SUPERIOR COURT
Washington Unit
65 State Street
Montpelier VT 05602
802-828-2091
www.vermontjudiciary.org

CIVIL DIVISION
Case No. 22-CV-00833

Mitchell Barber v John Hardy et al

Opinion and Order on Final Hearing

On May 1, 2023, this matter came before the Court for a contested final hearing. Plaintiff was present and was represented by Annie Manhardt, Esq. Defendants Kim Bushey and Jill Raymond were present and were represented by Assistant Attorney General Patrick Gaudet. The remaining Defendants were not present but were represented by AAG Gaudet. The Court accepted documentary and testimonial evidence, along with the arguments of counsel. Based on those submissions, the Court makes the following determinations.

The Facts

Plaintiff is incarcerated with the Vermont Department of Corrections (DOC or Defendants).[1] He is serving a sentence for an assaultive crime.

In or about April 2021, Plaintiff began participating in programming through the DOC's Risk Intervention Services (RIS). He signed an agreement prior to beginning the programming. Exhibit F. One of the provisions of the agreement,

[1] To the extent the Court needs to refer a particular Defendant it will do so by name. Otherwise, when using Defendants or the DOC the Court intends to refer to all Defendants.

which Plaintiff initialed, informed him that rule violations or DRs could result in him being removed from programming. *Id.*

Successful completion of RIS programming by a prisoner is a necessary requirement for being released into the community ahead of the prisoner's maximum sentence date. In Plaintiff's case, his maximum sentence date is the spring of 2025.

The purpose of RIS programming, as described by Defendant Raymond, is to prepare prisoners for a successful release back to the community. The programming can include many components depending on the needs of the prisoner, including educational, vocational, behavioral health trainings; and mental health assistance.

If a prisoner breaks prison or program rules, he can receive a Corrective Action Plan from RIS. If it is a very minor transgression, RIS gives oral redirections to divert the person from engaging in the improper conduct. If it is more serious, the CAP may be a written plan with steps to follow and goals to achieve. If very serious misconduct occurs, a Level 4 or 5 CAP may be issued, which is equivalent to a termination from RIS programming.

Between April and August 2021, Plaintiff engaged in misconduct and pled guilty to disciplinary violations ("DRs"). In response, RIS issued CAPs to him hoping to redirect his misbehaviors. He remained in the program, however.

By early September 2021, Plaintiff had been in programming for roughly six months. At that point, his mental health medications were changed, and he began

having mental health complaints. The RIS team discussed those increasing needs at a September 1 meeting. Exhibit S. The team also noted, however, that Plaintiff had not been truthful about his engagement with mental health providers.

Between September 14 and 18, Plaintiff was charged with a number of significant disciplinary violations. The allegations included racially threatening language, physical threats towards DOC staff, and a physical assault of DOC staff. The team discussed the serious nature of the violations and the similarity of the misbehavior to Plaintiff's past misconduct. Exhibit D. They decided to await the outcome of the DR process to decide what RIS action should be taken.

Additionally, as a matter of formal process, any recommendation from the prison RIS team to terminate a prisoner from programming would need to be approved by DOC's central RIS unit, which is headed by Defendant Kim Bushey. The central team also includes an RIS manager, a workforce development manager, and an educational specialist.

As his DR hearing date approached, Plaintiff chose to waive his right to a hearing on the charges and pled guilty. He hoped that by "accepting responsibility" for the DR, the RIS team would judge his involvement more favorably.

After the conclusion of the DR process, the RIS team met to discuss what the RIS response would be to Defendant's behavior. Given the extreme nature of the misconduct and its similarity to Plaintiff's past misconduct, Exhibit D, RIS recommended to the central RIS unit that Plaintiff receive a CAP 4, *i.e.,* a termination from programming. Exhibits Q, Q1, and Q2. They additionally

recommended that he would not be permitted to join programming again until six months had elapsed and three consecutive months had passed with Plaintiff receiving no additional DRs. *Id*. Lastly, as part of the termination, Plaintiff lost credit for the roughly six months of programming he engaged in between April and September 2021. The RIS team's recommendation also noted that Plaintiff had pled guilty to the DRs. *Id*.

Defendant Bushey credibly testified at trial that conduct that would warrant a CAP 3 response is behavior that is beginning to threaten the prisoner's progress in programming but has not escalated to threats to or violence towards other prisoners or DOC staff. When a prisoner engages in actual harm towards another or an actual threat of physical harm, she stated that a CAP 4 termination is appropriate. In Defendant Bushey's view, such behavior shows that the person is continuing to engage in the type of behavior for which he was sent to jail, is not progressing despite the provision of programming, and would be at high risk to reoffend if released into the community.

