

FILED

JUL 31 2008

CALEDONIA COURTS

STATE OF VERMONT  
CALEDONIA COUNTY, SS

Garth Drew  
Plaintiff

v.

Robert Hoffman, Commissioner  
Defendant

SUPERIOR COURT  
Docket No. 178-8-07 Cacv

DECISION ON MOTION FOR SUMMARY JUDGMENT

Plaintiff has filed a Petition for a Writ of Habeas Corpus. The Petition was filed on August 1, 2007. By his Petition, which is more properly considered a request for review of governmental action under V.R.C.P. 75, plaintiff challenges the legality of the Department of Corrections' (DOC) decision to revoke plaintiff's work-release furlough. Plaintiff is *pro se*. Defendant is represented by Kurt Kuehl, Esq. On June 11, 2008, defendant filed for summary judgment. The motion has not been opposed.

Undisputed Facts

Plaintiff is an inmate committed to Defendant's custody. On July 14, 2007, plaintiff was granted a work furlough. The furlough provided that he was to leave the correctional facility at 8 a.m., travel directly to work via transportation provided by specified individuals and return directly to the correctional center each night by 6 p.m. The furlough specifically stated that it was discretionary and could be cancelled at any time. Plaintiff signed the furlough authorization indicating his agreement to the conditions of the furlough.

On July 17, 2007, three days after the furlough was granted, Adam Favreau, a probationer, reported to his probation officer that he had been assaulted by plaintiff while at work. Plaintiff told his caseworker on July 17, 2007 that he was no longer working for his employer, Eric Belknap. Belknap subsequently confirmed Plaintiff's suspension from work. On July 20, 2007, the caseworker received a telephone call from Belknap reporting the assault of Favreau by Plaintiff. As a result, DOC did not grant another work furlough to plaintiff pending its investigation of the alleged assault.

After investigating the assault, DOC conducted a Central Case Review on September 17, 2007 in order to determine a case plan. Based upon plaintiff's conduct, convictions, and supervision history while incarcerated and while on furlough, DOC decided to delay plaintiff's conditional reentry into the community pursuant to DOC Directive 371.15 § 4.2, because plaintiff represented an imminent risk to public safety.

There are DOC regulations which provide administrative remedies for inmates aggrieved by DOC decisions. The administrative procedures require that the aggrieved inmate first either voice a verbal complaint to a DOC staff member or file a written informal complaint within 10 business days after the event or discovery of the cause of the complaint. If there is no agreed-upon plan in response to the action by the complaint from the inmate within 48 hours, the inmate may initiate the formal grievance process.

The formal grievance procedure is initiated by the inmate filing a grievance submission form within 14 days of the outcome of the informal process. The DOC then has 21 days to respond to the grievance.

Once a response is received, the inmate, if dissatisfied, may appeal within 10 days by filing a Decision to Appeal to Corrections Executive. The Corrections Executive responds to the appeal within 20 days of its receipt.

If the inmate is dissatisfied with the Corrections Executive's decision, he may take an appeal within 10 days to the Commissioner of Corrections. The Commissioner's office has 20 days to respond. Once the inmate has received the Commissioner's response, the inmate has exhausted his administrative remedies.

Here, Plaintiff did not file a Decision to Appeal to the Commissioner regarding his claim that he was denied a work furlough pass without due process. Plaintiff has failed to exhaust his administrative remedies.

#### Conclusions of Law

Summary judgment is appropriate where the movant satisfies a stringent two-part test. There must be no genuine issue as to any material fact, and the movant must be entitled to judgment as a matter of law. *Gore v. Green Mountain Lakes*, 140 Vt. 262, (1981).

In determining a motion for summary judgment, the court derives the undisputed facts from the statements of fact required under V.R.C.P. 56(c)(2). Facts are considered undisputed when supported by the record and not controverted by the non-movant's statement of facts which are also supported by evidence in the record. *Boulton v. CLD Consulting Engineers, Inc.*, 175 Vt. 413 (2000).

V.R.C.P. 56(c)(3) provides that judgment in favor of the movant should be entered forthwith if it is demonstrated that there is no genuine issue of any material fact in the record evidence and that the party is entitled to judgment as a matter of law. The party seek summary judgment has the burden of proof and the non-movant is to be given the benefit of all reasonable doubts and inferences. *Espinete v. Horvath*, 157 Vt. 257 (1991). Summary judgment is mandated where, after an adequate time for discovery, a party fails to make a showing sufficient to establish the existence of an element essential

to its case and for which it has the burden of proof at trial. *Poplaski v. Lamphere*, 152 Vt. 251 (1989).

