STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
No. 21-CV-2144

JAMES VEZINA,
Appellant,

v.

JAMES BAKER, COMMISSIONER,
VERMONT DEP'T OF CORRECTIONS
Appellee.

RULING ON THE STATE'S MOTION TO DISMISS

Vermont prisoner and appellant James Vezina filed this action seeking Rule 74 review of a Department of Corrections case-staffing decision pursuant to 28 V.S.A. § 724, which permits limited review of certain case-staffing decisions following a furlough violation. The decision at issue would ensure that Mr. Vezina is not eligible for furlough for an extended time. The State has filed a (second) motion to dismiss, arguing that the decision is not subject to review under § 724 because it follows from a "nontechnical" violation of furlough—a violation amounting to a crime. Mr. Vezina does not dispute that the violation amounts to a crime, but he opposes dismissal, arguing that review under § 724 is available for both technical (non-criminal) and nontechnical (criminal) violations of furlough. He further argues that the court should interpret § 724 in that manner because the case staffing process is unconstitutional otherwise.

By its terms, the statute does not provide review for nontechnical violations. Section 724, in its entirety, reads as follows:

> (a) Authority of the Department. The Department shall identify in the terms and conditions of community supervision furlough those programs necessary to reduce the offender's risk of reoffense and to promote the offender's accountability for progress in the reintegration process. The Department shall make all determinations of violations of conditions of community supervision furlough pursuant to this subchapter and any resulting change in status or termination of community supervision furlough status.
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> (b) 90-day interruption or revocation. Any interruption of an offender's community supervision furlough after the Department has found a technical violation of furlough conditions shall trigger a Department Central Office case staffing review and Department notification to the Office of the Defender General if the interruption will be 90 days or longer.

(c) Appeal. An offender whose furlough status is revoked or interrupted for 90 days or longer shall have the right to appeal the Department's determination to the Civil Division of the Superior Court in accordance with Rule 74 of the Vermont Rules of Civil Procedure. The appeal shall be based on a de novo review of the record. The appellant may offer testimony, and, in its discretion for good cause shown, the court may accept additional evidence to supplement the record. The 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 pursuant to subsection (d) of this section.

(d) Technical violations.
(1) As used in this section, "technical violation" means a violation of conditions of furlough that does not constitute a new crime.
(2) 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.

28 V.S.A. § 724. Mr. Vezina focuses exclusively on the first sentence of § 724(c) to argue that it expansively permits review in any case in which "furlough status is revoked or interrupted for 90 days or longer."

The sentence that Mr. Vezina focuses on has to be viewed in isolation to support his argument. "The words of a statute are not to be read in isolation, however, but rather in the context and structure of the statute as a whole." *In re Vermont Verde Antique Intern., Inc.*, 174 Vt. 208, 211–12 (2002). In context, review clearly is available only for "technical" violations, violations of furlough conditions that do not amount to new crimes.

Section 724(c) specifically says that, on appeal, the appellant has the burden of proving that the DOC "abused its discretion in imposing a furlough revocation or interruption for 90 days or longer *pursuant to subsection (d) of this section.*" (Emphasis added.) Subsection (d), in turn, defines a technical violation, and it expresses the standards by which to measure abuses of discretion regarding technical violations. It is thus clear that, in appealing, the appellant has the burden of proving an abuse of discretion regarding a technical violation. There are no similar provisions applicable to nontechnical violations. With no statutory standards for measuring abuses of discretion regarding nontechnical violations, the court would have no way to meaningfully provide the review that § 724 contemplates. The review available under § 724(c) extends to technical violations only.

Section 724(b) also requires the DOC to notify the Office of the Defender General of any revocations or 90-day or greater interruptions following technical violations only. This

presumably is intended to ensure that the Prisoners' Rights Office has notice of cases in which review is available. If review also were available in the case of nontechnical violations, one would think notice to the Prisoners' Rights Office would be every bit as warranted. The court presumes that the legislature made this distinction for a reason, namely, that review is simply not available in the case of nontechnical violations.

Review is available under § 724 for statutorily defined technical violations only.

Nevertheless, Mr. Vezina claims that the above interpretation of § 724 renders the whole case staffing process unconstitutional. He argues that the due process rights described in *Morrissey v. Brewer*, 408 U.S. 471 (1972) apply in this context, and *Morrissey* requires two hearings, a first hearing to determine guilt and a second hearing at which mitigation evidence may be presented. See *id.* at 488 ("The parolee must have an opportunity to be heard and to show, if he can, that he did not violate the conditions, or, if he did, that circumstances in mitigation suggest that the violation does not warrant revocation."). Mr. Vezina argues that Vermont's case staffing process includes no hearing and thus violates this right. Section 724, if interpreted to permit de novo review—with a hearing—of every such case staffing decision, Mr. Vezina argues, would "rescue" the case staffing process from unconstitutionality.

The right Mr. Vezina has seized on was clarified in a later decision of the Supreme Court as follows:

> Neither *Gagnon* nor *Morrissey* considered a revocation proceeding in which the factfinder was required by law to order incarceration upon finding that the defendant had violated a condition of probation or parole. *Instead, those cases involved administrative proceedings in which revocation was at the discretion of the relevant decisionmaker.* Thus, the Court's discussion of the importance of the informed exercise of discretion did not amount to a holding that the factfinder in a revocation proceeding must, as a matter of due process, be granted discretion to continue probation or parole. Where such discretion exists, however, the parolee or probationer is entitled to an opportunity to show not only that he did not violate the conditions, but also that there was a justifiable excuse for any violation or that revocation is not the appropriate disposition.

Black v. Romano, 471 U.S. 606, 612 (1985) (citation omitted; emphasis added). The right thus exists when the factfinder has the discretion to return the inmate to the community regardless of a violation.

No such discretion exists in Vermont statute or the DOC's rules. According to DOC Directive 410.02, Procedural Guidelines § (5)(f):

> If the Hearing Officer determines that the offender is guilty of a violation, the Hearing Officer:
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> i. Will inform the offender and give to them the outcome and the facts that the Hearing Officer relied on to support the finding of guilt, on the Hearing Report Form;

ii. Will permit the offender to enter a statement, if they wish, orally or in writing, regarding their agreement or disagreement with their guilt, and enter it on the Hearing Report Form;
iii. Will refer the case for case staffing. (See Section 11.)

The hearing officer has no discretion to nevertheless return the inmate to furlough. He can only refer the matter for a case staffing, which is described as follows:

The Case Staffing will:
i. Determine the length of incarceration required to control or reduce the risk for re-offense;
ii. Determine the requirements for the offender to complete prior to release to conditional re-entry/furlough, in order to demonstrate the risk is reduced; or
iii. Make a determination that the offender must serve their maximum sentence to control the risk to the community, themselves or others.

DOC Directive 410.02, Procedural Guidelines § (11)(a). There is no discretion in the case staffing process to immediately return the inmate to furlough regardless of the violation; nor is the case staffing team the finder of fact as to the violation of conditions.

Once a furlough violation has been found, there is no discretion to nevertheless not revoke furlough. It is automatically revoked, meaning that furlough has officially ended and the inmate is reincarcerated. The discretion then exercised in the course of the case staffing is the forward-looking enterprise as to when the inmate will again become eligible for another shot at furlough. Mr. Vezina has not provided the Court with any law supporting a conclusion that this forward-looking enterprise is subject to the due process right that he has asserted.

Order

For the foregoing reasons, the State's motion to dismiss is granted. The State shall submit a form of judgment. V.R.C.P. 58(d).

SO ORDERED this 12th day of January, 2022

Robert A. Mello
Superior Judge