STATE OF VERMONT

SUPERIOR COURT Washington Unit	CIVIL DIVISION No. 21-CV-3093

LEVI J. DAVIS,
Appellant,

v.

VERMONT DEPARTMENT OF CORRECTIONS
Appellee.

DECISION ON THE MERITS

In this V.R.C.P. 74 appeal, Vermont inmate Levi J. Davis challenges a Department of Corrections ("DOC") case-staffing decision pursuant to 28 V.S.A. § 724. The Court received the DOC's furlough revocation record on November 7, 2021, and a hearing on the merits was held via Webex on February 7, 2022.[1] Appellant was present at the hearing and was represented by Emily Tredeau, Esq. Appellee was represented by Robert C. Menzel, Esq. Based upon a de novo review of the record and the credible evidence admitted at the hearing, the Court makes the following findings, conclusions and orders.

Davis, who is 37 years of age, has been convicted of several offenses, including aiding in the commission of a felony, unlawful trespass into an occupied residence, possession of stolen property, and resisting arrest, among other things. (DOC Case Staffing & NOS Packet Record, 2). He also has an extensive record of inmate disciplinary infractions ((DOC Incident-Infraction History 2003-2021). In addition, Davis also suffers from alcohol and drug use disorders. As a result of his convictions, Davis' maximum release date is July 20, 2025.

Davis has been on furlough or parole in the community several times in the past, and each time his furlough or parole was interrupted for picking up new criminal charges. This occurred in October of 2017, when Davis became abusive and threatening towards the police when they stopped him for driving without a license (Id., 201-202). It happened again in June of 2019, when Davis was cited and charged with simple assault for hitting an 18-year-old girl in the face (Id., 203). Davis' furlough was interrupted again in October of 2019, when he was cited and arrested for unlawful mischief and resisting arrest (Id., 205). Then, in July of 2020, Davis was given a six-month furlough interrupt when he was cited

[1] The reason for the delay in resolving this appeal is largely because DOC filed a motion to dismiss in which it asserted that this Court had no jurisdiction to adjudicate this matter. Because the motion raised a question of jurisdiction, the motion had to be resolved before the Court could consider the merits of the appeal. The Court denied the motion on January 28, 2022, and the hearing on the merits took place on February 7th.

and arrested for operating a motor vehicle without the owner's consent; at the time of his arrest, a hyperthermic needle was found in his pant pocket (Id., 231-233); he had also violated his curfew and electronic monitoring conditions (Id.).

On March 4, 2021, DOC again placed Davis on community supervision furlough in the community. He was to reside with his girlfriend and engage in medicated assisted treatment ("MAT") at Allen Pond. In addition, he was given several conditions that he had to comply with while on furlough, including condition C1 ("I will not be cited or charged; I will not commit any act punishable by law including city and municipal code violations) (Case Staffing & NOS Packet Record, 8-10).

On May 26, 2021, a clerk at a local convenience store accused Davis of attempting to steal a beer from the store; Davis returned the beer and left the store, but the clerk reported the incident to the police and also told them that he had observed a firearm in Davis' waistband (Incident-Infraction History Record, 252-254). At the same time, another individual told the police that Davis had stolen a backpack out of a vehicle (Id.). No charges were filed with respect to either complaint, however, so Davis' supervision furlough officer gave him a 6 pm – 6 am curfew as a graduated sanction for these alleged infractions (Id.).

The furlough officer tried to reach Davis by cell phone on May 26th to discuss the foregoing complaints, but she could not reach him because he had not set up his voice mail, so she called Davis' girlfriend the following day (Id., 255). The girlfriend reported that Davis had not been home all night except for five minutes to change. She also told the officer that Davis had not followed up with his MAT appointments at Allen Pond, despite her efforts to convince him that he needed to be in the program to help him keep clean (Id,). The furlough officer met with Davis on June 3rd and gave him a reprimand for not having his voicemail box set up. She also put him on a GPS and instructed him to begin MAT treatments by June 14th (Id.).

From early June through mid-July 2021, Davis committed several more furlough violations. He repeatedly failed to maintain his voicemail box, which made it difficult for his furlough officer to contact his without having to go through his girlfriend. He also repeatedly violated his curfew and electronic GPS monitoring requirements (Id., 256-260). On July 20th, the furlough officer studied Davis' GPS monitoring results and discovered that Davis had spent the night driving around Rutland in violation of his curfew (Id., 261). Later that day, the furlough officer learned that the police were looking for Davis in connection with a complaint they had received that Davis had caused an estimated $5,000 of damage to the grounds at the Rutland Country Club; this was of particular concern to the furlough officer, inasmuch as Davis' GPS results showed that he had been driving through the Rutland Country Club from 1:22 to 1:25 that same morning (Id.). The furlough officer decided to place Davis on house arrest with a 24-hour curfew, but before she could do that she learned that the police had found Davis highly intoxicated and covered in blood and that they were citing him for impeding a law enforcement officer (Id.).

A hearing officer found Davis guilty of violating his furlough conditions by being cited for a new crime (Case Staffing & NOS Packet, 5-8). Following the revocation, DOC performed a "case staffing" to determine what the consequence should be for Davis' violation. DOC decided that he should receive "a two-year interrupt," which meant that he would have to serve another two years in prison before again being eligible for release on

furlough (Id., 4).

Davis contends that the two-year interrupt is not only excessive but also unconstitutional because his only violation was to have been cited for a crime. He points out that he has not been convicted of any crime and that there is no affidavit or sworn statement in the record stating that he committed any crime. He contends that he should be immediately released back on furlough because he was living where he was supposed to be living, helping take care of his children, working, and pursuing treatment in the community. DOC argues that its determination should be affirmed. In addition, DOC contends that Davis is not eligible for release back into the community because he has pending charges against him.

