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DISTRICT IV

July 3, 2019

To:

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You are hereby notified that the Court has entered the following opinion and order:

2018AP179

Jason Ungeth v. Randy Hepp (L.C. # 2017CV2383)

Before Blanchard, Kloppenburg and Fitzpatrick, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Jason Ungeth appeals a circuit court order dismissing his certiorari action for lack of jurisdiction. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. We summarily affirm. *See* WIS. STAT. RULE 809.21 (2013-14).¹

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Ungethum, an inmate at Oshkosh Correctional Institution, was terminated from his job with Badger State Industries (BSI) after he was placed in temporary lockup for possession of contraband. Ungethum filed an inmate complaint through the Inmate Complaint Review System (ICRS) challenging his termination. The Institution Complaint Examiner (ICE) recommended dismissal of the inmate complaint because “no administrative code or policy violations have occurred.” The Reviewing Authority agreed and dismissed the complaint.

Ungethum then appealed the dismissal of his inmate complaint to the Corrections Complaint Examiner (CCE). Printed on the appeal form is the following language quoted from WIS. ADMIN. CODE § DOC 310.13(6) (Dec. 2014):² “The CCE shall recommend a decision to the secretary within 35 working days of receipt of the appeal.” The following language from WIS. ADMIN. CODE § DOC 310.14(1) also appears on the appeal form: “The secretary shall make a decision within 10 working days following receipt of the CCE’s recommendation.” In this case, the CCE recommended to the secretary that Ungethum’s appeal be dismissed, with the modification that Ungethum be paid wages for the amount of time he spent in temporary lockup. The secretary, by his designee, issued a decision on August 30, 2017, accepting the CCE’s recommendation and dismissing Ungethum’s appeal with the modification.

On September 25, 2017, Ungethum filed a petition for writ of certiorari in the circuit court, naming as respondents Mark Marschall, who was his BSI supervisor, and Randy Hepp and Judy Smith, who were the wardens of Oshkosh Correctional Institution for the relevant time periods. The circuit court issued a writ of certiorari directed to Hepp.

² All references to the Wisconsin Administrative Code ch. DOC 310 are to the December 2014 register unless otherwise noted.

On October 23, 2017, Ungethum moved to supplement the writ petition in order to add Jon Litscher, the DOC secretary, as a respondent. The respondents filed a motion to quash the writ as misdirected. The circuit court granted the motion after a hearing, concluding that the court was without jurisdiction to proceed. Ungethum moved for reconsideration, and the court denied the motion. Ungethum now appeals.

Whether a writ of certiorari is misdirected, and thus insufficient, is a question of law that this court reviews de novo. *Myers v. Smith*, 2009 WI App 49, ¶9, 316 Wis. 2d 722, 766 N.W.2d 764. Certiorari is only available for reviewing a final determination. *Id.*, ¶10. “The writ must be directed ‘to the board or body whose acts are sought to be reviewed, otherwise the court cannot obtain jurisdiction either of the subject-matter or of the persons composing such board or body.’” *Id.* (quoted source omitted). For an inmate complaint, the final decision-making authority is identified by reference to the administrative code provisions. *Id.* In this case, the final decision-making authority was the DOC secretary. *See* WIS. ADMIN. CODE § DOC 310.13(3) (March 2018) (“The secretary’s decision is final.”). The DOC secretary was, therefore, a necessary party to Ungethum’s certiorari action.

Ungethum argues on appeal that he was confused as to whom the final decision maker was and that, as a pro se litigant, his misdirection of the writ should be excused. This court rejected a similar argument in *Myers*, stating:

We understand that, particularly for a pro se appellant, some sections of the administrative code may be difficult to navigate. *Myers*, however, appears to have followed the procedures and obtained a final determination by the secretary’s designee as envisioned by the code. He initiated a complaint using the ICRS, he was dissatisfied with the ICE’s determination, he sought review, a CCE reviewed the determination and recommended that the secretary approve the decision, and the secretary adopted the

CCE's recommendation. Myers has not made, nor could he reasonably support, an argument that he did not know the final decision maker was the secretary. Accordingly, we affirm the order of the circuit court, which dismissed the petition for lack of jurisdiction because the writ was misdirected.

Myers, 316 Wis. 2d 722, ¶12.

Like Myers, Ungethum followed the proper administrative procedures for initiating and seeking review of his inmate complaint. Ungethum exhausted his administrative remedies, as required by WIS. ADMIN. CODE § DOC 310.05, and acknowledged in his petition for writ of certiorari that “[t]here is no nonjudicial remedy available subsequent to CCE-Madison and the Secretary’s decisions on appeal.” In light of these facts, and given our decision in *Myers*, Ungethum cannot reasonably support an argument that he did not know the final decision maker was the DOC secretary.

The secretary’s decision was issued on August 30, 2017. By the time Ungethum filed his motion on October 23, 2017 to supplement the writ petition to add the secretary as a respondent, the 45-day statute of limitations for certiorari actions by prisoners had run. *See* WIS. STAT. § 893.735(2). Therefore, under *Myers*, 316 Wis. 2d 722, ¶10, the circuit court lacked jurisdiction over the DOC secretary and his decision. We conclude that the circuit court properly dismissed the action and quashed the writ as misdirected.

Therefore,

IT IS ORDERED that the order is summarily affirmed under WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals