STATE OF VERMONT

SUPERIOR COURT
Windsor Unit

CIVIL DIVISION
Docket No. 817-11-09 Wrcv

Allen Rheaume
Plaintiff

v.

Andrew Pallito, Commissioner
Defendant

DECISION ON MOTION

Commissioner Pallito has filed a Motion to Dismiss Plaintiff's claim for relief under V.R.C.P. 75. While not abundantly clear, the basis for dismissal appears to be the failure of Plaintiff to state a claim pursuant to V.R.C.P. 12 (b)(6) or lack of subject matter jurisdiction under V.R.C.P. 12 (b)(1). Under either theory, Plaintiff is entitled to the benefit of all well-pleaded facts and inferences. *Richards v. Town of Norwich*, 169 Vt. 44 (1999). A motion to dismiss for failure to state a claim should not be granted unless there exists no facts or circumstances which would entitle the Plaintiff to relief. *Powers v. Office of Child Support*, 173 Vt. 390 (2002).

Plaintiff, Allen Rheaume is an inmate serving a life sentence. He has challenged his classification by the Department of Corrections as a "high risk" sex offender. The parties dispute whether the challenge to the classification was made in a timely manner. Resolution of that issue is not necessary in order to decide the instant motion.

The challenge filed by Plaintiff is based upon V.R.C.P. 75, which allows for review of certain government actions. Discretionary acts are not subject to V.R.C.P. 75 review unless at common law the action sought to be reviewed would be subject to an extraordinary writ. *Vermont State Employees Association v. Vermont Criminal Justice Training Council*, 167 Vt. 191 (1997).

Classification and programming decisions by the Department of Corrections regarding inmates under their care are discretionary acts. *King v.Gorczyk*, 175 Vt. 220 (2003). In addition to the broad discretion afforded the Commissioner regarding such matters, an inmate has no liberty interest in a programming or classification decision. *Conway v. Gorczyk*, 171 Vt. 374 (2000).

Construing all facts and inferences in Plaintiff's favor, Plaintiff's challenge to his classification is not based upon any claim for statutory relief. Therefore, since Rule 75 relief is only available when not appealable under V.R.C.P. 74 if such review is otherwise available by

law, the review here is only proper if relief would have been available by extraordinary writ under the common law. In this case, only two common law writs could conceivably apply to Plaintiff's claim, certiorari and mandamus.

The common law writ of certiorari applied to review of judicial actions by inferior courts and tribunals. The Department of Corrections is not an inferior tribunal to the Superior Court. Therefore, certiorari is not available in this instance.

A writ of mandamus could issue at common law only when the petitioner had a clear and certain right to the relief sought. *Petition of Fairchild*, 159 Vt. 125 (1992). The decisions reached by the Department of Corrections in this case were discretionary ones. Again construing Plaintiff's complaint in the light most favorable to him, Plaintiff disagrees with the classification decision reached by the Department. Whether his challenge was timely or not, the Commissioner's discretionary classification decision is not proper for review under V.R.C.P. 75. *Chrysler Corp. v. Makovec*, 157 Vt. 84 (1991).

Because the determination that the unavailability of Rule 75 review is dispositive of this claim the Court will not consider the other issues raised in the Motion to Dismiss. The Motion to Dismiss is **GRANTED**.

Dated at Woodstock this 23rd day of August, 2010.

Harold E. Eaton, Jr.
Superior Court Judge