STATE OF VERMONT

SUPERIOR COURT Washington Unit	CIVIL DIVISION No. 22-CV-412

RONALD LOCKE,
Plaintiff,

v.

NICHOLAS DEML, Commissioner,
Vermont Department of Corrections,
Defendant.

RULING ON THE STATE'S MOTION TO DISMISS AND
MOTION TO STAY AND MR. LOCKE'S MOTION TO AMEND

Plaintiff Ronald Locke is an inmate in the custody of the Vermont Department of Corrections. In his original pro se complaint, he seeks Rule 75 review of a June 2021 case staffing decision to, in effect, not release him on furlough for at least a year. The State then filed a motion to dismiss both for failure to state a claim and for lack of subject matter jurisdiction. Before opposing dismissal, Mr. Locke became represented by an attorney, and she filed a motion to amend the complaint. Mr. Locke then opposed dismissal in light of the claims and allegations of the amended pleading, which is asserted to merely clarify the original complaint.

Mr. Locke attached the grievance history to his original complaint. Those documents make clear that the basis for the grievance asserted by Mr. Locke was that he had presented a "release plan" in support of furlough and he disagreed with the outcome of the case staffing. The responses from the DOC make clear that it was fully familiar with the facts of his case, and in its discretion Mr. Locke was not fit for furlough at that time. This position is captured best in the administrative response at the corrections executive level of review:

> You have previously participated in both incarcerative, and community based, VTPSA [Vermont Treatment Program for Sexual Abusers]. Despite this, during your last community placement, you engaged in significant risk-based behaviors towards another member of the community. You have demonstrated neither understanding of your risk (as recently as last week, you continue to engage in victim blaming, talking about women in the way you act as you do) nor an ability or willingness to use the tools gained in group to address your behavior. The decision at the case staffing to delay release for another year was appropriate.
>
> It should be noted that, subsequent to the staffing, you sent an unwanted, explicitly sexual letter to a female in the community. This behavior bears sharp similarity to the behavior which resulted in your reincarceration and punctuates

precisely the concerns expressed by the Central Staffing Committee.

As far as the facts go in relation to the original complaint, Mr. Locke's objections that he had crafted a release plan appears to be nonresponsive to the DOC's rationale in not granting furlough at that time, which appears to be that he simply was not fit for furlough.

The State filed a motion to dismiss the original complaint. The motion may be fairly read to encompass two arguments: first, that Rule 74 review under 28 V.S.A. § 724 was available and Mr. Locke had failed to seek it; and second, that the DOC's furlough decision was essentially an unreviewable exercise of discretion under any of the writs that otherwise might have supported Rule 75 review.

In support of the first argument, the State cited a Windsor Civil decision that may reflect the view that *any* case staffing decision in which furlough is not granted may be reviewed under 28 V.S.A. § 724. This court has ruled to the contrary *many* times. Section 724 review is available only for the case staffing that, among other things, immediately follows the termination of community supervision furlough. See, e.g., *Wheelock v. Vermont Dept. of Corrections*, No. 21-CV-360, 2021 WL 8201982, at *3 (Vt. Super. Ct. Sept. 24, 2021). The case staffing at issue here did not immediately follow from a furlough revocation. Section 724 review is irrelevant. To the extent that another trial court has a different view of the statute, the court respectfully disagrees.

Otherwise, the only writ that could support review of any ordinary decision to not grant furlough is mandamus. The decision to grant furlough is discretionary, however. See 28 V.S.A. § 723(a) ("Department may release from a correctional facility . . . ."). Mandamus is virtually never available to review discretionary decisions. See *Inman v. Pallito*, 2013 VT 94, ¶¶ 15–16, 195 Vt. 218. Thus, no meaningful Rule 75 claim is apparent in the original complaint.

