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**CLERK
NEBRASKA SUPREME COURT
COURT OF APPEALS**

CASE No. S-22-719

NEBRASKA SUPREME COURT

JUSTEEN WILLIAMS,

Appellant,

v.

SCOTT FRAKES, DIRECTOR, ET AL.,

Appellees.

Appeal from the District Court of Lancaster County
Kevin R. McManaman, District Judge

BRIEF OF APPELLEES

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Statement of Jurisdiction

This is an appeal from the district court's dismissal at the pleadings stage of the appellant Justeen Williams' complaint. The appeal was filed and perfected within 30 days of the district court's file-stamped dismissal order.

Because Williams' complaint alleged that her *future tentative* mandatory release date from prison should be over a decade from now in November of 2033 rather than the appellee officials' Department of Correctional Services calculation of November 2036, this Court may want to consider whether the case should be dismissed on the grounds it is not ripe. The fundamental principle of ripeness is that courts should avoid entangling themselves, through premature adjudication, in abstract disagreements based on contingent future events that may not occur at all or may not occur as anticipated. *Pennfield Oil Co. v. Winstrom*, 276 Neb. 123, 140, 752 N.W.2d 588, 602–03 (2008).

Williams, a three-time convicted felon, seems to assume no future loss of good time for bad behavior, no additional criminal convictions, and no statutory changes in the next decade affecting inmate *future tentative* mandatory release dates. The phrase "future tentative" for a mandatory release date over a decade from now is itself an indication that this case may not be ripe. See, notation at bottom of Williams' Department Sentence and Release Information: "NOTE-ALL DATES ARE SUBJECT TO CHANGE: An inmate's . . . tentative release date can be changed as a result of a disciplinary action, a restoration of good time, a parole revocation, or a change in the law or the

interpretation of the law.” (T31, attachment to Williams’ complaint)

Statement of the Case

A. Nature of the Case

This is an appeal from the district court’s dismissal of the appellant Williams’ complaint at the pleadings stage.

B. Issues Before the District Court

Williams is an inmate whose complaint alleged that her *future tentative* mandatory release date from her three prison sentences was miscalculated by the appellee officials of the Nebraska Department of Correctional Services. Williams alleged that her future tentative mandatory release date should be November 23, 2033, not the date of November 23, 2036, which had been calculated by the Department of Correctional Services. (T2-3, Complaint ¶¶ 6 and 10).

Thus, Williams sought an earlier future discharge from prison. Her complaint alleged legal theories for causes of action by a federal Section 1983 civil rights claim and per the Nebraska Administrative Procedure Act, which Act allows a limited waiver of sovereign immunity to challenge the *validity* of an agency’s regulation. The legal theory causes of action in the complaint would allow recovery of attorney fees by her attorney. Williams’ complaint did not allege a cause of action under Nebraska’s Uniform Declaratory Judgment Act, which does not allow for recovery of attorney fees.

C. How Issues Were Decided in the District Court

The district court dismissed Williams' complaint at the pleadings stage by a concise two-page order stating that, "Williams has brought the wrong causes of action to make such a challenge, and the case must be dismissed." (T81-82)

D. Standard of Review

A district court's grant of a motion to dismiss on the pleadings is reviewed de novo, accepting the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party. *Schaeffer v. Frakes*, 306 Neb. 904, 947 N.W.2d 714 (2020); *Rutledge v. City of Kimball*, 304 Neb. 593, 935 N.W.2d 746 (2019).

Propositions of Law

The fundamental principle of ripeness is that courts should avoid entangling themselves, through premature adjudication, in abstract disagreements based on contingent future events that may not occur at all or may not occur as anticipated.

Pennfield Oil Co. v. Winstrom, 276 Neb. 123, 140, 752 N.W.2d 588, 602–03 (2008).

A prisoner in state custody cannot use a § 1983 action to challenge the fact or duration of his [or her] confinement.

Wilkinson v. Dotson, 544 U.S. 74, 78 (2005).

