STATE OF VERMONT
WASHINGTON COUNTY, SS.

LAURA ZIEGLER)
)
v.)
)
STATE OF VERMONT, et al.)

Washington Superior Court
Docket No. 548-8-02 Wncv
Docket No. 134-3-03 Wncv

Decision
Defendants' Motion for Summary Judgment, filed March 19, 2004 in No. 134-3-03 Wncv

In both of these consolidated cases, Plaintiff Laura Ziegler seeks access to governmental documents, based on the Access to Public Records Act, related to the use of pepper spray on inmates in the custody of the Department of Corrections. In the case filed first (548-8-02 Wncv), she requested a copy of a Department Directive on the subject. A redacted version was provided to her by the Department, whereupon she challenged the justification for the redactions and sought access to an unredacted or less redacted version. The parties briefed the issues relating to the extent of the redactions, and the court then conducted an *in camera* review of the document. The court has issued a ruling (February 25, 2004) and a revised redacted version, in which the document was redacted, but to a lesser extent than the Department had done. The document has been released to the Plaintiff.

In the second and related case (134-3-03 Wncv), Ms. Ziegler seeks access to additional documents she requested from the Department in five separate requests made between January 15, 2003 and February 20, 2003. Defendants filed the Motion for Summary Judgment now before the court, in which they claim that the court does not have authority to act on the petition because the Plaintiff did not exhaust required administrative processes before filing suit.

Plaintiff is an individual person representing herself. Defendants are the State of Vermont and the Secretary of the Vermont Agency of Human Services, of which the Department of Corrections is a part. They are represented by Assistant Attorney General Marie J. Salem.

Facts Material to the Subject Matter of the Motion

The Department submitted a brief Statement of Undisputed Facts that includes five statements of fact. Plaintiff agrees with four of them but disputes the fifth. Both parties made many additional factual allegations in the supplemental memoranda they filed with the court.

It is undisputed that Plaintiff made five specific Public Record Act requests to the

Department of Corrections on the following dates:

January 15, 2003
January 29, 2003
February 18, 2003 (#1)
February 18, 2003 (#2)
February 20, 2003.

January 15, 2003 Request.

With respect to the first request, the Defendants offer as an undisputed fact the assertion that: "Plaintiff did not appeal the records produced by the Department in response to her January 15, 2003 request to Agency of Human Services Secretary Charles Smith." However, the document relied on by the Department shows that Plaintiff filed an appeal on January 30, 2003.

It is not clear to the court, from the filings of both parties after the initial statements of undisputed facts, exactly what the facts are related to the January 15, 2003 request, or what was the followup, either by the Department or in response to Department action. It appears that the Department is claiming that documents were provided in response to the January 15, 2003 request and that although there was an appeal on January 30, 2003, there was no appeal from the action the Department took in response to the document request. It appears that the Plaintiff is claiming that although some documents were ultimately provided in response to the request (or the appeal, and it is not clear which), as to others there was an inadequate response. The facts related to these arguments of the parties are not included in the statements of fact. The one fact that is undisputed is that after Plaintiff appealed to the Agency Secretary and records were produced, she filed no further appeal.

Other four requests.

With respect to the remaining four requests, the Defendants offer as an undisputed fact the assertion that: "Plaintiff did not appeal the record requests of January 29, 2003, February 18, 2003 (both), and February 20, 2003 to Agency of Human Services Secretary Charles Smith." Plaintiff responded that this fact is undisputed. It is undisputed, therefore, that whatever the Department's responses to these four requests were (and the fact statements do not specify whether the Department did or did not respond), Plaintiff did not pursue an appeal of the outcome to the Secretary of the Agency.

