VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 22-CV-01554

William Wheelock v Nicholas Deml et al

Opinion and Order on Cross-Motions for Summary Judgment

In February 2022, the Vermont Department of Corrections (DOC) considered prisoner William Wheelock's appropriateness for early release to the community at a "case staffing" session.[1] The case staffing concluded that Mr. Wheelock was not appropriate for early release and that it would consider the matter again in a year. Mr. Wheelock grieved that determination, and there is no dispute that he exhausted his administrative remedies. In his amended complaint, he alleges that the DOC relied improperly on demonstrably false information related to past misconduct and one item of "uncharged" misconduct. He asks the Court to remand the case to the DOC for a new case staffing untainted by the inaccurate information and uncharged misconduct. The parties have filed cross-motions for summary judgment addressing. The Court makes the following determinations.

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[1] The DOC defines *case staffing* as "Review of pertinent case plan information by Department of Corrections facility, probation and parole, and central office staff in order to make decisions about appropriate custody level, furlough status, programming, direct community placement, release sensitive notification (RSN), community notification, level "C" designation for offenders convicted of listed offenses, and sex offender releases and parole recommendations. (371.29) Community Notification for High Risk Offenders." DOC Glossary of Terms at 6, available at https://doc.vermont.gov/sites/correct/files/documents/VermontDepartmentofCorrectionsGlossary%20of%20Terms.pdf.

II. The Summary Judgment Standard

Summary judgment is "an integral part of the . . . Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Morrisseau v. Fayette*, 164 Vt. 358, 363 (1995) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)); *see* Vt. R. Civ. P. 1. Summary judgment is appropriate if the evidence in the record, referred to in the statements required by Vt. R. Civ. P. 56(c)(1), shows that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Vt. R. Civ. P. 56(a); *Gallipo v. City of Rutland*, 163 Vt. 83, 86 (1994) (summary judgment will be granted if, after adequate time for discovery, a party fails to make a showing sufficient to establish an essential element of the case on which the party will bear the burden of proof at trial). The Court derives the undisputed facts from the parties' statements of fact and the supporting documents. *Boulton v. CLD Consulting Engineers, Inc.*, 2003 VT 72, ¶ 29, 175 Vt. 413, 427. A party opposing summary judgment may not simply rely on allegations in the pleadings to establish a genuine issue of material fact. Instead, it must come forward with deposition excerpts, affidavits, or other evidence to establish such a dispute. *Murray v. White*, 155 Vt. 621, 628 (1991). Speculation is insufficient. *Palmer v. Furlan*, 2019 VT 42, ¶ 10, 210 Vt. 375, 380. Where, as here, there are cross-motions for summary judgment, the parties opposing summary judgment "are entitled to the benefit of all reasonable doubts and inferences." *Montgomery v. Devoid*, 2006 VT 127, ¶ 9, 181 Vt. 154, 156.

III. The Undisputed Facts

As far as the summary judgment record goes, all that can be known about the DOC's February 2022 decision denying early release to Mr. Wheelock appears in a "case staffing form." The form has discrete portions related to a 2020 case staffing, a 2021 case staffing, and the current 2022 case staffing.

There are long sections of the 2020 portion describing Mr. Wheelock's relevant criminal convictions, facility behavior, supervision history, and program history, as well as a narrative of the furlough violation and revocation that prompted the 2020 case staffing. The decision at the 2020 case staffing was: "Review in 1 year w/Classification Director." The Court understands this to mean that, following furlough revocation, Mr. Wheelock would not be returned to the community immediately, and a subsequent case staffing would occur in a year.

The 2021 case staffing form reads: "Review in 1 year. CSS to work with Mr. Wheelock on completing a release plan that addresses behavior that went wrong when released previously. If no release plan, will staff again in year from 1/2022."[2] The Court understands this to mean that, if a case plan were completed, a new case staffing would occur in 2022. If not, the next case staffing would be in 2023.

Evidently, a release plan was completed as the form then continues into the 2022 case staffing review at issue here. The 2022 case staffing form updates the previous information on Mr. Wheelock's behavior and prior supervision. It also

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[2] "CSS" means "Corrections Service Specialist." DOC Glossary of Terms at 5 (within definition of *Case Co-Management*), available at https://doc.vermont.gov/sites/correct/files/documents/VermontDepartmentofCorrectionsGlossary%20of%20Terms.pdf.

continues to contain the information set out in prior case staffing reviews. Thus, while the report reflects separate 2020, 2021, and 2022 decisions, as to historical facts that inform the decisions, it is cumulative. In other words, each decision is predicated generally on the factual information on which prior decisions were based.