Mr. Locke's proposed amended pleading does not save the day. In the new complaint, he complains that the DOC has failed to do anything to help him produce a satisfactory early "release plan" and to program him effectively. He claims that these deficiencies violate statutory rights enforceable by mandamus and are arbitrary and capricious in violation of his due process rights. Mr. Locke attached to his proposed amended complaint the June 2021 case staffing documentation and the more recent June 2022 case staffing documentation, which occurred after the complaint was filed. He also attached myriad communications between his counsel—doing yeoman's work behind the scenes to help prepare him for a successful early release decision—and various agents of the DOC.

As statutory bases for these duties, Mr. Locke cites 28 V.S.A. §§ 1, 102(c)(3), (8). Section 1 provides in relevant part that the DOC has a duty to "develop and implement a plan preparing [an inmate] for return to the community." Section 102(c)(3) obligates the DOC "[t]o establish and maintain at each correctional facility a program of treatment designed as far as practicable to prepare and assist each inmate to assume his or her responsibilities and to participate as a citizen of the State and community." Section 102(c)(8) obligates the DOC "[t]o establish in any appropriate correctional facility a system of classification of inmates, to establish a program for each inmate upon his or her commitment to the facility and to review the program

of each inmate at regular intervals, and to effect necessary and desirable changes in the inmate's program of treatment." These are obviously very broadly stated duties with the details largely left to the DOC's discretion. Moreover, nothing about these duties guarantees any particular outcome for any particular inmate, much less that they will come together in a way that guarantees early release.

Mr. Locke seems to be sensitive to the highly generalized nature of these duties. He claims in the new complaint not that he disagrees with how the DOC has undertaken them in the hope that the court will order it to exercise its discretion in some other way. Instead, he claims that the DOC has simply not undertaken them at all, presumably in hopes that the court will order the DOC to do something rather than nothing. That, he asserts, should be subject to a mandamus claim or a due process claim.

The fundamental problem with these claims, even if the court were to agree that they could be viable in theory, is that the factual allegations of the new complaint, including attachments, utterly fail to indicate that the DOC has failed to undertake these duties. Rather than ignoring Mr. Locke and doing nothing, the record clearly shows that Mr. Locke has completed VTPSA programming both in the facility and in the community. Yet he apparently has been incorrigible, and it has done him little good. The DOC has experimented with releasing him to the community, and that has failed. More recently, DOC staff has been communicating responsively with his counsel in an effort to support his attempts at crafting a release plan that might help create a pathway towards furlough. All the while, the DOC has been regularly case staffing him to evaluate his circumstances.

In the course of the June 2022 case staffing, in which it was effectively determined that he would not be furloughed for at least the next two years, the explanation of decision is as follows:

> As of this date, there are no known evidence-based interventions which adequately mitigate the level of risk this individual poses. The State must determine the risk & needs of the individual to recidivate and the risk to the public or individual safety. The State will continue to review this case, updated evidence-based practices, and the ability to offer an intervention and/or supervision strategies which can be reasonably expected to mitigate the risk in determining the case plan.

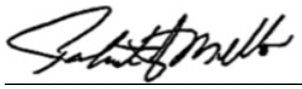
In the context of the record, it becomes clear that by saying that the DOC has done nothing, what Mr. Locke means is that the DOC has done nothing that has worked to make him fit for early release. That claim, however, is not reviewable. Whatever the enforceable extent of the DOC's statutory duties as described above, they do not come with guarantees of a favorable outcome. Otherwise, Mr. Locke points to nothing *specific* that the DOC has failed to do that it had a *specific* duty to do.

The proposed amended complaint thus is futile and denied for that reason. "[A] court may deny a motion to amend when, among other reasons, amendment would be futile." *Vasseur v. State*, 2021 VT 53, ¶ 7, 2021 WL 3009964.

Order

For the foregoing reasons, the State's motion to dismiss is granted. Mr. Locke's motion to amend is denied. The State's motion to stay is denied as moot.

SO ORDERED this 28th day of July, 2022.



Robert A. Mello
Superior Judge