Defendant Bushey also credibly testified as to the relationship between the DR and the RIS CAP processes. RIS does not engage in actual investigations or make specific findings as to a participant's conduct or mitigating circumstances involved in the events. The RIS team often waits until the DR process is complete so that they have all possible information before them in making a CAP determination. There are times when a DR is dismissed on a procedural basis, but the RIS team "has reason to believe" the behavior actually occurred. In that event a

CAP will issue based on the behavior. Likewise, the RIS team might be persuaded by mitigating factors that the nature of the offense for which a serious DR was issued may not warrant a termination. RIS's focus is on the prisoner's behavior.

Defendant Bushey had no specific memory of the incidents involving Plaintiff. Her testimony was limited to her general approach to such matters, which she believed was likely consistently applied with regard to Plaintiff's case. She was able to agree that the central team concurred with the recommendation to terminate Plaintiff from programing. Exhibit R. In support of that determination, she also noted the similarities between the threatening and assaultive incident that led to his incarceration, Exhibit D, and the September 2021 behavior, Exhibit Q2.

After his termination from RIS programming, Plaintiff was offered no services to help him attain readmission. He received a number of DRs that further delayed it as well. In January 2023, at his request, he began working with Defendant Raymond one-on-one. He is now reinstated in RIS programming.

Analysis

Plaintiff makes two main points to the Court. First, he asserts that the RIS process is "punitive," and, therefore, he was entitled to a hearing before being terminated from the program. *See* 20 V.S.A. §§ 851-52; *Rose v. Touchette*, 2021 VT 77, 215 Vt. 555. Second, he maintains that he was not told that the termination from programming would be a direct result of the guilty pleas to the DRs. If he had known, he asserts he would not have waived his right to a hearing and that his

admissions of guilt cannot be considered voluntary. Plaintiff asks that the Court expunge his DRs and restore his six months of credit in RIS programming.

The Defendants argue that the RIS process is nonpunitive under *Rose* and that termination from it does not require a hearing. They also contend that termination from RIS is a separate process from the DR one; that Plaintiff's termination was not a direct result of the DR process; that Plaintiff did not need to be specifically informed of any connection between the two; and that, in any event, Plaintiff had been informed of the collateral relationship between the two processes in his agreement and had received RIS consequences following his prior DR convictions. They maintain that the guilty pleas were knowing and voluntary.

I. The Requirement of a Hearing

In *Rose*, the Court considered whether plaintiff was entitled to a hearing prior to being terminated from a DOC program for sexual abusers. The Court concluded that a hearing would be required if the termination could be considered "punishment." Though not a precise fit in this context, the Court adopted the United States Supreme Court's approach set out in *Bell v. Wolfish*, 441 U.S. 520, 538–39 (1979), to analyze whether such a decision was "punitive" in nature. To make that determination, the Court counseled lower courts to consider the following factors: "(1) whether the intent of the government officials is to punish, (2) whether the purpose of the restriction in question is for some legitimate governmental purpose, and (3) whether the restriction is excessive in relation to its purpose." *Rose*, 2021 VT 77, ¶ 21, 215 Vt. at 564 (internal quotations omitted). If the intent of

the action is to punish, the court need not examine the remaining factors. *Borden v. Hofmann*, 2009 VT 30, ¶ 21, 185 Vt. 486, 496 (concluding that DOC's imposition of Nutraloaf diet to certain prisoners was punitive).

The Supreme Court also has advised that evidence of intent in this context will often be based on circumstantial evidence and that punitive intent can be inferred by evidence showing that the governmental action was focused on the goals of deterrence and retribution. *See Rose*, 2021 VT 77, ¶¶ 30–31, 215 Vt. at 567–68; *Borden*, 209 VT 30, ¶ 21, 185 Vt. at 396.

In this instance, Plaintiff has provided such evidence of punitive intent in connection with his termination from programming. That intent is most plainly revealed by the fact that Plaintiff's termination from RIS programming was accompanied by other sanctions. He was stripped of credit for the six months of programming he had completed. Going forward, he was made ineligible for reinstatement for a six-month period. He was also precluded from reapplying unless he did not receive DRs for any misbehavior for a period of three consecutive months. In addition, Plaintiff was not provided with any type of plan for services that he might engage in in the interim to be able to adjust his behaviors so he might return to programming. The RIS termination notice simply advised him to "work seriously on the issues that led to your termination." Exhibit R. Defendants offered no evidence at trial to explain any treatment-based reasons for the sanctions imposed. In the Court's view, such sanctions have significant deterrent and retributive qualities. *See Rose*, 2021 VT 77, ¶¶ 30–31, 215 Vt. at 567–68; *Borden*,

209 VT 30, ¶ 21, 185 Vt. at 396. Those sanctions, taken in total, provide proof by a preponderance of a punitive intent behind Plaintiff's termination.

