judgment on the pleadings.

{¶16} 7. On June 17, 2009, relator filed a document indicating opposition to respondent's motion for judgment on the pleadings. It further indicated that a motion for summary judgment was being submitted as well.

{¶17} 8. On July 29, 2009, the magistrate issued an order denying respondent's June 9, 2009 motion for judgment on the pleadings.

{¶18} 9. On August 17, 2009, respondent moved for summary judgment. In support, respondent submitted his affidavit executed August 14, 2009. Respondent's affidavit consists of 21 enumerated paragraphs contained on 11 pages. Attached to the affidavit are exhibits lettered A through M.

{¶19} 10. Respondent's affidavit specifically addresses each of the alleged ten appeals and three original grievances that are the subject of the complaint. With the exception of an alleged appeal identified by the complaint as "Ex 2," respondent avers that he has provided relator written responses to the appeals and original grievances.

{¶20} 11. Paragraph 20 of respondent's affidavit addresses the alleged appeal identified by relator as "Ex 2" attached to the complaint:

> Wickensimer attaches, as Relator's Exhibit 2 to the Petition for Writ of Mandamus, an Appeal to the Chief Inspector. This appeal does not contain a grievance number nor does he attach any supporting documentation. I have reviewed all documentation and appeals received in our office from inmate Wickensimer. Our records indicate that the Appeal to the Chief Inspector which Wickensimer attached to his Petition for Writ of Mandamus as Exhibit 2, was not presented to the office of the Chief Inspector therefore no decision could be rendered. (Exhibit M, Bates No. 000092.)

{¶21} 12. Exhibit M attached to respondent's affidavit appears to be an exact copy of exhibit 2 attached to the complaint. The two exhibits (respondent's exhibit M and relator's exhibit 2) show a preprinted form captioned "Appeal to Chief Inspector." On the form, January 20, 2009 is listed as the date. No grievance number is provided in the space for a grievance number. Above the caption, the notation "Ex 2" appears.

{¶22} 13. On August 19, 2009, the magistrate issued an order giving notice that respondent's August 17, 2009 motion for summary judgment is set for submission to the magistrate on September 8, 2009.

{¶23} 14. On September 11, 2009, the magistrate issued an order giving notice that, to the extent that relator's June 17, 2009 filing can be construed as a motion for summary judgment, it is set for submission to the magistrate on September 30, 2009. In the order, the magistrate, sua sponte, extended the submission date on respondent's motion for summary judgment to September 30, 2009.

{¶24} 15. Earlier, on September 1, 2009, relator filed a memorandum in opposition to respondent's motion for summary judgment. He also filed his affidavit executed August 20, 2009.

{¶25} 16. In his affidavit, relator avers:

> Respondent Gary Croft claims to have not received one of my grievance appeals marked as Exhibit 2 in the appendix to my original action. On or about January 20, 2009, I mailed that grievance appeal to his office. I received no written responses, just like my other appeals and original grievances, and it was mailed in the same envelop[e] as several other grievance appeals he is not disputing reception of. On or about April 15, 2009, I mailed a service copy of my original action along with Exhibit 2 to Respondent Gary Croft at the Office of the Chief Inspector. He clearly received this copy, as he has reproduced it as Exhibit M to his motion for summary judgment and it still has my hand-written "Ex. 2" in the top right corner.
>
> In "Answer of Respondent Gary Croft," filed in May 2009, Respondent claimed he answered all of my grievances and that all of my issues were moot. This was his fourth defence [sic], paragraph 10. He now claims in his affidavit, under oath, in paragraph 2-, that he never received it.
>
> In April he received Exhibit 2. In May he said he answered it. Now he says he never received it but attaches a copy of "Ex 2" as Exhibit M[.] * * *

Conclusions of Law:

{¶26} It is the magistrate's decision that this court grant respondent's motion for summary judgment and deny relator's motion for summary judgment.

{¶27} Summary judgment is appropriate when the movant demonstrates that: (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, said party being entitled to have the evidence construed most strongly in his favor. *Turner v. Turner* (1993), 67 Ohio St.3d 337, 339-340; *Bostic v. Connor* (1988), 37 Ohio St.3d 144, 146; *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66. The moving party bears the burden of proving no genuine issue of material fact exists. *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 115.

{¶28} Civ.R. 56(E) states:

> * * * When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.

{¶29} Ohio Adm.Code 5120-9-31 is captioned: "The inmate grievance procedure." It provides, in pertinent part:

> (A) The department of rehabilitation and correction shall provide inmates with access to an inmate grievance procedure. This procedure is designed to address inmate complaints related to any aspect of institutional life that directly and personally affects the grievant. This may include complaints regarding policies, procedures, conditions of confinement, or the actions of institutional staff.