The memos and attachments filed by both parties after the initial fact statements contain many assertions of fact concerning the actions that occurred following each of the requests, but the factual material is confusing and unorganized. In order to develop a clear understanding of whether all material facts are disputed or undisputed, the court would need to analyze and organize these extra facts asserted in multiple filings or included as attachments. This would entail sorting through many pages of memos and attachments, in which assertions are made not in chronological order, and verifying whether or not they are supported as required by the rule. Under V.R.C.P. Rule 56 on Summary Judgments, it is the parties' responsibility to set forth

clearly, with proper references to the record, the undisputed facts forming the basis for a ruling of law on summary judgment. *Boulton v. CLD Consulting Engineers, Inc.*, 2003 VT 72 ¶ 29, 14 Vt.L.W. 238, 242 (citing *Richart v. Jackson*, 171 Vt. 94, 97 (2000)).

Rule 56(c)(3) was recently amended to make clear that any documentary evidence relied upon must be referred to in the statements of material fact in order for the court to consider it in ruling on the motions. Reporter's Notes to 2003 Amendment. While the parties may believe that they have placed this material before the court, they have not done so in accordance with the rule, which allocates responsibilities appropriately for efficient use of judicial resources. The court declines to overlook the rule and assume the burden of the parties' organizational and analytic tasks. As a consequence, the court's decision must necessarily be based on the Defendants' Statement of Undisputed Facts and the Plaintiff's response to it, and not the extra unorganized factual assertions.

Analysis

Plaintiff relies on the Vermont Access to Public Records Act, 1 V.S.A. §§ 315, *et seq.*, as the basis for seeking a court order requiring the Department to provide her with the documents she requested. Defendants argue that as a matter of law, and based on undisputed facts, Plaintiff failed to exhaust her administrative remedies before filing suit, and therefore the court is without jurisdiction to hear her claim. Plaintiff counters that as a matter of law, she is deemed to have exhausted her administrative remedies and therefore the court does have jurisdiction.

As the above summary of facts shows, the circumstances with respect to the January 15, 2003 request are somewhat different from those related to the other four requests in that Plaintiff disputes whether or not she appealed the Department's response of the January 15, 2003 request to the Agency Secretary. There is no statement of facts relating to what happened or did not happen after Plaintiff's filing of the appeal, although it is undisputed that after she was provided with documents, she filed no further appeal.

Because there is no clear statement of all the facts that are material to the issue of whether administrative remedies have been exhausted in relation to the January 15, 2003 request, the court is unable to make a ruling of law. Therefore, Defendants' motion for summary judgment must be denied as to the January 15, 2003 request.

With respect to the other four requests, it is undisputed that Plaintiff filed no appeal to the Agency Secretary before filing this suit.

Defendants' argument for summary judgment is that a person who requests public records from the Department of Corrections must always appeal to the Secretary of the Agency before filing for court enforcement, regardless of whether the Department of Corrections personnel did or did not respond to the initial record request. Plaintiff responds that the statute sets forth no

such requirement, and that on the contrary, the statute specifically provides that if the Department fails to respond within specified time provisions, she is deemed to have exhausted administrative remedies and may proceed with judicial enforcement.

In arguing that Plaintiff was required to exhaust appeals to the Agency Secretary with respect to all record requests before the court has jurisdiction to hear her petition, Defendants rely on *Bloch v. Angney*, 149 Vt. 29 (1987). In that case the plaintiff asked the custodian for access to certain records, and the custodian refused to provide them. The plaintiff then sued the custodian in superior court, without appealing to the head of the agency. The superior court dismissed the case. The Supreme Court affirmed the dismissal, citing 1 V.S.A. § 318 (a)(2) and § 319 (a):

> Upon a denial of access by the custodian, § 318(a)(2) provides a right of appeal to the head of the applicable agency. Section 319(a) confers subject matter jurisdiction on the Washington Superior Court, or other superior courts, when [any] person [is] aggrieved by the denial of a request for public records under this subchapter . . . ." Thus, § 319(a) makes the procedural requirements of § 318 a prerequisite to an action in the superior courts. See *Smith v. State Highway Bd.*, 117 Vt. 343, 349, 91 A.2d 805, 809-10 (1952) (failure to exhaust an administrative remedy precludes a court from acting on the matter). The trial court reasoned correctly that because plaintiff had failed to allege compliance with § 318 in his complaint, the court lacked subject matter jurisdiction to entertain the action. . . .

Bloch, 149 Vt. at 31 (additional citation omitted).

