Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2008-130

NOVEMBER TERM, 2008

David McGee	}	APPEALED FROM:
	}	
	}	
v.	}	Washington Superior Court
	}	
	}	
Robert Hofmann, Commissioner of Vermont Department of Corrections	}	DOCKET NO. 501-7-07 Wncv
	}	
		Trial Judge: Dennis R. Pearson

In the above-entitled cause, the Clerk will enter:

Plaintiff David McGee appeals from a superior court order granting the Department of Corrections' (DOC) motion for summary judgment and dismissing plaintiff's V.R.C.P. 75 complaint alleging that DOC improperly denied him the opportunity to shave three times per week while in disciplinary or administrative segregation. Plaintiff contends the court erred in: (1) finding that DOC properly opposed his motion for summary judgment; (2) concluding that there were no genuine issues of material fact and granting judgment in favor of DOC; and (3) denying his motion to alter or amend. We affirm.

The facts may be summarized as follows. Plaintiff was serving a sentence at the Northern State Correctional Facility when he was held in disciplinary segregation from Monday, January 29, 2007 to the following Tuesday, February 6, 2007. Over that weekend, as the trial court here found, plaintiff was afforded a thirty-minute out-of-cell period, as provided by DOC Directive 410.06, which he used for recreation rather than to shave and shower.[1] Several months later, in July 2007, plaintiff filed a V.R.C.P. 75 complaint, alleging that DOC's adherence to Directive 410.06 violated departmental policy and state and federal law, and that he suffered skin problems because he was not allowed to shave more frequently. The parties filed cross-motions for summary judgment. In February 2008, the court issued a written decision granting DOC's motion and denying plaintiff's motion, and entered judgment in favor of DOC. The court denied two subsequent motions for reconsideration. This pro se appeal followed.

[1] Directive 410.06 states, among other provisions, that prisoners on disciplinary or administrative segregation will be issued razors for thirty minutes on weekends unless on a no-razor status.

Plaintiff raises a number of preliminary issues that have no merit or no bearing on the merits. He contends initially that DOC failed to file a timely opposition and supporting affidavits in response to plaintiff's motion for summary judgment or a statement of material facts identifying the genuine issues to be tried. Plaintiff does not contend or demonstrate that this claim, whatever its merits, was raised below and preserved for review on appeal. State v. Yoh, 2006 VT 49A, ¶ 36 (we do not ordinarily consider issued not raised below). Moreover, the record shows that DOC effectively opposed plaintiff's motion by filing a cross-motion for summary judgment, a separate statement of undisputed material facts, and two supporting affidavits. Accordingly, we find no basis to disturb the court's ruling on procedural grounds.

Plaintiff next contends the court erred in finding that there were no genuine issues of material fact. He asserts specifically that the court erred in finding that plaintiff was afforded an out-of-cell period and opportunity to shave over the weekend. The court's finding was supported by an assistant superintendent's affidavit outlining DOC's practice of offering inmates in disciplinary segregation a thirty-minute period on Saturday that they can use for recreation or personal hygiene, including shaving, or both provided that there is time, and that plaintiff used this period for recreation. Although plaintiff alleged that he was not given such an opportunity, his affidavit merely stated that he was denied the use of a razor and thus did not, as the trial court found, effectively dispute the evidence that was given a thirty-minute out-of-cell period and used it for recreation. Plaintiff also contends the evidence failed to support the court's finding that plaintiff suffered "unspecified" skin problems, although he does not show, nor do we discern, how the specificity of his skin problems was material to the claim. Plaintiff also faults the court for failing to address an allegation in his opposition memorandum concerning an alleged second incident in segregation that occurred in November 2007, but this was not raised in the complaint or an amended complaint and the allegations did not clearly relate to the claims at issue.

The heart of plaintiff's claim is that the court erroneously rejected his assertion that Directive 410.06 violates DOC policy requiring compliance with national standards. He relies in this regard on DOC Directive # 02, § 7(a), which calls for DOC policy directives to be periodically reviewed to "assure [that] corrections are made to reflect changes in . . . [n]ational standards," and an American Correctional Association (ACA) standard requiring that inmates in segregation have the opportunity to shave and shower at least three times per week. The claim lacks merit for two reasons. First, as the trial court correctly observed, the DOC directive provides for periodic review to "reflect" changes in national policy but does not expressly require such compliance, and the DOC has reasonably construed the provision to be aspirational rather than mandatory. See Loveland v. Gorczyk, 173 Vt. 501, 501 (2001) (mem.) (we defer to DOC's interpretation of its regulations "absent compelling indications of error"). Second, the ACA is a private, non-governmental association the purpose of which is to promote the improvement of correctional facilities "through the administration of a voluntary accreditation program and the ongoing development and revision of relevant, useful standards" which are "mandatory only if a facility decides to become a part of the ACA accreditation process." Bolton v. Goord, 992 F.Supp. 604, 620 (S.D.N.Y. 1998); accord Hadi v. Liberty Behavioral Health Corp., 927 So. 2d 34, 37 n.2 (Fla. Dist. Ct. App. 2006). The DOC has not opted to seek accreditation through the ACA, and no statute or regulatory provision mandates compliance with ACA standards. Plaintiff's reliance on a federal prison regulation reflecting the ACA standard is similarly unavailing, as that regulation applies solely to federal prisons. Plaintiff also claims that the DOC policy contravenes state law, citing 28 V.S.A. §853(a)(2)(B)(iii), but this provision

merely states in broad terms that "[a]dequate sanitary and other conditions required for the health of the inmate shall be maintained," and plaintiff has not demonstrated that the shaving policy represents a general threat to health standards. Accordingly, the trial court was correct in concluding that Directive 410.06 does not violate DOC policy, binding national standards, or state law.

Finally, plaintiff contends the court erred in denying his motion to alter or amend the judgment, asserting that the trial court erred in finding that the motion was untimely and that it lacked jurisdiction owing to plaintiff's intervening notice of appeal. The court denied the motion on these grounds as well as explicitly on the merits, and reiterated its conclusion that plaintiff had demonstrated no grounds to alter the judgment in a subsequent order denying plaintiff's motion for reconsideration. Plaintiff has not demonstrated that this conclusion was erroneous. Nor has he demonstrated that he was prejudiced by the court's denial of the motion to alter or amend prior to plaintiff's filing of his reply memorandum. Accordingly, we find no basis to disturb the judgment.

Affirmed.

BY THE COURT:

_____
Paul L. Reiber, Chief Justice

_____
John A. Dooley, Associate Justice

_____
Marilyn S. Skoglund, Associate Justice