On July 14, 2007 the plaintiff was granted a work furlough by the Department of Corrections. Under the terms of the furlough he was authorized to be out of the correctional facility between 8 am and 6 pm. He had to return to the correctional facility each night. The furlough was, in fact, a work release rather than a twenty-four-hour per day furlough. In addition, the furlough, by its own terms, was discretionary and subject to cancellation at any time. Shortly after receiving the furlough, plaintiff was engaged in assaultive behavior, which caused him to lose his job. As a result of the complaint of the assault, the DOC elected not to grant another work furlough to the plaintiff. Subsequently, the Department of Corrections conducted a central case review and decided to delay plaintiff's conditional reentry pursuant to Department of Corrections directives.

Plaintiff asserts that he has a liberty interest by virtue of his furlough status. However, under Vermont law there is no liberty interest inherent in a furlough status. *Conway v Cumming* 161 Vt. 113 (1993). Our Supreme Court has stated that furlough generally does not concern a fundamental constitutional right or a suspect class; therefore, plaintiffs must demonstrate that there is no conceivable rational relation between the challenge regulation and a legitimate end of government." *Parker v Gorczyk*, 170 VT 263, 276 (1999).

The United States Supreme Court has recognized a constitutionally protected liberty interest with regard to parole. *Morrissey v Brewer*, 408 US 471 (1972). The Court of Appeals for the Second Circuit, in reviewing Vermont's furlough statute, observed that extended furlough pursuant to the statute has some of the characteristics of parole. *Holcomb v Lykens*, 337 F 3<sup>rd</sup> 217 (2<sup>nd</sup> Cir. 2003).

Plaintiff's limited work release here was not the equivalent of parole. Plaintiff was not free from the confinement of prison and his liberty was limited to a substantial degree: he was required to spend the majority of every day in confinement, leaving only to go directly to work. As a result, plaintiff was not entitled to due process in connection with DOC's determination not to issue further work furloughs. Compare *Young v. Harper*, 520 US 143 (1997) (Oklahoma overcrowding-relief program, whereunder inmate for five months "kept his own residence; he sought, obtained, and maintained a job; and he lived a life generally free of the incidents of imprisonment," created liberty interest subject to due process protections.)

Here, plaintiffs part-day work furlough falls well short of the type of extended furlough which might create a liberty interest. Plaintiff was required, under the terms of his furlough, to spend 14 hours out of every 24 within the confines of the correctional center. He had no liberty interest in the work release furlough.

Further, to the extent the plaintiff claims the DOC abused its discretion by not granting additional work furloughs, his complaint is properly considered a review of

governmental action pursuant to V.R.C.P. 75. However, in order to have subject matter jurisdiction review the exercise of discretion by DOC, a party must exhaust all administrative remedies before seeking relief in the court. *In re D. A. Associates*, 150 Vt. 18 (1988). When an agency has jurisdiction to decide an issue, courts are not to interfere with an agency's decision-making unless and until all administrative remedies have been exhausted. *In re R.L.*, 163 Vt 168 (1995).

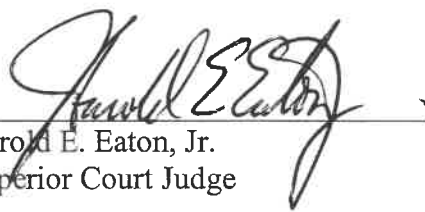
Here, plaintiff is afforded a number of administrative appeals of the DOC's decision making process. The plaintiff has failed to exhaust those remedies in that he did not take an appeal to the Commissioner of Corrections regarding his claim that he was denied a work furlough pass without due process protections. As a result, he has not exhausted the administrative remedies afforded to him. Accordingly, this court lacks subject matter jurisdiction under V.R.C.P. 75 to review the department's decision not to grant additional furloughs.

Because the plaintiff had no liberty interest in the work furlough, and because he has failed to exhaust his administrative remedies concerning the exercise of discretion by the Commissioner, his appeal should be dismissed.

#### Order

Plaintiff's complaint is dismissed and judgment is entered for the defendant in connection with this claim.

Dated at St. Johnsbury, Vermont in Caledonia County this 31 day of July 2008.

  
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Harold E. Eaton, Jr.  
Superior Court Judge