VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 21-CV-01699

Herman Yoh v James Baker

RULING ON MOTION TO DISMISS

Petitioner Herman Yoh, an inmate in the custody of the Vermont Department of Corrections ("DOC"), seeks relief in the nature of mandamus under V.R.C.P. 75. He alleges that DOC failed to develop or implement a plan of treatment that would prepare him for return to the community. DOC seeks dismissal for lack of subject matter jurisdiction.[1] For the reasons set forth below, the Court denies the motion.

Factual Background

In its motion, DOC makes only a facial challenge to subject matter jurisdiction. Thus, the court accepts Mr. Yoh's factual allegations and reasonable interferences therefrom. *See Rheaume v. Pallito*, 2011 VT 72, ¶ 2 (stating standard of review under Rule 12(b)(1)). Viewed through this lens, the following facts emerge for purposes of this motion.

Mr. Yoh is serving a sentence for the murder of his wife; he reached his minimum sentence on September 12, 2017. (Second Am. Pet. for Review, at ¶¶ 2-3). In November 2017, DOC classified Mr. Yoh as a "Level B" offender. (*Id*. at ¶ 6). According to DOC policy, "'Level B offenders are the priority group for institutional treatment programs, if the sentence structure permits[, and t]hese offenders will be released on their minimum release dates, if they have participated satisfactorily in their designated program(s), consistent with the requirements described in this Directive.'" (*Id*. at ¶ 7) (quoting DOC Directive 371.12, at 2). DOC did not consider Mr. Yoh for any treatment programs at that time, however, and decided that his case would be reviewed in two years. (*Id*. at ¶ 8).

In his January 2020 review (also known as a "case staffing"), Mr. Yoh was considered for enrollment in an institutional treatment program. (*Id*. at ¶¶ 9-10). The DOC form documenting this

[1] At argument on the motion, counsel for DOC conceded that its subject matter jurisdiction argument applies only to the first two of Mr. Yoh's three enumerated claims. Irrespective of the analysis below, therefore, the third claim—that DOC violated Mr. Yoh's state and federal due process rights—survives the jurisdictional challenge.

case staffing indicated that Mr. Yoh had scored "high" on tests that measured his risk of recidivism and repeat domestic violence. (Pl.'s Ex. 1 at 3). In deciding to deny him treatment programming, DOC explained that it "does not believe the current programming officered [sic] will address his risk to the community." (*Id*. at 4). Further, "[t]he department will continue to review and adjust programs which it has available, [and] the case staffing will be reviewed in 1 year." *Id*. A year later, DOC conducted another case staffing, but, relying on the exact same information, again concluded that it "does not believe that the current programming officered [sic] will address [Mr. Yoh's] risk to the community." (Pl.'s Ex. 2 at 2).[2] Cullen Bullard, the former Director of Classification for DOC, reviewed the decision in July of 2021; he likewise concluded that "the department has not identified programming options which would reduce [Mr. Yoh's] risk to the community." *Id*. DOC again reviewed Mr. Yoh's case in February of 2022, with the similar conclusion that DOC "does not currently have programming that would reach [Mr. Yoh's] needs." (Pl.'s Ex. 3 at 2). DOC further indicated that Mr. Yoh's case would be reviewed again in one year.

