STATE OF VERMONT

SUPERIOR COURT Washington Unit	CIVIL DIVISION No. 21-CV-360
WILLIAM WHEELOCK, Plaintiff, v. VERMONT DEPARTMENT OF CORRECTIONS, Defendant.	

RULING ON THE STATE'S MOTION IN LIMINE

On January 20, 2021, the Vermont Department of Corrections, via a "case staffing," decided against releasing Plaintiff William Wheelock on furlough. The totality of its written decision is as follows: "Review in 1 year. CSS to work with Mr. Wheelock on completing release plan that addresses behavior that went wrong when released previously. If no release plan will staff again in year from 1/2022." Mr. Wheelock seeks Rule 74 review of this decision pursuant to the recently enacted 28 V.S.A. § 724. The case was set for a bench trial on September 20, 2021.

Shortly before trial, the State filed a motion characterized as "in limine" but really seeking dismissal, arguing that the decision on review does not fall under § 724, and thus the court has no statutory jurisdiction to review it. The parties argued this issue at the beginning of trial, the court took the matter under advisement, trial proceeded, and then the parties briefed the dismissal issue further in post-trial memoranda, which the court has reviewed. For the following reasons, the court concludes that the decision on review is not subject to review under § 724 because Mr. Wheelock's furlough had previously been revoked, and the decision at issue is merely a subsequent consideration of his current suitability for furlough.

The DOC has long had a policy describing how it handles violations of furlough conditions by inmates. DOC Directive 410.02. In short, where DOC personnel determine that an alleged violation of conditions warrants it, the inmate is returned to the facility from the community and is promptly given a "due process hearing." Standards for such a determination were fleshed out recently by the adoption of the new version of Directive 430.11 (response to furlough violations). The entire due process hearing procedure is described at Directive 410.02, Procedural Guidelines §§ 1–11. The role of the hearing officer is to determine guilt or innocence. *Id.*, Procedural Guidelines § 5(d). If the inmate is not guilty, he is promptly returned to the community. If the inmate is guilty, an administrative appeal process is available to test the determination of guilt. *Id.*, Procedural

Guidelines § 6. In either event, the hearing officer solely determines whether the inmate is guilty or not guilty. The hearing officer does not impose any sort of sanction if the inmate is guilty. The *consequence* of a determination of guilt is a completely separate process.

If the inmate is found guilty, the hearing officer "[w]ill refer the case for case staffing." *Id.*, Procedural Guidelines § 5(f)(iii). If there was an administrative appeal, the case staffing may await the outcome of the appeal. *Id.*, Procedural Guidelines § 6(d). The Directive describes the case staffing process as follow:

> 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.

Id., Procedural Guidelines § 11. The "case staffing" is simply a decision-making process—there are no further procedural rights for the inmate leading up to it. It is a highly discretionary determination made by DOC personnel based on their expertise following the determination of guilt that, prior to the adoption of 28 V.S.A. § 724, generally would be unreviewable in court.

The case staffing is the decision point at which an "interrupt" or revocation may be imposed. "Furlough interrupt" and revocation are not defined in statute or, as far as the court can tell, in the DOC's rules or policies.

Act 148 relabeled conditional reentry furlough "community supervision furlough" and subjected the case-staffing part of this process—not the guilt determination part—to specific standards and court review. See 2019, No. 148, §§ 10–11 (Adj. Sess.)—28 V.S.A. §§ 723–724. Those sections provide as follows:

28 V.S.A. § 723—Community supervision furlough

> (a) The Department may release from a correctional facility to participate in a reentry program while serving the remaining sentence in the community a person who:
>
> (1) has served the minimum term of the person's total effective sentence;
> (2) is ineligible for or refuses presumptive parole pursuant to section 501a of this title or has been returned or revoked to prison for a violation of conditions of parole, furlough, or probation; and
> (3) agrees to comply with such conditions of supervision the Department, in its sole discretion, deems appropriate for that person's furlough.
>
> (b) The offender's continued supervision in the community 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.

(c) Prior to release under this section, the Department shall screen and, if appropriate, assess each felony drug and property offender for substance abuse treatment needs using an assessment tool designed to assess the suitability of a broad range of treatment services, and it shall use the results of this assessment in preparing a reentry plan. The Department shall attempt to identify all necessary services in the reentry plan and work with the offender to make connections to necessary services prior to release so that the offender can begin receiving services immediately upon release.

28 V.S.A. § 724—Terms and conditions of community supervision furlough

(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.

(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.

Section 723 describes community supervision furlough, and § 724 creates a limited right to review and describes a standard applicable to sanctions for breaches of conditions. Under § 724, there is a right to review whenever an inmate is adjudged guilty of a violation of community supervision furlough conditions not amounting to a crime and the subsequent case staffing results in a 90-day interrupt or more severe sanction, including revocation. As for standards, there is no statutory limitation on the DOC's discretion in the event that the violation amounts to a crime. If it is a noncriminal breach of conditions only (called a "technical" violation), then a 90-day interrupt or greater sanction is automatically an abuse of discretion *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." On appeal, the inmate has "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" subject to Rule 74. Regardless of the circumstances, the inmate cannot argue that a lesser sanction is an abuse of discretion because there is no right to review a lesser sanction.

