SUPERIOR COURT
Washington Unit
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CIVIL DIVISION
Case No. 22-CV-03359

Bernard Carter v State of Vermont et al

Opinion and Order on Motion to Dismiss

Defendant State of Vermont Department of Corrections seeks dismissal under Vt. R. Civ. P. 12(b)(1), arguing that the Court has no jurisdiction under Vt. R. Civ. P. 75 to entertain Plaintiff's claim that the Department has failed to develop any type of programming for his return to the community. Plaintiff maintains that controlling statutes mandate that the Department create such a plan for an inmate in his position, it has not done so, and Rule 75 provides jurisdiction in the nature of *mandamus* to force it to create a plan. The Court makes the following determinations.

In reviewing a jurisdictional motion, "'all uncontroverted factual allegations of the complaint [are] accepted as true and construed in the light most favorable to the nonmoving party.'" *Mullinnex v. Menard*, 2020 VT 33, ¶ 8, 212 Vt. 432, 438 (2020) (quoting *Conley v. Crisafulli*, 2010 VT 38, ¶ 3, 188 Vt. 11, 13)). To succeed, the Department must demonstrate "beyond doubt that there exist no facts or circumstances that would entitle the plaintiff to relief." *Wool v. Off. of Pro. Regul.*, 2020 VT 44, ¶ 8, 212 Vt. 305, 310 (internal quotation omitted).

In this matter, Plaintiff's Amended complaint asserts that he is an inmate in the care and custody of the Department and that he is not serving a sentence of life without parole. It alleges that the Department has failed to provide him with any form of programming to help with his eventual return to the community. He asserts that he is a "Level C" sex offender, that he has asked for sex offender programming, and that the Department's position is that it will not offer any programming until six months prior to his release date. He asserts that the Department's duty to provide programming is mandatory under 28 V.S.A. § 1, and that court intervention is needed to force the Department to act.

The Department maintains that the Court lacks jurisdiction under Rule 75 to challenge such programming decisions. Analogizing to general programming determinations, it argues that its decision-making process concerning Plaintiff's programming is discretionary and immunized from review under Rule 75. *See Rheaume v. Pallito*, 2011 VT 72, ¶ 6, 190 Vt. 245, 249 ("There is no question that the structuring of programming requirements is within the agency purview of the [Department]; thus Rule 75 review cannot be derived from [the writ of *mandamus*]."). For purposes of a motion to dismiss, the Court disagrees.

Vt. R. Civ. P. 75 allows limited judicial review of governmental administrative decisions, but only "if such review is otherwise available by law." The Vermont Supreme Court has interpreted this provision to mean that review is allowable if it "is provided by the particular statute establishing an agency," or falls under one of the common law writs, namely: *certiorari*, *mandamus*, or prohibition. *Rheaume*, 2011 VT 72, ¶¶ 9–10, 190 Vt. at 250. As there is no statutory right to

review in this case, this Court has jurisdiction only if one of those writs is applicable.

Plaintiff contends that his claim falls withing the scope of *mandamus* jurisdiction. *Mandamus* is a remedy wherein the Court "require[s] a public officer to perform a simple and definite ministerial duty imposed by law." *Sagar v. Warren Selectboard*, 170 Vt. 167, 171 (1999). For it to apply, there must some statutory limitation on the Department's discretion. *See Rheaume*, 2011 VT 72, ¶¶ 9–10, 190 Vt. at 250.

Plaintiff's principal argument is that 28 V.S.A. § 1 provides such a constraint. That law states:

> The Department *shall* formulate its programs and policies recognizing that almost all criminal offenders ultimately return to the community, and that the traditional institutional prisons fail to reform or rehabilitate, operating instead to increase the risk of continued criminal acts following release. The Department *shall develop* and *implement* a comprehensive program that will provide necessary closed custodial confinement of frequent, dangerous offenders, but that also *will establish as its primary objective the disciplined preparation of offenders for their responsible roles in the open community*. The Department *shall ensure* that the comprehensive program required by this subsection includes 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*.

28 V.S.A. §1(b) (emphasis added).

Though limited, *mandamus* provides a potential avenue for relief for so-called "extreme abuse[s] of discretion," where *mandamus* is used to address truly arbitrary abuses of power. *See Vermont State Employees' Ass'n, Inc. v. Vt. Crim. Justice Training Council*, 167 Vt. 191, 195 (1997). Case law has made clear, however, that an extreme abuse of discretion still must amount "to a practical

refusal to perform a certain and clear legal duty." *Inman v. Pallito*, 2013 VT 94, ¶ 15, 195 Vt. 218, 224 (internal quotation omitted). Absent that, *mandamus* may not issue. *See Holcomb v. Pallito*, No. 2011–316, 2012 WL 390699, at *1 (Vt. Jan. 26, 2012) (unpublished mem.).

In this instance, and indulging all inferences in favor of Plaintiff, the Court believes Section 1(b) may provide a jurisdictional basis for relief. Its language appears mandatory, and it arguably requires the Department to develop programming for an inmate in Plaintiff's position. In short, the Amended Complaint alleges that the Legislature has imposed a compulsory duty via Section 1(b), and the Department has refused to comply with that mandate. In the Court's view, *mandamus* potentially may lie to enforce the Legislature's command.

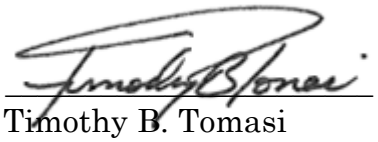
In that regard, the Courts finds persuasive much of the reasoning of the Chittenden Civil Division's decision in *Yoh v. Baker*, No 21-CV-01699, 2022 WL 12611679, *2-3 (Aug. 16, 2022) (Hoar, J), which also concluded that *mandamus* may provide relief in similar circumstances. There, the Court drew a distinction, at the dismissal stage, between the Department's discretionary decisions regarding the type of programming to afford an inmate, and its mandatory duty to provide some programming under Section 1(b). *Id*. at *2. The same is true here.

No more is necessary for the Court to decide the motion in favor of Plaintiff. The Court believes it appropriate to evaluate the nature and circumstances of the

Department's conduct, and its decisions concerning this issue on a developed record.[1]

WHEREFORE, the motion to dismiss is denied.

Electronically signed on Tuesday, September 12, 2023, pursuant to V.R.E.F. 9(d).



Timothy B. Tomasi
Superior Court Judge

[1] A number of concluding points are warranted. The Department did not address Plaintiff's assertion that 28 V.S.A. § 102(c)(8) also imposes a mandatory duty on the Department. Given the Court's discussion of Section 1(b), it need not reach that argument. The Department did not address Plaintiff's claim under the due process clause, and the Court takes no view on that issue. In a footnote, the Department makes a passing reference to Plaintiff's challenge as being untimely. Such a claim is an affirmative defense, and it has not been adequately presented by Defendant. The Court does not address that contention at this juncture. Nor does the Court take any position at this time as to what amounts to a program or programming in a correctional facility. The Amended Complaint alleges that Plaintiff has received no programming, and that is accepted for purposes of this motion.