

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2001-511

APRIL TERM, 2002

James Millett

v.

John Gorczyk, et al.

}	APPEALED FROM:
}	
}	Orleans Superior Court
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}	
}	DOCKET NO. 44-2-01 Oscv
}	
}	Trial Judge: Dennis R. Pearson
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}	
}	

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

Petitioner appeals an Orleans Superior Court order granting summary judgment to the Commissioner of the Department of Corrections ("DOC"), and others, on his claim that DOC has arbitrarily denied him earned reduction in time ("ERT") credits under 28 V.S.A. 811(b). We find no abuse of DOC's discretion, and affirm.

The facts relevant to petitioner's claim are undisputed. Petitioner was sentenced on October 6, 1998 to serve three to five years after he violated probation on three charges of violating abuse prevention orders, and was charged with a fourth similar crime. To allow petitioner to participate in intensive substance abuse and domestic abuse programs DOC administered, the court ordered him to serve his sentence on pre-approved furlough. After repeatedly violating the ISAP conditions by consuming alcohol, his furlough was revoked on April 20, 1999, and petitioner was incarcerated.

In accordance with its authority under 28 V.S.A. 102(c)(8), DOC classified petitioner as having a very high need (four on a scale of one to four) for alcohol, violence, and academic programming, and a high need (three on a scale of one to four) for employment programming. Petitioner, as well as his caseworker, case supervisor, and the facility superintendent, signed off on the classification. Petitioner was subsequently placed in the North East Correctional Facility so that he could participate in the DOC's "Pathways" program.

Petitioner left the Pathways program on or about June 15, 1999 after being directed to sing "Old McDonald Had a Farm" and to dance the "Hokey Pokey" in a group session, which he refused to do. DOC later transferred petitioner to the Greenville correctional facility in Virginia because he was no longer enrolled in the Pathways program. While at Greenville, petitioner earned his GED certificate. He also worked and received vocational training as an electrician's helper. To address his need for alcohol and violence rehabilitation, petitioner completed a "Breaking Barriers Program," Phases I and II of a "Substance Abuse Psycho-Educational Program," and an ongoing "Therapeutic Support Group." Petitioner received some ERT awards as a result of his participation in those programs, in addition to his employment, but DOC did not award him the maximum ERT available. DOC continued to identify the Pathways program as a prerequisite to additional ERT awards for petitioner.

Dissatisfied with the amount of ERT DOC has awarded him, petitioner filed the present action in Orleans Superior Court challenging both his offender programming classification and the ERT awards. He complained that his programming classification has deprived him of substantial ERT credit, and DOC has withheld ERT awards from him arbitrarily. He argued that DOC was unjustified in not giving the same ERT credit for participation in the Virginia

programs as it might for participation in DOC's Vermont rehabilitative programs. The superior court entered summary judgment against petitioner, reasoning that DOC has discretion in classifying inmates and in awarding ERT, and petitioner failed to show DOC abused that discretion. This appeal followed.

On appeal, petitioner contends that DOC abused its discretion in awarding him ERT by failing to give him the maximum credits available for his participation in the Virginia facility's rehabilitative programs. Petitioner believes the Virginia programs are qualitatively superior to those in which he was required to participate in Vermont, including the Pathways program. Consequently, petitioner believes he is entitled to the maximum number of ERT credits available under 28 V.S.A. 811(b).

Section 811(b) of Title 28 authorizes DOC to award an inmate a reduction of up to ten days in the maximum term of the inmate's confinement for participation in educational or vocational training, treatment, or work DOC has identified to meet the inmate's needs. 28 V.S.A. 811(b). Awarding ERT credits is a matter committed to DOC's discretion. Conway v. Gorczyk, 171 Vt. 374, 379 (2000). As we noted in Conway v. Gorczyk, whether an inmate will actually earn good-time credits if he successfully participates in DOC programs is speculative due to the discretionary nature of the awards. Id. Aside from petitioner's bare assertion, nothing in the record leads us to conclude that DOC abused its discretion in declining to award petitioner the maximum number of ERT credits available since petitioner's incarceration. For example, petitioner failed to supply information about the Virginia programs in relation to the Pathways program so that the court could evaluate his claim that the programs are equivalent. Summary judgment was therefore appropriate. See Madden v. Omega Optical, Inc., 165 Vt. 306, 309 (1996) (this Court applies same standard as trial court when reviewing summary judgment: judgment is appropriate when no genuine issue of material fact exists and movant is entitled to judgment as a matter of law).

Also committed to DOC discretion is the determination of which treatment programs an inmate must participate in to meet the inmate's needs. Nash v. Coxon, 155 Vt. 336, 338 (1990). That discretion necessarily includes evaluating the efficacy of treatment programs in out-of-state correctional facilities to meet petitioner's needs. Again, petitioner has failed to show that DOC abused its discretion in its choice of programming. Petitioner's transfer to Virginia, and the apparent consequential decrease in ERT credits granted to him, resulted from petitioner's unwillingness to continue participating in the Pathways program in Vermont. DOC still believes that the Pathways program is the appropriate placement for petitioner, and petitioner may succeed in obtaining the additional ERT he desires by reconsidering his decision to complete the Pathways program. Absent a showing that DOC abused its discretion in making the ERT awards, however, summary judgment in DOC's favor was proper.

Affirmed.

BY THE COURT:

John A. Dooley, Associate Justice

James L. Morse, Associate Justice

Denise R. Johnson, Associate Justice