

STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
No. 21-CV-1711

KC MYERS,
Plaintiff,

v.

JAMES BAKER, COMMISSIONER,
VERMONT DEPT OF CORRECTIONS
Defendant.

FILED

DEC 14 2021

VERMONT SUPERIOR COURT
WASHINGTON CIVIL

RULING ON MR. MYERS' MOTION FOR SUMMARY JUDGMENT
AND MOTION TO EXPEDITE

Vermont prisoner and plaintiff KC Myers alleges in his amended complaint that the Vermont Department of Corrections has administered its “earned time program” in a manner violating the Ex Post Facto Clause of the U.S. Constitution as applied to him. U.S. Const. art. I, § 10. He claims that if the DOC had applied the program in a constitutional manner, he would be entitled to 7 days of earned time off the minimum and maximum of his sentence for the month of January 2021. Mr. Myers has filed a motion for summary judgment, which the State opposes, addressing that matter. The State has not filed a cross-motion. He separately requested an expedited determination of that motion because, if entitled to the relief he seeks, his new minimum will be in the next several days, and he may become entitled to some release to the community at that time. Mr. Myers’ motion to expedite is granted. His motion for summary judgment, however, is denied for the following reasons.

By legislation in 2019 and 2020, the legislature directed the DOC to adopt a rule, to become effective January 1, 2021, giving inmates monthly reductions to the minimums and maximums of their sentences in compliance with certain statutory standards. 2019, No. 56, § 2; 2019, No. 148 (Adj. Sess.), § 14; 28 V.S.A. § 818. If all other standards are met, the inmate will become entitled to the credit “for each month during which the offender . . . is not adjudicated of a major disciplinary rule violation.” 28 V.S.A. § 818(b)(2)(A). By statute, therefore, it is the month of adjudication that can disqualify an inmate from earning a reduction as applied to that month.

The DOC adopted a rule. APA Rule # 21-011, available at https://doc.vermont.gov/sites/correct/files/documents/Earned_Time_Rule_Adopted_Rule_FINAL.pdf (cited as Vt. Admin. Code 12-8-38 on Westlaw). According to the DOC Rule, an otherwise entitled inmate will be given the credit for each month “[t]he offender has not been adjudicated of a major disciplinary rule violation as outlined in Department facility rules. ‘Adjudicated’ rule

violations do not include pending violations, or violations that remain subject to appeal rights.” Rule 21-011 § III(C)(1).

The rule complies with the statute by determining the month for which credit may be withheld as the month of the adjudication of a major rules violation. The rule specifically defines “adjudicated” to not include pending violations, whether not yet determined, within the appeal period, or on appeal. This ensures that “adjudication” for purposes of the rule means the month in which the rules violation was determined with finality, otherwise preserving the inmate’s right to credit in the interim. The DOC’s refinement of that expression makes good sense. Were it otherwise, the DOC would frequently be in the position of granting or withholding credit that it later determines to have done in error.

In this case, the record shows that Mr. Myers engaged in conduct in violation of the rules, and an incident report issued, on December 29, 2020. A hearing concluded in January, and the determination of guilt for a major rules violation occurred on January 11, 2021. Mr. Myers had 7 days to appeal. DOC Directive 410.01, Procedural Guidelines § 9(a). There is no indication in the record of an appeal, which puts the finality date at 1/18/21—still in January. The DOC therefore did not give Mr. Myers earned reduction credit for January.

Mr. Myers does not complain that the DOC has misunderstood or misapplied 28 V.S.A. § 818 or its own rule. He solely argues that because he was not given credit in January due to conduct that occurred in December, the month before the rule became effective, he somehow has been treated in violation of the Ex Post Facto Clause.

“Under the Ex Post Facto Clause, states may not retrospectively apply laws to a criminal defendant’s prior actions, if that retroactive application disadvantages the affected offender. To disadvantage an offender, the law must ‘retroactively alter the definition of crimes or increase the punishment for criminal acts.’” *Chandler v. Pallito*, 2016 VT 104, ¶ 19, 203 Vt. 482 (citations omitted). Mr. Myers has the burden of proof. See *California Dep’t of Corrections v. Morales*, 514 U.S. 499, 510 n.6 (1995).

Mr. Myers’ claim has no merit. He simply considers the fact that the statute and rule look to the month of adjudication rather than the month of the underlying conduct as being retroactive in a sense and pronounces that a violation of the constitution. He does not explain at all how these circumstances could result in any retroactive *increase* in punishment, the sine qua non of an Ex Post Facto violation. To the extent that he claims that he somehow *lost* sentence credit that he previously had earned, it is simply not so.

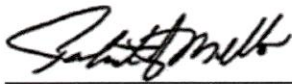
The statute and rule operate retrospectively—not retroactively—only in the sense that they withhold credit in the month of adjudication even if the underlying conduct giving rise to that adjudication occurred in an earlier month, including the month before the effective date of the rule. But the new rule did not replace an old rule that entitled Mr. Myers to 7 days of credit for the month of January; Mr. Myers did not possess credit that he later lost. Before the new rule, Mr. Myers was not entitled to 7 days of credit for the month of January, and applying the new rule simply maintained that status quo for that month. There was no operative “disadvantage,” much less a retroactive one.

The new rule exclusively provides a forward-looking benefit to inmates insofar as it can only operate to reduce their sentences, cannot increase their sentences, and (as applicable here), does not replace some more generous program that previously existed. It thus neither operates retroactively nor to increase punishment in any way cognizable by the Ex Post Facto Clause.

Order

For the foregoing reasons, Mr. Myers' motion for summary judgment is denied. The court will treat this decision as granting summary judgment to the State unless Mr. Myers objects within 10 days. V.R.C.P. 56(f)(1). If he does not, the State then shall promptly submit a form of judgment. V.R.C.P. 58(d).

SO ORDERED this 14th day of December, 2021.



Robert A. Mello
Superior Judge