Defendants argue that the principle of *Bloch* is that an appeal to the head of the agency is always a jurisdictional prerequisite. They argue that no such appeal was filed for any of Plaintiff's requests, and therefore the prerequisite to jurisdiction has not been met.

Plaintiff agrees that the procedural requirements set forth in 1 V.S.A. § 318 must be met as a prerequisite to an action in superior court, as required by § 319(a). She notes, however, that in *Bloch*, the custodian *refused* to provide the documents, making an appeal to the agency head necessary under the specific provision of § 318(a)(2) because of the custodian's clear denial of access. Plaintiff argues that a different provision of 1 V.S.A. § 318 applies to the facts of this case, specifically 1 V.S.A. § 318 (b), because the custodian did not refuse or deny access, but failed to respond adequately to her requests. Under § 318 (b), a person making a request "shall be deemed to have exhausted [her] administrative remedies with respect to each request if the agency fails to comply within the applicable time limit provisions of [§ 318(a)]." Under § 318 (a), the Legislature has established time limits within which a government custodian must respond to requests. Plaintiff claims that in her case, there was a failure to respond adequately within applicable time limits with respect to each of her requests, and therefore she is deemed to have exhausted her administrative remedies.

In general, a person seeking relief from action of an administrative agency must exhaust administrative remedies before seeking relief from the courts. Although there are exceptions, exhaustion is clearly required when specified by statute. *Stone v. Errecart*, 165 Vt. 1, 4 (1996). Generally, the question of whether an appeal to the head of the agency is the *exclusive* means of pursuing relief is a matter of statutory construction. *Town of Bridgewater v. Department of Taxes*, 173 Vt. 509, 510 (2001) (mem.). The paramount goal is to give effect to the Legislature's intent. *Id.*

Plaintiff's argument depends on her factual assertions that the Department of Corrections did not respond adequately to her requests within the time prescribed in the statute. She argues that when the custodian fails to respond promptly, she need not go through the exercise of appealing to the Secretary of the Agency because that would contravene legislative intent. She asks the court to interpret the Public Records Act in this manner. Defendants seek an interpretation that an appeal to the head of the agency is always required, even if there is an initial non-response at the level of the Department of Corrections.

In order to have a basis for considering Plaintiff's argument, the court would need facts that are not within the body of undisputed material facts before the court. Specifically, the court has no facts about whether there was any response to each of the four requests on the part of the custodian. Therefore, the court cannot consider Plaintiff's proposed interpretation at this time.

Defendants' argument rests entirely on the holding in *Bloch*. In that case, the Court construed § 319(a) in a factual setting in which the custodian *refused* to provide a document, and the person making the requesting skipped the specific requirement in § 318(a)(2) to appeal a denial to the head of the agency. The facts before the court at this point in this case are not complete enough to establish what happened after the four requests. The facts do not show a refusal, as in *Bloch*. Therefore Defendants have not shown that the *Bloch* holding controls this case, and they cannot prevail on their argument for summary judgment.

It appears probable that once a complete body of facts is properly before the court, this court will be called upon to decide whether, when a custodian at the Department level fails to respond "promptly" or adequately to a request , the person making the request is required to appeal to the Secretary of the Agency first before seeking judicial enforcement, or whether such person is deemed to have exhausted administrative remedies under § 318 (b) and may file suit in superior court. This will call upon the court to interpret § 318 in harmony with § 319(a) in the light of legislative intent, applying established principles of statutory construction. It would be premature to do so at this point, because of the absence of a complete set of facts upon which to rest such a ruling.

1 V.S.A. § 319(b) provides that proceedings under this Act shall take precedence on the docket. The matter will be set for a pretrial status conference to determine the amount of time necessary for a hearing in order to expedite resolution of the case.

ORDER

For the foregoing reasons, Defendants' Motion for Summary Judgment is *denied,* and

A pretrial status conference will be scheduled to plan for an evidentiary hearing.

Dated this 16th day of July , 2004.

Mary Miles Teachout

Hon. Mary Miles Teachout
Superior Court Judge