VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 22-CV-00587

Kyle Zanks v Nicholas Deml

Order Regarding the State's Motion for Summary Judgment

Defendant the Vermont Department of Corrections (DOC) designated Plaintiff Kyle Zanks, an inmate in the DOC's custody, a "high-risk sex offender." He challenged that designation administratively without success and has taken a statutory appeal *de novo* here. *See* 13 V.S.A. § 5411b(b) (indicating that the review available is "appeal de novo" and subject to Vt. R. Civ. P. 75 procedure); *see also Sylvester v. Touchette*, No. 312-6-19 Wncv, 2020 WL 13260810, *3 n.2 (Vt. Super. Ct., May 28, 2020) (Tomasi, J.) (noting enigmatic nature of conducting this review under Rule 75 rather than Rule 74). The State has filed a motion for summary judgment, arguing that the Court should defer to the DOC's determination, which is warranted based on the administrative record.

The Court is concerned that the manner by which the State has framed the underlying record and Mr. Zanks has framed the issues on appeal in response are not consonant with the Court's review under § 5411b(b). To avoid any potential prejudice, the Court now clarifies its review under § 5411b(b) and will give the parties an opportunity for further briefing.

The Court examined the nature of its review under 13 V.S.A. § 5411b(b) in detail in *Lockwood v. Baker*, No. 21-CV-1206, 2022 WL 16758031 (Vt. Super. Ct., Oct. 28, 2022) (Mello, J.), and to a lesser extent in *Sylvester*. *Lockwood* is consistent with *Sylvester* but

more exhaustively examines the nature of the Court's review of the DOC's high-risk designation process. The State cited both cases in its motion, and Mr. Zanks has not argued that other standards should apply in this case. Neither case is binding, but both are persuasive on relevant points. The Court adopts the relevant portions of both cases, at least at the outset.

To summarize the purport of *Sylvester and Lockwood*: the statutory expression *appeal de novo* in § 5411b(b) contemplates a form of *record review* for which deference to the agency is, to some extent, appropriate. It does not contemplate a *de novo* hearing or trial. While the underlying administrative process includes an opportunity for the offender to present argument and evidence to the sex offender review committee (Committee), that opportunity is not an adversarial, quasi-judicial hearing. It is an opportunity for the offender to influence the Committee's exercise of discretion based on the record before it. Similarly, the Court's review does not contemplate a *de novo* evidentiary proceeding.

In this case, the record before the Committee, including the transcript of the administrative hearing, is in the record of this case. This Court's role is to review the administrative record and determine whether it agrees with the agency's decision, per *Lockwood*, giving the agency appropriate deference. Mr. Zanks' role is to show that the agency got it wrong, and the Court therefore should "disagree" with it.

The DOC's determination following the administrative hearing, as far as it goes, is as follows:

> During the hearing, you were given the opportunity to be heard and to present any relevant evidence to the Committee.

> You presented a written statement to the committee which stated, in summary, as a youthful offender, you did not think about the effects of your actions and behaviors to others as well as not taking programming and probation conditions seriously. You also stated, in summary, you are looking forward to self-improvement and finding ways of interacting with others in a safe manner.
>
> Your attorney, Patricia Lancaster asked Victoria Marini-Bowley, Ph.D. to attend the hearing to discuss the results of a psychosexual evaluation and review that was conducted by Vermont Forensic Associates, Dr. John Holt and herself. When asked of her evaluation of Mr. Zanks' risk, Dr. Victoria Marini-Bowley stated her opinion is that you have pattern of opportunistic sexual offending rather than predatory. She further stated you have a pattern of offending that will continue without interventions such as high–intensity treatment.
>
> The Committee designated you high risk based on your pattern of predatory sexual offending. "Predatory" means an act directed at stranger, or person with whom relationship has been established or promoted for the primary purpose of victimization. "Pattern" means having two or more sexual offense victims and typically, one or more prior sex offense convictions. The Committee did not find your presentation compelling enough to alter our decision.
>
> The Committee considered the evidence you presented, and based upon the facts outlined above, the Committee has [determined to maintain the designation].

The State attached to its Rule 56 motion a statement of undisputed facts, which recites certain "facts" in the administrative record. Mr. Zanks responded to the statement with objections to the effect that certain such facts are not undisputed, particularly whether certain conduct included victimizing anyone (as opposed to consensual contact), whether one victim was a "stranger," and ultimately whether Mr. Zanks has a "pattern of predatory sexual offending." Mr. Zanks' memorandum begins as follows: "NOW COMES Kyle Zanks, through counsel, Annie Manhardt, Esq., Prisoners' Rights Office, and opposes Defendant's motion for summary judgment on the grounds set forth below. This case cannot be decided on summary judgment because there is a

factual dispute as to whether Mr. Zanks' offense history meets the definition of "predatory," and the Department of Corrections (DOC) has not demonstrated that it is entitled to judgment as a matter of law." It concludes with this: "WHEREFORE, for all the foregoing reasons, Mr. Zanks respectfully requests that this Court deny Defendant's motion for summary judgment and set this case for trial." Mr. Zanks does not indicate what he envisions would take place at such a trial.

In other words, at least to some extent, the State's presentation of parts of the record as purported *undisputed facts* implies that the Court is not conducting record review insofar as it invites Mr. Zanks to dispute those facts, as though the Court will resolve those disputes after an evidentiary hearing. Mr. Zanks responded by disputing certain facts, including the Committee's determination that he has a "pattern of predatory sexual offending," and thus asks for a trial to resolve those disputes of fact.

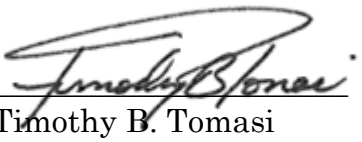
The parties' presentation of the issues in this manner appears to convert the administrative decision from an exercise of discretion into an agency determination of fact, suggesting that the Court now will resolve this appeal, not by record review, but by making findings of fact on disputed evidence -- all in plain conflict with nature of review described in *Sylvester* and *Lockwood*. Neither party has briefed this dissonance (or the nature of this Court's review at all).

To avoid any prejudice, before conducting its review of the record, the Court will invite further briefing from the parties more clearly addressing the nature of the Court's review under *Sylvester* and *Lockwood*.

Order

For the foregoing reasons, each party may submit an additional memorandum of law within 30 days, and each may submit a responsive memorandum within 15 days thereafter. The Court will then determine whether oral argument is needed regarding the motion.

Electronically signed on Wednesday, September 20, 2023, pursuant to V.R.E.F. 9(d).



Timothy B. Tomasi
Superior Court Judge