Discussion

Rule 75 authorizes relief in the nature of a writ of mandamus to "command . . . an official, agency, or lower tribunal 'to perform a simple and definite ministerial duty imposed by law.'" *Wool v. Menard*, 2018 VT 23, ¶ 11 (quoting *Vt. State Employees' Ass'n v. Vt. Crim. Just. Training Council*, 167 Vt. 191, 195 (1997)). Mandamus jurisdiction under Rule 75 thus will not lie where the action or decision at issue involves the exercise of discretion. *See Rheaume v. Pallito*, 2011 VT 72, ¶ 11 (Rule 75 mandamus jurisdiction lacking to review DOC's programming requirements for a high risk inmate because there are no statutory limits on "the broad discretion of the DOC to determine what mode of treatment best serves individual inmates"); *Inman v. Pallito*, 2013 VT 94, ¶¶ 16-18 (the evaluation of an inmate's actions by prison staff leading to decision to terminate inmate from institutional programming is not reviewable under Rule 75 because decision "fundamentally involves the exercise of professional expertise and discretion"). "This rule is subject to the exception, however, that where there is 'an arbitrary abuse of the power vested by law in an administrative officer or board which amounts to a virtual refusal to act or to perform a duty imposed by law, *mandamus* may be resorted to in the absence of other adequate legal remedy.' " *Alger v. Dep't of Labor & Indus.*, 2006 VT 115, ¶ 15 (quoting *Roy v. Farr*, 128 Vt. 30, 34 (1969)); *see Corcoran v. Vill. of Bennington*, 128 Vt. 482, 489

[2] Both case staffing decisions, in January of 2020 and again in January of 2021, included the identical typographical error ("officered").

(1970) ("[W]here a duty is imposed upon public officials, but discretion accorded in the manner of its performance, mandamus will lie to require it to be done, but will not dictate the details of its doing.").

Relying on this exception, Mr. Yoh asserts that DOC's failure to develop or implement any plan of treatment for his return to the community amounts to a refusal to perform clear statutory duties. *See* 28 V.S.A. §§ 1(b), 102(c)(3), & 102(c)(8). DOC argues that its periodic determinations that its current programming options were not suitable for Mr. Yoh's specific needs were discretionary determinations, and thus beyond Rule 75 mandamus jurisdiction, per *Rheaume* and *Inman.* At least for the purpose of subject matter jurisdiction at the pleading stage, the court finds Mr. Yoh's argument more persuasive.

Unlike the petitioners in *Rheaume* and *Inman*, Mr. Yoh does not directly challenge any DOC programming decisions. Rather, he asserts, essentially, that DOC has failed to make a programming decision. DOC's admitted failure to take action is the gravamen of the request for mandamus; Mr. Yoh plainly does not ask the court to second-guess or pass judgment on DOC's decisions or its reasoning. DOC's motion thus confuses the question of *how* it furnishes inmate programming with the question of *whether* it develops and implements a plan of treatment for any inmate in its custody. *Rheaume* and *Inman* make clear that the former determination is discretionary; the statutes, however, strongly suggest that the latter is not.

Indeed, the pertinent statutory provisions suggest at least a colorable basis for mandamus jurisdiction here. For example, 28 V.S.A. § 1(b) appears to impose a mandatory duty on DOC. The full text of that subsection is pertinent:

> The Department *shall* formulate its programs and policies recognizing that almost all criminal offenders ultimately return to the community, and that the traditional institutional prisons fail to reform or rehabilitate, operating instead to increase the risk of continued criminal acts following release. The Department *shall* develop and implement a comprehensive program that will provide necessary closed custodial confinement of frequent, dangerous offenders, but that also will establish *as its primary objective* the disciplined preparation of offenders for their responsible roles in the open community. The Department *shall* ensure that the comprehensive program required by this subsection includes a process by which *each* offender sentenced to any term of imprisonment other than for life without parole, within 30 days after receiving his or her sentence, *shall* begin to develop and implement a plan preparing for return to the community.

