UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2114

September Term, 2014

DONTAY CARTER-EL

v.

INMATE GRIEVANCE OFFICE

Meredith,
Wright,
Nazarian,

JJ.

Opinion by Meredith, J.

Filed: July 12, 2016

Dontay Carter-El, appellant, is a State prisoner, and this case involves the dismissal of a grievance he filed against the Inmate Grievance Office ("IGO"), appellee, in which he sought to compel the IGO to forward his grievance to the Office of Administrative Hearings for a contested case hearing. The IGO conducted a preliminary review, as mandated by statute, and dismissed the grievance. Some months later, eschewing a timely petition for judicial review of the IGO's dismissal, appellant filed a petition for writ of mandamus, seeking to have the Circuit Court for Allegany County order the IGO to send his grievance to the Office of Administrative Hearings. Arguing that mandamus did not lie in this instance to compel the performance of a discretionary duty, and further pointing out that appellant impeded the IGO's investigation of his grievance by refusing to supply the IGO with certain documents it requested, the IGO filed a motion to dismiss the petition for writ of mandamus. Although the IGO did not request a hearing on its motion to dismiss, appellant did expressly request a hearing in his reply to the IGO's motion. The circuit court granted the IGO's motion to dismiss without conducting a hearing, and this is the appeal.

QUESTION PRESENTED

In his brief, appellant presented two questions for this Court's review, which we have condensed as follows[1]: Did the circuit court err in granting appellee's motion to dismiss

[1]In his Brief, appellant presented the following questions:

1. Did the lower court err in concluding that appellant has no 'clear legal right' to a hearing and appellee has no corresponding 'imperative duty' to forward a grievance to the Office of Administrative Hearings once the 'face' of the grievance states a claim for relief?

(continued...)

without the hearing requested by appellant?

We answer that question "yes," without reaching the merits of the court's premature ruling on the motion to dismiss. We will vacate the judgment and remand this case to the Circuit Court for Allegany County so that a hearing can be conducted on appellee's motion to dismiss pursuant to Rule 2-311(f).

FACTS AND PROCEDURAL HISTORY

Appellant is incarcerated at Western Correctional Institution ("WCI"), in Cumberland, Maryland. On September 17, 2013, the Circuit Court for Allegany County evidently filed an order granting a complaint appellant had filed for a writ of mandamus against Frank Bishop, the warden of WCI. We say "evidently" because the record in this case reveals nothing about the substance of the September 17 writ of mandamus, other than it had apparently emanated from a grievance filed by appellant that had been docketed by appellee as "No. 20101967." There is no information in the record regarding what the grievance in No. 20101967 entailed, or what the specific relief ordered by the circuit court in its September 17 mandamus encompassed.

Rather, the record in this case begins on August 5, 2014, when appellant filed a Petition for Issuance of a Writ of Mandamus against the IGO, Scott S. Oakley, its Executive Director, Robin Woolford, its Deputy Director, and Lenora Adegbesan, identified as

[1](...continued)

2. Did the trial court err in not granting appellant's request for hearing prior to granting appellee's motion to dismiss?

"Executive Assistant."[2] According to appellant's August 5, 2014, petition for issuance of a writ of mandamus, the IGO and its named personnel had failed to comply with the September 17, 2013, writ of mandamus. In his petition, appellant alleged the following:

> 1). On October 15, 2013, [appellee] received a grievance from [appellant] after this Court issued a mandamus order against the warden of WCI over his refusal to comply with the meritorious grievance order in IGO No. 20101967. The grievance specifically requested as relief that "the [DPSCS] Secretary take remedial action against the warden and to order that I be given compensation and damages for the continued violations that led to the Mandamus petition being filed." It was given IGO case number "20131774".
>
> 2). On November 26, 2013, defendant Oakley conducted "a preliminary investigation of the grievance" and required [appellant] to send a copy of this Court's mandamus order along with "a copy of the petition upon which the 'mandamus order' was issued" to the IGO within 30 days of that date or that the grievance would be dismissed.
>
> 3). On December 10, 2013, [appellant] forwarded a copy of the mandamus order and petition from which the order was issued to the [appellee].
>
> 4). [Appellee has] made a concerted effort, for years, to deny [appellant] the hearing on the merits of this underlying grievance in violation of [appellant's] constitutional and statutory rights.
>
> 5.) It has been over six months now and [appellee has] ignored and intentionally refused to grant [appellant] the hearing required by statute on the merits of his received grievance.