> * * *
>
> (K) The inmate grievance procedure shall be comprised of three consecutive steps fully described below. * * *
>
> (1) The filing of an informal complaint – step one:
>
> Within fourteen calendar days of the date of the event giving rise to the complaint, the inmate shall file an informal complaint to the direct supervisor of the staff member, or department most directly responsible for the particular subject matter of the complaint. Staff shall respond in writing within seven calendar days of receipt of the informal complaint. If the inmate has not received a written response from the staff member within a reasonable time, the inmate should immediately contact the inspector of institutional services either in writing or during regular open office hours. The inspector of institutional services shall take prompt action to ensure that a written response is provided to the informal complaint within four calendar days. If a response is not provided by the end of the fourth day, the informal complaint step is automatically waived. * * *
>
> (2) The filing of the notification of grievance – step two:
>
> If the inmate is dissatisfied with the informal complaint response, or the informal complaint process has been waived, the inmate may obtain a notification of grievance form from the inspector of institutional services. All inmate grievances must be filed by the inmate no later than fourteen calendar days from the date of the informal complaint response or waiver of the informal complaint step. The inspector of institutional services may also waive the timeframe for the filing of the notification of grievance, for good cause. The inspector of institutional services shall provide a written response to the grievance within fourteen calendar days of receipt. * * * The inspector of institutional services may extend the time in which to respond, for good cause, with notice to the inmate. The chief inspector or designee shall be notified of all extensions. * * *
>
> (3) The filing of an appeal of the disposition of grievance – step three:
>
> If the inmate is dissatisfied with the disposition of grievance, the inmate may request an appeal form from the inspector of

> institutional services. The appeal must then be filed to the office of the chief inspector within fourteen calendar days of the date of the disposition of grievance. For good cause the chief inspector or designee(s) may waive such time limits. The chief inspector or designee(s) shall provide a written response within thirty calendar days of receipt of the appeal. The chief inspector or designee(s) may extend the time in which to respond for good cause, with notice to the inmate. The decision of the chief inspector or designee is final. * * *
>
> * * *
>
> (M) Grievances against the warden or inspector of institutional services must be filed directly to the office of the chief inspector within thirty calendar days of the event giving rise to the complaint. Such grievances must show that the warden or inspector of institutional services was personally and knowingly involved in a violation of law, rule or policy, or personally and knowingly approved or condoned such a violation. The chief inspector or designee(s) shall respond in writing within thirty calendar days of receipt of the grievance. The chief inspector or designee(s) may extend the time in which to respond for good cause, with notice to the inmate. The decision of the chief inspector or designee is final.

{¶30} The threshold issue here is whether Ohio Adm.Code 5120-9-31 provides to a prisoner a clear legal right enforceable in mandamus. As for the time limitations for a written response by the chief inspector to the filing of an appeal or an original grievance, the case law strongly suggests that no clear legal right enforceable in mandamus exists. In *State ex rel. Larkins v. Wilkinson* (1997), 79 Ohio St.3d 477, 479, a case cited by respondent, the court held that Ohio Adm.Code 5120-9-09(M)'s provision that the ODRC director will act upon an appeal in writing within 30 days did not confer a clear legal right upon the prisoner that the director render his decision within the 30 day period. The *Larkins* court explained:

> Larkins next asserts that Wilkinson's failure to follow Ohio Adm.Code 5120-9-09(M) rendered the Rules Infraction Board proceedings illegal and void. Larkins cites *Cobb v.*

> *Cobb* (1959), 112 Ohio App. 19, 15 O.O.2d 343, 174 N.E.2d 290, in support of this contention. But *Cobb* relied on our decision in *State ex rel. Smith v. Barnell* (1924), 109 Ohio St. 246, 142 N.E.611. In *Smith*, 109 Ohio St. at 258, 142 N.E. at 614, we noted that seemingly mandatory time limitations "imposed merely with a view to the prompt and orderly conduct of business, are directory and not mandatory." Based on *Smith*, 109 Ohio St. at 259-260, 142 N.E. at 614-615, the thirty-day period specified in Ohio Adm.Code 5120-9-09(M) is not tantamount to a *jurisdictional* requirement because a full consideration of an appeal might take more than thirty days. Prison regulations like Ohio Adm.Code 5120-9-09(M) are primarily designed to guide correctional officials in prison administration rather than to confer rights on inmates. [*Sandin v. Conner* (1995), 515 U.S. 472] at 481-482, 115 S.Ct. at 2299, 132 L.Ed.2d at 428.

