

STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
No. 22-CV-195

JORDAN HEMINGWAY,
Appellant,

v.

VERMONT DEP'T OF CORRECTIONS
Appellee.

RULING ON THE STATE'S MOTION TO DISMISS

Appellant Jordan Hemingway seeks review under 28 V.S.A. § 724 of a case staffing decision dated June 2, 2021, imposing a lengthy furlough interrupt. The State has filed a motion to dismiss, arguing essentially that the court lacks subject matter jurisdiction because the case staffing arose out of a nontechnical violation of furlough conditions.¹ According to the State, the nontechnical violation is that Mr. Hemingway was cited for new crimes while on furlough. Mr. Hemingway has filed no opposition to dismissal.

Section 724 provides review in the case of *technical* furlough violations. A technical violation is one for which the underlying conduct “does not constitute a new crime.” 28 V.S.A. § 724(d)(1). A *nontechnical* violation thus is one for which the underlying conduct is a new crime.

The record clearly shows that, whatever happened while Mr. Hemingway was on furlough, the DOC charged him only with being cited or charged with new crimes, not with having committed them. Mr. Hemingway declined a hearing and thus admitted that he had been cited or charged. As the court explained in *Geraw v. Vt. Dep't of Corr.*, No. 21-CV-2443 (Vt. Super. Ct. Jan. 21, 2022), “a citation is just an accusation by a police officer. Section 724, on the other hand, depends on whether the furlougee actually engaged in chargeable criminal conduct. Obviously, one can be accused of something one did not do. By merely noting the fact of the citation, the hearing officer neither explicitly nor implicitly made any determination as to the nature of the underlying conduct.”

In this case, Mr. Hemingway admitted everything he had been accused of, but that did not include having committed new crimes, only being charged or cited. That he may

¹ The State characterizes the issue as one of “standing,” but does not then actually make any argument about standing. See *Hinesburg Sand & Gravel Co., Inc. v. State*, 166 Vt. 337 (1997), for an example of a traditional standing analysis. The State also characterizes the issue as one of failing to state a claim. V.R.C.P. 12(b)(6). Mr. Hemingway, however, is not attempting to assert a legal claim. He is appealing a case staffing decision under § 724. The issue briefed by the State is a simply whether any such cause of action is available under § 724 due to the technical or nontechnical nature of the violation.

have pleaded guilty to the offenses at some point after the hearing is irrelevant. The determination must be made by the hearing officer in the course of the NOS proceeding. Because the record includes no admission or determination of criminality during furlough, the court declines to dismiss on the basis argued by the State, despite Mr. Hemingway's lack of an opposition filing.

However, the face of the record clearly shows that the court lacks jurisdiction for a different reason. Mr. Hemingway's case staffing occurred on June 2, 2021. He purports to have signed the notice of appeal on December 2, 2021. It appears to have been first received by either the court or the DOC no earlier than January 19, 2022, long after the 30-day appeal period had expired. See V.R.C.P. 74(b); V.R.A.P. 4(a)(1).

The court lacks jurisdiction on that basis and will dismiss for that reason. However, because Mr. Hemingway has not had a fair chance to brief this issue, dismissal will not take effect for 10 days. Mr. Hemingway shall file any objection to dismissal on this basis within 10 days, after which, if he does not, dismissal will be entered.

Order

The State's motion to dismiss is granted subject to a 10-day objection period as set forth above. If no objection is filed, dismissal will be entered, and the State shall submit a form of judgment. V.R.C.P. 58(d).

SO ORDERED this 25th day of March, 2022.



Robert A. Mello
Superior Judge