VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 23-CV-00089

Walter Taylor, III, Appellant v. Nicholas Deml, Commissioner of the Vermont Department of Corrections, et al., Appellee	FINDINGS OF FACTS AND CONCLUSIONS OF LAW

RULING ON THE MERITS

In this Rule 75 case, Appellant Walter Taylor seeks a writ of mandamus ordering Appellee Nicholas Deml, Commissioner of the Vermont Department of Corrections ("DOC"), to provide him with an appropriate program that would prepare him for return to the community. On April 25, 2023, this matter came before the Court for a bench trial on the merits, held by Webex. DOC was represented by AAG Kassie R. Tibbott. Appellant Taylor appeared and represented himself. During the hearing, the Court heard testimony from Taylor and argument from the parties and admitted many pages of exhibits. Following the hearing, the Court allowed time for the parties to submit post-hearing memoranda, which were complete on May 30, 2023. DOC's submission included a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. Based upon the parties' submissions and the credible evidence admitted at the hearing, the Court makes the following findings, conclusions, and order.

Factual Background

Mr. Taylor is presently incarcerated in DOC custody and housed in an out-of-state facility in Mississippi. He is serving an 8-22 year sentence and believes that 2029 will be his earliest release date. Prior to being sent out of state, Taylor spent time at Marble Valley Regional Correctional Facility in Rutland and Northern State Correctional Facility in Newport. Mr. Taylor testified that he is unprepared to be released into the community and he does not think DOC is adequately preparing him for this. He has often been placed in segregation and close confinement without access to educational opportunities, vocational training, and recreation/physical fitness time. He has filed grievances but has not been granted the relief he seeks. Taylor's Exhibits 1 and 2 show that when he has inquired about specific options, he has been referred to vocational programs, encouraged to submit applications for jobs or other requests, and told that resources are limited and asked to be patient until space becomes available or informed that he is not eligible for certain offerings due to his risk level and other factors.

While at MVRCF, Taylor participated in some classes, which were cut short when he was transferred to NSCF. He has a high school degree but wants to take college courses and has requested that DOC pay for his college education. He is also interested in employment so he can earn money to prepare for his release. While housed in segregation, Taylor did not have access to facility libraries. He can also use tablets to access legal materials, but testified that he usually does not have sufficient funds to access other things. Mr. Taylor has been told that he will be offered specific risk reduction programming approximately nine months prior to his minimum release date.

Discussion

"Rule 75 provides for review of 'action or failure or refusal to act by an agency of the state or a political subdivision thereof, including any department, board, commission, or officer, that is not reviewable or appealable under Rule 74.'" *Rose v. Touchette*, 2012 VT 77, ¶ 13 (quoting V.R.C.P. 75(a)). As relevant here, Rule 75 authorizes relief in the nature of a writ of mandamus to "command . . . an official, agency, or lower tribunal to perform a simple and definite ministerial duty imposed by law." *Wool v. Menard*, 2018 VT 23, ¶ 11 (quotation omitted). Generally, mandamus jurisdiction under Rule 75 will not lie where the action or decision at issue involves the exercise of discretion. *See, e.g.*, *Rheaume v. Pallito*, 2011 VT 72, ¶ 11 (Rule 75 mandamus jurisdiction lacking to review DOC's programming requirements for a high risk inmate because there are no statutory limits on "the broad discretion of the DOC to determine what mode of treatment best serves individual inmates"). However, the Vermont Supreme Court has held that mandamus review is available for allegedly arbitrary abuses of discretion that "amount to a practical refusal to perform a 'certain and clear' legal duty." *Inman v. Pallito*, 2013 VT 94, ¶ 15.

The Court construes Mr. Taylor's Complaint as asserting that DOC has entirely failed to do anything to prepare him to be ready to return and reintegrate into the community upon his release.[1] Taylor looks to 28 V.S.A. § 1(b) as the source of DOC's obligations. Based on the recognition that "almost all criminal offenders ultimately return to the community," § 1(b) states that in establishing programs, DOC shall have as "its primary objective the disciplined preparation of offenders for their responsible roles in the open community." It further provides that DOC has a duty to devise "a process by which each offender sentenced to any term of imprisonment other than for life without parole, within 30 days after receiving his or her sentence, shall begin to develop and implement a plan preparing for return to the community."