In this case, Mr. Wheelock violated his furlough conditions and was returned to incarceration in early 2020. According to the case staffing form, Record at 84, "it is our recommendation that Wheelock remain incarcerated as a max-out case due to the nature of his violent crime of murder and horrible supervision history both inside the correctional facilities and while in the community under community supervision." It goes on and eventually says, "Review in year w/Classification Director." It is unclear whether this refers to the recommendation that he should be characterized as a Level C offender or that review of his furlough suitability in one year should be undertaken with the Classification Director. In any event, he remained in the facility until his furlough suitability was reviewed again a year later. As to the early 2020 decision, preceding § 724 by about a year and not reviewable under § 724, there is no more detailed furlough decision in the record. Mr. Wheelock concedes that he is not seeking review of the early 2020 decision. He claims, however, that the newer, January 2021 decision that he is not fit for furlough nevertheless is reviewable under § 724.

Both parties assiduously draw no distinction between a furlough *interrupt* and a *revocation,* and both characterize the early 2020 decision as a one-year interrupt.[1] In the State's view, once an inmate's furlough is ended to any extent, the inmate then no longer is on furlough, and § 724 cannot apply to any furlough decisions but for the one that coincides with the initial termination of furlough. In Mr. Wheelock's view, once furlough is ended to any extent, any furlough decision thereafter necessarily occurs during an interruption of furlough and necessarily falls under § 724. Both interpretations are sweepingly overbroad.

The State's interpretation of § 724 would largely nullify it altogether. It would limit the right to review to a determination of how long the DOC must wait until it next

[1] Despite the semantics, the State does, however, clearly describe the January 2021 decision as a routine annual furlough evaluation and not the imposition of a sanction due to a furlough violation.

determines whether to furlough an inmate (the length of the interrupt) and would have no other binding impact, rendering court review a largely pointless process.

Mr. Wheelock's interpretation eliminates the obvious significance of the connection between the furlough violation and the resulting case staffing. That connection is the entire premise for § 724 review. Nothing in § 724 implies that the legislature intended to subject the DOC's highly discretionary decision-making about furlough suitability to review in court but for to the extent those decisions are made in direct response to a specific furlough violation.

Section 724 expressly distinguishes between a revocation and an interruption. The legislature would have no reason to use two terms, which typically have different meanings, in this context were they mere synonyms. We generally presume that the legislature chose its words advisedly and avoid interpretations that render parts of statutes superfluous. See *Vermont Natl. Tel. Co. v. Dept. of Taxes*, 2020 VT 83, ¶ 26, 250 A.3d 567; *Northfield Sch. Bd. v. Washington S. Educ. Assn.*, 2019 VT 26, ¶ 15, 210 Vt. 15. A revocation implies that something has been stopped permanently or indefinitely. See Merriam-Webster Dictionary, revoke (online) (accessed Sept. 23, 2021) ("to annul by recalling or taking back : RESCIND"). An interruption, on the other than, implies that something has been stopped temporarily. *Id.*, interruption ("a stoppage or hindering of an activity for a time"). Section 724 treats a revocation as a serious sanction subject to the same review that is available only in the case of interruptions of 90 days or greater in duration.

Thus, if an inmate violates furlough, and the case staffing determines that revocation (permanent or indefinite removal of furlough eligibility) is appropriate, subsequent case staffing reviews and determinations about furlough suitability are not subject to § 724 review, unless the inmate was again furloughed, determined to have violated conditions, and case staffed.

However, if an inmate violates furlough, and the case staffing determines that an interrupt (removal of furlough eligibility for a definite time) is appropriate, then when that time is over, eligibility must be reinstated (presumably absent any material changes in circumstances), and the DOC must take steps to return the inmate to furlough.

Turning to the facts of this case, while the record could be clearer, it is clear enough to determine that in early 2020, Mr. Wheelock's sanction for violating furlough was a *revocation*. He plainly was removed from furlough pending further consideration in the future but not with any enforceable anticipation that with the mere passage of time he in fact would be returned to furlough. And such future consideration is all that happened in January 2021. The January 2021 case staffing, the one at issue here, thus is not subject to review under § 724. The court has no statutory jurisdiction over Mr. Wheelock's claim, which must be dismissed.

This is not a case in which the DOC case staffed Mr. Wheelock to remain in the facility for one year, anticipating that it would return him to furlough at the end of that year (a one-year interrupt), but then changed its mind later. If that were permissible, then the DOC could, as Mr. Wheelock argues, attempt to case staff everyone to an 89-day interrupt to avoid any review at all, and then reconsider the length of the interrupt on the 89th day, extending it to a far lengthier time, yet still avoiding statutory review, all in

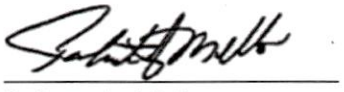
derogation of the statutory right to review in § 724. That is not what happened in this case, however, so the court declines to consider such a scenario.

Because this decision disposes of this case, the court declines to address any other issues raised by the parties, whether in briefing or at trial, and will make no findings based on the testimony at trial.

Order

For the foregoing reasons, the State's motion in limine is granted. Counsel for the State shall submit a form of judgment. V.R.C.P. 58(d).

SO ORDERED on this 24th day of September 2021.



Robert A. Mello
Superior Judge