STATE OF VERMONT

SUPERIOR COURT Washington Unit	CIVIL DIVISION No. 21-CV-2088
JOHN SHEEHY, Appellant, v. JAMES BAKER, COMMISSIONER, VERMONT DEP'T OF CORRECTIONS Appellee.	

RULING ON THE STATE'S MOTION TO DISMISS

Vermont prisoner and appellant John Sheehy filed this action seeking Rule 74 review of a Department of Corrections case-staffing decision on January 27, 2021 pursuant to 28 V.S.A. § 724, which permits limited review of certain decisions following a furlough violation. The decision at issue would ensure that Mr. Sheehy is not eligible for furlough for an extended time. The State has filed a motion to dismiss. Though the disputed decision does not appear to have arisen out of a technical violation of furlough conditions, the State does not seek dismissal on that basis. Rather, it argues that: (1) the notice of appeal is insufficiently pleaded for Rule 8 purposes; (2) the notice of appeal fails to allege on its face that Mr. Sheehy was on furlough prior to the decision and that he otherwise is entitled to review under § 724; (3) for the same reasons, he lacks "standing"; and (4) the notice of appeal was not filed in a timely manner.[1]

The State's first three arguments are meritless and substantially misunderstand the nature of this action. Under Rule 74, a case such as this is initiated with a *notice of appeal*, not a complaint. V.R.C.P. 74(a). The purpose of the notice of appeal is to notify the parties and the court that the proceeding that began in the agency is continuing, and it triggers the appellate court's jurisdiction. The applicable standards are basic:

> The timely filing of a notice of appeal is jurisdictional. Other failures to comply with the appellate rules in taking an appeal do not affect the validity of the appeal, but are grounds for "appropriate" action. Courts liberally construe the requirements of Rule 3. If a litigant's action is the functional equivalent of what the rule requires, we will find compliance. If a

[1] In the State's reply, it argues for the first time that the case-staffing decision at issue in this case is not subject to review under 28 V.S.A. § 724, as opposed to faulting Mr. Sheehy for failing to make a threshold showing of the availability of review on the face of the notice of appeal. The court declines to address that issue as it was raised for the first time in the reply, depriving Mr. Sheehy of a fair opportunity to address it. See *Bigelow v. Dept. of Taxes*, 163 Vt. 33, 37–38 (1994).

> litigant files in a timely fashion a document that specifically indicates an intent to appeal and gives sufficient notice of that intent, there is compliance with the requirement to file a notice of appeal. An error in compliance with [appellate procedure] will affect the validity of an appeal only if it is prejudicial to another party.

In re Shantee Point, Inc., 174 Vt. 248, 259–60 (2002); see also *Casella Const., Inc. v. Dept. of Taxes*, 2005 VT 18, ¶ 6, 178 Vt. 61 ("A notice of appeal serves two functions—it informs 'the parties and the tribunals concerned that the proceedings are not concluded so they may respond accordingly,' and it invokes 'appellate jurisdiction by accomplishing the transfer of the cause to the reviewing authority while the question sought to be reviewed remains open to appeal.'" (citations omitted)).

Mr. Sheehy's notice of appeal specifically identifies the decision he is appealing—the case-staffing decision on January 27, 2021. It also identifies the appellee (the State), the court to which the appeal is being taken (Washington Civil Division), and he signed it.

The State's argument that he was supposed to include a set of allegations that would explicitly show that he is entitled to relief under 28 V.S.A. § 724 is simply wrong. That is not the purpose of a notice of appeal. The State's assertion that without such allegations it has no way to know whether he even was on furlough prior to the January 27 decision is hyperbole. Surely the Department of Corrections does not keep track of inmate furloughs by asking inmates which have been on furlough and when. The court notes that the DOC appears to have had no trouble submitting the administrative record relevant to the January 27 decision in response to the notice of appeal that it now finds so deficient. The court also notes that Rule 74(d) requires a statement of questions only where otherwise "required by law," and here there is no such requirement. These arguments have no merit.

If the State believed that Mr. Sheehy's appeal was not authorized by § 724, it had but to file a motion to dismiss so explaining. It has not done so.

Timeliness

The only question, then, is whether Mr. Sheehy's notice of appeal was filed in a timely manner. The notice of appeal is required to be filed within 30 days of the disputed decision. V.R.C.P. 74(b); V.R.A.P. 4(a)(1). The decision occurred on January 27, 2021, and the notice of appeal was filed on July 28, 2021, long after 30 days had elapsed. However, Mr. Sheehy asks the court to treat his notice as timely filed due to "excusable neglect." V.R.C.P. 6(b)(1)(B).[2]

According to the representations (uncontested by the State) of his attorney, Kelly Green, most of the delay in this case was attributable to confusion over whether a notice of appeal pursuant to 28 V.S.A. § 724 must await the exhaustion of administration remedies. The current version of § 724 became effective on January 1, 2021. It permits an inmate to immediately appeal from a case-staffing decision in appropriate circumstances. Prior to this version of the statute, the DOC specifically enabled inmates to seek administrative

[2] Both parties apply the Rule 6 excusable neglect standard to Mr. Sheehy's argument. For that reason, the court applies that standard.

review of case-staffing decisions. DOC Directive 410.02, Procedural Guidelines § 6(g). However, in an "interim memo," signed on December 30, 2020, and effective on January 1, 2021, the DOC deleted § 6(g) from Directive 410.02, presumably to eliminate administrative review now that, at least in some cases, direct review in court would be available. While the interim memo modifies the substance of Directive 410.02, the face of the directive has not been changed, requiring one to synthesize the two to understand their intended effect.

This change in the administrative process apparently was not well publicized. The Prisoners' Rights Office did not become aware of it until several months later, before which it expressly advised inmates to exhaust their administrative remedies before filing a notice of appeal under § 724.

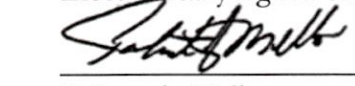
While normally ignorance of the law is no excuse, the court believes the circumstances here warrant some accommodation. One might have expected someone at the Department of Corrections at some point to have communicated with the Prisoners' Rights Office in the event of such a significant procedural change on the very day that an important new statutory right was to become effective and could be certain to generate a large amount of litigation, but that apparently never happened. There also is no indication that the DOC did anything else to educate prisoners as to the new procedure, either when it was adopted or when it began receiving unnecessary grievances, which it should have known would delay invocations of appellate rights under § 724. See 28 V.S.A. § 854(3) ("All inmates shall be informed of the grievance procedure, which shall be available to all inmates.")

Counsel's representations suggest that Mr. Sheehy was reasonably diligent in attempting to seek review. There is no prejudice to the State. On balance, the court concludes that this is a case of excusable neglect and will treat Mr. Sheehy's notice of appeal as timely.

Order

For the foregoing reasons, the State's motion to dismiss is denied.

Electronically signed on 10/6/2021 1:17 PM, pursuant to V.R.E.F. 9(d)



Robert A. Mello
Superior Judge