Vermont Superior Court
Filed 07/01/26
Rutland Unit

STATE OF VERMONT

SUPERIOR COURT
Rutland Unit

CIVIL DIVISION
Docket No. 25-CV-3649

NELSON BARNEY,
Petitioner

v.

NICHOLAS DEML,
Respondent
Commissioner, Vermont Department of Corrections

Decision: Rule 75 Review of Governmental Action

A hearing was held on June 8 and June 15, 2026. Nelson Barney was present and represented by Attorney Jill P. Martin with assistance from Intern Reilly Loynd. The Commissioner was represented by Attorney John H. Lacey. All persons appeared remotely on June 8 and in person on June 15, 2026.

Findings of Fact

Nelson Barney is in the custody of the Department of Corrections and has been under the supervision of the Department of Corrections periodically over the past 20 years, most of his adult life. He is currently incarcerated based on convictions from a 2023 case, 23-CR-7763, in which he was convicted of two counts of violating a temporary order of abuse prevention, and two counts of violation of conditions of release. His maximum sentence date is February 16, 2027.

On February 17, 2024 he was released on furlough to an approved residence in Bennington County. At the time of his release, he had not been determined by the Department of Corrections as a risk to the public. and therefore neither the Risk Sensitive Notification (RSN) or Risk Containment (RC) designations described below had been applied to him.

Two months after his release on furlough, in May of 2024, he was arrested and charged with 4 counts in Docket 24-CV-5197 based on an incident reported by his ex-girlfriend in which she alleged that he attempted to enter her residence while she resisted. He was taken into custody and returned to jail and given a notice of a furlough revocation hearing (Exhibit 7) that specified that the basis for revocation of his furlough was violation of furlough Condition One, which was "I will not be cited or charged; I will not commit any act punishable by law including city and municipal code violations.". Since he had been cited for a new crime, there was clearly a

violation of Condition One and therefore no basis to contest the revocation. He signed a waiver of his right to a hearing to contest whether he had violated that furlough condition.[1]

Following his furlough revocation, on June 19, 2024 there was a Case Staffing. He was given a 4 year interrupt of his sentence, meaning his furlough was interrupted for a period that would have exceeded his maximum sentence date of February 16, 2027.

Shortly thereafter, on June 27, 2024, a 'weight of the evidence' hearing was held on the new charges, resulting in him being held without bail while those charges were pending. Thus there was no need for the Department to address his furlough or risk status as he would remain incarcerated while the new charges were pending.

In September of 2024, Jordan Pasha, who had worked at the Department of Corrections since 2016 and was familiar with Mr. Barney, became Director of Classification. During the period of October and November of 2024, he was working on revising the Risk Notification and Risk Containment policies; revisions became effective a few months later, in April of 2025.

In January 2025 Mr. Barney went to trial on the new charges, and on January 23, 2025, he was found Not Guilty on all four counts. He expected that he would return to his prior furlough status. He remained incarcerated subject to the 4 year interrupt.

Following his acquittal, a new Case Staffing was held, on January 28, 2025, to address a request from his Probation and Parole Officer for "RSN Designation." Inmates are not allowed to attend case staffings, at which decisions are made by a committee. The committee reduced his 4 year interrupt to the time remaining on the sentence he was serving. He was also designated "RSN" under the Risk Sensitive Notification Directive, meaning he was designated as a risk to public safety.[2] An RSN designation has the effect of slowing down any action toward release into the community as it provides for a release plan as well as notification to those who may be impacted by release. The committee established conditions that he could not reside in Bennington County and that a case staffing would be held prior to release eligibility. The evidence did not show clearly that the ex-girlfriend who provided the information used to charge him in May of 2024 had requested notification of release, but since she had left her home and contacted law enforcement and made a complaint about an incident of contact with him, it was not unreasonable for the Department to be cautious about release without conditions that would minimize risk of future conflict.

On February 21, 2025, a request was made for a Case Staffing to address Risk Containment. This is a separate designation governed by Directive 371.10 with terms at the time that had been effective since July 25, 2024. (Exhibit 9). Its purpose was "to identify incarcerated

[1] At the hearing in this matter, the Department's attorney attempted to have him acknowledge on cross examination that his signature signified an admission of guilt to the crime(s) for which he was newly charged, but he was clear that he waived his furlough revocation hearing because he was admitting to having been cited, but not admitting guilt of the crimes charged.