The Court finds that the trial evidence also revealed some nonpunitive intentions behind the termination. Specifically, the Court believes that, based on his behavior, the RIS determination that Plaintiff was not ready to be released was a nonpunitive concern. Such mixed motives do not preclude a primary finding of punitive intent, however. *Borden*, 2009 VT 30, ¶ 16, 185 Vt. at 493. Further, that particular concern does not address whether, with altered services, Plaintiff might have been ready for release within a six- or nine-month period.

The Defendants' remaining arguments in favor of its nonpunitive intent also fail. Defendants claimed that there are finite resources and that DOC has an interest in limiting programming spaces to those who are on the path to success. Similarly, Defendants asserted that continuing ineffective programming may be detrimental to a prisoner's ultimate success. They also suggested that Plaintiff's termination was done because he failed to engage actively in the programming. *See Rose*, 2021 VT 77, ¶ 28 n.2 (citing *Inman v. Pallito*, 2013 VT 94, ¶ 15, 195 Vt. 218, 224, for proposition that terminating a prisoner for his perfunctory participation in programming and actions that violated tenets of the programming would not be considered punitive).

Despite these assertions, little or no evidence was offered in support of such rationales at trial. The evidence from Defendants Raymond and Bushey was largely generic and did not delve deeply into DOC's motives or the

benefits/detriments to either the RIS program or the individual prisoner from a termination such as this one. Nor did they establish that Plaintiff's months of engagement in programming should be seen as merely token participation.[2]

Accordingly, the Court finds sufficient evidence to determine that Plaintiff's termination was punitive in nature.

The parties dispute the appropriate remedy that should flow from that conclusion. Plaintiff argues that he should be granted the six months of RIS credit he had received before being terminated. Defendants maintain that he should be afforded a hearing on whether termination was an appropriate remedy for his September 2021 conduct. *See* 20 V.S.A. §§ 851–52. The Court agrees, in part, with both sides. The Court concludes that the appropriate remedy for a failure to afford Plaintiff the hearing required by Sections 851–52 is to afford him such a hearing. As part of the remedy, however, if Plaintiff prevails at that hearing, he will be entitled to restoration of his six months of RIS credit.

II. The Voluntariness of the DR Waivers

Though not a controlling decision, *Favreau v. Pallito,* 2015-418, 2016 WL 3883202 (Vt. July 13, 2016), counsels that, prior to accepting a guilty plea in a disciplinary proceeding, the DOC must advise a prisoner of the "definite, immediate, and automatic" consequences of a guilty plea. *Id*. at *2. Otherwise, the

[2] The Court takes no position on whether such considerations or other arguments, on a different factual record, might support a finding of a nonpunitive intent in connection with a decision to terminate a prisoner from RIS programming.

plea cannot be considered voluntary. The Court finds persuasive the *Favreau* analysis and the cases on which it is based.

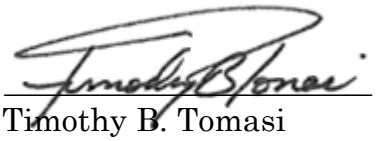
In this case, the evidence shows that Plaintiff's termination was not an "automatic" consequence of his plea. The Court is persuaded that the RIS termination process and the DR process are separate and distinct. While one can inform the other, the RIS examination is independent of the DR proceedings. The Court accepts Defendant Bushey's testimony that RIS decisions can and do diverge from the results of the DR process. In short, the RIS decision-making process is not dependent upon and does not necessarily follow the results of the DR proceeding. Given that conclusion, the Court does not believe that DOC was required to advise Plaintiff of the potential that his guilty plea might have some collateral impact on his programming.

If Plaintiff is asserting that he was unaware of *any* connection between the two processes, that position is simply not credible. Plaintiff signed an agreement when he began RIS programming. That agreement told him that rule violations or DRs could result in him being removed from programming. Exhibit F. Plaintiff also had been through the DR process before while in RIS programming and had received CAPs following those DR proceedings. Lastly, Plaintiff testified that he agreed to plead guilty to the DRs because he hoped it might look better to the RIS team because he took accountability for his actions. Plaintiff was aware of the connections between the processes.

Conclusion

In light of the foregoing, judgment is entered in favor of Plaintiff as to his demand for a hearing under Sections 851–52, and in favor of Defendants as to Plaintiff's request to vacate his guilty pleas.

Electronically signed on Friday, May 5, 2023, pursuant to V.R.E.F. 9(d).



Timothy B. Tomasi
Superior Court Judge