In the conclusion of his petition, appellant asked that the circuit court issue a writ of mandamus compelling appellee to "expedite forwarding of [appellant's] grievance, IGO No. 20131774, to the Office of Administrative Hearings."

[2]According to appellee's Brief, Ms. Adegbesan "has never been served with a summons or a copy of the Petition, and is not an appellee." We will refer to the IGO, Oakley, and Woolford collectively as "appellee."

On October 6, 2014, appellee filed a motion to dismiss. It pointed out that, by statute, Oakley, its Executive Director, was required to "conduct a preliminary review of each complaint submitted to [the IGO]." Maryland Code, Correctional Services Article (1999, 2008 Repl. Vol.) ("Corr. Serv."), § 10-207(a). Pursuant to Corr. Serv. § 10-207(b), if, after conducting a preliminary review, the Executive Director or his designee finds the complaint to be "wholly lacking in merit on its face," the complaint can be dismissed without a hearing or specific findings of fact, and that dismissal constitutes an appealable final judgment for the purposes of judicial review. *Id.* at § 10-207(b)(2)(ii).

If the Executive Director's preliminary review reveals that the complaint is **not** wholly lacking in merit on its face, the complaint is referred to the Office of Administrative Hearings for further proceedings. *Id*. at § 10-207(c).

Corr. Serv. § 10-201 *et seq*. establishes the Inmate Grievance Office, and delineates its duties and responsibilities; among other things, the code provides that the IGO is a subsidiary entity within the Department of Public Safety and Correctional Services ("DPSCS"). To assist in implementing the provisions of Corr. Serv. § 10-201 *et seq*., DPSCS adopted Title 12, Subtitle 07 of the Code of Maryland Regulations ("COMAR"). COMAR 12.07.01.02B provides: "The Executive Director [of the IGO] shall conduct a preliminary review of each grievance properly filed with the [IGO]." COMAR 12.07.01.03 is captioned "Duties of the Executive Director," and provides, in pertinent part:

> B. The Executive Director shall:
>
> (1) Act as chief administrative officer for the Office ensuring that all records and files are properly maintained;

(2) Docket and acknowledge receipt of a grievance;

(3) Conduct a preliminary review of each grievance as required under Regulation .06 of this chapter;

(4) Prepare a written summary of the grievance that specifies issues that may be considered at a hearing;

(5) Compile documents that may be considered in a preliminary review or a hearing that include, without limitation:

(a) Institutional records;

(b) Classification records;

(c) Disciplinary proceeding records;

(d) Administrative remedy procedure decisions, and

(e) Any other information or citations of law that may be useful in determining the merits of the grievance;

(6) If necessary, conduct a preliminary investigation of the grievance;

(7) If a hearing is necessary, make a preliminary determination of a grievant's request for a representative or witness, or both;

(8) If a hearing is necessary, refer the grievance to the Office of Administrative Hearings; and

(9) Prepare the record of the agency, when requested, for judicial review.

(Emphasis added.)

"[A] preliminary investigation of the grievance" is not defined, but COMAR 12.07.01.06 describes the scope of the Executive Director's preliminary review of a grievance:

A. The Executive Director shall conduct a preliminary review of a grievance and determine if the grievance should:

(1) Be dismissed; or

(2) Proceed to a hearing.

B. The Executive Director shall dismiss a grievance on preliminary review as wholly lacking in merit if:

(1) The grievant is not in the custody of the Commissioner [of Correction] or the Director of the Patuxent Institution at the time the grievance is received by the Office;

(2) The grievance is not brought against any official or employee of the Division or the Patuxent Institution;

(3) The grievance is not filed within the time constraints and does not meet the exceptions under Regulation .05 of this chapter;

(4) The grievant did not properly exhaust remedies available under the Administrative remedy procedure or the disciplinary proceeding;

(5) The grievant does not establish a claim for which the Office can grant relief; or

(6) The grievance is moot.

