

Note: In the case title, an asterisk () indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

ENTRY ORDER

SUPREME COURT DOCKET NO. 2020-113

FEBRUARY TERM, 2021

Edward Johnson* v. Michael P. Touchette	}	APPEALED FROM:
	}	
	}	Superior Court, Washington Unit,
	}	Civil Division
	}	
	}	DOCKET NO. 459-8-19 Wncv
		Trial Judge: Timothy B. Tomasi

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

Plaintiff appeals the trial court’s decision dismissing his Vermont Rule of Civil Procedure 75 complaint as untimely. We affirm.

Plaintiff is an inmate committed to the care and custody of the Department of Corrections (DOC) and is incarcerated in a facility in Mississippi. In August 2019, plaintiff filed a complaint in the superior court for review of governmental action pursuant to Rule 75. Plaintiff alleged that on May 31, 2019, he was issued a disciplinary report for fighting with another inmate. On June 1, he was notified that a hearing would be held on June 6. At the hearing, the hearing officer found plaintiff guilty of a Major “B” violation and ordered him to serve fifteen days in restrictive housing.

On June 7, 2019, plaintiff appealed the decision to the prison warden, arguing that his due process rights had been violated. Specifically, he argued that: the maximum permissible sanction for a Major “B” violation is fourteen days; the investigating officer did not comply with DOC policy requiring him to notify plaintiff of the hearing at least twenty-four hours in advance and to provide plaintiff with all nonconfidential reports about the incident; the investigating officer inaccurately described the other inmate’s injuries at the hearing; and no one checked to see if plaintiff had a serious mental illness, in which case a physician’s approval would be required to place him on disciplinary segregation. On June 12, the prison warden upheld the hearing officer’s decision. Plaintiff alleged that he appealed the warden’s decision to defendant, then DOC Commissioner Michael Touchette, on June 18, but never heard back. On August 20, 2019, he filed his Rule 75 complaint in superior court.

Defendant moved to dismiss the complaint as untimely and for failure to state a claim for which relief could be granted. Plaintiff did not respond. The trial court ruled that Rule 75 required plaintiff to file his complaint within thirty days of DOC’s final administrative determination, which in this case was the prison warden’s June 12 decision. The court therefore concluded that it lacked jurisdiction over plaintiff’s complaint and granted the motion to dismiss. This appeal followed.

Appeals from inmate disciplinary decisions are governed by DOC Directive 410.01, which has been in effect since May 2012. Vt. Dep't of Corr. Directive 410.01, Facility Rules and Inmate Discipline [hereinafter Directive 410.01], <https://doc.vermont.gov/sites/correct/files/documents/policy/correctional/410.01-facility-rules-and-inmate-discipline.pdf> [<https://perma.cc/MNZ4-6FFE>] (eff. May 1, 2012); see Pratt v. Pallito, 2017 VT 22, ¶ 3, 204 Vt. 313 (describing DOC's administrative procedures for inmate discipline). Under Directive 410.01, an inmate who wishes to challenge a hearing officer's decision on a disciplinary report must file a written notice of appeal to the prison superintendent within seven days. Directive 410.01, Procedural Guidelines § 9(a). The superintendent is required to respond to the appeal within thirty days, or the disciplinary report will be expunged. Id. § 9(c). Unlike the DOC policies governing inmate grievances or administrative segregation decisions relied upon by plaintiff in his brief, Directive 410.01 does not provide for a further appeal to the Commissioner. Compare id. § 9(a)-(d), with Offender Grievance System § 5(e), Code of Vt. Rules 13 130 005, <https://doc.vermont.gov/sites/correct/files/documents/policy/correctional/320-Grievance-System-Rule.pdf> [<https://perma.cc/5S5B-FGKS>], and Vt. Dep't of Corr. Directive 410.03, Placement on Administrative Segregation § 5(a), <https://doc.vermont.gov/sites/correct/files/documents/policy/correctional/410.03-Admin-Seg.pdf> [<https://perma.cc/39YA-ZUUA>]. Rather, Directive 410.01 makes clear that the superintendent of the facility renders the final administrative decision in disciplinary cases, stating that “[a]ppeals to the Superintendent will delay access to the courts for the instant issue until the appeal process is completed or thirty (30) calendar days, whichever is sooner.” Id. § 9(d).

There is no statute that specifically provides for judicial review of inmate disciplinary decisions. Accordingly, such decisions may only be reviewed pursuant to Rule 75. Coutu v. Town of Cavendish, 2011 VT 27, ¶ 12, 189 Vt. 336. A Rule 75 complaint “shall be filed within 30 days after notice of any action . . . of which review is sought unless the court enlarges the time in accordance with Rule 6(b).” V.R.C.P. 75(c); see Coutu, 2011 VT 27, ¶ 13 (recognizing requirement of timely filing under Rule 75 and affirming dismissal of untimely filed complaint). Although untimely filing of a Rule 75 complaint does not divest the trial court of jurisdiction over the subject matter, the court has discretion to dismiss the complaint as time-barred. See Reporter's Notes, Rule 75 (explaining that time limit contained in rule is not jurisdictional); Coutu, 2011 VT 27, ¶ 13; cf. Clark v. Baker, 2016 VT 42, ¶ 20, 201 Vt. 610 (reviewing decision on motion for retroactive extension of time for abuse of discretion).

Here, plaintiff timely appealed from the hearing officer's decision to the warden, who is the functional equivalent of a superintendent in the Mississippi facility. The warden upheld the decision on June 12. Plaintiff then had thirty days, or until July 12, 2019, to file a Rule 75 complaint challenging the decision. Plaintiff did not file his complaint in superior court until August 20, 2019. The court therefore had discretion to dismiss the complaint as untimely filed.

In his appellate brief, plaintiff argues that in previous cases, he had appealed to the Commissioner in order to exhaust his administrative remedies. He claims that the delay in filing his complaint was partly due to the fact that he was waiting for a response from the Commissioner and partly because the Mississippi facility staff were slow to pick up his mail.

The trial court may, in its discretion, enlarge the time for filing a Rule 75 complaint for excusable neglect. See V.R.C.P. 75(c) (stating complaint must be filed within thirty days of governmental action being appealed from unless trial court enlarges time in accordance with Rule

6(b)); V.R.C.P. 6(b) (providing that court may, for good cause, extend time “on motion made after the time has expired if the party failed to act because of excusable neglect”). However, plaintiff did not seek an extension of time to file his complaint for these reasons. He also did not file a response to defendant’s motion to dismiss. He therefore has not preserved his arguments regarding excusable neglect. Miller-Jenkins v. Miller-Jenkins, 2010 VT 98, ¶ 28, 189 Vt. 518 (mem.) (explaining that this Court will not address issues not raised before trial court).

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice