

**STATE OF VERMONT**

**SUPERIOR COURT  
Windsor Unit**

**CIVIL DIVISION  
Docket No. 107-3-16 Wrcv**

**JACOB S. FORCIER,  
Petitioner**

v.

**LISA MENARD,  
Respondent**

**DECISION  
MOTION TO DISMISS (#2)**

The Vermont Attorney General, on behalf of Respondent Lisa Menard, moves to dismiss this Rule 75 review of a Department of Corrections programming decision for lack of subject matter jurisdiction. The State's motion is granted.

**Procedural History**

The Petitioner filed this petition for review under Rule 75 on March 9, 2016. The Respondent filed this motion on June 24, 2016. The Petitioner is self-represented and the Respondent is represented by Assistant Attorney General Emily A. Carr.

**Discussion**

As noted above, the Petitioner seeks a Rule 75 review of a Department of Corrections programming decision. Specifically, the Petitioner seeks review of the Department's decision not to allow him to begin programming until pending charges against him are resolved. The State has moved to dismiss this action for lack of subject matter jurisdiction. The court agrees that it lacks subject matter jurisdiction over Department programming decisions.

Generally speaking, Rule 75 review is not available for discretionary acts absent a showing that the inferior agency or tribunal's decision was arbitrary and capricious. *Alger v. Department of Labor and Industry*, 2006 VT 115. There is little dispute that it is within the Department's discretion to determine whether and when an inmate receives programming. *Rheuame v. Pallito*, 2011 VT 72, ¶ 11. However, the Petitioner has alleged in his response to this motion that the Department's programming decision was arbitrary and capricious. Petitioner's Response at ¶ 13.

Normally, this would be sufficient to survive a motion to dismiss a Rule 75 petition. Nevertheless, the court agrees with the State's argument that the Supreme Court has specifically held that the Department's granular programming decisions are unreviewable as a matter of subject matter jurisdiction above and beyond the normal limitations of Rule 75. See *Rheuame*, 2011 VT

72 at ¶ 11 (“We conclude that while an inmate may have review of his designation under Rule 75, the particular programming requirements promulgated after that designation becomes final are a matter of DOC discretion and as such are nonreviewable under Rule 75.”). This applies to all programming decisions, not only those related to high-risk sex-offender programming as in *Rheuame*. See *Inman v. Pallito*, 2013 VT 94, 195 Vt. 218. Indeed, the specific program sought by Petitioner, VTPSA, was addressed in *State v. Cavett*, where the Supreme Court stated that the decision to terminate an inmate from participation in VTPSA was unreviewable. *State v. Cavett*, 2015 VT 91 (the specific holding of this case relates to the probation revocation consequence of the termination, not the termination itself).

The court therefore lacks subject matter jurisdiction to review the Department’s decision to deny the Petitioner VTPSA programming. The State’s motion to dismiss is *granted*.

Dated in Woodstock, Vermont this \_\_\_\_ day of August, 2016.

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Mary Miles Teachout  
Superior Court Judge