[2] The policy in effect at the time was a version of Policy 371.29, effective November 3, 2014 (Exhibit 4) which had replaced Directive 371.28 that had been in effect since November 1, 2012 (Exhibit 3). It was superseded effective April 3, 2025 by a new version of 371.28 (Exhibit 5).

individuals who pose a high risk of dangerousness to the community if released." The information provided in connection with this request was that he was "Convicted of Listed Offense, ORAS Score of Moderate or High; SI Barney is convicted of a violent listed offense being Violation of Abuse Prevention Order 2nd or Subsequent SI Barney also has a high ORAS score." (Exhibit 8, page 3).

The Policy then in effect, Exhibit 9, sets forth Criteria for risk containment classification, the Process for classification, and a procedure for Review. It specifies that a Risk Containment classification shall be made by the Central Case Staffing Committee[3] following initial steps to identify a case that "may meet the criteria." As to classification criteria, it provides as follows:

"An incarcerated individual may receive a risk containment classification if:

(a) The offense for which they have been convicted is a: (i) [inapplicable], or (ii) Listed offense, as defined in 13 V.S.A. § 5301 (7); **and** [emphasis added]

(b) The individual constitutes a threat to the life, safety, or physical or mental well-being of others, on the basis of evidence establishing. . .[4 alternative criteria]." (Exhibit 9, page 2).

As to "Process for Risk Containment Classification:"

"The [Central Case Staffing] Committee

(a) **Shall** determine if the case is appropriate for consideration,
(b) **Shall** refer all cases identified as appropriate for consideration for a risk determination classification for forensic evaluation by an evaluator certified in (an) evidence-based tool(s) approved by the DOC; and
(c) May request cultural consultation services, when deemed necessary after or recommended by the forensic evaluator." (Exhibit 9, pages 3-4; emphasis added).

For all cases referred for forensic evaluation, the assigned Correctional Services Specialist (CSS) "**shall**:

(a) Provide the incarcerated individual with written notification that they have been referred for a forensic evaluation. The form shall include the purpose of the evaluation, and inform the incarcerated individual that they can provide mitigating information for consideration and the consequence of not participating;

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[3] While the RC policy in Exhibit 9 does not define the members of a Central Case Staffing Committee, Exhibit 3 contains the following definitions:
"Case Staffing: A review of pertinent case plan information by Department of Corrections facility, probation and parole, and central office staff in order to make classification decisions about appropriate custody level, furlough status, programming, and level "C" designation for offenders convicted of listed offenses, as well as release sensitive notification cases.
"Central Case Staffing: A review of pertinent offender case plan information by a committee of central executives and the local staff involved in that case, in order to make classification decisions that requires (sic) consultation with and decision-making by staff from multiple disciplines."
Thus RSN classifications may be made by a committee whose members include local facility and P & P personnel as well as central office staff, while Risk Containment designation requires not only local staff but also central executives as well as consultation with multidisciplinary staff.

(b) Review the form with the incarcerated individual and ask the individual to sign the notification, acknowledging receipt; if the incarcerated individual refuses to sign . . .
(c) Return the signed notification to the Director of Classification and Facility Designation." . . .

"After the forensic evaluation, the Committee **shall** review the case **again** [emphasis added], including the results of the evaluation and an updated record check, to make a final determination on whether the incarcerated individual shall receive a risk containment classification." (Exhibit 9, page 4; emphasis added).

The policy further provides, under Section C entitled "Review of Risk Containment Classification," that an "incarcerated individual who has received a risk containment classification may submit a written petition to the Director of Classification and Facility Designation for a change in their risk containment classification no more than once every 12 months." (Exhibit 9, page 5).

Following the request for a case staffing for Mr. Barney related to Risk Containment, a Case Staffing was held on March 5, 2025. The Committee of six members delayed release for one year and "determined that a Risk Containment designation is appropriate and will send a referral to executive leadership for a review and final designation." It thus went beyond determining that the case was "appropriate for consideration," i.e., that the prerequisite of a Listed Offense conviction existed, as it made a determination designation subject to central review.

There is no evidence that the steps required by the Risk Containment Policy then in effect, as quoted above, were followed. Mr. Barney was never given written notification that he was being referred for a forensic evaluation or asked to sign a notification, nor was he given notice that he could provide mitigating information for consideration. The committee had before it the affidavit used to charge him with 4 counts in May of 2024 of which he was later found not guilty. Providing an opportunity for mitigating information would have given him the chance to explain what the evidence was at trial resulting in not guilty verdicts and its impact on possible risk evaluation. It also would have given him the chance to argue that he was not eligible for Risk Containment because the offenses for which he was under sentence were not Listed Offenses, as they were violations of an emergency RFA order and not a final order.[4]

There is no evidence that a forensic evaluation ever took place. Because there was no forensic evaluation, there was also no compliance with the requirement that a Central Case Staffing Committee "review the case again" after the evaluation, "including the results of the evaluation and an updated record check, to make a final determination on whether the incarcerated individual shall receive a risk containment classification." (Exhibit 9, page 4). There

[4] 13 V.S.A. § 5301 (7) provides that a "listed crime" includes "(V) violation of abuse prevention order as defined in section 1030 of this title, excluding violation of an abuse prevention order issued pursuant to 15 V.S.A. § 1104 (emergency relief) or 33 V.S.A. § 6936 (emergency relief).

was some kind of review involving the central office, but there is no documentation of when that occurred, who was present, and what information was considered.

Following the Case Staffing committee's "determination" and referral on March 5, Mr. Barney wrote a letter on May 11, 2025. It is not in evidence but according to Mr. Pasha's response, it was written as an "appeal" and expressed "multiple issues related to RSN Designation, Risk Containment, and the results of your recent furlough violation." The evidence suggests that Mr. Barney may have challenged the Risk Containment designation because the crime for which he was convicted, Violation of an Abuse Prevention Order, was a violation of a Temporary, and not a Final Order, and therefore not a listed offense because only a violation of a final order is a Listed Offense.

Mr. Pasha responded to Mr. Barney in a letter dated May 22, 2025 in which he stated that the appropriate response on Mr. Barney's part was not an appeal to Mr. Pasha but it was to file a grievance, which Mr. Barney subsequently did and which led to this claim for Rule 75 Review of Governmental Action following completion of the grievance procedure.

In Mr. Pasha's letter of May 22, 2025, he acknowledged that Mr. Barney was "not considered a listed offender" but stated that "this is not the only criteria for an RSN designation or for consideration of a Risk Containment classification." (Exhibit 11). He stated that "your case has not yet been fully reviewed under the lens of Risk Containment.. . .Your case is currently under review to determine the necessity of a forensic evaluation and/or to determine of (sic) a Risk Containment classification is justified. . . .You will receive notification, in writing, when the Department has determined the appropriateness of a Risk Containment classification." In the last paragraph of the two page letter, he noted that Mr. Barney had the opportunity under Directive 371.10 to provide mitigating information. "There is information in your letter which could be considered mitigating. As such, I have forwarded your letter to the staff member assigned to review your case. It will be considered as we continue the review process." (Exhibit 11, page 2). The letter makes clear that the Risk Containment evaluation process was in a review status but the review had not yet occurred. It also shows that he had not been given any written form or information up to that point that he could provide mitigating information, whereas two months prior, in March, the Committee had reached the conclusion that "a Risk Containment designation is appropriate."

By the time of this letter, the Risk Containment policy 371.10 had been amended. A new version was signed by the Commissioner on April 3, 2025 with an effective date of April 3, 2025, while the referral to "executive leadership for a review and final designation" was pending.

Mr. Pasha testified that he applied the April 2025 provisions in Mr. Barney's case, and his position is that since Mr. Barney's case was still under review and not yet final in April of 2025, it was appropriate to use the revised terms.

The policy as revised and effective April 3, 2025, Exhibit 10, still requires that "the offense for which they [the person] have been convicted" is a "listed offense as defined in 13 V.S.A. § 5301 (7) . . . **and** [emphasis added] [other criteria]."