The 2022 CSS recommendation and rationale reads as follows:

> This is a restaffing to decide if William Wheelock is ready for the community. He has a long history of noncompliance with the rules. He has been back inside since 2/12/2020. Just a week prior to his reincarceration, he posted on facebook, "To everyone I love, I'm sorry but I spent the last 32 years. In a cage, I'm not spending the rest of it on a leash."
> He is doing laundry at the facility, so is holding a job.
> He has had 3 major B's in the last year.
>
> Inside he has been doing okay and has been pushing for release to MA. I am new to William's case (1 1/2 months) so am only familiar with his case through notes and the P&P office, so I would have to defer to P&P and Central.
>
> Field recommends that Mr. Wheelock remains incarcerated. We are not in approval of a Parole to MA as we would not release him to furlough in the community.
>
> Although this is a [1987] murder case and he has not picked up any new violent charges He has been unsuccessful NUMEROUS times in the community. Would a VRAG be considered appropriate for a level C staffing?

The totality of the 2022 case staffing decision is quite succinct: "Based on community safety issues, release is not approved at this time. Review in 1 year."

The facility behavior summary in the 2020 section of the case staffing report includes two inaccurately described disciplinary infractions.[3] The report shows that

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[3] Mr. Wheelock concedes that two other entries originally claimed to be inaccurate are actually accurate. Mr. Wheelock also claims another portion of the 2020 information implies that he was found guilty of a drug-related violation when he was found not

Mr. Wheelock was found guilty of "failure to abide by facility rules" on June 30, 2018, and possession or introduction of drugs or alcohol on May 23, 2009. In fact, Mr. Wheelock was acquitted of both disciplinary violations, and the information in the case staffing report was false.

The 2020 section of the form also reflects that, while on an earlier community release, Mr. Wheelock "was forcing residents to give him clean urine samples so he could sell them to the Federal offenders." Mr. Wheelock does not assert that this information is false, much less that the DOC's records show that the information is false. Rather, he asserts only that he was never charged with that misconduct and, thus, was never found guilty of it. The State concedes only that he was never charged in connection with that misconduct and was never found guilty of it. The accuracy of the information is not in dispute.

As for whether DOC relied on the above information, Mr. Wheelock alleges in his statement of undisputed facts, and the State expressly concedes, that the DOC relied on the information in the case staffing report in making its 2022 decision.

IV. Timeliness of Review

In his amended complaint, Mr. Wheelock cites both due process and Rule 75 without defining the legal basis for his claim in any detail. A governmental failure to comply with the petitioner's due process rights can warrant relief through Rule 75.

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guilty of the offense. In fact, however, the report does not state that he was found guilty of that violation.

The parties have litigated this solely as a Rule 75 case, and the Court analyzes it as presenting only a Rule 75 claim.

The State argues that this case is untimely because the incorrect information that prompted the appeal appears in the 2020 portion of the case staffing report, yet Mr. Wheelock waited until the 2022 case staffing to challenge it. As a result, the State maintains that this case was filed long outside the 30-day limitation period of Vt. R. Civ. P. 75(c).

Rule 75(c) requires a party to seek review within 30 days of a governmental action or refusal to act. Mr. Wheelock is seeking mandamus review of the DOC's failure to act on his grievance, which addressed (among other things) the DOC's alleged reliance on inaccurate information in the 2022 case staffing. The State does not argue that this case is untimely in relation to the conclusion of the 2022 grievance process. Instead, it asserts that Mr. Wheelock has become forever saddled with the inaccurate information attached to him for case staffing purposes because he failed to act within 30 days of those inaccuracies first appearing in the case staffing report, in 2020. The Court disagrees.

The purpose of Rule 75(c) is to ensure that review is sought promptly in relation to the disputed governmental action, not to fossilize and immunize historical facts in the manner urged by the State. Mr. Wheelock challenges the 2022 decision process, not the 2020 decision process. He asserts that later action relied, in part, on the information from the earlier process. There is no untimeliness under Rule 75(c).[4]

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[4] A prisoner also may seek to correct their DOC records through the process set out in 28 V.S.A. § 107(e). Such relief would not assist Mr. Wheelock in this case, however.

V. Mandamus Analysis

Mr. Wheelock's complaint faces some significant hurdles under Rule 75. The disputed decision in this matter was a routine early-release determination. It was not "punishment" in any sense. It did not occur because of any breach of a condition of furlough or parole or any violation of a facility rule. Generally, such decisions fall within the DOC's broad, and typically unreviewable, discretion. There is no right to early release, and Mr. Wheelock claims no such right in this case. He rightly does not ask the Court to second-guess the outcome of the disputed case staffing. Rather, he seeks review of the DOC's alleged reliance on false information and uncharged misconduct in making that decision.

Rule 75 is a procedure, not an independent claim. *Rose v. Touchette*, 2021 VT 77, ¶ 13, 215 Vt. 555, 561. The only potential basis for review under Rule 75 in these circumstances would be that narrow portion of mandamus relief addressing "arbitrary abuses of discretion that 'amount to a practical refusal to perform a 'certain and clear' legal duty.'" *Id.* (quoting *Inman v. Pallito*, 2013 VT 94, ¶ 15, 195 Vt. 218, 224). In this instance, the DOC is required to maintain an offender reintegration process, which may result in placement in the community. *See* 28 V.S.A. § 721. Though such decisions are highly discretionary, at some point, extreme arbitrariness can be actionable. *Id.* In the Court's view, a DOC decision that relies on demonstrably false information may well place that determination beyond the scope of the ample discretion granted by the Legislature to the Department regarding such matters.