The Administrative Procedure Act provides a limited statutory waiver of the State's sovereign immunity and confers subject

matter jurisdiction for a declaratory judgment action seeking determination regarding the validity of a state agency's rule or regulation.

Heist v. Nebraska Department of Correctional Services, 312 Neb. 480, 979 N.W.2d 772 (2022).

Perryman v. Neb. Dep't of Corr. Servs., 253 Neb. 66, 568 N.W.2d 241 (1997).

Statement of Facts

The relevant transcript filings are:

- 1) The appellant Williams' complaint. (T1-50)
- 2) The appellee prison officials' motion to dismiss. (T51-52)
- 3) The district court's dismissal order. (T81-82)

Argument

District Court Properly Dismissed the Complaint

The district court correctly dismissed Williams' complaint by an order which stated and applied the applicable law. (T81-82) The appellees believe their best argument is for this Court to review the district court's order, which is correct, comprehensive, and concise.

Williams' first and second causes of action under 42 U.S.C. § 1983 failed to state a cause of action because the United States Supreme Court has held that “[a] prisoner in state custody cannot use a § 1983 action to challenge the fact or duration of his [or her] confinement.” *Wilkinson v. Dotson*, 544 U.S. 74, 78 (2005). The district court properly cited *Wilkinson* as the reason

why Williams' first and second causes of action failed to state a claim. (T82).

Williams' third cause of action failed to state a claim under Neb. Rev. Stat. § 84-911 and per *Perryman v. Neb. Dep't of Corr. Servs.*, 253 Neb. 66, 568 N.W.2d 241 (1997), for failing to challenge the validity of a state agency's rule or regulation, which authority was properly cited by the district court. (T82) The district court also cited the recent decision of *Heist v. Nebraska Department of Correctional Services*, 312 Neb. 480, 979 N.W.2d 772 (2022), which reaffirmed *Perryman*. *Heist* stated:

[T]he APA [Administrative Procedure Act] provides a limited statutory waiver of the State's sovereign immunity and confers subject matter jurisdiction for a declaratory judgment action seeking a determination regarding the *validity* of a state agency's rule or regulation. This waiver applies only to a 'rule or regulation,' which the APA defines to mean 'any standard of general application adopted by an agency in accordance with the authority conferred by statute.' The APA further provides that the term 'rule or regulation' shall not include 'internal procedural documents which provide guidance to staff on agency organization and operations, lacking the force of law, and not relied upon to bind the public.

Heist, 312 Neb. at 488, 979 N.W.2d at 780. (Emphasis added.)

As correctly explained by the district court, “The crux of Williams’ claim, however, is a challenge to NDCS’s [Department’s] interpretation of state law as it relates to her sentencing calculation. The State has not waived its sovereign immunity under Neb. Rev. Stat. § 84-911 for that challenge. [*Heist* cited as authority by district court.]”

Williams has made only two assignments of error on appeal. She has not assigned error that she was not allowed to amend her complaint in the district court, nor has she explained what any alleged amended complaint would look like to correct her flawed complaint, nor she did make any such showing in the district court. See, *Chaney v. Evnen*, 307 Neb. 512, 527, 949 N.W.2d 761, 772–73 (2020) (Dismissal affirmed on appeal because no error by trial court when appellant did not show how an amendment would cure the complaint’s problems) (“trial and appellate courts will likely be left to guess at what amendments plaintiff might seek to make and thus have no way to know whether the problems with the dismissed complaint can be cured.”).

Conclusion

The appellees request that this Court affirm the judgment of the district court.

SCOTT FRAKES, DIRECTOR,
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Certificate of Compliance

I hereby certify that this brief complies with the word count and typeface requirements of Neb. Ct. R. App. P. § 2-103. This brief contains 1,495 words, excluding this certificate. This brief was created using Word Microsoft 365.

/s/ **James D. Smith**, #15476

Certificate of Service

I hereby certify that on Monday, March 13, 2023 I provided a true and correct copy of this *Brief of All Appellees* to the following:

Justeen Williams represented by Gerald L Soucie (16163) service method: Electronic Service to **jerdog16163@windstream.net**

Signature: /s/ James Smith (15476)