(Emphasis sic.)

{¶31} Even if it could be successfully argued that Ohio Adm.Code 5120-9-31 provides a clear legal right to a written response to the filing of an appeal or original grievance within a reasonable period of time, relator's claim to any such right is now moot because he has now been afforded the written responses to the appeals and original grievances actually received by the office of chief inspector.

{¶32} A genuine issue of material fact under Civ.R. 56 is not created by relator's averment that, on or about January 20, 2009, he "mailed" to the office of chief inspector a grievance appeal identified as "Ex 2" attached to the complaint.

{¶33} As earlier noted, in his affidavit, respondent avers that the "records" of his office indicate that the appeal identified by relator as "Ex 2" was not presented to his office and that "therefore no decision could be rendered."

{¶34} As earlier noted, in his affidavit, relator claims that, because respondent was served a copy of the complaint at the time of the filing of this action, that service can substitute for the requirement under Ohio Adm.Code 5120-9-31(K)(3) that an

inmate's appeal "must then be filed to the office of the chief inspector." Relator is incorrect. The rule does not permit the filing of a grievance appeal via the service of a complaint at the filing of a mandamus action.

{¶35} Relator's averment that he "mailed" the grievance appeal to the office of chief inspector does not, by itself, create a genuine issue of material fact with respect to respondent's averment that the records of the office of chief inspector indicate that the appeal was not presented to that office. There is no real dispute here that, in fact, the records of the office of chief inspector indicate that the appeal was never received by the office of chief inspector.

{¶36} Thus, respondent correctly concludes that, under the rule, no duty to provide a written response to the alleged appeal ever arose.

{¶37} Accordingly, for all the above reasons, it is the magistrate's decision that this court grant respondent's motion for summary judgment. It is further the magistrate's decision that this court deny relator's motion for summary judgment.

/s/ Kenneth W. Macke
KENNETH W. MACKE
MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Sean Swain,	:	
Relator,	:	
v.	:	No. 09AP-483
Gary Croft [Chief Inspector, Ohio Department of Rehabilitation and Correction],	:	(REGULAR CALENDAR)
Respondent.	:	

M A G I S T R A T E ' S D E C I S I O N

Rendered on December 17, 2009

Sean Swain, pro se.

Richard Cordray, Attorney General, and *Ryan G. Dolan*, for respondent.

IN MANDAMUS
ON MOTION FOR SUMMARY JUDGMENT

{¶38} In this original action, relator, Sean Swain, an inmate of the Toledo Correctional Institution ("TCI"), requests a writ of mandamus ordering respondent, Gary Croft, Chief Inspector for the Ohio Department of Rehabilitation and Correction ("ODRC"), to provide him written decisions to six appeals allegedly filed with the office of chief inspector pursuant to the inmate grievance procedure set forth at Ohio Adm.Code 5120-9-31.

Findings of Fact:

{¶39} 1. On May 15, 2009, relator filed this mandamus action.

{¶40} 2. According to the complaint, on March 19, 2009 relator mailed six grievance appeals to the office of chief inspector. Relator has attached to his complaint as exhibits purported copies of each of the alleged six appeals and other related documents.

{¶41} 3. On June 16, 2009, respondent filed an answer to the complaint.

{¶42} 4. Also on June 16, 2009, respondent moved for judgment on the pleadings.

{¶43} 5. On July 30, 2009, the magistrate denied respondent's June 16, 2009 motion for judgment on the pleadings.

{¶44} 6. On October 9, 2009, respondent moved for summary judgment. In support, respondent submitted his own affidavit executed October 9, 2009. He also submitted the affidavit of Tara Pinski executed October 9, 2009.

{¶45} 7. In his affidavit, respondent avers that he is the chief inspector for ODRC and he is the custodian of records for the office of chief inspector. Respondent avers that his records "do not indicate receipt of any original appeals dated March 19, 2009 as listed in Mr. Swain's petition." (Croft affidavit, at ¶7.)

{¶46} 8. In her affidavit, Pinski avers that she became the acting inspector of institutional services at TCI on August 1, 2009 and assumed the position full time on September 1, 2009. She avers that she personally met with relator on several occasions in an effort to resolve his outstanding grievances. (Pinski affidavit, at ¶9.)

{¶47} 9. In her affidavit, Pinski avers that TCI had no record of any informal complaint or notification of grievance ("NOG") relating to three purported appeals to the office of chief inspector. (Pinski affidavit, at ¶13.) To resolve this problem, after her consultation with Assistant Chief Inspector Don Coble and the office of the Ohio Attorney General, it was decided, with relator's agreement, that Pinski would "renumber" the three NOGs and that, as the acting institutional inspector, she would respond to them under one grievance number, i.e., ToCi 09-09-000001.

