

VERMONT SUPERIOR COURT

SUPERIOR COURT
Windsor Unit

CIVIL DIVISION
Docket No. 447-7-12 Wrcv

David Farnsworth
Plaintiff

v.

Andrew Pallito
Mark Potanas
Defendant

DECISION ON MOTION TO DISMISS

Plaintiff seeks review of a disciplinary (DR) report he received for a Major A#8 violation while incarcerated in the care of the Department of Corrections. Plaintiff was found guilty of the DR on March 12, 2012. He appealed the finding to the Superintendent on April 5, 2012 and is alleged to have received the denial of the appeal on April 6, 2012. Plaintiff filed this action seeking review of the DR pursuant to V.R.C.P. 75 in this court on July 13, 2012.

A review of government action under V.R.C.P. 75 requires the complaint to be filed within 30 days after notice of any action or refusal to act of which review is sought. V.R.C.P. 75(c). Plaintiff's complaint appears not to have been filed within the time required under V.R.C.P. 75(c), which would have required the complaint to have been filed no later than May 6, 2012.

The filing requirement under V.R.C.P. 75 is not jurisdictional. *Fyles v. Schmidt*, 141 Vt. 419 (1982). In *Fyles*, the court found the defendant sewer district was estopped from claiming the plaintiffs' suit was timely filed based upon a letter sent by the defendants stating a refusal to act just a few days before suit was filed.

No such conduct is alleged to have occurred here. Defendants are not alleged to have made representations to Plaintiff restating a refusal to act between the time of the Superintendent's denial and the time suit was filed. Accordingly, there is no issue of estoppel as was present in *Fyles*.


However, the Motion to Dismiss must fail because the time of the Superintendent's denial is not before the Court. Plaintiff's complaint contains the substance of the Superintendent's response but not the date of it, a critical issue to the determination of this motion. The date of the Superintendent's response is interjected only in the motion to dismiss itself.

FILED

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Because the Court does not have the date of the Superintendent's denial before it in a proper fashion for consideration in this context, Defendant's Motion to Dismiss is DENIED. Nothing in this ruling shall preclude motion practice pursuant to V.R.C.P. 56.

Dated at Woodstock this 17th day of October, 2012.



Harold E. Eaton, Jr.
Civil Division Judge

FILED

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