C. The Executive Director shall notify the grievant, in writing, of the decision to dismiss the grievance on preliminary review.

D. The Executive Director's decision to dismiss a grievance following a preliminary review is final.

In its motion to dismiss appellant's petition for writ of mandamus, appellee argued that Oakley, its Executive Director, in the course of conducting his preliminary review, determined that a preliminary investigation of the grievance was necessary. To that end, Oakley had requested, in a letter dated November 26, 2013, that appellant provide him with "a copy of the Court's 'mandamus order' to which your grievance refers, together with a

copy of the petition upon which the 'mandamus order' was issued," within thirty days. Otherwise, the letter explained, appellant's grievance "will be dismissed pursuant to [Corr. Serv.] § 10-207(b)(1) as having been determined to be wholly lacking in merit, without further notice to you." According to Oakley's affidavit, which was filed as an exhibit to appellee's motion to dismiss, appellant had never provided the requested information, even as of September 30, 2014, the date of the affidavit.

Accordingly, and as promised, appellee dismissed appellant's grievance at the close of business on December 26, 2013. Appellant did not file a petition for judicial review of that decision. Corr. Serv. § 10-207(b)(ii). Instead, approximately eight months later, appellant filed a petition for writ of mandamus, seeking to have the court order appellee to send his grievance to the OAH for a hearing, even though the grievance had been dismissed at the end of Oakley's preliminary review, and no judicial review of that final decision had been pursued. Therefore, as appellee argued in its motion to dismiss, appellant had failed to exhaust his administrative remedies, and was not entitled to a writ of mandamus. Furthermore, appellee pointed out, the issuance of a writ of mandamus is within the discretion of the court, and appellant had failed to demonstrate that he was entitled to proceed with his grievance, let alone that the court should order the IGO to forward his grievance to OAH for a contested case hearing.

On October 14, 2014, appellant filed a paper captioned "Reply Motion and Request for Hearing." Appellant maintained that he had demonstrated a "clear legal right" to a contested case hearing, based solely on the "face" of the grievance, and that appellee did not

have the authority to investigate beyond the "face" of the grievance on preliminary review. Appellant also argued that he was not required to send Oakley the materials from the earlier grievance that Oakley had requested in connection with his preliminary investigation, but that he could "establish, at the requested hearing, [appellee's] refusal to acknowledge receipt of the requested documents, documents that [appellant] was not legally required to submit in the first place[.]"[3] Appellant also asserted that the doctrine of exhaustion of administrative remedies did not apply to his case.

In addition to requesting a hearing in the title of appellant's reply, appellant also said in the second sentence of the document that he "requests a hearing on [appellee's] motion prior to any action dispositive of this action." In the conclusion of the reply, appellant again asserted a request for a hearing "prior to any ruling dispositive of this matter." And the clerk made a docket entry reflecting that a request for hearing was filed on October 14, 2014.

On October 17, 2014, the circuit court, without holding a hearing, filed an order granting appellee's motion to dismiss. This timely appeal followed.

DISCUSSION

Maryland Rule 2-311(f) provides, as relevant to this case:

> A party desiring a hearing on a motion . . . shall request the hearing in the motion or response under the heading "Request for Hearing." The title of the motion or response shall state that a hearing is requested. Except when a rule expressly provides for a hearing, the court shall determine in each case whether a hearing will be held, but **the court may not render a decision that**

[3]Appellant did not provide an affidavit to counter Oakley's affidavit, in which Oakley had sworn that appellee had never received the supplemental materials it requested from appellant.

> **is dispositive of a claim or defense without a hearing if one was requested as provided in this section.**

(Emphasis added.)

The State concedes that "the circuit court erred in dismissing the petition without a hearing," although it also argues that, on the merits, the dismissal was legally correct.

