ENTRY ORDER

SUPREME COURT DOCKET NO. 2009-310

MAY TERM, 2010

Willard Buell	}	APPEALED FROM:
	}	
v.	}	Washington Superior Court
	}	
Robert Hofmann	}	DOCKET NO. 548-8-07 Wncv
		Trial Judge: Helen M. Toor

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

Petitioner appeals from the trial court's entry of summary judgment in defendant's favor. On appeal, petitioner argues that there are factual disputes and summary judgment is not appropriate. We affirm.

The issue in this case involves petitioner's eligibility for furlough, a matter that is vested in the authority of the Department of Corrections (DOC). 28 V.S.A. § 808(a). The DOC adopted Directive 371.15, which delineates the criteria for conditional re-entry furlough. Pursuant to that directive, offenders "shall be released on conditional re-entry once they have completed their entire minimum sentence." Directive 371.15, § 4.2. The DOC may, however, delay release for specified reasons, including where "[t]here is substantial credible evidence that the release will place a particular citizen at risk of harm." Id.

The following facts are undisputed. Petitioner was convicted in 1998 of aggravated domestic assault and is currently incarcerated. In 2006, he was released into the community on a conditional re-entry program. His furlough was revoked because he contacted the victim of the crime. One month later he was released again, and he assaulted the same victim. For this behavior, he was convicted of aggravated domestic assault in 2007. When petitioner reached his minimum sentence, the DOC conducted a review of his case and decided to delay granting petitioner furlough based on its assessment that releasing petitioner would present a risk of harm to the victim of his assault. In its decision, the DOC explained that petitioner had repeatedly contacted the victim,* even when he was ordered by the court not to do so. The DOC also recounted petitioner's repeated assaults of the victim, including one while on prior furlough release. Finally, the DOC explained that the victim had expressed fear that petitioner would find her and hurt her.

In August 2007, petitioner filed suit in superior court alleging that the DOC improperly delayed releasing him on conditional re-entry furlough even though he had served his minimum sentence. The trial court construed petitioner's filing as a request for review of governmental

* Petitioner contacted the victim approximately ninety-seven times from August 16, 2007 to January 24, 2008.

action pursuant to Vermont Rule of Civil Procedure 75. Petitioner alleged that there was an issue of material fact as to whether the victim feared him. In support, petitioner presented an affidavit from the victim stating that she does not fear petitioner and does not object to his furlough release. The trial court granted the DOC summary judgment, concluding that the record supported the DOC's decision that petitioner would present a risk of danger to the victim if released. As to the victim's affidavit, the court noted that her subjective feelings were relevant, but not dispositive. Petitioner appeals.

On appeal, petitioner argues that the trial court erred in granting summary judgment because there is a disputed fact as to whether petitioner poses a threat to the victim of his crime. In reviewing a grant of summary judgment, this Court uses the same standard as the trial court. Madden v. Omega Optical, Inc., 165 Vt. 306, 309 (1996). Summary judgment is appropriate where there are no issues of material fact and a party is entitled to judgment as a matter of law. V.R.C.P. 56(c)(3). In this case, we conclude that there was no genuine issue of material fact and that the court did not err in granting summary judgment to the DOC.

Review of governmental action under Rule 75 in the nature of certiorari involves a very narrow standard of review. See In re Town of Bennington, 161 Vt. 573, 574 (1993) (mem.). "[W]hen reviewing administrative action by the DOC under V.R.C.P. 75, we will not interfere with the DOC's determinations absent a showing that the DOC clearly and arbitrarily abused its authority." King v. Gorczyk, 2003 VT 34, ¶ 7, 175 Vt. 220. The DOC has broad discretion in assessing whether an inmate is eligible for conditional re-entry. See 28 V.S.A. § 808(a) (granting the DOC "sole discretion" in setting conditions and place of confinement). Therefore, the limited question for the trial court was whether the DOC abused its authority. Given the undisputed evidence that petitioner previously violated furlough by contacting and assaulting the victim, it was not unreasonable for the DOC to determine that petitioner's release would "place a particular citizen at risk of harm." Directive 371.15, § 4.2. The trial court was not required to engage in a fact-finding analysis of whether the victim actually feared harm from petitioner because the critical issue was whether there was a reasonable basis to conclude that petitioner presented a risk of harm. Because there was "competent evidence to justify the adjudication," we conclude that the DOC did not err in delaying petitioner's release. Rouleau v. Williamstown Sch. Bd., 2005 VT 131, ¶ 4, 179 Vt. 576 (mem.) (quotation omitted).

Affirmed.

BY THE COURT:

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice