STATE OF VERMONT

SUPERIOR COURT Washington Unit	CIVIL DIVISION No. 21-CV-2448

DANIEL KING, JR., Appellant, v. VERMONT DEP'T OF CORRECTIONS Appellee.	FILED JAN 19 2022 VERMONT SUPERIOR COURT WASHINGTON CIVIL

DECISION ON THE MERITS

In this V.R.C.P. 74 appeal, Vermont inmate Daniel King, Jr. 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 August 24, 2021, and a hearing on the merits was held via Webex on January 18, 2022.[1] Appellant was present at the hearing and was represented by Kelly Green, 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.

King, who is 40 years old, has a criminal record extending back to 1999, including ten felonies and three misdemeanors (DOC Record, 1). He is currently serving a 3½-10-year sentence imposed in 2018 for burglary, accessory to burglary, and possession of stolen property, among other things (Id., 26-57, 67). His minimum release date was March 9, 2021, and his maximum release date is September 9, 2027 (DOC Record, 67). He also has a history of substance abuse (crack cocaine and heroin), but he has been "sober" (his word) since August of 2017.

In January of 2021, DOC placed King on community supervision furlough and instructed him to reside at the home of Mary Corbett in Wallingford, Vermont, to work at Corbett's dog kennel, and to observe a 9 p.m. to 5 a.m. curfew (Id. 22-24). King was given a number of other conditions that he also had to comply with while on furlough, including to report to his supervising officer as directed, remain accessible to his supervising officer by phone and email at all times, and not leave the State of Vermont without the permission of his supervising officer (Id.).

On May 24, 2021, Corbett called King's supervising officer and informed him that King had left her residence at noon on May 21st and had not returned (Id., 2, 10-12, 15-21).

[1] The delay in reaching merits was due in part to the fact that DOC filed, but then later withdrew a motion to dismiss this appeal, and to the fact that an earlier date had to be continued at the request of Appellant's counsel due to a scheduling conflict.

The supervising officer tried three times to reach King by cell phone that same day, but King did not answer the phone, and the phone would not allow the officer to leave King a voice mail message. Thinking that King might have gone to see his 18-year-old son, who lived just over the border near Keene, New Hampshire, the supervising officer asked the Sheriff's Office in Cheshire County, New Hampshire, to go to the son's residence to see if King was there. The Sheriff's Office reported back that King had been seen at his son's residence recently, but he was not currently there. The next day, May 25th, the supervising officer tried again to reach King by phone, again without success. Two days later, King's supervising officer placed King on "abscondence" status and a warrant was issued for King's return to the correctional facility (Id. 5, 7, 14). King was apprehended at a friend's house in Keene, New Hampshire, on June 1, 2021. He had been missing, and his whereabouts unknown, for eleven days (i.e., May 21st to June 1st).

DOC found King guilty of having violated his furlough conditions, and his furlough was revoked (Id., 4-9). Following the revocation, DOC performed a "case staffing" to determine what the consequence should be for King's violation. DOC decided that he should receive "a one-year interrupt," which meant that he would have to serve another year in prison before again being eligible for furlough consideration (Id. 2). DOC based its decision on the number of King's violations and his risk scores for reoffending (Id.).

King contends that the one-year interrupt was excessive. He points out that he did not relapse on drugs or commit any other crime while he was on furlough. In addition, he argues that Corbett lied to his supervising officer when she said that he had left her residence on May 21st. According to King, Corbett was an evil and dishonest person who had become jealous of his efforts to reconnect with his son's mother and who therefore made up the story of his leaving her residence in order to get him in trouble. King further claims that Corbett, in an effort to control him, stole his cell phone from him and even tried to poison him. In addition, King claims that he had complained to his supervising officer about Corbett and had begged him to let him live somewhere else, but that his officer had insisted that he continue to reside with her. Therefore, he panicked a fled to New Hampshire. Lastly, King claims that he was only missing for three days and that he voluntarily turned himself in. DOC argues that that King's version of the events lacks credibility and that its one-year interrupt should be affirmed.

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 warrant 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 agrees with DOC that King's far-fetched version of the events lacks credibility. It is highly improbable, to say the least, that a supervising furlough officer would require a furloughee to continue living with someone who was trying to poison him. The Court finds that King moved out of Corbett's residence on May 21st and absconded with his friend to New Hampshire. This does not mean, however, that DOC's one-year interrupt should be affirmed. In light of all the relevant circumstances, the Court concludes that DOC abused its discretion in imposing a one-year interrupt of King's furlough status.

This Court has heard almost twenty of these Rule 74 case staffing appeals, several of which have involved furloughees who absconded. Those cases reveal that, absent aggravating circumstances, when a furloughee absconds for the first time, DOC generally re-incarcerates the furloughee for a short period of time, typically for six months or less, and then returns the furloughee to the community under furlough supervision. Only where the furloughee has absconded for a second time, or committed new criminal offenses, or relapsed and refused to engage in needed substance abuse services, has DOC imposed and this Court affirmed a one-year interrupt for absconding. *See, for example,* Aspen v. Dept. of Corrections, Docket No. 21-CV-2302, Decision on the Merits (11/29/21) (affirming a one-year interrupt for absconding a second time for more than seven weeks); Welch v. Dept. of Corrections, Docket No. 21-CV-2797, Decision on the Merits (12/23/21) (affirming a one-year interrupt for absconding to New York State for two years and committing new criminal offenses there); Bard v. Dept. of Corrections, Docket No. 21-CV-2805, Decision on the Merits (12/29/21) (affirming a one-year interrupt for relapsing on illegal drugs, failing to engage in treatment, and absconding for three months).

Here, this was King's first time absconding from furlough, and he was missing for only eleven days. He had been on furlough successfully for four months, during which he had stayed in contact with his supervising furlough officer, re-connected with his 18-year-old son, remained gainfully employed, committed no new crimes, and consumed no illegal drugs. Although he had a significant criminal record, his record was not substantially different from that of other individuals for whom DOC imposed interruptions of six months or less under similar circumstances. The court concludes, therefore, that DOC abused its

discretion in imposing an interrupt of more than six months in this case.

For the foregoing reasons, DOC's one-year interrupt of the Appellant's community supervision furlough is reversed, and a six-month interrupt is imposed instead. Those six months expired up on December 1, 2021. Therefore, DOC is ordered to return the Appellant to the community on furlough at the first opportunity.

SO ORDERED this 19th day of January, 2022.

Robert A. Mello
Superior Judge