{¶48} 10. On September 2, 2009, Pinski provided relator with a disposition of grievance for grievance number ToCi 09-09-000001. (Pinski affidavit, at ¶13.) In that disposition, Pinski denied the three grievances. Relator timely appealed the disposition to the office of chief inspector on September 18, 2009.

{¶49} 11. In his affidavit, respondent avers that, on October 7, 2009, his office affirmed the disposition of the institutional inspector with respect to grievance number ToCi 09-09-000001. (Croft affidavit, at ¶11.)

{¶50} 12. Another of relator's purported appeals to the office of chief inspector involves grievance number ToCi 12-08-000113. According to the Pinski affidavit, relator filed an NOG with the institutional inspector on December 9, 2008. On June 19, 2009, relator submitted an appeal to the office of chief inspector. On July 23, 2009, the office of chief inspector affirmed the decision of the institutional inspector. (Pinski affidavit, at ¶14.)

{¶51} 13. The two remaining alleged appeals to the office of chief inspector are more problematical on this motion for summary judgment. In her affidavit, Pinski avers that she denied both of the NOGs submitted to her by relator involving grievances ToCi

06-09-000093 and ToCi 06-09-000120. She attaches as exhibits 13 and 15 to her affidavit the two dispositions of grievance. Exhibits 13 and 15 indicate that the dispositions of grievances for ToCi 06-09-000093 and ToCi 06-09-000120 were issued September 14, 2009. (Pinski affidavit, at ¶15-16.)

{¶52} 14. Pinski avers that relator did not timely appeal her dispositions of those two NOGs to the office of chief inspector. (Pinski affidavit, at ¶15-16.)

{¶53} 15. Also, in his affidavit, respondent avers that relator failed to timely appeal the institutional inspector's dispositions of the NOGs in ToCi 06-09-000093 and ToCi 06-09-000120. (Croft affidavit, at ¶12.)

{¶54} 16. According to paragraph 13 of the Croft affidavit:

> All Notifications of Grievances and Grievance Appeals that are the subject of the instant Case No. 09APD 05-483 and properly presented to the Institutional Inspector and the Office of the Chief Inspector have been reviewed, thoroughly investigated and decisions have been rendered.

{¶55} 17. According to paragraph 16 of the Pinski affidavit:

> All Notification of Grievances that are the subject of this lawsuit have been reviewed, thoroughly investigated and decisions have been rendered.

{¶56} 18. On October 16, 2009, the magistrate issued notice that respondent's October 9, 2009 motion for summary judgment was set for submission to the magistrate on November 6, 2009.

{¶57} 19. On October 29, 2009, relator filed his response to respondent's summary judgment motion. In support, relator submitted his own affidavit executed October 19, 2009. The affidavit avers in part:

> [Nine] Some time in the week after I mailed my appeals to Respondent's office in September, I was in the office of

> institutional inspector Tara Pinski. She was on the phone. She indicated that she was speaking to the Ohio Attorney General's office about me. I told her to tell them I said, "Hi." Ms. Pinski said into the phone, "Swain says, 'Hi.'" Ms. Pinski did no relay to me that the Attorney General's office said, "Hi," in response. Instead, Ms. Pinski said that they wanted to know if I was going to appeal her recent dispositions. I told her, loud enough for the party on the other end of the phone to hear, "I already have." Ms. Pinski then checked on the computer to see if I was in the timelines to appeal and told the party on the line that I was.
>
> [Ten] Ms. Pinski indicated after the call was concluded that she had been speaking with Susan Calderon and that the Attorney General's office had not received the documents Ms. Pinski had sent them. They were sent by either fax or e-mail (I do no know the difference). The process was, she put the paperwork on the copier and typed in an address that began SusanCalderon@ohioattorneygeneral.gov. Ms. Pinski complained about the length of the address.
>
> [Eleven] Based on this conversation, I question how Ms. Tara Pinski could assert to have personal knowledge that I did not appeal her dispositions. Both she and Susan Calderon of the Ohio Attorney General's office (if Ms. Pinski was actually on the phone with her) both had been informed that I had appealed her decisions.
>
> [Twelve] Ms. Pinski had copies of both of my appeals that the chief inspector claims to have never received. I saw them in the file in her office as we were going over paperwork. Thus, she knows conclusively that I have filed appeals in TOCI-06-09-000093 and TOCI-06-09-000120.

Conclusions of Law:

{¶58} It is the magistrate's decision that this court grant respondent's motion for summary judgment, as more fully explained below.

