VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 22-CV-01633

Jess Taylor v. Vermont Department of Corrections

ENTRY REGARDING MOTION

Title: Motion to Dismiss (Motion: 4)
Filer: Lauri A. Fisher
Filed Date: September 29, 2022

The motion is GRANTED IN PART and DENIED IN PART.

Mr. Taylor is an inmate in the custody of the Commissioner of the Department of Corrections and serving a sentence in prison. He alleges that he became eligible for release in September of 2021 when he had completed all required programming and had served his minimum sentence, and the only thing he needed for release was a suitable residence. He alleges that he owned an unoccupied home property in Leicester, Vermont to which he could return, but that DOC did not release him despite the availability of his home, and that moreover, because he was not granted a timely release, his property was taken for tax sale in April of 2022 and he lost it as a residence. He pursued administrative remedies by filing successive grievances, and alleges he did not receive a response. He seeks money damages from the DOC Commissioner in the amount of $308,400 and immediate release from prison.

The Department has filed a Motion to Dismiss pursuant to V.R.C.P. 12 (b)(6) for failure to state a claim for which relief may be granted. For the reasons set forth below, the Motion is granted as to the claim for money damages, but denied as to Rule 75 review of the DOC's action with respect to evaluation of his housing.

Claim for money damages

The claim for money damages is specifically described in the Complaint as a claim against Nicholas J. Deml, Commissioner of the Department of Corrections, "sued in their official capacity."

The law concerning the responsibility of high state officials for claims for monetary compensation arising from governmental acts is correctly set forth in the Commissioner's Motion to Dismiss: they are immune from lawsuits by the doctrine of absolute immunity. "Absolute immunity is generally afforded to ... the highest executive officers, where the acts complained of are performed within their respective authorities." *Libercent v. Aldrich,* 149 Vt.

76, 81 (1987). The policy behind this law is allow such officials to devote their attention to the exercise of their governmental responsibilities without distraction.

The complaint does not describe any acts on the part of Commissioner Deml that were outside the scope of his duties as Commissioner, nor any personal involvement in Mr. Taylor's situation. Therefore, based on the immunity of the Commissioner, the complaint against him for money damages is dismissed.

Rule 75 claim for review of decision not to release Mr. Taylor to his home

Mr. Taylor alleges that in September of 2021 he was approved for release on furlough to an approved residence, and claims that he was wrongfully denied release even though he owned an unoccupied residence to which he could have returned.

Jurisdiction to address the claim.

The Department first argues that the court lacks jurisdiction over the claim on the grounds that there is no statutory right to review of furlough decisions. The Department further argues that none of the common law writs is applicable to confer jurisdiction for review. Specifically, the Department argues that furlough release decisions are directly within the Department's grant of statutory authority for the exercise of discretion, citing 28 V.S.A. §808 and *Rheaume v. Pallito*, 2011 VT 72, ¶ 6.

Nonetheless, aspects of a release decision may be reviewable if there was an arbitrary abuse of the discretionary power.

> Mandamus will ordinarily lie only "to compel a public officer to perform an official act which is merely ministerial," and only where "the right sought to be enforced is certain and clear." *Roy v. Farr,* 128 Vt. 30, 34, 258 A.2d 799, 801–02 (1969). This rule is subject to the exception, however, that where there is "an arbitrary abuse of the power vested by law in an administrative officer or board which amounts to a virtual refusal to act or to perform a duty imposed by law, *mandamus* may be resorted to in the absence of other adequate legal remedy." *Id.* at 34, 258 A.2d at 802.

Alger v. Department of Labor and Industry, 2006 VT 115 ¶15.:

In its most recent opinion on the availability of Rule 75 review of decisions of the Department of Corrections, the Vermont Supreme Court has set forth the following:

> We begin by addressing whether jurisdiction exists under Rule 75. Rule 75 provides for review of "action or failure or refusal to act by an agency of the state or a political subdivision thereof, including any department, board, commission, or officer, that is not reviewable or appealable under Rule 74." V.R.C.P. 75(a). Rule 75 does not explain which decisions are reviewable but "provides a procedure applicable whenever county court review ... is available as a matter of general law by proceedings in the nature of certiorari, mandamus, or prohibition." Reporter's Notes, V.R.C.P. 75. Mandamus review is available for allegedly arbitrary abuses of discretion that "amount to a practical refusal to perform a

'certain and clear' legal duty." Inman v. Pallito, 2013 VT 94, ¶ 15, 195 Vt. 218, 87 A.3d 449.

DOC contends that the court lacked jurisdiction to consider plaintiff's claim because programming decisions are not reviewable under Rule 75. See Inman, 2013 VT 94, ¶ 18, 195 Vt. 218, 87 A.3d 449 (holding that "DOC's decision to terminate an inmate from [a] program is not a disciplinary action, but instead a programming decision within its discretion" and therefore not reviewable under Rule 75); Rheaume v. Pallito, 2011 VT 72, ¶¶ 9-11, 190 Vt. 245, 30 A. 3d 1263 (affirming that programming decisions are not reviewable for mandamus under Rule 75).

