VERMONT SUPERIOR COURT
Addison Unit
7 Mahady Court
Middlebury VT 05753
802-388-7741
www.vermontjudiciary.org

CIVIL DIVISION
Case No. 63-3-20 Ancv

Burnett vs. Touchette

**DECISION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT**

Petitioner Austin Burnett is an inmate in the custody of the Vermont Department of Corrections ("DOC"). In 2017, Mr. Burnett participated in the Vermont Treatment Program for Sexual Abusers (VTPSA). Before completion, DOC removed him from the program. When he later applied for sentence credit for participation in VTPSA, DOC denied the request. Mr. Burnett grieved the denial all the way to the Commissioner; after the Commissioner denied the grievance, Mr. Burnett appealed the denial to this court. Both parties now move for summary judgment. The court grants the Commissioner's motion and denies Mr. Burnett's.

The standards applicable to a motion for summary judgment are familiar. Nevertheless, the decision here rests in part on the allocation of burdens. Thus, at the risk of belaboring the obvious, the court restates those burdens.

Under Rule 56, the initial burden falls on the moving party to show an absence of dispute of material fact. *E.g.*, *Couture v. Trainer*, 2017 VT 73, ¶ 9, 205 Vt. 319 (citing V.R.C.P. 56(a)). When the moving party has made that showing, the burden shifts to the non-moving party; that party may not rest on mere allegations, but must come forward with evidence that raises a dispute as to the facts in issue. *E.g.*, *Clayton v. Unsworth*, 2010 VT 84, ¶ 16, 188 Vt. 432 (citing *Alpstetten Ass'n, Inc. v. Kelly*, 137 Vt. 508, 514 (1979)). Where that party bears the burden of proof on an issue, if fairly challenged by the motion papers, it must come forward with evidence sufficient to meet its burden of proof on that issue. *E.g.*, *Burgess v. Lamoille Housing P'Ship*, 2016 VT 31, ¶ 17, 201 Vt. 450 (citing *Poplaski v. Lamphere*, 152 Vt. 251, 254–55 (1989)). The evidence, on either side, must be admissible. *See* V.R.C.P. 56(c)(6); *Gross v. Turner*, 2018 VT 80, ¶ 8, 208 Vt. 112 ("Once a claim is challenged by a properly supported motion for summary judgment, the nonmoving party may not rest upon the allegations in the pleadings, but must come forward with admissible evidence to raise a dispute regarding the facts."). The court must give the non-moving party the benefit of all reasonable doubts

and inferences. *Carr v. Peerless Ins. Co.*, 168 Vt. 465, 476 (1998). Thus, "[i]n determining the existence of genuine issues of material fact, courts must accept as true the allegations made in opposition to the motion for summary judgment, so long as they are supported by affidavits or other evidentiary material." *Gates v. Mack Molding Co.*, 2022 VT 24, ¶ 13, 279 A.3d 656 (quotation omitted).

Viewed through this lens, the following facts emerge as undisputed. Prior to December 14, 2017, Mr. Burnett had participated in VTPSA while incarcerated at Northwest State Correctional Facility. On December 14, 2017, the DOC Intervention Service Treatment Team sent Mr. Burnett a "Notice of Program Termination." Mr. Burnett did not grieve the decision to remove him from the program. Nor, although the Notice offered him the opportunity to reapply, is there any evidence that he did so, or that he ever completed the program. Instead, twenty-one months later, he filed a Grievance Form #1, asserting that he was entitled to sentence credit, because his removal had been a suspension. Ultimately, on December 3, 2019, the Commissioner denied the grievance, thereby exhausting Mr. Burnett's administrative remedies. Over 100 days later, Mr. Burnett filed this Rule 75 appeal.

The appeal fails for two reasons. First, Rule 75(c) makes clear that the complaint must be filed within 30 days after the action under review; here, Mr. Burnett missed that deadline by 76 days. While Rule 75 expressly recognizes the court's authority, under Rule 6(b), to extend this deadline, the court declines to do so. Mr. Burnett offers a combination of excuses for his delay in filing. None are supported by affidavit or competent evidence. While the court has discretion to find excusable neglect, *see Clark v. Baker*, 2016 VT 42, ¶ 20, 201 Vt. 610 ("The decision of the trial court in deciding whether there has been excusable neglect is discretionary . . . ."), that finding must rest on more than the bald assertions of counsel. Thus, Mr. Burnett has failed to meet his burden on this point.

Second, the appeal fails on the merits. Mr. Burnett argues that DOC's action, in removing him from the VTPSA program, was not a termination but a suspension. The document effecting his removal, however, refutes this argument. Including the title of the document, the Notice denotes the action taken as a "termination" no fewer than six times; it never uses the term, "suspension," or any form or synonym of that word.

Nevertheless, Mr. Burnett's appeal hangs on an interpretation of the Notice that would substitute "suspension" for "termination." He thus assumes the role of Humpty Dumpty:

> "When I use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean — neither more nor less."
>
> "The question is," said Alice, "whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master — that's all."