A significant difference is that the revised policy no longer requires all candidates to be referred for a forensic evaluation. However, it does require certain prerequisites prior to the determination of whether "a forensic evaluation is advised." (Exhibit 10, page 4).Those prerequisites include the following "for all cases determined appropriate for consideration." *Id.* "The CSS shall:

(i) Provide the incarcerated individual with written notification that the case is being reviewed for a risk containment classification. The form shall:
   a. Include that the individual may be referred for a forensic evaluation; the purpose of the evaluation; and the consequences of not participating; and
   b. Inform the incarcerated individual that they can provide mitigating information for consideration;

(ii) Review the form with the incarcerated individual and:
   a. Ask the individual to select whether they consent to the forensic evaluation, if referred, and sign the form; and
   b. Return the signed form to the Classification Unit Director."

The notice in Mr. Pasha's letter of May 22, 2025 that Mr. Barney could provide mitigating information came after the March meeting in which the Case Staffing committee had determined that a Risk Containment designation was appropriate. It was not on a "form," as required by both versions of the Directive, but in the last paragraph of a two page letter.

Under the revised April version, whether a forensic evaluation takes place or not, "Upon receipt of all the relevant material by the Central Case Staffing Committee, the Committee shall:

a. Review the material to determine if the individual meets the criteria for risk containment classification set out in Section A, Classification Criteria for Risk Containment,
b. Document its determination, including which criteria were met." (Exhibit 10, page 5).

The evidence does not include documentation of a meeting of the Central Case Staffing Committee or the basis of its determination showing which criteria were met. Rather, the evidence was that no such documentation could be located. The evidence does include a letter from Mr. Pasha dated July 9, 2025 notifying Mr. Barney that he was classified Risk Contained in accordance with Directive 371.10. It references his "total criminal, incarcerated and field supervision history" and gives notice of the opportunity to use the grievance process. Mr. Pasha hand-delivered this letter, which was signed by Mr. Barney on July 16, 2025. Mr. Barney filed a timely grievance, and filed this case thereafter.

Exhibit 8, the record of Case Staffing events, includes an "Update" to the March 25, 2025 Case Staffing that states in full: "After review, Mr. Barney will be considered risk contained. Notification done via hand delivered letter. J. Pasha, Director of Classification." There is no documentation of the review or its determination "including which criteria were met" as required in the April 2025 version of the Directive. The effect of the Risk Containment classification is that Mr. Barney would not be eligible for furlough release and would be incarcerated for the maximum remaining time on his sentence

Mr. Barney continues to assert that when he waived his right to a furlough revocation hearing, he was not admitting guilt to the 4 new charges against him, of which he was later found not guilty, but was only admitting that he had been cited for a new offense. He also claims that he is not eligible for Risk Containment because the offenses for which he was convicted and is under sentence were not Listed Offenses, which he argues is a requirement for Risk Containment.

Mr. Pasha in his testimony took the view that when Mr. Barney waived his right to a furlough revocation hearing in May of 2024 he was admitting guilt to the new charges. He also considers that it was appropriate for the case staffing committee to consider the content of the affidavit attached to those charges despite the jury verdict at trial of not guilty on all counts. He reasons that the charges were not vacated so that the content of the affidavit remained a valid source of information to be considered by the Department. He acknowledges that the offenses for which Mr. Barney is currently under sentence are not listed offenses, but he had opined that (a) that is not the only criterion, and (b) Mr. Barney has a conviction for a listed offense in his past criminal history, which can be used to qualify for risk containment.

Conclusions of Law

In seeking review of governmental action, Petitioner asserts that there were three errors in the procedures leading to his RSN and Risk Containment classifications:

(1) the Department treated him as if he was guilty of the 2024 charges in reliance on (a) his waiver of a furlough revocation hearing and (b) the content of the charging affidavit, despite the Not Guilty verdicts of the jury;

(2) the Department treated him as guilty of a Listed Offense whereas the offenses for which he is incarcerated are not Listed Offenses; and

(3) the Department did not follow the requirements of its own Directives regarding necessary procedures for Risk Containment designation.

Rule 75 review is "available for allegedly arbitrary abuses of discretion that 'amount to a practical refusal to perform a "certain and clear" legal duty.'" Rose v. Touchette, 2021 VT 77 ¶13, citing Inman v. Pallito, 2013 VT 94, ¶ 15.

