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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2008-102

OCTOBER TERM, 2008

Robert Miller	}	APPEALED FROM:
	}	
v.	}	Franklin Superior Court
	}	
Robert Hofmann, Commissioner of Department of Corrections	}	DOCKET NO. S343-07 Fc
	}	
		Trial Judge: Ben W. Joseph

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

Petitioner appeals from the trial court's order granting summary judgment to the Department of Corrections on his Vermont Rule of Civil Procedure 75 complaint. We dismiss the appeal as moot.

The record indicates the following. Petitioner was incarcerated based on a series of crimes directed toward his ex-girlfriend. He was released on conditional reentry furlough (CR) in May 2007. By agreement, petitioner's movements were tracked by a GPS tracking system to protect his victim, and he was to remain 400 feet from the victim's residence, vehicle, and her place of employment. On June 1, 2007, the Department alleged that the GPS data showed that petitioner had travelled within 150 feet of the victim's residence, thereby violating the terms of his agreement. Following notice of the violation and a hearing, a hearing officer found that petitioner had violated the terms of his CR agreement by placing himself in close proximity to the victim's home. The case was referred to central staffing, which recommended that petitioner remain incarcerated until he completed a domestic violence program.

In July 2007, petitioner filed a pro se petition for habeas corpus in superior court, alleging that his due process rights were violated at the hearing and that there was insufficient evidence to show that he violated the conditions of his furlough. The court treated the filing as a Rule 75 complaint, and in February 2008, after petitioner filed a pleading listing his "undisputed facts," the court granted summary judgment to the Department. The court found that the undisputed evidence demonstrated that there was "some evidence" to support the hearing officer's conclusion that petitioner violated the terms of his CR. Petitioner appealed, and while his appeal was pending, he was again released on CR. The State now moves to dismiss this appeal as moot, and we grant its request.

Before addressing the issue of mootness, we must note that petitioner did not file a motion for summary judgment, nor did the Department file a response that comported with

Vermont Rule of Civil Procedure 56(c). By granting summary judgment to the Department sua sponte, the court deprived petitioner of "a reasonable opportunity to show the existence of a fact question." See Kelly v. Town of Barnard, 155 Vt. 296, 309 (1990) (quotation omitted) (stating that before the court can grant summary judgment, it must give the opposing party a reasonable opportunity to show existence of fact question). Moreover, while we apply a deferential standard of review to the disciplinary decisions of the Department, the whole thrust of petitioner's complaint was that the evidence presented at the disciplinary hearing was insufficient to support the Department's decision. See King v. Gorczyk, 2003 VT 34, ¶ 7, 175 Vt. 220 (explaining that when reviewing a decision from an inmate disciplinary hearing, the court need only find that there was "some evidence" in order to uphold a conviction, and that the "some evidence" standard requires us to determine whether there was "any evidence in the record that could support the conclusion reached by the disciplinary board" (quotation and citation omitted)). Petitioner maintained that the Department's GPS data was inaccurate because he would have had to travel more than one mile in seven seconds. Petitioner also identified inconsistencies in the reports offered by the Department, both of which apparently relied on the same GPS data. One report alleged that petitioner sat behind the victim's house for a period of time, while the other indicated that he left the area near the victim's house almost immediately. Given the shortcomings in the Department's evidence cited by petitioner, it appears that there was a genuine dispute of fact as to whether the Department's evidence was sufficiently credible to support the hearing officer's decision.

Nonetheless, we agree with the State that this appeal must be dismissed as moot. Generally "a case becomes moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." In re Moriarty, 156 Vt. 160, 163 (1991) (quotation omitted). The propriety of the hearing officer's ruling is no longer at issue because petitioner has been once again released on CR. See In re P.S., 167 Vt. 63, 67 (1997) (explaining that because mentally ill individual had been released from hospital under a new order of nonhospitalization and was living in the community, the old order that she was appealing no longer had any effect on her commitment status or residence, and as a result, the case was moot unless it fit within an exception to the mootness doctrine).

We are not persuaded that any of the exceptions to the mootness doctrine apply here. This case is not one that is capable of repetition yet evading review. This narrow exception "applies only if: (1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." In re P.S., 167 Vt. at 67-68 (quotation omitted). There can be no reasonable expectation that petitioner will be subjected to the same action again. See In re Green Mountain Power Corp., 148 Vt. 333, 335 (1987) (explaining that a reasonable expectation of being subjected to the same action again requires more than just a theoretical possibility of the same event happening in the future; party must show a "demonstrated probability" that it will become embroiled again in the same controversy (quotation omitted)). This appeal involves a fact-specific challenge to the hearing officer's decision, specifically, whether the hearing officer's decision was supported by the evidence.[*]

[*] Petitioner did not argue below that he possessed a liberty interest in his conditional furlough status, and we do not address this issue on appeal. See Bull v. Pinkham Eng'g Assocs.,

Because petitioner has been released again on CR, any future violations and future actions by the Department will necessarily involve wholly different facts. Petitioner will have ample opportunity to challenge any future decisions should he again violate the terms of his CR agreement.

Petitioner also fails to show that negative collateral consequences are likely to result from the action being reviewed. He suggests that any negative entry in his prison record could reduce his chance for parole. As the State notes, however, the decision whether to release an individual on parole is a discretionary act that involves consideration of a number of different factors. See 28 V.S.A. § 502a. We agree with the State that any potential effect that the hearing officer's decision may have on petitioner's future status is too speculative to fall within this exception. See Spencer v. Kemna, 523 U.S. 1, 14 (1998) (reaching similar conclusion, and rejecting as speculative petitioner's claim that his parole revocation could be used to his detriment in a future parole proceeding); see also Phifer v. Clark, 115 F.3d 496, 500 (7th Cir. 1997) ("[A]n event's potential influence on future discretionary decisions is insufficient to save a claim from mootness." (citation omitted)). Petitioner's appeal is moot and it is therefore dismissed.

Appeal dismissed as moot.

BY THE COURT:

_____
Paul L. Reiber, Chief Justice

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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170 Vt. 450, 459 (2000) ("Contentions not raised or fairly presented to the trial court are not preserved for appeal.").