L. Carroll, Through the Looking Glass, ch. 6. Of course, Humpty Dumpty was claiming the right to use his own words as he chose, irrespective of their settled meanings; Mr. Burnett would go further, presuming to tell DOC that he is the master of DOC's words, and so free to ascribe to them whatever meaning suits his purpose. This argument does not withstand even passing scrutiny.

Mr. Burnett's argument hangs by one slender thread: he observes that the Notice of Termination allows him to reapply in five months, while DOC's "Interim Revision Memo on 371.06 Suspension and Termination from Correctional Programs" permitted offenders who had been terminated from VTPSA to reapply six months after termination. He notes further that pursuant to the VTPSA Orientation Handbook, a "typical suspension period is 30—90 days, however, could be longer depending on the nature of the suspension and other program and facility sanctions." The very next section of the Handbook, however, undercuts Mr. Burnett's argument. It provides, "If you are terminated, you will be removed from the program." "Removal" appears nowhere in the Handbook's discussion of suspension. The Notice of Termination's opening sentence—"DOC Intervention Services Team has decided to remove you from [VTPSA]"—thus further confirms that DOC's action was in fact a termination and not a suspension.

The plain language of DOC's Notice of Termination, read in the light of DOC's Interim Revision Memo and its VTPSA Orientation Handbook, thus makes clear that DOC's action here was not a suspension but a termination. Were there any doubt in this regard, the deference owed to decisions of administrative agencies would command the same conclusion. The Supreme Court has made clear that, "out of respect for the 'expertise and informed judgment' of agencies, and in recognition of our proper role in the separation of powers, we apply a deferential standard of review to agency decisions." *In re Williston Inn Group*, 2008 VT 47, ¶ 11, 183 Vt. 621 (citations omitted). This deference extends to an agency's interpretation of its own regulations. *See In re Verburg*, 159 Vt. 161, 165 (1992) ("we employ a deferential standard of review for an agency's interpretations of its own regulations"). The court's role is thus limited: "We still conduct an independent review and will overturn an agency's interpretation of its own promulgated regulation that exceeds the authority granted under the state enabling statute, that conflicts with past agency interpretations of the same rule, that results in 'unjust, unreasonable or absurd consequences,' or that demonstrates 'compelling indications of error.' " *In re Conservation Law Foundation*, 2018 VT 42, ¶ 16, 207 Vt. 309.

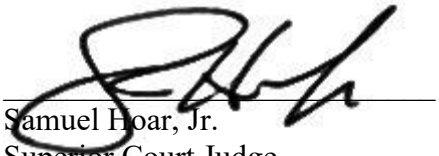
Here, Mr. Burnett has not suggested, nor has the court found any indication that DOC exceeded its statutory authority. Rather, 28 V.S.A. § 102(b)(2) confers on the Commissioner the authority "[t]o exercise supervisory power over and to establish and administer programs and policies . . . for the correctional treatment of persons committed to the custody of the Commissioner." The Legislature has also charged the Commissioner with the responsibility "[t]o make rules and regulations for the governing and treatment of persons committed to the custody of the Commissioner." 28 V.S.A. § 102(c)(1). The Supreme Court has made clear that the Commissioner enjoys "broad discretion" in the exercise of these responsibilities. *See Rheaume v. Pallito*, 2011 VT 72, ¶ 11, 190 Vt. 245. As a matter of logical necessity, this discretion must include the Commissioner's interpretation of DOC programming requirements and decisions made with respect to those requirements. When and how to allow sentence credit for participation in or removal from such programs is thus well within the Commissioner's statutory authority. Equally, interpreting a removal from programming as a termination is well within the Commissioner's statutory authority.

Mr. Burnett has not brought to the court's attention any prior DOC interpretations that are inconsistent with its interpretations here. Nor would its determination that Mr. Burnett's removal from the VTPSA program was a termination result in an "unjust, unreasonable or absurd consequence[]." Finally, that determination does not demonstrate "compelling indications of error." Conversely, however, it seems absurd to suggest that a removal was a suspension when there is no evidence of a resumption. *Compare Suspension*, MERRIAM-WEBSTER DICTIONARY ONLINE, HTTPS://WWW.MERRIAM-WEBSTER.COM/DICTIONARY/SUSPENSION (accessed February 20, 2023) (defining "suspension" as "the state or period of being suspended: such as . . . temporary removal.") *with Termination*, MERRIAM-WEBSTER DICTIONARY ONLINE, HTTPS://WWW.MERRIAM-WEBSTER.COM/DICTIONARY/TERMINATION (accessed February 20, 2023) (defining "termination" as "end in time or existence"). Instead, the Commissioner's interpretation follows the most basic rule of interpretation—that words are given their plain, ordinary meaning. As far as appears, Mr. Burnett's removal from the VTPSA program was not temporary; it was the end of his participation. Thus, by any reasonable interpretation, it was a termination.

## ORDER

The court denies Mr. Burnett's Motion for Summary Judgment and grants the Commissioner's Cross-Motion for Summary Judgment. All claims are dismissed with prejudice. Counsel for the Commissioner shall submit the form of judgment required by V.R.C.P. 58.

Electronically signed pursuant to V.R.E.F. 9(d): 2/20/2023 1:56 PM



Samuel Hoar, Jr.
Superior Court Judge