We hold that the circuit court was required to conduct a hearing to determine the merits of the motion to dismiss. In *Karl v. Blue Cross Blue Shield of Maryland, Inc*., 100 Md. App. 743 (1994), we noted that "a 'motion to dismiss' . . . is one that, if granted, would be dispositive 'of the case,'" and therefore "a requested hearing must be provided before a court may grant a motion for sanctions that is dispositive of a claim or defense; *i.e.,* before granting a motion to dismiss the case." *Id.* at 747.

When requested by one party, a hearing is required even if the moving party as to the motion to dismiss did not request a hearing. In *Adams v. Offender Aid & Restoration of Baltimore, Inc*., 114 Md. App. 512 (1997), we noted: "The rule is in the passive voice and does not make reference to the party who makes the motion, but emphasizes the effect of the ruling." *Id.* at 515. In reviewing the legislative history behind Rule 2-311(f) in *Adams,* we observed:

> [T]he purpose of the rule . . . is to prevent a final disposition — one that removes a claim or a defense — unless the losing party has had a chance to argue on the record and to prevent the court from ruling incorrectly. The rule does not provide an exception to the exception, that is, an exception to permit the court to rule without a hearing on dispositive motions if the opposing party fails to file a response.
>
> The history of the rule discloses that the original intent of the Rules Committee in fashioning the rule was to leave the discretion to grant a hearing

with the trial judge because "most motions are frivolous or dilatory in nature" and the disposition of the motions is "an administrative matter." *Fowler v. Printers II*, 89 Md. App. 448, 483, 598 A.2d 794, 811 (1991). In his remarks on Rule 2-311(f), John F. McAuliffe, then chair of the Rules Committee, stated:

> It is the Committee's intent that the court be permitted to dispose of motions without hearings whenever a hearing is not deemed necessary and the ruling the court determines to be appropriate is not dispositive of a claim or defense . . . .

Fowler, 89 Md. App. at 484, 598 A.2d at 811-12 (quoting Letter from John F. McAuliffe, Chair of the Rules Committee (Aug. 1, 1983)(emphasis supplied)). Judge McAuliffe, for the Court, further explained in *Phillips v. Venker*:

> Under section (f) of [Maryland Rule 2-311], if the motion is one for which a hearing must be granted and the moving party demands a hearing, the court may not thereafter rule on the motion without a hearing, even if no response is filed. The motions rule does not recognize the concept of a default in response to a motion. Rather, the court must consider the merits of the motion before it. The responding party may elect to file no response and rely on the hearing demanded by the moving party . . . .

316 Md. 212, 217, 557 A.2d 1338, 1340-41 (1989) (emphasis supplied) (quoting P. NIEMEYER AND L. RICHARDS, MARYLAND RULES COMMENTARY (1984), (1988 suppl.) at page 33.) **The Rules Committee and the Court clearly intended that a certain category of motions not be decided without a hearing, if either party has requested one.**

The minutes recording the adoption of Rule 2-311(f) indicate that the proposed rule from the subcommittee recommended that the holding of hearings on all motions be discretionary with the trial judge; however, the recommendation was amended by the Rules Committee to provide that the movant be entitled to a hearing as a matter of right. After some further discussion, the language was restated to provide that "[i]f the ruling is dispositive of the claim or defense, the party affected is entitled to a hearing as a matter of right and the court will set the motion down for a hearing." The Rules Committee submitted this language to the subcommittee for drafting, and it drafted the language as it stands today. Even though the subcommittee's version does not state "the party affected," the subcommittee drafted the rule,

> as it stands, according to the intent of the Rules Committee, stating that it did not change the substance.
>
> * * *
>
> The Rules Committee clearly wanted to assure that litigants are entitled to a hearing, if they wish, on the category of motions which may bear the consequence of depriving a litigant of the ability to proceed in court.

Id. at 516-18 (emphasis added).

In this case, appellant's request for hearing was sufficient to trigger Maryland Rule 2-311(f). We therefore vacate the grant of appellee's motion to dismiss, and remand to the Circuit Court for Allegany County for a hearing on that motion.

JUDGMENT OF THE CIRCUIT COURT FOR ALLEGANY COUNTY VACATED. CASE REMANDED FOR HEARING ON MOTION TO DISMISS. COSTS TO BE PAID BY ALLEGANY COUNTY.