DOC may release an inmate from prison and place him or her on community supervision furlough if the inmate has served his or her minimum sentence and agrees to comply with such conditions as DOC, in its sole discretion, deems appropriate. 28 V.S.A. § 723(a). The inmate's continuation on furlough is "conditioned on the offender's commitment to and satisfactory progress in his or her reentry program and on the offender's compliance with any terms and conditions identified by the Department." Id. §723(b). If the offender commits a "technical violation" (i.e., "a violation of conditions of furlough that does not constitute a new crime") that DOC believes warrants an "interruption" of the furlough, then DOC must hold "a Department Central Office case staffing review" to determine the length of the interrupt. Id. §724(b).

An offender whose community supervision furlough is revoked or interrupted for 90 days or longer has a right to appeal DOC's determination to the Superior Court under V.R.C.P. 74. The appeal must be "based on a de novo review of the record," the appellant "may offer testimony, and the Court, in its discretion and for good cause shown, "may accept additional evidence to supplement the record." Id. §724(c). Under the statute, "[t]he appellant shall have the burden of proving by a preponderance of the evidence that the Department abused its discretion in imposing a furlough revocation or interruption for 90 days or longer…." Id. Lastly, the statute provides:

> It shall be abuse of the Department's discretion to revoke furlough or interrupt furlough status for 90 days or longer for a technical violation, unless:
>
> (A). the offender's risk to reoffend can no longer be adequately controlled in the community, and no other method to control noncompliance is suitable; or
>
> (B) the violation or pattern of violations indicate the offender poses a danger to others or to the community or poses a threat to abscond or escape from furlough.

Id. §724(d)(2).

The Court declines to address Davis' contention that his furlough revocation violated his due process rights because it was premised on a violation of the condition that he not be *cited* for a new crime, and there is no finding or other substantial evidence of criminal conduct or a conviction. Assuming, without deciding, that a due process issue related to the

furlough revocation hearing may be properly raised during review of the resulting case staffing decision under 28 V.S.A. § 724, Davis waived the issue by failing to preserve it at the time of the revocation hearing. One may "waive virtually any right, constitutional or statutory." State v. Hance, 157 Vt. 222, 2233 (1991). The purpose of the preservation requirement is to ensure that the agency has a fair chance to address an issue before it is presented to the judicial branch for further review. Pratt v. Pallito, 2017 VT 22, ¶ 16, 204 Vt. 313. "[T]p properly preserve an issue, a party must present the issue to the administrative agency 'with specificity and clarity in a manner which gives the [agency] a fair opportunity to rule on it.'" Id., (citation omitted). Because Davis did not do that, he is precluded from pursuing the issue for the first time here on appeal

Given the record in this case, the Court cannot conclude that DOC abused its discretion in imposing a two-year interrupt of Davis' furlough status. Shortly after Davis was placed on furlough he began engaging in risky behavior. His furlough officer responded by imposing a series of graduated sanctions, including curfews and electronic monitoring requirements, designed to attempt to control him in the community, but Davis ignored them. He also failed to follow up with substance abuse treatment in the community. In the end, the furlough officer would have placed Davis on house arrest with a 24-hour curfew had he not been arrested for impeding a law enforcement officer. In addition, at the time of his arrest Davis was found to be highly intoxicated and covered with blood.

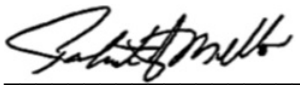
Under these circumstances, DOC would have been justified in revoking Davis' furlough status even if he had not been cited for a new criminal offense. As noted earlier, the statute expressly provides that it is not an abuse of discretion for DOC to interrupt furlough status for 90 days or longer if "the offender's risk to reoffend can no longer be adequately controlled in the community, and no other method to control noncompliance is suitable…." 28 V.S.A. § 724(d)(2)(A). Moreover, an inmate's continuation on furlough "is conditioned on the offender's commitment to and satisfactory progress in his or her reentry program and on the offender's compliance with any terms and conditions identified by the Department." Id. § 723(b). Based upon the record in this case, it was reasonable for DOC to conclude that Davis' risk to reoffend could no longer be controlled in the community, because he had failed to progress in his substance use treatment, resumed drinking heavily and posed a danger to others.

Lastly, if this had been Davis' first failure at furlough, the court would probably have been willing to reduce his interrupt to one year or possibly even six months. But that is not the case. This was the fourth time since June of 2019 that Davis' furlough or parole status in the community had to be interrupted for engaging in risky behavior and picking up new crimes. For the foregoing reasons, DOC's two-year interrupt of the Appellant's community supervision furlough is affirmed. *See* Smart v. Dept. of Corrections, Docket No. 21-CV-2592, Decision on the Merits (December 31, 2021) (affirming a 2-year interrupt for a third failure at furlough and a pattern or risky behavior)..

Because the Court has affirmed DOC's two-year interrupt, the Court does not need to address DOC's contention that Davis is not eligible to be released back on furlough

because he has pending charges against him.[2]

SO ORDERED this 18th day of February, 2022



Robert A. Mello
Superior Judge

[2] The Court notes, however, that DOC released Davis back into the community on furlough in March of 2021, even though he had charges pending for simple assault and operating a motor vehicle without the owner's consent. Quite obviously, DOC does not consistently enforce the policy directive upon which it bases its contention that an inmate with pending charges is not eligible for release on furlough.