

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2001-545

JUNE TERM, 2002

James M. Millett

v.

John Goczyk

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APPEALED FROM:

Chittenden Superior Court

DOCKET NO. S1313-00 CnC

Trial Judge: Mary Miles Teachout

In the above-entitled cause, the Clerk will enter:

Plaintiff inmate appeals the superior court's decision denying his request for an order requiring the Department of Corrections to award him additional Earned Reduction of Term (ERT) against his prison sentence. We affirm.

In October 2001, plaintiff, through counsel, filed an amended complaint under V.R.C.P. 75 asking the court to award him 85 days of ERT that the Department should have, but failed to, award him between July 1999 and September 2000. The complaint made two claims: (1) plaintiff was improperly denied the ERT he could have earned had he been in the Pathways program; and (2) plaintiff was denied partial ERT for September through November, 1999, when no programs were available. At the November 2, 2001 hearing on the matter, plaintiff complained that he had been transferred to a prison in Virginia before he had been given a full opportunity to participate in the Pathways Program for violent offenders, for which he could have been awarded ERT. He also argued that he had participated in other programs entitling him to partial ERT.

At the conclusion of the hearing, based on plaintiff's own testimony and the testimony of a Department official, the superior court found that (1) plaintiff entered into and then left the Pathways Program on the same day, August 5, 1999; (2) plaintiff was repeatedly informed by prison officials of the consequences of leaving the program - that his name would be placed on the list of those prisoners available for out-of-state transfer, and that he would not be awarded full ERT; (3) he was also informed that he could reenter the Pathways Program within a limited period of time as long as he met the applicable criteria, even after he had been transferred out of state; (4) despite the warnings, plaintiff failed to do what was necessary to reenter the program; (5) before December 1999, plaintiff failed to participate in other programs that would have allowed him to receive partial ERT; and (6) beginning in December 1999, plaintiff actively participated in programs that earned him five days of ERT per month, but he was still not entitled to the full ten days of ERT per month because of his failure to participate in the needs-based Pathways Program. Based on these findings, the court dismissed the complaint, concluding that plaintiff failed to demonstrate that the Department had erred in calculating his ERT during the relevant period.

Plaintiff's sole argument on appeal is as follows: "The court's ruling at this hearing was that appellant was not entitled to the 10 days a month that was sought. But, the appellant "was" entitled to 5 days a month for those said so months." Based on this argument, plaintiff asks this Court "to grant him the 5 days for the said so months at the November 2, 2001 hearing." At the oral argument, he clarified that the court found he was entitled to and receiving 5 days per month

ERT for each month after November, 1999, but the Department had improperly awarded him less than 5 days for most of these months. He also conceded that he was not entitled to the extra 5 days per month of ERT which would have resulted from participation in the Pathways program.

We cannot conclude that the issue plaintiff now raises was in the case below. Plaintiff's complaint appears to concede that apart from the Pathways program issue, he was awarded the correct amount of ERT after November 1999 by virtue of a grievance decision by the Commissioner. As a result the superior court never ruled on the issue plaintiff now raises on appeal. We cannot rule on issues not raised below. See In re Miller, 170 Vt. 64, 69 (1999).

Affirmed.

BY THE COURT:

John A. Dooley, Associate Justice

James L. Morse, Associate Justice

Marilyn S. Skoglund, Associate Justice