[1] For this reason, DOC's Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction is denied. Taylor's allegations that DOC essentially refused to perform its clear statutory duties are sufficient to confer subject matter jurisdiction to consider mandamus under Rule 75. *See Wool*, 2018 VT 23, ¶ 15 (holding that mandamus relief was potentially available where Plaintiff alleged that DOC has failed to perform its nondiscretionary, statutory duty regarding inmate telephone services); *Yoh v. Baker*, No. 21-CV-01699, 2022 WL 12611679 (Vt. Super. Ct. Aug. 2022) (inmate's allegation that "DOC failed to develop or implement a plan of treatment that would prepare him for return to the community" was sufficient to confer subject matter jurisdiction over claim for mandamus relief). Of course, the remaining question, which is addressed below, is whether Taylor has met his burden to prove the merits of his claim at trial.

There can be no question that these duties are stated in very broad and general terms, with the details left largely to DOC's discretion. As such, Taylor does not point to any specific programming decisions or denials of his requests by DOC as subject to Rule 75 review. Rather, he contends that DOC abused its discretion by not engaging in any programming at all. However, the evidence in the record does not support Taylor's assertion.

The Court credits Mr. Taylor's testimony that currently, he feels unprepared to return to the community and that there are educational and other enrichment opportunities that he would like to pursue. However, the record evidence shows that DOC has programs and educational opportunities available, albeit not at a level that Taylor finds sufficient or comprehensive. There have been times when Taylor was unable to take advantage of certain classes or vocational opportunities because he was ineligible due to his classification level, or he had to wait for space and personnel time to open up. But this does not amount to a complete failure by DOC to provide any programs. It is well settled that the duty imposed on DOC does not guarantee an inmate's participation in any specific class or program opportunity, especially ones that DOC does not offer. *See Nash v. Coxon*, 155 Vt. 336, 339 (1990) ("There is a considerable difference between a facility with virtually no educational or rehabilitative programs . . . and one that has a reasonable selection of such programs but declines to expend funds to add new options requested by specific inmates."). Moreover, the judiciary "is ill-suited to micromanage prison programming." *Sylvester v. Pallito*, No. 2010-277, 2011 WL 4984753, at *3 (Vt. Mar. 2011) (unpub. mem.).[2]

Taylor also challenges DOC's policy that he is not able to engage in specific risk reduction planning ("RPP") until he is approximately nine months out from his minimum release date. The Court appreciates that for inmates such as Taylor who are serving lengthy sentences, this seems like an extremely long time to wait. Nevertheless, based on the record before the Court, we cannot conclude that DOC's policy determination constitutes a wholesale failure to act or to "begin to develop and implement a plan preparing for return to the community." 28 V.S.A. § 1(b). As the Supreme Court has explained, courts must strictly apply the rigorous mandamus standard "in the context of Rule 75 challenges to prison programming because of DOC's legislatively conferred authority to oversee such programming." *Sylvester*, 2011 WL 4984753, at *3. Thus in "reviewing administrative action by the DOC under V.R.C.P. 75, [courts] 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. Here, the Court finds DOC has not utterly refused to provide any programming options to Mr. Taylor and therefore it has not abused its discretion with respect to inmate programming or failed to perform its statutory duty.

[2] Trial courts are free to "consider three-justice decisions from [the Vermont Supreme] Court for their persuasive value, even though such decisions are not controlling precedent." *Washburn v. Fowlkes*, Docket No. 2015-089, 2015 WL 4771613, at *3 (Vt. Aug. 2015) (unpub. mem.) (citing V.R.A.P. 33.1(d), which provides that an "unpublished decision by a three-justice panel may be cited as persuasive authority but is not controlling precedent," except under limited circumstances).

Order

For the foregoing reasons, the Court concludes Appellant has failed to demonstrate that he is entitled to a writ of mandamus. Accordingly, the Court grants Judgment in favor of Appellee DOC. *See* Judgment Order. DOC's Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction is DENIED.

Electronically signed on July 21, 2023 at 5:22 PM pursuant to V.R.E.F. 9(d).

Megan J. Shafritz
Superior Court Judge