{¶59} Summary judgment is appropriate when the movant demonstrates that: (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, and that

conclusion is adverse to the party against whom the motion for summary judgment is made, said party being entitled to have the evidence construed most strongly in his favor. *Turner v. Turner* (1993), 67 Ohio St.3d 337, 339-340; *Bostic v. Connor* (1988), 37 Ohio St.3d 144, 146; *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66. The moving party bears the burden of proving no genuine issue of material fact exists. *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 115.

{¶60} Civ.R. 56(E) states:

> * * * When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.

{¶61} Ohio Adm.Code 5120-9-31 is captioned: "The inmate grievance procedure." It provides, in pertinent part:

> (A) The department of rehabilitation and correction shall provide inmates with access to an inmate grievance procedure. This procedure is designed to address inmate complaints related to any aspect of institutional life that directly and personally affects the grievant. This may include complaints regarding policies, procedures, conditions of confinement, or the actions of institutional staff.
>
> * * *
>
> (K) The inmate grievance procedure shall be comprised of three consecutive steps fully described below. * * *
>
> (1) The filing of an informal complaint – step one:
>
> Within fourteen calendar days of the date of the event giving rise to the complaint, the inmate shall file an informal complaint to the direct supervisor of the staff member, or department most directly responsible for the particular

> subject matter of the complaint. Staff shall respond in writing within seven calendar days of receipt of the informal complaint. If the inmate has not received a written response from the staff member within a reasonable time, the inmate should immediately contact the inspector of institutional services either in writing or during regular open office hours. The inspector of institutional services shall take prompt action to ensure that a written response is provided to the informal complaint within four calendar days. If a response is not provided by the end of the fourth day, the informal complaint step is automatically waived. * * *
>
> (2) The filing of the notification of grievance – step two:
>
> If the inmate is dissatisfied with the informal complaint response, or the informal complaint process has been waived, the inmate may obtain a notification of grievance form from the inspector of institutional services. All inmate grievances must be filed by the inmate no later than fourteen calendar days from the date of the informal complaint response or waiver of the informal complaint step. The inspector of institutional services may also waive the timeframe for the filing of the notification of grievance, for good cause. The inspector of institutional services shall provide a written response to the grievance within fourteen calendar days of receipt. * * * The inspector of institutional services may extend the time in which to respond, for good cause, with notice to the inmate. The chief inspector or designee shall be notified of all extensions. * * *
>
> (3) The filing of an appeal of the disposition of grievance – step three:
>
> If the inmate is dissatisfied with the disposition of grievance, the inmate may request an appeal form from the inspector of institutional services. The appeal must then be filed to the office of the chief inspector within fourteen calendar days of the date of the disposition of grievance. For good cause the chief inspector or designee(s) may waive such time limits. The chief inspector or designee(s) shall provide a written response within thirty calendar days of receipt of the appeal. The chief inspector or designee(s) may extend the time in which to respond for good cause, with notice to the inmate. The decision of the chief inspector or designee is final. * * *
>
> * * *

> (M) Grievances against the warden or inspector of institutional services must be filed directly to the office of the chief inspector within thirty calendar days of the event giving rise to the complaint. Such grievances must show that the warden or inspector of institutional services was personally and knowingly involved in a violation of law, rule or policy, or personally and knowingly approved or condoned such a violation. The chief inspector or designee(s) shall respond in writing within thirty calendar days of receipt of the grievance. The chief inspector or designee(s) may extend the time in which to respond for good cause, with notice to the inmate. The decision of the chief inspector or designee is final.

{¶62} The threshold issue here is whether Ohio Adm.Code 5120-9-31 provides to a prisoner a clear legal right enforceable in mandamus. As for the time limitations for a written decision by the chief inspector upon the filing of an appeal, the case law strongly suggests that no clear legal right enforceable in mandamus exists. In *State ex rel. Larkins v. Wilkinson* (1997), 79 Ohio St.3d 477, 479, a case cited by respondent, the court held that Ohio Adm.Code 5120-9-09(M)'s provision that the ODRC director will act upon an appeal in writing within 30 days did not confer a clear legal right upon the prisoner that the director render his decision within the 30 day period. The *Larkins* court explained:

> Larkins next asserts that Wilkinson's failure to follow Ohio Adm.Code 5120-9-09(M) rendered the Rules Infraction Board proceedings illegal and void. Larkins cites *Cobb v. Cobb* (1959), 112 Ohio App. 19, 15 O.O.2d 343, 174 N.E.2d 290, in support of this contention. But *Cobb* relied on our decision in *State ex rel. Smith v. Barnell* (1924), 109 Ohio St. 246, 142 N.E.611. In *Smith*, 109 Ohio St. at 258, 142 N.E. at 614, we noted that seemingly mandatory time limitations "imposed merely with a view to the prompt and orderly conduct of business, are directory and not mandatory." Based on *Smith*, 109 Ohio St. at 259-260, 142 N.E. at 614-615, the thirty-day period specified in Ohio Adm.Code 5120-9-09(M) is not tantamount to a *jurisdictional* requirement because a full consideration of an appeal might take more than thirty days. Prison regulations like Ohio Adm.Code

> 5120-9-09(M) are primarily designed to guide correctional officials in prison administration rather than to confer rights on inmates. [*Sandin v. Conner* (1995), 515 U.S. 472] at 481-482, 115 S.Ct. at 2299, 132 L.Ed.2d at 428.

(Emphasis sic.)

{¶63} As earlier noted, on May 15, 2009, relator, a TCI inmate, filed this original action alleging that he had not received written decisions from respondent following his alleged mailing of six grievance appeals on March 19, 2009. Relator's complaint prays for a writ of mandamus ordering respondent to provide written decisions for his six grievance appeals.

{¶64} It is undisputed that, following the filing of this action, TCI institutional inspector Pinski personally met with relator several times in an effort to resolve his outstanding grievances.

{¶65} It is undisputed that relator agreed to the consolidation of three grievances, and that on September 2, 2009, Pinski issued her written disposition of grievance denying the consolidated grievances (ToCi 09-09-000001). It is undisputed that relator timely appealed Pinski's disposition and that, on October 7, 2009, chief inspector Croft (respondent) affirmed Pinski's disposition of those consolidated grievances.

{¶66} It is further undisputed that another of relator's purported appeals to the office of chief inspector received a written decision from the chief inspector's office on July 23, 2009.

{¶67} Regarding the remaining two of the six alleged appeals of March 19, 2009, it is undisputed that, following relator's filing of this action, Pinski issued written denials of both NOGs submitted to her by relator involving grievances ToCi 06-09-000093 and

ToCi 06-09-000120. With respect to the right to administratively appeal Pinski's denial of the NOGs in those two grievances, both Pinski and Croft aver that relator failed to file appeals with the office of chief inspector. On the other hand, relator, by affidavit, avers that he mailed appeals to the office of chief inspector.

{¶68} Notwithstanding the efforts that Pinski and Croft have undisputedly made to resolve relator's complaint, relator avers that Croft and Pinski are mistaken as to whether he filed appeals to the office of chief inspector regarding two grievances ruled upon by Pinski.

{¶69} Relator here claims that this scenario presents a genuine issue of material fact which requires this court to deny respondent's motion for summary judgment. The magistrate disagrees.

{¶70} That Pinski and respondent have endeavored to resolve relator's complaint does not create for relator a clear legal right under Ohio's inmate grievance procedures that is enforceable in mandamus. As the *Larkins* court explained, prison regulations are primarily designed to guide correctional officials in prison administration rather than to confer rights on inmates.

{¶71} Accordingly, it is the magistrate's decision that this court grant respondent's motion for summary judgment.

/s/ Kenneth W. Macke
KENNETH W. MACKE
MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Lambert Dehler,	:	
Relator,	:	
v.	:	No. 09AP-535
Gary Croft, Office of the Chief Inspector of Ohio Department of Rehabilitation and Correction and Kim Frederick, Inspector of Institutional Services, Trumbull Correctional Institution,	:	(REGULAR CALENDAR)
Respondents.	:	

M A G I S T R A T E ' S D E C I S I O N

Rendered on December 18, 2009

Lambert Dehler, pro se.

Richard Cordray, Attorney General and *Lawrence H. Babich*, for respondents.

IN MANDAMUS
ON MOTION FOR SUMMARY JUDGMENT

{¶72} In this original action, relator, Lambert Dehler, an inmate of the Trumbull Correctional Institution ("TCI"), requests a writ of mandamus ordering respondent Gary Croft ("Croft"), Chief Inspector for the Ohio Department of Rehabilitation and Correction ("ODRC"), to provide him written decisions regarding five original grievances relator filed with the office of chief inspector in January, March and April 2009. Also, relator

requests that the writ order respondent Kim Frederick ("Frederick"), the TCI inspector of institutional services ("institutional inspector"), to provide him written dispositions of three notifications of grievance he filed with Frederick in April and May 2009.

Findings of Fact:

{¶73} 1. On June 1, 2009, relator filed this mandamus action against respondents.

