

VERMONT SUPERIOR COURT

SUPERIOR COURT
Windsor Unit

CIVIL DIVISION
Docket No. 184-4-12 Wrcv

Jose S. Amaro
Plaintiff

v.

Andrew Pallito, et al.
Defendants

DECISION ON MOTION TO DISMISS

Defendants have filed a motion to dismiss Plaintiff's complaint for V.R.C.P. 75 review of the finding of disciplinary violation (DR) made against him by Defendants. No opposition has been filed by Plaintiff, who has discharged his counsel and is representing himself.

Defendants seek dismissal based upon Plaintiff's lack of any liberty interest in having a DR removed from his record. It is difficult to determine what relief Plaintiff is seeking (removal of the DR or otherwise) as he has alleged no procedural or substantive violation of his rights in connection with the DR proceeding. It appears uncontested that Plaintiff has served any sanction imposed in connection with the DR.

In this case the Plaintiff has not alleged any violation of a liberty interest, i.e. lack of procedural due process. *Sandin v. Conner*, 515 U.S. 472 (2000); *Conway v. Cummings*, 161 Vt. 113 (1993). He has also not alleged the evidence was insufficient to convict him of the DR. If such an allegation had been made, the Court's role would be to determine whether there was any evidence in the record that could support the conclusion reached by the disciplinary board. *Herring v. Gorczyk*, 173 Vt. 240 (2001). All Plaintiff has alleged in his complaint is the procedural history of the case. The recitation of the procedural history does not, by itself, establish any basis for relief.

Common law writs have been abolished and replaced with V.R.C.P. 74 and 75, which are now the exclusive vehicles to challenge governmental action or inaction. *Garbitelli v. Town of Brookfield*, 2011 VT 122. A court reviewing governmental action is typically limited to review of questions of law. *Ketchum v. Town of Dorset*, 2011 VT 49, ¶¶ 14–15, 190 Vt. —, 22 A.3d 500 (mem.). Review of evidentiary questions is limited to “whether there is any competent evidence to justify the adjudication.” *Id.* ¶ 14 (quotation omitted). Applying this standard, review is normally limited to answering legal questions raised by the factual record developed in the administrative proceeding. *Id.* ¶ 15. Accordingly, it is not up to the court to search the record to see if there is any basis for a claim.

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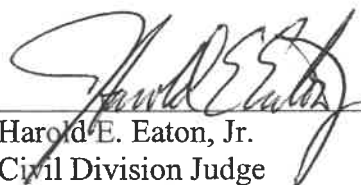
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Motions to dismiss are not favored, and are rarely granted. *Gilman v. Maine Mutual Fire Ins. Co.*, 2003 VT 55, ¶ 14, 175 Vt. 554 (mem.). The purpose of a motion to dismiss is to test the law of the case, not the facts which underlie the complaint. *Kane v. Lamothe*, 2007 VT 91, ¶ 14, 182 Vt. 241. In considering a motion to dismiss, the court assumes all factual allegations in the complaint to be true and gives the benefit of all reasonable inferences to the non-moving party. *Richards v. Town of Norwich*, 169 Vt. 44, 48 (1999). A motion to dismiss should not be granted unless it is beyond doubt that there exist no facts or circumstances which would entitle the plaintiff to relief. *Assoc. of Haystack Property Owners, Inc. v. Sprague*, 145 Vt. 443, 446-47 (1985).

This Court is mindful that Plaintiff is representing himself. However it is not up to the Court or the Defendants to guess at what Plaintiff's complaint may be. At present, Plaintiff's complaint does not state any basis for relief or what actual relief is requested. Plaintiff has until December 17, 2012 to file an amended complaint for relief which sets forth the specific relief requested and the claimed basis for that relief. In the absence of such a filing, the instant claim will be dismissed.

Dated at Woodstock this 3rd day of December, 2012.


Harold E. Eaton, Jr.
Civil Division Judge

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