Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-017

JUNE TERM, 2017

Jeffrey Michael Brandt	}	APPEALED FROM:
	}	
	}	Superior Court, Washington Unit,
v.	}	Civil Division
	}	
	}	
Lisa Menard, Commissioner, David Turner and Dominic Damato	}	DOCKET NO. 8-1-16 Wncv
	}	
		Trial Judge: Mary Miles Teachout

In the above-entitled cause, the Clerk will enter:

Petitioner Jeffrey-Michael Brandt appeals from the superior court's dismissal of his complaint for review of governmental action. We affirm.

Petitioner is an inmate in the custody of the Vermont Department of Corrections (DOC). He is incarcerated in a facility in Michigan. On October 7, 2015, petitioner filed an informal grievance to DOC alleging that staff at the Michigan facility had been improperly trained in disciplinary procedures. He then filed a formal grievance claiming that the Michigan staff told him that if an inmate rejected a sanction offered to resolve a minor disciplinary report (DR) and requested a due process hearing, staff were required to give the inmate a major DR in retaliation for not accepting the offer. According to petitioner, DOC policy directive 410.01(3)(d) permits the issuance of a major DR in such situations but does not mandate it.[1] Petitioner requested that the Michigan staff be properly trained and "that all DR sanctions be removed from my record as they are held against me for jobs, furlough, etc." DOC rejected the grievance because it did not mention a specific grievable event. Petitioner's appeal from that decision to the DOC commissioner was denied for the same reason.

In January 2016, petitioner filed the instant action in the superior court pursuant to Rule 75 of the Vermont Rules of Civil Procedure. In his complaint, he alleged that officials in the Michigan facility were improperly trained and were ignoring DOC policy directive 410.01(3)(d). In an affidavit submitted with his complaint, petitioner stated that he had received a DR for a minor violation. Petitioner claimed he was told that if he did not agree to the minor sanction he was offered to resolve the matter, he would be given a major DR and moved to segregation pending a hearing on the major DR. He stated that he "reluctantly accepted the minor sanction." Petitioner's affidavit did not state when this incident took place. However, he attached a copy of a DR for a minor violation of "[f]ailure to abide by facility unit rules" that was issued to him on October 4, 2015.

DOC moved to dismiss petitioner's complaint on the ground that the court lacked subject matter jurisdiction to review the allegedly improper practice because petitioner did not seek relief in the nature of

[1] See Vt. Dep't of Corrections Directive 410.01(3)(d), Facility Rules and Inmate Discipline 8, http://www.doc.state.vt.us/about/policies/rpd/correctional-services-301-550/401-500-programs-security-and-supervision/410-01-facility-rules-and-inmate-discipline.pdf [https://perma.cc/5FGS-KFQE].

mandamus or certiorari. The court granted DOC's motion to dismiss, but for a different reason: it found that petitioner lacked standing to challenge the allegedly illegal practice because he had not claimed a specific consequence to himself as a result of the practice at issue. The court noted that "[petitioner] asserts that this practice was applied to him at some point in the past, but any such disciplinary action is not part of the grievance exhausted in relation to this case now."

A petitioner must demonstrate that he has standing in order for a court to have jurisdiction over his Rule 75 claim. Richards v. Town of Norwich, 169 Vt. 44, 49 (1999). "On the face of the complaint, the plaintiff must allege at least the threat of an 'injury in fact' to some protected interest in order to establish his or her standing." Town of Cavendish v. Vt. Pub. Power Supply Auth., 141 Vt. 144, 147-48 (1982) (citation omitted). "[O]ur review of dismissal for lack of standing is the same as that for lack of subject matter jurisdiction. We review the lower court's decision de novo, accepting all factual allegations in the complaint as true." Brod v. Agency of Nat. Res., 2007 VT 87, ¶ 2, 182 Vt. 234.

Petitioner's complaint does not allege that he was harmed or that he was under imminent threat of harm from the allegedly illegal practice at the Michigan facility. His complaint states only that "[s]taff at NLCF were improperly trained in Due Process Disciplinary Procedures and that [defendants Turner and Damato] had authorized the NLCF to ignore Policy Directive 410.01(3)(d)." There were no allegations in his complaint regarding the DR he received in October 2015 or any other DR. On the face of his complaint, he lacks standing to challenge the alleged practice. See Town of Cavendish, 141 Vt. at 147-48.

Assuming without deciding that the trial court should have considered the affidavit attached to his complaint that describes his October 2015 minor DR, or should have on its own initiative offered him an opportunity to amend his complaint to expressly reference that incident, we still affirm the trial court's dismissal. Even if petitioner had expressly asserted in his complaint that he had been personally injured by the allegedly improper practice when he was forced to accept an unwanted sanction in October 2015, the court would still lack subject matter jurisdiction to hear his claim because he did not exhaust his administrative remedies for that incident. "This Court has consistently held that when administrative remedies are established by statute or regulation, a party must pursue, or 'exhaust,' all such remedies before turning to the courts for relief." Rennie v. State, 171 Vt. 584, 585 (2000). Where a party fails to exhaust administrative remedies, the court may dismiss the case for lack of subject matter jurisdiction. Jordan v. State, 166 Vt. 509, 511 (1997). There is no evidence that petitioner ever timely sought DOC review of the October 2015 disciplinary report. Because petitioner did not exhaust his administrative remedies, dismissal was appropriate.

Affirmed.

BY THE COURT:

_____
Paul L. Reiber, Chief Justice

_____
Beth Robinson, Associate Justice

_____
Harold E. Eaton, Jr., Associate Justice