STATE OF VERMONT

SUPERIOR COURT **CIVIL DIVISION**
Washington Unit **Docket No. 621-10-17 Wncv**

JOSEPH BRUYETTE
Plaintiff

v.

LISA MENARD, Commissioner,
Vermont Department of Corrections
Defendant

DECISION
The State's Motion to Dismiss

Joseph Bruyette is an inmate in the custody of the Commissioner of the Vermont Department of Corrections. His claim in this case arises out of an impasse with the Department. The complaint and its attachments suggest that the DOC has sought a DNA sample from Mr. Bruyette pursuant to 20 V.S.A. § 1933 (mandatory samples for Vermont DNA database purposes). Mr. Bruyette refuses to give a sample now, having for many years insisted that he previously gave the State DNA samples repeatedly. The DOC appears to refuse to consider Mr. Bruyette for programming that otherwise might be appropriate *because* he refuses to give a DNA sample. Mr. Bruyette objects to the inability to program insofar as it is important to a realistic chance of early release. He nevertheless declines to provide a DNA sample based on his position that he already has done so.

The State has filed a motion to dismiss arguing that the court has no jurisdiction to review programming decisions and otherwise there is no apparent relief available in the nature of certiorari or mandamus. Mr. Bruyette argues in opposition to dismissal principally that he has stated a claim for constitutional retaliation that should not be dismissed. He also argues that mandamus review should be available because the DOC has a ministerial duty in 20 V.S.A. § 1935 with which it has failed to comply.

The State's arguments about the lack of jurisdiction over programming decisions and certiorari relief are not relevant to the claims Mr. Bruyette has asserted in this case. The court therefore declines to analyze such claims or arguments.

Mr. Bruyette's argument about constitutional retaliation is not sufficiently made and is unpreserved. The Vermont Supreme Court has made clear that "retaliation claims by prisoners are prone to abuse." *In re Girouard*, 2014 VT 75, ¶ 16, 197 Vt. 162. While retaliation claims supported by "specific factual allegations" sufficient to show a prima facie case of a constitutional violation may survive the pleading stage, "'wholly conclusory' complaints alleging retaliation can be dismissed at the pleading stage." *Id*. In this case, Mr. Bruyette's *argument* about retaliation is purely conclusory, it is not alleged in the complaint at all, even in a

conclusory fashion, and it was not mentioned in the grievance proceedings. Thus it is not preserved as an issue for this court. See *Pratt v. Pallito*, 2017 VT 22, ¶ 16, 204 Vt. 313 ("[T]o properly preserve an issue, a party must present the issue to the administrative agency 'with specificity and clarity in a manner which gives the [agency] a fair opportunity to rule on it.'"). The claim therefore is both insufficiently alleged and not preserved.

Mr. Bruyette's "mandamus" claim (as explained in briefing) is predicated on 20 V.S.A. § 1935. Section 1933 requires certain individuals to give DNA samples. The DOC presumably asserts, and Mr. Bruyette has not suggested otherwise, that he is among those required by statute to give a sample. Section 1935 addresses the procedure if someone who is required to give a sample refuses to do so. In such a case, "the commissioner of the department of corrections . . . *shall* file a motion in the superior court for an order requiring the person to provide the sample." 20 V.S.A. § 1935(a) (emphasis added). That person then is entitled to a hearing on whether he or she will be ordered to provide a sample. *Id*. § 1935(b), (c). Notably, "[a] person required to submit a DNA sample who is serving a sentence in a correctional facility shall have his or her DNA samples collected or taken . . . *if the person has not previously submitted a DNA sample*." 20 V.S.A. § 1933(b) (emphasis added).

The appearance in this case is that the DOC refuses to consider Mr. Bruyette for programming because Mr. Bruyette refuses to provide a DNA sample in compliance with 20 V.S.A. § 1933. Apparently the DOC has not filed a motion to compel Mr. Bruyette to give a DNA sample pursuant to § 1935, in effect depriving Mr. Bruyette of a hearing under that section at which the facts may (or may not) show that he is not required to give a sample. Instead, the DOC apparently responds to Mr. Bruyette's position by refusing to consider him for programming.

Section 1935(a) says that the DOC "shall" file a motion to compel in the event of a refusal to provide a sample in compliance with § 1933. "Shall" typically is mandatory and it appears to be so intended in § 1935(a). That subsection does not also say that the DOC may ignore that requirement and penalize or attempt to coerce a recalcitrant inmate by refusing to consider programming or by imposing other consequences rather than filing a § 1935(a) motion.

Mr. Bruyette asserts that he is willing to give a DNA sample if it is first shown that he has not properly done so in the past. The resolution of that issue requires a hearing to determine whether he already has complied with § 1933 or must yet do so. "Venue for proceedings under this section shall be in the territorial unit of the superior court where the conviction occurred." 20 V.S.A. § 1935(f). It is unknown whether venue for Mr. Bruyette's claim is in this court, or even if such a hearing is what he is seeking in this case.

In any event, under these circumstances the court cannot conclude that there are no facts or circumstances under which the Plaintiff would be entitled to relief. *Powers v. Office of Child Support*, 173 Vt. 390 (2002).

ORDER

For the foregoing reasons, the Motion to Dismiss is *denied*.

The court will schedule a status conference to determine the future needs of the case.

Dated at Montpelier, Vermont this 20th day of November 2018.

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Mary Miles Teachout
Superior Judge