We disagree. Plaintiff did not seek review of DOC's decision to remove him from programming, but rather DOC's decision not to grant him a statutorily required hearing before doing so. Accordingly, this case is distinguishable from Rheaume and Inman, which involved direct challenges to programming decisions. Here, plaintiff contends that the statute creates a clear legal duty: before being punished, an incarcerated person is entitled to a fact-finding hearing, with the right to notice of the charge, to confront the person bringing the charge, to testify, and to question witnesses. 28 V.S.A. §§ 851-852.

Rose v. Touchette, 2021 VT 77 ¶¶ 13-15.

A fair reading of Mr. Taylor's complaint is that the Department failed to exercise a legal duty to evaluate the residence he owned for approval as a residence suitable for furlough release. The court therefore concludes that it has jurisdiction to address the claim.

Analysis of Motion to Dismiss

In Vermont, motions to dismiss are "not favored and rarely granted." *Alger v. Dep't of Labor & Indus.*, 2006 VT 115, ¶ 12, 181 Vt. 309 (citations omitted). "The complaint is a bare bones statement that merely provides the defendant with notice of the claims against it." *Colby v. Umbrella, Inc.*, 2008 VT 20, ¶ 13. "the threshold a plaintiff must cross in order to meet our notice-pleading standard is 'exceedingly low'". *Bock v. Gold*, 2008 VT 81, ¶ 4.

The Department argues that Mr. Taylor's petition "is challenging the Department's decision to deny him approval to return to his former home. . .The Department has full authority with regard to determining housing parameters of furlough. 28 V.S.A. §723 (b), Directive 348." (Motion to Dismiss at 4.) The Department argues that he cannot meet the housing requirement. It appears to be arguing the merits of a presumed informed decision to deny approval of Mr. Taylor's home. "Appellant . . .cannot meet the housing requirement. . .he was convicted of a Listed Offense which requires. . .strict housing parameters." *Id.*

It is quite possible that someone in the Department reviewed Mr. Taylor's Leicester home and determined that it did not meet required specifications for a residence for a person in Mr. Taylor's situation, and also reviewed other housing options and determined that no other housing was available. That, however, is not an issue that can be resolved in connection with a motion to dismiss. It is also possible, based on the complaint, that the home was not reviewed. Whether

there were or were not responsible reviews of his Leicester home or other housing options is outside the scope of analysis on a motion to dismiss, which must focus only on whether there are sufficient allegations for a claim, not on the merits of any defense.

Mr. Taylor states in his complaint: "I again asked to have my home address submitted for residence and this was over 3 weeks ago, still holding me in jail past my minimum with no answer either way." (Complaint at 4.) In the grievance forms he submitted that accompany his complaint he alleges that "DOC failed to provide the proper guidance necessary to be released on my minimum. . ." (Exhibit 1); "DOC failed to help me gain housing. . ." (Exhibit 2).

Mr. Taylor wrote his complaint himself without the benefit of legal representation. Motions to dismiss are disfavored and the standard for alleging claims is low. The complaint must be read in the light most favorable to the complainant. The court must assume all factual allegations in the complaint are true. *Association of Haystack Property Owners, Inc. v. Sprague,* 145 Vt. 443, 446 (1985). "A court should not dismiss a cause of action for failure to state a claim upon which relief may be granted 'unless it appears beyond doubt that there exist no circumstances or facts which the plaintiff could prove about the claim made in his complaint which would entitle him to relief.'" *Id.* (citing *Levinsky v. Diamond,* 140 Vt. 595, 600-01(1982).

Mr. Taylor's complaint asserts a claim that the Department had a legal duty to evaluate his available Leicester home to see if it could be an approved residence for furlough release and the implication in the complaint is that the Department failed to do so. The facts, if proven (e.g., if it were proven that DOC was given information about his available residence and refused to even give it consideration), could support a conclusion of abuse of discretion.

Therefore, the Motion to Dismiss is denied as to Mr. Taylor's Rule 75 claim for review of the Department's conduct in considering whether he had available housing suitable for approval. While it is true, as the Department notes, that even if Mr. Taylor proves a claim for failure to exercise a clear duty, this court does not have the authority to substitute its own judgment on the housing issue and therefore has no authority to order him to be released from prison. The court would, however, have the authority to remand the matter to the Department for consideration of available housing.

Order

The Motion to Dismiss is granted as to the claim for money damages and denied as to the Rule 75 claim for review of governmental action. A status conference shall be scheduled to determine whether any pretrial procedures are needed or whether the case is ready for hearing.

Electronically signed November 16, 2022 pursuant to V.R.E.F. 9 (d).

Mary Miles Teachout

Mary Miles Teachout
Superior Judge (Ret.), Specially Assigned