

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2010-166

DECEMBER TERM, 2010

Harry R. Norway	}	APPEALED FROM:
	}	
	}	
v.	}	Washington Superior Court
	}	
	}	
Andrew Pallito	}	DOCKET NO. 578-8-09 Wncv

Trial Judge: Geoffrey W. Crawford

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

Plaintiff Harry Norway, an inmate committed to the custody of the Commissioner of Corrections, appeals from a superior court order rejecting his challenge to the Department of Correction’s decision denying him furlough release. Plaintiff contends the court erroneously interpreted the Department’s furlough policy to include criteria beyond its terms. We affirm.

In August 2009, plaintiff filed a pro se habeas-corporus petition challenging the Department’s refusal to grant him furlough release after he had served his minimum term, as allowed by Department regulations. The trial court converted the petition to one for review of administrative action under V.R.C.P. 75, and held an evidentiary hearing in April 2010. In addition to plaintiff, two officials from the Department testified. Following the hearing, the court issued a written decision upholding the Department’s decision. Among its findings, the court noted that plaintiff is 40 years old and, since his youth, has spent extensive periods in prison for a variety of offenses, including DUI, larceny, and forgery.

The trial court further found that plaintiff had served the minimum of his current sentence and therefore was eligible under Department regulations for conditional re-entry status, or furlough release. The Department denied him furlough, however, under a regulation providing that release may be delayed if the facility superintendent believes “[t]hat based on risk assessment, and current behavior in the correctional facility release will pose an imminent risk to public safety.” Department of Corrections, Directive 371.15, § 4.2(2). In conducting its review, the Department administered an assessment evaluation known as a Revised Level of Service Inventory (LSI-R), which is designed to measure the risk of reoffending. See Department of Corrections, Directive 371.07, § 4.3.2 (providing for administration of LSI-R for cases referred for conditional release review). Plaintiff’s score placed him in the moderate to high risk group for Vermont inmates, with a 48 percent probability of reoffending. The “case staffing review” form, prepared by the superintendent as part of the review process, contained an extensive summary of the offenses for which plaintiff was currently incarcerated and his probation and parole history. It also included responses from the Newport, St. Johnsbury, and Barre probation and parole offices concerning plaintiff’s potential for supervision. One response noted that plaintiff’s previous probation releases had been marked by a “pattern of non-compliance, alcohol use, and on-going criminal behavior,” and another noted that an earlier supervised release had

ended in his escape and re-incarceration. None of the offices was willing to accept supervision of plaintiff. All of the foregoing information was considered by the Department in determining that plaintiff's release would pose an imminent risk to public safety.

Plaintiff challenged the Department's ruling on the ground that it exceeded its authority in considering his supervision history when determining whether he posed an imminent risk. He argued that, in authorizing a delay "based on risk assessment and current behavior," the conditional re-entry policy limited the Department's consideration to plaintiff's performance on the LSI-R risk assessment evaluation and his disciplinary file (which showed only minor infractions). The trial court was unpersuaded, noting that the policy governing conditional re-entry specifically requires the facility superintendent to provide a "case staffing review form along with a rational[e] for the delay," Directive 371.15, § 4.2, and that the form includes information relating to the inmate's criminal and supervision history. In addition, the conditional re-entry policy provides that release plans must address a number of factors, including the need to "adequately manage the offender's criminal risk," which requires consideration of the inmate's amenability to supervision. Finally, the trial court observed that the re-entry policy broadly acknowledges that corrections officials "must be allowed to exercise professional judgment to delay release of eligible offenders." *Id.* Thus, the court concluded that the "risk assessment," called for under the conditional re-entry policy, was broader than the risk assessment "tools," such as the LSI-R evaluation, administered pursuant to the Department's general assessment policy, and permits the consideration of multiple factors in determining whether an inmate's release poses an imminent risk. Accordingly, the trial court found no merit to the claim that the Department had arbitrarily abused its discretion in violating its own policy, and entered judgment for the State. This appeal follows.

Plaintiff asserts in summary fashion that the Department employed "criteria beyond the scope" of its rule in delaying his furlough release. Plaintiff does not, however, address the trial court's analysis or the provisions of the policies on which it relied. We generally defer to the Department's interpretation of its own rules "absent compelling indications of error." Loveland v. Gorczyk, 173 Vt. 501, 501 (mem.) (quotation omitted). We have reviewed the policies in question and agree with the trial court that, read as a whole, they amply support the Department's view that "risk assessment" is not limited to an inmate's test scores and disciplinary record, but includes a broad range of factors—including the inmate's supervisory record—necessary for the Department to exercise its professional judgment. Accordingly, we discern no basis to disturb the judgment.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice