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

CIVIL DIVISION
Case No. 21-CV-04065

Charles Sherman v Nicholas Deml

Opinion and Order on Cross-Motions for Summary Judgment and Mr. Sherman's Second Motion to Amend

The Vermont Department of Corrections (the DOC) has classified Plaintiff Charles Sherman, a Vermont prisoner, as "Level C" according to its Directives 371.10 and 371.11. Level C is "reserved for those inmates whose listed offenses are egregiously harmful and who are assessed as high risk for future violent criminality." Directive 371.10 § 4.1. Mr. Sherman challenges the directives because he believes his classification will have a negative impact on his ability to engage in programming and become eligible for early release. In his first amended complaint, he seeks an order declaring that these directives are void because the DOC was required to, but did not, adopt the directives using the formal rulemaking process of the Vermont Administrative Procedures Act (VAPA), 3 V.S.A. §§ 801–849.

The parties then filed cross-motions for summary judgment addressing that issue. In his motion, Mr. Sherman principally endeavors to show that the disputed directives amount to "rules" for VAPA purposes and were required to have been adopted using VAPA rulemaking procedures. In its motion, the State argues that: (1) Mr. Sherman's attack on the *process* by which the directives were adopted—the

only issue in the amended complaint—is barred by VAPA's 1-year repose statute, 3 V.S.A. § 846(e); and (2), in any event, the directives are not rules that required formal VAPA rulemaking.

In Mr. Sherman's "opposition" to the State's motion, he essentially concedes that his challenge, at least as framed in the first amended complaint, is untimely under Section 846(e): "Defendant is correct that 3 V.S.A. § 846(e) establishes a one-year limitations period for challenging an agency's wholesale failure to comply with [VAPA]. Mr. Sherman concedes that this may be fatal to his claim for declaratory relief." He simultaneously filed a motion to amend the complaint, however.

The proposed second amended complaint is essentially identical to the first, except that, rather than purporting to seek declaratory relief, Mr. Sherman now hopes to seek relief under Vt. R. Civ. P. 75 (mandamus).[1] This nominal shift, he suggests, automatically bypasses VAPA's 1-year repose period: "The agency's failure to comply with this nondiscretionary legal duty [to adopt the directives as formal VAPA rules] is reviewable under Rule 75, with no limitations period." Mr.

---

[1] Mr. Sherman's new characterization of his claim as seeking relief in the nature of mandamus is, at a minimum, highly unusual. Ordinarily, mandamus may be appropriate when there has been a failure to perform a ministerial duty over which the agency lacks discretion. If mandamus is warranted, relief typically would be an order compelling the agency to perform that ministerial duty. In this case, Mr. Sherman, in the proposed second amended complaint, does not request an order compelling the DOC to undertake the VAPA rulemaking process with regard to the disputed directives, a duty the DOC no longer has under 3 V.S.A. § 846(e). Instead, he seeks an order *barring* the DOC from implementing the directives until it adopts them as VAPA rules. That is, he is attempting to use mandamus to stop an agency from doing something (usually the province of the writ of prohibition) rather than to compel it to do something (mandamus).

Sherman's Opposition to Summary Judgment at 2 (filed Jan. 23, 2023). Without explanation, he declares that this approach was "inspired" by *Otter Creek Solar LLC v. Vt. Agency of Nat. Res.*, 2022 VT 60 (Dec. 02, 2022).

In the Court's view, *Otter Creek*, demonstrates both that the State is entitled to summary judgment in this case and that Mr. Sherman's second motion to amend is futile.

I. Summary Judgment Standard

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.

II. The Undisputed Facts

For summary judgment purposes, the following facts are undisputed. The DOC adopted the disputed directives in 2002, and they became effective that same year. The DOC did not do so using VAPA's formal rulemaking procedures, 3 V.S.A. §§ 836–841. The DOC first classified Mr. Sherman as Level C in September 2020. On April 27, 2022, his classification status was reviewed. It was determined that he would remain at Level C, and the matter would be reviewed again in 2 years.

III. The Timeliness of Challenge in First Amended Complaint

In the first amended complaint, Mr. Sherman claims that the disputed directives are invalid and should be declared void because they were not adopted by the DOC under VAPA's formal rulemaking procedures. He asserts that those procedures were required by 3 V.S.A. § 831(a) ("Where due process or a statute directs an agency to adopt rules, the agency shall initiate rulemaking and adopt rules in the manner provided by" VAPA's formal rulemaking procedures.).

VAPA, however, includes a narrow statute of repose that, one year after the effective date of the rule, forecloses precisely the limited type of challenge that Mr. Sherman attempts to raise here: "An action to contest the validity of a rule *for noncompliance with any of the provisions of this chapter* . . . must be commenced within one year after the effective date of the rule." 3 V.S.A. § 846(e) (emphasis added). "The limitation period in § 846(e) is 'a statute of repose that precludes an attack on a rule [for procedural noncompliance with VAPA], even if an individual does not become subject to it until after the period expires.'" *Otter Creek Solar LLC*

v. Vermont Agency of Nat. Res., 2022 VT 60, ¶ 13 (quoting *LaFaso v. Patrissi*, 161 Vt. 46, 63 n.7 (1993)). Unlike a statute of limitations, a statute of repose starts to run when a discrete event occurs, not when a claim accrues, "even if this period ends before the plaintiff has suffered any injury." Black's Law Dictionary (7th ed. 1999) at 1423.[2]

Under Section 846(e), attacks on the procedure by which the directives were adopted were forever foreclosed one year after the directives became effective in 2002. As a result, the claim in Mr. Sherman's first amended complaint was forever barred roughly two decades ago, and the State is entitled to summary judgment on that basis. Because Mr. Sherman's claim is time-barred, it is unnecessary to determine whether, as a legal matter, the directives were required to have been adopted using formal APA rulemaking procedures.[3]

IV. Mr. Sherman's Second Motion to Amend

In his second motion to amend, Mr. Sherman proposes to bring the same challenge—that the directives should have been adopted using formal APA rulemaking procedures—but under the guise of seeking relief in the nature of

---

[2] Such laws rely on the principle that persons similarly situated to Mr. Sherman had the ability to and could have challenged the directives at the time they were enacted.

[3] Either way, as was the case in *Otter Creek*, because the directives were not adopted as VAPA rules, they lack the force of law that VAPA rules possess. *See* 3 V.S.A. §§ 835(b), 845(a); *Otter Creek Solar*, 2022 VT 60, ¶ 11.

mandamus under Vt. R. Civ. P. 75. Citing *Otter Creek,* he argues that such a claim completely bypasses the 3 V.S.A. § 846(e) repose period.[4] The Court disagrees.

In *Otter Creek*, the plaintiff–appellant asserted, among other things, that three "policies" of the Agency of Natural Resources (ANR) were invalid because ANR did not adopt them in compliance with the rulemaking requirements of VAPA. *See Otter Creek Solar LLC v. Vermont Agency of Nat. Res.*, 2022 VT 60, ¶ 4. The Court rejected this argument because the claim had been brought after the expiration of the 1-year statute of repose set out in Section 846(e). *Id.* ¶¶ 12–14. As that 1-year period had expired, the Court found the plaintiff's challenge was precluded.

After so ruling, the Court mentioned Rule 75 briefly as follows:

> Plaintiffs have identified no other Vermont law to support their claim that they have an unlimited right to challenge any administrative rule that negatively impacts them at any time. Notably, they do not assert that they are entitled to relief under Vermont Rule of Civil Procedure 75, which provides a procedure to review certain governmental actions that are not otherwise reviewable or appealable. *Even if they had, such a claim would be unlikely to succeed, as plaintiffs' action is not in the nature of the one of the common-law writs such as certiorari or mandamus.* The civil division therefore properly dismissed plaintiffs' claims for declaratory relief.

Id. ¶ 16 (emphasis added).

Nothing in *Otter Creek* states or implies that a party is free to do at any time under Rule 75 what otherwise has been clearly barred by the Legislature under 3

---

[4] The proposed second amended complaint also references Vermont Const. ch. I, art. 4 (due process). But Mr. Sherman presented no due process claim in his motion papers or at oral argument.

V.S.A. § 846(e). "A court can issue a writ of mandamus . . . only under certain circumstances: (1) the petitioner must have a clear and certain right to the action sought by the request for a writ; (2) the writ must be for the enforcement of ministerial duties, but not for review of the performance of official acts that involve the exercise of the official's judgment or discretion; and (3) there must be no other adequate remedy at law." *Petition of Fairchild*, 159 Vt. 125, 130 (1992). The opportunity to challenge the DOC's failure to use VAPA's rulemaking procedures was lost many years ago under Section 846(e). *See CTS Corp. v. Waldburger*, 573 U.S. 1, 9 (2014) ("Statutes of repose effect a legislative judgment that a defendant should 'be free from liability after the legislatively determined period of time.'" (citation omitted)); *Fed. Hous. Fin. Agency v. UBS Americas, Inc.*, 712 F.3d 136, 140 (2d Cir. 2013) (explaining that "statutes of repose affect the underlying right, not just the remedy" as with a limitations statute). After the repose period ran in this case, there no longer could be any clear and certain *right* remaining to be vindicated by relief in the nature of mandamus. And before Section 846(e) expired, there was no need for mandamus as a declaratory action under 3 V.S.A. § 807 was available.

While Mr. Sherman suggested at oral argument that the DOC must still follow APA requirements, that argument does not advance his case. To the extent he is correct, APA standards, applied to this case, would say that the disputed directives cannot be challenged after the statute of repose has ended. Accordingly, to the extent Rule 75 could be employed to order the DOC to follow APA rules, those rules would not preclude enforcement of the directives.

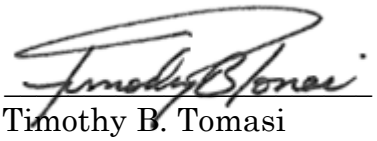
The Court concludes that there was one opportunity to challenge the process by which the directives were adopted, and it expired one year after the directives became effective. 3 V.S.A. § 846(e).

While the Court usually grants a motion to amend liberally, Vt. R. Civ. P. 15, it is appropriate to deny amendment where the newly asserted claim would fail as a matter of law. In such a case, the motion should be denied because allowing the amendment would be "futile." *See Perkins v. Windsor Hosp. Corp.*, 142 Vt. 305, 313 (1982). Such is the case here.

Conclusion

For the foregoing reasons, the State's motion for summary judgment is granted, and Mr. Sherman's is denied. Mr. Sherman's motion to amend is denied on grounds of futility.

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



Timothy B. Tomasi
Superior Court Judge