

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

FILED
AT ALBUQUERQUE
JUL 8 1971
E. E. GRESON
CLERK

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PHYSIOLOGY & GENCOLOGY
UNIVERSITY OF MANSFIELD CENTER

MARION MIMS, III,)
)
Plaintiff,)
)
)
UNITED STATES OF AMERICA,)
)
Defendant.)

NO. 8935 CIVIL

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MEMORANDUM OPINION

Plaintiff is a free lance writer who operates a business of writing and selling technical articles for publication. In preparing an article on lasers, plaintiff requested that the Information Office, Kirtland Air Force Base, New Mexico allow him to take close-up photographs of a non-classified laser located at the Kirtland Base, and to allow him to have an interview with the officer in charge of the laser. These requests after consideration by Kirtland officials and their supervisors in the Air Force chain of command were denied.

The Air Force through Kirtland officials did offer to make Air Force photographs of the laser in question available, but the plaintiff found them unsatisfactory for his purposes and did not accept them.

After final denial by the Air Force, plaintiff brought this action seeking a temporary injunction prohibiting claimed violation of certain acts and regulations by an agency of the United States, namely the United States

Air Force; a permanent injunction prohibiting violations of certain acts and a reversal of the decision denying plaintiff's request to take photographs of a laser and interview the Air Force Officer in charge of the laser in question.

Although plaintiff's pro se complaint is somewhat difficult to follow, it appears plaintiff first sought to bring his claim under the Tucker Act, 28 U.S.C. § 1346(a)(2), The Freedom of Information Act, 5 U.S.C. § 552(a), the 1946 Administrative Procedure Act, 5 U.S.C. § 1005, (the Administrative Procedure Act was amended in 1966 and is embodied in 5 U.S.C. § 701, et seq), 50 U.S.C. § 797(a) and certain Air Force Regulations, AFR 190-12 and AFR 205-1.

He later amended to include the Small Business Act, 15 U.S.C. § 631(a), and in his response to defendant's Motion to dismiss he relies on Rule 61, Federal Rules of Civil Procedure to allow inclusion of 28 U.S.C. § 1361 as additional basis for jurisdiction.

Presently at issue is defendant's Motion to dismiss for lack of jurisdiction and for failure to state a claim upon which relief can be granted.

Plaintiff appears to base jurisdiction primarily on the Administrative Procedure Act. Plaintiff relies on sections of the 1946 Act which spell out the basis for judicial review. The corresponding section of the current statute is 5 U.S.C. § 704 which provides:

"Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."

Plaintiff asserts that the denial of his requests are final actions by the Air Force and asks this Court to reverse the decisions.

Plaintiff seeks to find in the Freedom of Information Act, 5 U.S.C. § 552(a) statutory authority for review under the Administrative Procedure Act, supra, of the decisions denying him the opportunity to photograph the laser and interview the officer. 5 U.S.C. § 552(a)(3) which is the material portion of the Statute provides:

"* * * (E)ach Agency, on request for identifiable records, made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed shall make the records promptly available to any person * * * "

Plaintiff's request to photograph and interview are not identifiable records within the meaning of the Act. Therefore his claim under it, and under the Administrative Procedure Act fails.

Plaintiff also requested that "additional information" regarding the denial of his request be supplied to him. This additional information in the form of inter-agency letters from Air Force officials to the local Air Force officer concerning plaintiff's requests is not available to the plaintiff.

5 U.S.C. § 552(b)(5) provides:

"This section does not apply to matters that are -- inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

The inter-agency memoranda sought falls within this provision.

Plaintiff's claim under the Tucker Act, 28 U.S.C. § 1346 as defendant points out, and as plaintiff concedes in his response to defendant's Motion to dismiss is misplaced. Equitable relief is not available to plaintiff under the Tucker Act, and therefore his claim based on the Act fails for lack of jurisdiction.

Plaintiff's amended complaint alleges jurisdiction by virtue of the Administrative Procedure Act and the Small Business Act. The Small Business Act only states the policy of the United States and does not give plaintiff a right of action against the United States. It affords no basis for jurisdiction.

Plaintiff also claims jurisdiction under 50 U.S.C. § 797(a), a provision of the Internal Security Act. Section 797(a) provides a penalty for violating security regulations. Plaintiff further claims that two Air Force Regulations provide jurisdiction. These regulations provide for answering news queries, AFR 190-12, and classification of Air Force records, and property, AFR 205-1. Jurisdiction is not afforded by the statute and cannot be based on regulations.

Although not set forth in his complaint or amended complaint, plaintiff seeks in his answer to defendant's Motion to dismiss to include 28 U.S.C. § 1361 as an additional basis for jurisdiction. 28 U.S.C. § 1361 allows the Court to compel an officer or employee of the United States to perform a duty owed to a plaintiff by issuing a writ of

mandamus. In this case there is no duty owing to the plaintiff.

This complaint should be dismissed for lack of jurisdiction and for failure to state a claim upon which relief can be granted. Since plaintiff is appearing pro se and in order that he may have full opportunity to state a claim if any he has, leave should be granted to file an amended complaint within ten days.


UNITED STATES DISTRICT JUDGE