{¶74} 2. According to the complaint, during January, March and April 2009, relator filed five original grievances with the office of chief inspector. According to the complaint, Croft has not provided relator with written decisions regarding any of the original grievances.

{¶75} 3. According to the complaint, during April and May 2009, relator filed three notifications of grievance with the TCI institutional inspector. According to the complaint, Frederick has not provided him with written dispositions of those grievances.

{¶76} 4. On June 19, 2009, respondents answered the complaint.

{¶77} 5. Also on June 19, 2009, respondents moved for judgment on the pleadings.

{¶78} 6. On July 30, 2009, the magistrate denied respondents' motion for judgment on the pleadings.

{¶79} 7. On October 1, 2009, respondents moved for summary judgment. In support, respondents submitted their own affidavits. Frederick executed her affidavit on September 23, 2009 and Croft executed his affidavit on September 25, 2009.

{¶80} 8. In his affidavit, Croft avers that he has provided to relator written decisions with respect to the five original grievances that relator alleges were filed with the office of chief inspector during January, March and April 2009.

{¶81} 9. In her affidavit, Frederick avers that she has provided to relator written dispositions regarding the three notifications of grievance filed with the TCI institutional inspector during April and May 2009.

{¶82} 10. On October 5, 2009, the magistrate issued notice that respondents' motion for summary judgment is set for submission to the magistrate on October 26, 2009.

{¶83} 11. On October 21, 2009, relator moved to strike the Croft and Frederick affidavits. Relator also moved for continuance of the summary judgment submission date so that relator can conduct discovery. Relator has not filed his own affidavit or any other affidavit to counter any of the averments contained in the Croft and Frederick affidavits.

{¶84} 12. On October 26, 2009, respondents filed a written response in opposition to relator's October 21, 2009 motion to strike their affidavits and for a continuance to pursue discovery.

Conclusions of Law:

{¶85} It is the magistrate's decision that this court grant respondents' motion for summary judgment, as more fully explained below.

{¶86} Summary judgment is appropriate when the movant demonstrates that: (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, and that

conclusion is adverse to the party against whom the motion for summary judgment is made, said party being entitled to have the evidence construed most strongly in his favor. *Turner v. Turner* (1993), 67 Ohio St.3d 337, 339-340; *Bostic v. Connor* (1988), 37 Ohio St.3d 144, 146; *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66. The moving party bears the burden of proving no genuine issue of material fact exists. *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 115.

{¶87} Civ.R. 56(E) states:

> * * * When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.

{¶88} Ohio Adm.Code 5120-9-31 is captioned: "The inmate grievance procedure." It provides, in pertinent part:

> (A) The department of rehabilitation and correction shall provide inmates with access to an inmate grievance procedure. This procedure is designed to address inmate complaints related to any aspect of institutional life that directly and personally affects the grievant. This may include complaints regarding policies, procedures, conditions of confinement, or the actions of institutional staff.
>
> * * *
>
> (K) The inmate grievance procedure shall be comprised of three consecutive steps fully described below. * * *
>
> (1) The filing of an informal complaint – step one:
>
> Within fourteen calendar days of the date of the event giving rise to the complaint, the inmate shall file an informal complaint to the direct supervisor of the staff member, or department most directly responsible for the particular

> subject matter of the complaint. Staff shall respond in writing within seven calendar days of receipt of the informal complaint. If the inmate has not received a written response from the staff member within a reasonable time, the inmate should immediately contact the inspector of institutional services either in writing or during regular open office hours. The inspector of institutional services shall take prompt action to ensure that a written response is provided to the informal complaint within four calendar days. If a response is not provided by the end of the fourth day, the informal complaint step is automatically waived. * * *
>
> (2) The filing of the notification of grievance – step two:
>
> If the inmate is dissatisfied with the informal complaint response, or the informal complaint process has been waived, the inmate may obtain a notification of grievance form from the inspector of institutional services. All inmate grievances must be filed by the inmate no later than fourteen calendar days from the date of the informal complaint response or waiver of the informal complaint step. The inspector of institutional services may also waive the timeframe for the filing of the notification of grievance, for good cause. The inspector of institutional services shall provide a written response to the grievance within fourteen calendar days of receipt. * * * The inspector of institutional services may extend the time in which to respond, for good cause, with notice to the inmate. The chief inspector or designee shall be notified of all extensions. * * *
>
> (3) The filing of an appeal of the disposition of grievance – step three:
>
> If the inmate is dissatisfied with the disposition of grievance, the inmate may request an appeal form from the inspector of institutional services. The appeal must then be filed to the office of the chief inspector within fourteen calendar days of the date of the disposition of grievance. For good cause the chief inspector or designee(s) may waive such time limits. The chief inspector or designee(s) shall provide a written response within thirty calendar days of receipt of the appeal. The chief inspector or designee(s) may extend the time in which to respond for good cause, with notice to the inmate. The decision of the chief inspector or designee is final. * * *
>
> * * *

> (M) Grievances against the warden or inspector of institutional services must be filed directly to the office of the chief inspector within thirty calendar days of the event giving rise to the complaint. Such grievances must show that the warden or inspector of institutional services was personally and knowingly involved in a violation of law, rule or policy, or personally and knowingly approved or condoned such a violation. The chief inspector or designee(s) shall respond in writing within thirty calendar days of receipt of the grievance. The chief inspector or designee(s) may extend the time in which to respond for good cause, with notice to the inmate. The decision of the chief inspector or designee is final.

{¶89} The threshold issue here is whether Ohio Adm.Code 5120-9-31 provides to a prisoner a clear legal right enforceable in mandamus. As for the time limitations for a written decision by the chief inspector to the filing of an original grievance or the time limitations for a written disposition by the institutional inspector, the case law strongly suggests that no clear legal right enforceable in mandamus exists. In *State ex rel. Larkins v. Wilkinson* (1997), 79 Ohio St.3d 477, 479, a case cited by respondents, the court held that Ohio Adm.Code 5120-9-09(M)'s provision that the ODRC director will act upon an appeal in writing within 30 days did not confer a clear legal right upon the prisoner that the director render his decision within the 30 day period. The *Larkins* court explained:

> Larkins next asserts that Wilkinson's failure to follow Ohio Adm.Code 5120-9-09(M) rendered the Rules Infraction Board proceedings illegal and void. Larkins cites *Cobb v. Cobb* (1959), 112 Ohio App. 19, 15 O.O.2d 343, 174 N.E.2d 290, in support of this contention. But *Cobb* relied on our decision in *State ex rel. Smith v. Barnell* (1924), 109 Ohio St. 246, 142 N.E.611. In *Smith*, 109 Ohio St. at 258, 142 N.E. at 614, we noted that seemingly mandatory time limitations "imposed merely with a view to the prompt and orderly conduct of business, are directory and not mandatory." Based on *Smith*, 109 Ohio St. at 259-260, 142 N.E. at 614-615, the thirty-day period specified in Ohio Adm.Code 5120-9-09(M) is not tantamount to a *jurisdictional* requirement

> because a full consideration of an appeal might take more than thirty days. Prison regulations like Ohio Adm.Code 5120-9-09(M) are primarily designed to guide correctional officials in prison administration rather than to confer rights on inmates. [*Sandin v. Conner* (1995), 515 U.S. 472] at 481-482, 115 S.Ct. at 2299, 132 L.Ed.2d at 428.

(Emphasis sic.)

{¶90} Even if it could be successfully argued that Ohio Adm.Code 5120-9-31 provides an inmate a clear legal right to a written decision upon the filing of an original grievance with the office of chief inspector within a reasonable period of time, and that it also provides an inmate a clear legal right to a written disposition upon the filing of a notification of grievance with the institutional inspector within a reasonable period of time, such claim to any such right is now moot because relator has been undisputedly provided the written decisions and written dispositions that were the subject of his complaint in mandamus.

{¶91} Relator's October 21, 2009 motion to strike the Croft and Frederick affidavits and for a continuance to conduct discovery is denied.

{¶92} Civ.R. 56(F) provides:

> Should it appear from the affidavits of a party opposing the motion for summary judgment that the party cannot for sufficient reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just.

{¶93} Relator states that he needs a continuance to obtain discovery "to properly impeach the affidavits of Croft [and] Frederick." However, on August 12, 2009, relator filed as exhibits copies of the written decisions of Croft regarding the five original grievances that are the subject of the complaint against Croft. Thus, relator, in effect,

concedes that Croft has provided the written decisions that are sought in this mandamus action.

{¶94} Moreover, relator does not aver in any affidavit of his own that he has not been provided the written decisions he seeks from Croft or the written dispositions he seeks from Frederick.

{¶95} Accordingly, pursuant to Civ.R. 56(F), relator has failed to show the need for discovery with respect to the motion for summary judgment. See *State ex rel. Keller v. Columbus*, 164 Ohio App.3d 648, 2005-Ohio-6500, ¶38-44.

{¶96} Accordingly, for all the above reasons, it is the magistrate's decision that this court grant respondents' motion for summary judgment.

/s/ Kenneth W. Macke
KENNETH W. MACKE
MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).