28 V.S.A. § 1(b) (emphasis added). That provision—especially its liberal use of "shall," and reference to "each offender"—does not appear to give DOC discretion to refuse entirely or otherwise neglect to develop and implement some treatment programming for each offender (except those serving for life

without parole). *Compare Town of Victory v. State*, 174 Vt. 539, 544 (2002) (mem.) ("Use of the word 'shall' in a statute generally means that the action is mandatory, as opposed to directory."); *Petition of Fairchild*, 159 Vt. 125, 130 (1992) (statute providing that zoning administrator "shall not have the power to permit any" nonconforming development is "unequivocal" and non-discretionary, requiring administrative enforcement); *and Alger*, 2006 VT 115, ¶ 23 (use of "shall" in state fire code "phrases the duties of landlords in mandatory terms," which in turn requires agency enforcement against landlord violators), *with Parker v. Gorczyk*, 170 Vt. 263, 268 (1999) (28 V.S.A. § 808(a), indicating that DOC "may" grant furlough upon certain DOC determinations, does not limit DOC's discretion to refuse to make such determinations regarding certain offenders until after they have reached minimum sentence). This provision also does not afford DOC unlimited discretion as to *when* it must take such action; the process of developing and implementing treatment for the return to the community must *begin* no later than 30 days after the start of an offender's term.

The conclusion that 28 V.S.A. § 1(b) creates a mandatory duty finds further support in its legislative history. That historyreveals that the statute's mandatory language was intentionally added to an earlier, more permissive version of the provision. In 2005, on the tails of a detailed, prescriptive report by the Governor's commission on corrections overcrowding, the Legislature passed substantial corrections reform legislation. *See* 2005, Act No. 63, § 1. There, the Legislature declared that it was "crucial that decisions of the legislative, judicial, and executive branches aggressively advance the mission of the department of corrections to work with and gain the support of community members to achieve the successful reintegration of offenders into the community." *Id*. at § 1(1); *see also id*. at § 1(16)(J) (stressing the importance of "a range of palliative programs . . . to assist inmates to achieve necessary personal change" in order to facilitate community reintegration and control costs). To that end, the Legislature amended Section 1(b) in two ways. First, the words "strive to" were struck from the second sentence, as follows: "The department shall ~~strive to~~ develop and implement a comprehensive program which will provide necessary closed custodial confinement of frequent offenders, but which also will establish as its primary objective the disciplined preparation of offenders for their responsible roles in the open community." 2005, Act No. 63, § 17. Second, the new legislation added the entire last (third) full sentence, requiring that DOC commence the process of development and implementation of a treatment plan within 30 days after the start of each offender's term. *See id*. The Legislature thus limited DOC's discretion, changing the more general goals and objectives into clearer mandatory duties with a specific time constraint. *Cf. Parker v. Gorczyk*, 170 Vt. at 268-69

(describing former version of 28 V.S.A. § 1(b) as "merely set[ting] forth the general goals of penal institutions").

Mr. Yoh also points to 28 V.S.A. § 102(c)(8), as imposing the same mandatory duty on DOC. That interpretation is also fairly plausible. Section 102(c) charges the Commissioner with various "responsibilities," including:

> [The responsibility 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, to effect necessary and desirable changes in the inmate's program of treatment.

28 V.S.A. § 102(c)(8) (emphasis added). Much like Section 1(b), this provision applies to "each inmate" and sets deadlines for agency action: to establish a treatment program "upon commitment to the facility," and review it "at regular intervals." The provision certainly gives DOC discretion to determine the appropriate program of treatment for each inmate, and likewise reserves to DOC the right to effectuate appropriate programmatic changes. It does not give discretion, however, *not* to establish and regularly review *some* treatment program for each inmate.[3]

That is enough to survive a Rule 12(b)(1) motion. There is a plausible mandatory duty to act, found in DOC's enabling statute. And the facts pleaded support the inference that DOC has not yet begun to develop or implement a plan of treatment for Mr. Yoh's return to the community, and thus, not performed this duty.[4] Those factors together constitute an adequate jurisdictional basis for the adjudication of a mandamus claim under Rule 75. As explained by our Supreme Court:

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[3] Even if there were no temporal limitation on DOC's discretion, that would not necessarily defeat mandamus jurisdiction. Review might still be had on grounds that the agency's action has been unreasonably or egregiously delayed. *See Ingerson v. Pallito*, 2019 VT 40, ¶¶ 30-33 (identifying circumstances under which DOC's failure to take mandatory action might be subject to an "unreasonable delay" analysis under the factors set forth in *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984)). Under that analysis, the absence of a definite statutory deadline for agency action would merely inform the analysis whether the delay in question was unreasonable in duration.

[4] In Mr. Yoh's opposition, and during the motion hearing, his counsel asserted that DOC had yet to *begin* to develop or implement a plan of treatment for Mr. Yoh's safe return to the community. That is a reasonable inference from the allegations in the Second Amended Petition for Review, including the exhibits attached thereto. During the motion hearing, DOC's counsel argued that DOC's periodic case staffings—during which DOC determined that it lacked any proper treatment programs for Mr. Yoh—themselves constituted sufficient "programming" or the implementation of a permissible "treatment plan" for Mr. Yoh, and thus satisfied whatever statutory mandates might apply to DOC in this context. That argument appears circular, however, or at least irrelevant, given its inconsistency with the agency's own case staffing records, which indicate that treatment programming is unavailable and has not been furnished to Mr. Yoh. *See In re TruConnect Comms., Inc.*, 2021 VT 25, ¶ 25 ("agency decision 'must stand or fall on the reasons given contemporaneously with the decision and not a later revision of those decisions'") (quoting *Conservation Law Found. v. Burke*, 162 Vt. 115, 128 (1993)); *see also Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 23, 50 (1983) (rejecting attorney's post-hoc rationalizations for agency action under general principles of administrative law).

> Mandamus is . . . a proper remedy in cases of arbitrary abuse of power legally to be exercised by an official or board that amounts to a refusal to perform their duties. *Proctor v. Hufnail*, 111 Vt. 365, 370. Such refusal to perform such duties, or to act at all, even if based on an erroneous opinion as to the operation of any statute on the facts of the case, does not alter the situation, and supports resort to mandamus.

Corcoran v. Vill. of Bennington, 128 Vt. 482, 490 (1970) (citing *Menut & Parks Co. v. Cray*, 114 Vt. 41, 51 (1944)); *see also Ahmed v. Dep't of Homeland Sec.*, 328 F.3d 383, 386 (7th Cir. 2003) ("'The requirement that a duty be 'clearly defined' to warrant issuance of a writ does not rule out mandamus actions in situations where the interpretation of the controlling statute is in doubt.'") (quoting *13th Reg'l Corp. v. U.S. Dept. of Interior*, 654 F.2d 758, 760 (D.C. Cir. 1980)); *cf. Rose v. Touchette*, 2021 VT 77, ¶ 16 (where inmate alleges that his termination from an institutional treatment program constituted intentional punishment taken without a statutorily-mandated fact-finding hearing, there is "colorable" jurisdiction under Rule 75 to permit adjudication, even if inmate may not prevail on the merits).

To be clear, DOC does not seek dismissal for failure to state a claim under Rule 12(b)(6), or otherwise test the merits. *Cf. Wool v. Menard*, 2018 VT 23, ¶¶ 11-18 (finding that inmate met all three requirements for mandamus, which include: (1) the petitioner's clear and certain right to the action; (2) petition sought enforcement of ministerial duties, not review of governmental acts involving the exercise of discretion; and (3) no other adequate remedy at law). Rather, DOC's attack, and equally this decision, address exclusively this court's subject matter jurisdiction at the pleading stage. Whether Mr. Yoh has stated or can prove a claim, or can justify the " 'drastic' " equitable remedy of a writ of mandamus, *Ley v. Dall*, 150 Vt. 383, 386 (1988) (quoting *Whiteman v. Brown*, 128 Vt. 384, 386 (1970)), are questions that must await later determination.

ORDER

The motion to dismiss is denied. The parties shall confer and submit a discovery/ADR stipulation.

Electronically signed pursuant to V.R.E.F. 9(d): 8/16/2022 8:29 PM

Samuel Hoar, Jr.
Superior Court Judge