In the parole context, the United States Court of Appeals for the Eleventh Circuit has framed essentially the same substantive issue as a matter of due process.

Monroe v. Thigpen, 932 F.2d 1437 (11th Cir. 1991). In *Monroe*, the inmate's file contained inflammatory information—that he admitted to raping his murder victim—that the Board of Pardons and Parole knew was false but nevertheless relied on in denying him parole. The inmate sued, claiming a due process violation. As in this case, he sought the removal of the false information from his record, not an order compelling the Board to grant parole. The Court acknowledged that there was no liberty interest in parole and that due process did not attach generally to the procedures by which parole decisions are made. It disagreed with the Board that due process would tolerate reliance on patently false information.

After noting that there is generally no protected liberty interest in parole determinations, the Court explained:

> Stated simply, the defendants argue that so long as the Alabama parole statute confers no liberty interest in parole they may rely on admittedly false information in denying parole without offending Due Process.
>
> We cannot agree with the defendants' argument. It is true that the Alabama parole statute is framed in discretionary terms and therefore does not confer a liberty interest in parole. Nevertheless, this discretion is not unlimited. A parole board may not engage in "flagrant or unauthorized action." [The statute granting discretion] cannot be read as granting the Board the discretion to rely upon false information in determining whether to grant parole. Therefore, by relying on the false information in [Petitioner's] file, the Board has exceeded its [discretionary] authority . . . and treated [Petitioner] arbitrarily and capriciously in violation of due process.

Monroe v. Thigpen, 932 F.2d 1437, 1441–42 (11th Cir. 1991) (citations omitted); *see also Hill v. State*, 594 So.2d 246, 248 (Ala. Ct. Crim. App. 1992) (similar). The Court finds persuasive the *Monroe* court's analysis.

Accordingly, in keeping with the decisions in *Rose* and *Monroe*, the Court concludes that Rule 75 provides a potential basis through which Mr. Wheelock may challenge the use of false information in connection with his parole decision. The key question, then, is whether the DOC relied on demonstrably false information in denying early release to Mr. Wheelock.

On this record, Mr. Wheelock's entitlement to relief is straightforward. The State has expressly conceded that there was materially inaccurate information in the case staffing report and that the DOC relied on the information in the report in arriving at its decision.

In the State's reply brief, it suggests, for the first time, that the record may not be so clear after all:

> For the reasons set forth above, it seems this case truly pivots on what Mr. Wheelock "believed" was considered because of the cumulative reporting style of the narrative. When read as [its] own separate date entries, the 2022 review was based upon concern over past furlough failures and the fear of the victims involved. There is simply no evidence that the 2022 staffing hinged on either of the drug-focused allegations to which Mr. Wheelock now clings from two case staffings prior.

State's Reply at 3 (filed March 20, 2022). Again, the Court disagrees.

The 2020, 2021, and 2022 decisions are discrete. The information on which they rely, however, is not segmented in relation to each decision: the factual part of the report is cumulative. Additionally, if the State wished to dispute reliance, it should not have expressly conceded reliance in response to Mr. Wheelock's statement of facts. Attempting to raise a new, consequential factual issue in a reply brief, after effectively accepting the contrary in response to the opposing party's factual statement is unfair to the opposing party and plainly at odds with Rule 56 procedure. *See* Vt. R. Civ. P.

56(c). A reply brief does not afford a party an opportunity to raise new arguments and contentions. *See Campbell v. Stafford*, 189 Vt. 567, 571 (2011).

The undisputed facts in the summary judgment record show that the DOC relied on admittedly false information in denying Mr. Wheelock's release to the community. Consequently, he is entitled to mandamus relief through a remand for a new case staffing that shall not consider the inaccurate information.

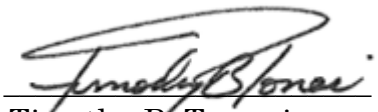
The Court comes to a different conclusion regarding Mr. Wheelock's attempt to claim some impropriety in the DOC's consideration of historical misconduct appearing in its records but for which he was never charged or convicted. There is no rule or principle that would limit the universe of information relied on by the DOC in considering early release decisions to actual convictions for misconduct. The DOC's decision making regarding a prisoner's appropriateness for release to the community is highly discretionary. In making such determinations, the DOC properly considers all information in its possession that it legitimately believes is relevant and accurate. DOC committed no error in relying on such information in this case.

Conclusion

For the foregoing reasons, Mr. Wheelock's motion for summary judgment is granted, and the State's motion is denied.

The DOC shall promptly conduct a new case staffing as to Mr. Wheelock's appropriateness for release to the community without consideration of the inaccuracies described in this decision.

Electronically signed on Thursday, April 6, 2023, pursuant to V.R.E.F. 9(d).



Timothy B. Tomasi
Superior Court Judge