

VERMONT SUPERIOR COURT

SUPERIOR COURT
Windsor Unit

CIVIL DIVISION
Docket No. 678-10-12 Wrcv

Nicholas Witham
Plaintiff

v.

Vermont Department of Corrections
Defendant

DECISION ON MOTION TO DISMISS

Plaintiff, a prisoner under Department of Corrections (“DOC”) custody, has brought this action seeking review under V.R.C.P. 75 concerning the defendant’s decision not to allow plaintiff, and presumably others, to purchase “anti-shank” toothbrushes at the Springfield Correctional Facility commissary. Plaintiff alleges the “finger” toothbrushes they are provided are inadequate and that having to stick fingers in one’s mouth is unsanitary.

On January 16, 2003, defendant filed a motion to dismiss. The motion has not been opposed.

Legal Standard:

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).

Claims:

Eighth Amendment:

Although the plaintiff’s complaint does not expressly state any constitutional violation, the Court will consider the Eighth Amendment issues potentially implicated by plaintiff’s pleading.

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The Constitution does not mandate comfortable prisons. *Rhodes v. Chapman*, 452 U.S. 337 (1981). But the treatment a prisoner receives while in custody and the conditions of his confinement are subject to Eighth Amendment review. *Helling v. McKinney*, 509 U.S. 25 (1993). There is a two part standard for determining violations of the Eighth Amendment. First, the deprivation by prison officials, objectively viewed, must be sufficiently serious, that is, a prison official's act or omission must result in the denial of "the minimal civilized measure of life's necessities" *Rhodes*, supra, 452 U.S., at 347. Secondly, in cases involving prison conditions, the prison officials must have acted with a state of mind of deliberate indifference to inmate health or safety. *Farmer v. Brennan*, 511 U.S. 825 (1994).

"[T]he ordinary discomfort accompanying prison life is part and parcel of the punishment those individuals convicted of criminal offenses endure as recompense for their criminal activity. Accordingly, only extreme deprivations are adequate to satisfy the objective component of an Eighth Amendment claim." *Shakka v. Smith*, 71 F. 3d 162, 166 (4th Cir. 1995). That a toothbrush might be modified within a facility for use as a weapon is a legitimate concern of prison officials. *Hare v. Carey*, 2010 WL 958157 (E.D. Cal. Mar. 12, 2010).

There is no constitutional right to a toothbrush of a particular type. The use of anti-shank toothbrushes due to security concerns within a facility is not an Eighth Amendment violation. *Prince v. Cameron*, 2012 WL 3536795 (M.D. Fla. Aug. 14, 2012). It is not a deprivation of the minimal civilized measure of life's necessities. The use of a finger toothbrush as compared to a different style of toothbrush is not an "extreme deprivation" triggering further inquiry under the Eighth Amendment. Without reaching the "state of mind" requirement for Eighth Amendment violations, the deprivation alleged by plaintiff, objectively viewed, is not sufficiently serious to afford a basis for a constitutional violation.

Rule 75:

V.R.C.P. 75 allows judicial review of governmental administrative decisions "if such review is otherwise available by law." V.R.C.P. 75(a). The scope of Rule 75 is limited, however, and there is no absolute right to appellate review of administrative decisions. *Mason v. Thetford School Board*, 142 Vt. 495, 498 (1983). Review is available when the statute creating an agency provides for such review or where it would be available under the general law by proceedings under the equivalent of common law writs. *Rheaume v. Pallito*, 2011 VT 72. Because Rule 75 represents "the modern equivalent of extraordinary relief by mandamus or certiorari," there is no right to review where it would not otherwise fall into the scope of one of the common law writs for extraordinary relief. *In re Town of Bennington*, 161 Vt. 573, 573-74 (1993) (mem.). These common law writs are prohibition, mandamus, and certiorari.

There is no statutory right of review of the operational decisions concerning correctional facilities. The Commissioner is vested with the statutory authority for operation of the correctional facilities within Vermont. 28 V.S.A. 102(c). Thus, Rule 75 review is available here only if the relief being sought falls within those decisions appealable at common law under a writ of prohibition, mandamus, or prohibition.

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A writ of prohibition seeks to prevent the unlawful assumption of jurisdiction by a tribunal contrary to common law or statutory provisions. *In re Mattison*, 120 Vt. 459 (1958). The operational decision made by the Department to not allow conventional toothbrushes is not a decision by a tribunal, nor is it a decision contrary to common law or statutory provisions. In fact, Vermont law expressly provides for the exercise of such authority and discretion by the supervisor of each correctional facility. 28 V.S.A. § 601(7) provides each supervising officer has the power and responsibility “to establish and administer rules, including rules for the operation of the facility, consistent with the provisions of this title and the general policies and regulations of the department”. The acts undertaken by the Department here are those clearly within the authority expressly given to them by statute. No relief in the nature of a writ of prohibition is available here.

A writ of mandamus is used to enforce the performance of existing duties. It does not create or require new duties on the part of the public officer. *Grout v. Gates*, 97 Vt. 434 (1924). There is no duty on the part of the Department to allow an inmate to use a particular type of toothbrush. Their duty is to provide humane conditions of confinement. *Hudson v. Palmer*, 468 U.S. 517 (1984). “The supervising officer of each facility shall be responsible for the efficient and humane maintenance and operation and for the security of the facility, subject to the supervisory authority conferred by law upon the commissioner.” 28 V.S.A. § 601. There is no basis for relief in the nature of a writ of mandamus here.

There is also no basis for relief under the common law writ of certiorari. A writ of certiorari is used to review the actions of inferior courts and tribunals. *Rheaume v. Pallito*, 2011 VT 72. The Department is not an inferior tribunal or court and it is not performing the functions of a quasi-judicial body when it establishes rules concerning the operation of the correctional facility. The Department has the responsibility to make rules for the facilities and for the supervisors of each facility to administer them. 28 V.S.A. § § 102(c); 601(7). The decision regarding which toothbrushes to allow is one over which the Department has discretion. Discretionary functions of the DOC are not reviewable under V.R.C.P. 75. *Rheaume v. Pallito*, 2011 VT 72.

Because plaintiff’s claim is not reviewable by statute and does not fall within any of the historic common law writs of prohibition, mandamus, or certiorari, there is no basis for review under V.R.C.P. 75.

Lack of Standing:

It is not clear from plaintiff’s complaint if he is seeking to assert the same claims on behalf of other inmates. His complaint is stated in the plural. However, plaintiff is not empowered to raise the rights of others and lacks standing to do so. *Hinesburg Sand & Gravel Co. v. State*, 166 Vt. 337 (1997).

Because plaintiff can not raise the rights of others, the court lacks subject matter jurisdiction concerning those claims.

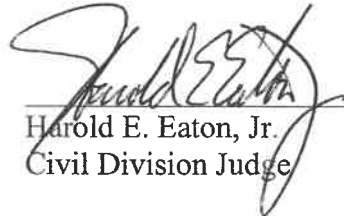
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ORDER

For the reasons stated herein, defendant's motion to dismiss is **GRANTED**.

Dated at Woodstock this 19th day of March, 2013.



Harold E. Eaton, Jr.
Civil Division Judge

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