Petitioner asks the court to conclude that the Department abused its discretion in making these errors and to issue a writ of mandamus striking the RSN and Risk Containment designations, including the prohibition against residing in Bennington County, and declaring him eligible for furlough.

RSN Classification of January 28, 2025

It is not the function of the court in a Rule 75 action to make its own decision on the merits, but only to determine whether there was an abuse of discretion by the Department in

carrying out applicable requirements or whether clear legal requirements were not followed in the required process. Under Directive 371.29 effective on January 28, 2025, Risk Sensitive Notification (RSN) designation apparently could be made without a finding of guilt on only specified offenses. There was some kind of incident in May of 2024 and what was before the committee at the January 28, 2025 Case Staffing was that despite the not guilty verdicts of the jury, Mr. Barney had a history of domestic violence, he was serving a sentence for violation of abuse prevention orders, and some kind of event had occurred between him and his ex-girlfriend in Bennington County that was sufficient for law enforcement to become involved. It was not unreasonable for the Department to slow down Mr. Barney's release and establish conditions that would minimize potential safety concerns. The court cannot conclude that such a decision was an abuse of discretion. The evidence does not support the conclusion that the Department acted improperly under its RSN Directive in making this designation, or abused its discretion in restricting him from Bennington County.[5]

Risk Containment Classification of July 9, 2025

Mr. Barney's Risk Containment classification started with a request made on February 21, 2025 followed by a Case Staffing on March 5, 2025 in which the Committee concluded that a Risk Containment "designation" was "appropriate" subject to executive review, and ended with a Risk Containment designation on July 9, 2025. The process straddled two versions of Directive 371.10, with procedural requirements changing as of April 3, 2025, midway through the process.

Under both versions of the Directive, the first step was to determine whether Mr. Barney qualified for consideration for Risk Containment; if so, the process would proceed by notifying him in writing that he had the opportunity to provide mitigating information.

Whether Mr. Barney qualified for Risk Containment

There are two requirements for qualification under both versions, one of which is that the person has been convicted of a Listed Offense. 13 V.S.A. § 5301 (7) identifies which offenses are Listed Offenses. 13 V.S.A. § 5301 (7) (V) identifies as a listed offense "violation of an abuse prevention order as defined in section 1030 of this title, excluding violation an abuse prevention order issued pursuant to 15 V.S.A. § 1104 (emergency relief) or . . .[inapplicable]. The only sentence for which Mr. Barney was incarcerated was for the charges in Docket 23-CR-7763. Those charges were for violations of a Temporary (emergency) Relief from Abuse Order, so that he was not then incarcerated for a Listed Offense.

The information in the case staffing record, presumably considered by the committee at the Case Staffing on March 5, 2025, states in the box of "Relevant Convictions that Relate to Current" the following at the top: "23-CR-07763 Violation of Abuse Prevention Order 2nd or

[5] The fact that release was delayed by one year is now moot, as that time period has passed.

Subsequent X2." It does not identify them as violations of a temporary order. (Exhibit 8, page 2). It is undisputed that the convictions were for violations of a temporary emergency order.

Mr. Pasha wrote in his letter of May 22, 2025 that a conviction for a Listed Offense was 'not the only criterion,' implying that it was not a necessary prerequisite, but both Directives are clear, through the use of the word "and" in the list of qualifying criteria, that a Listed Offense is a necessary qualifying requirement for Risk Containment, and the court so concludes.

Mr. Pasha took the position at the hearing that any Listed Offense in the inmate's history satisfies the requirement, regardless of whether the offense that is the basis for the current sentence is a Listed Offense or not. It is undisputed that Mr. Barney has past convictions for Listed Offenses. Other convictions listed on the form used for the Case Staffing, in the box of relevant convictions, are for domestic assault and aggravated domestic assault originating in 1996, 1999, and 2013. He alleges that the Listed Offense requirement for Risk Containment under the Directive is met only if the conviction for which the inmate is under sentence is a Listed Offense.

The positions of the two parties present a significant issue as to qualification, and calls for interpretation of the language of the Directive.

Both versions of the policy establish as a qualification: "The offense for which they have been convicted is a. . .Listed offense." It does not say 'the person has been convicted of a Listed Offense,' which might signify any listed offense from the past. Rather, it says, "*The* offense for which they have been convicted." This is a strong indication that it means the offense which is the basis for the person being currently in the custody of the Department under sentence. It makes sense that there would need to be a connection between current risk and imposition of risk containment. A person who has a current conviction for an offense that is not listed, but long ago had a conviction for a listed offense, may no longer present a current risk, but could be subject to risk containment under the interpretation advocated by the Department, which would significantly expand the Department's authority to make inmates ineligible for furlough. Such a position is not clearly established in the policy. The necessity of a listed offense conviction as a prerequisite to current risk containment is a more reasonable interpretation of the provision.

The Department did not present any cogent argument for application of its current interpretation that any past conviction for a Listed Offense could be used to make a person ineligible for furlough. The court concludes that the Listed Offense qualification requirement for risk containment means that "*The* offense for which they have been convicted" refers to the conviction which forms the basis for the current incarceration. Accordingly, the court concludes that in March and July of 2025, Mr. Barney did not qualify for risk containment, and that designation must be expunged.

Whether the procedural requirements for risk containment evaluation were met

Both versions of the Directive require that once it is determined that initial qualification criteria were met, the inmate be given notice in writing that the case is being reviewed for a possible risk containment classification and that the inmate has the opportunity to submit

mitigating information. This is an important procedural protection for inmates, as it would be the only opportunity to provide information to supplement what was otherwise available to the case staffing committee since the inmate cannot attend the case staffing.

This case provides an example of the function and importance of such a requirement, including when the notice must be given. What was available to the committee was the affidavit accompanying the charging information containing the initial statement of the complaining witness only—one side of the story. The fact that the jury found Mr. Barney not guilty on all counts indicates that there was likely more to the story, or another side to it. Since the inmate is not present at the case staffing, the way to get such information to the committee members is for the inmate to provide it up front—before the committee considers the case so that it has all relevant information at the start of its consideration. Otherwise, the committee members may reach their conclusion based only on the affidavit that is part of its file. In this case, the timing shows that the committee that met initially had already reached its conclusion that a Risk Containment designation was appropriate. The case was referred only for executive review, and the referral took place two months before Mr. Barney was ever informed that he had the opportunity to submit mitigating information.

Both the old and new versions of the Directive clearly require in written administrative Directives adopted by the Department that an inmate be notified in writing, prior to a case staffing at which Risk Containment will be under consideration of the opportunity to provide mitigating information. The notice is required to be on a form for the purpose under both versions, and both versions require the notice to be given prior to a decision being made. Mr. Barney was informed of it in the last paragraph of a two-page letter that was a reply to a letter he had written after the designation. The court concludes that it was contrary to both Directives for the Department to ignore the clear requirement that the inmate be notified of the opportunity to provide mitigating information prior to the initial consideration by the case staffing committee.

For this reason, the court concludes that it was not only an abuse of discretion but a failure to follow its own rules for the Department to classify him as Risk Contained without having provided the fair opportunity to provide mitigating information that the Directives mandate. The Directives impose a clear legal duty on the part of the Department to follow its own required processes. Otherwise, they would be meaningless. In this case, there was a failure to act according to the Department's clear legal duty to provide the notice in writing at the appropriate time so that mitigating information would be available to the case staffing committee at the time the case was being considered.

Summary

The Department failed to perform two clear legal duties created by its own Directives. First, it failed to establish the basic eligibility of Mr. Barney for risk containment consideration by determining whether or not his conviction was for a Listed Offense, which it was not. Second, once it treated him as eligible, it failed to notify him of the right to provide mitigating information in a timely manner. These actions, made contrary to the Department's own

established rules, constituted not only abuse of discretion but violations of clear and certain legal duties.

Order

For the reasons set forth above,

1. The request to vacate the RSN designation is *denied,* and

2. The classification of Risk Contained made on July 9, 2025 is stricken, and the case is remanded to the Department for that classification to be expunged.

Electronically signed July 1, 2026 pursuant to V.R.E.F. 9 (d).



Mary Miles Teachout
Superior Judge (Ret.), Specially Assigned