VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 23-CV-03524

Brandon Trudeau v. Nicholas Deml

DECISION ON RULE 74 APPEAL

Appellant Brandon Trudeau appeals DOC's imposition of a four-year interruption of furlough for what he (and DOC) characterizes as a "technical violation." He argues that the narrative on which DOC's Case Staffing Committee based this decision far exceeds the findings made by the DOC hearing officer, and is substantially unsupported by the record. He argues further that DOC abused its discretion in failing to apply the graduated sanctions approach set forth in its Administrative Directive 430.11. The court denies the appeal.

As a threshold matter, the court is obligated to examine its jurisdiction to hear this appeal. At the hearing on this appeal, the court raised this issue *sua sponte* and invited briefing. The court has now received and reviewed that briefing. That review persuades the court that it lacks jurisdiction to hear this appeal.

This appeal was brought pursuant to 28 V.S.A. § 724(d). That provision empowers the court only to review furlough decisions based on "technical" violations. A technical violation is one "that does not constitute a new crime." 28 V.S.A. § 722(4). Here, the DOC hearing officer found, by a preponderance of evidence, that Mr. Trudeau had supplied minors with alcohol. Supplying minors with alcohol is unquestionably a crime, *see* 13 V.S.A. § 658(a)(1); the only question is whether the hearing officer's finding alone is a sufficient basis on which to rest the determination as to whether or not the violation was "technical."

Mr. Trudeau has brought to the court's attention a decision in this regard by a sister unit, in which the court held that "the phrase 'constitutes a new crime' must, at a minimum for due process consideration, include some element or type of independent probable cause review." *Lowery v. Dep't of Corrections*, no. 22-CV-02519, slip op. at 3 (Oct. 3, 2022 (Richardson, J.). While this decision was authored by a colleague for whom the undersigned has the greatest respect, the court does not find it persuasive. The court's reasoning rests on the uncontroversial premise that a furloughee is entitled to

due process. It then proceeds: "the Court cannot accept an interpretation that would vest all process and review in a single administrative agency." *Id.* That, of course, is precisely what the Legislature has done, *see* 28 V.S.A. § 724(a) ("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.")—subject, of course, to Rule 74 review of some decisions, and Rule 75 review of all others.

Due process, in this context, requires "(a) written notice of the claimed violations of [furlough]; (b) disclosure to the [furloughee] of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking [furlough]." *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972) (made applicable to revocations of furlough by *Young v. Harper*, 520 U.S. 143, 152-53 (1997)). The Vermont Department of Corrections has implemented these protections through its Directive No. 410.02. Mr. Trudeau has not suggested that the Directive is in any way inadequate, or that DOC did not afford him its protections.[1] Indeed, the administrative record bears out that DOC did follow its procedures. Thus, the court concludes that the finding that Mr. Trudeau engaged in behavior that constituted a new crime comported with due process, and so is binding on this court.

The court notes that the DOC Central Case Staffing Committee determined that Mr. Trudeau's furlough violation was "technical." This determination, however, is not binding upon the court. *See John v. Deml*, no. 23-CV-4221 (Vt. Super. Dec. 3, 2023) (Richardson, J.) ("As a jurisdictional question, the determination ultimately lies with the court."); *see also Town of Charlotte v. Richmond*, 158 Vt. 354, 358 (1992) ("Subject matter jurisdiction cannot be waived"). Rather, it remains the province—indeed, the obligation—of the court to examine its subject matter jurisdiction. *See, e.g., Mullinnex v. Menard*, 2020 VT 33, ¶ 11, 212 Vt. 432 (Supreme Court has "independent obligation to ensure that we act only in cases in which we have subject matter jurisdiction"). Thus, it this court's determination, and not DOC's, that governs the jurisdictional question.

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[1] There is an irony inherent in the *Lowery* court's reluctance to accept DOC's determination that conduct "constitutes a new crime," absent "some element or type of independent probable cause review." Such review depends first on the whim of a prosecutor to charge or not to charge a crime, and then on an unreviewable judicial finding of probable cause—a standard far lower than the preponderance required for DOC's findings. And it overlooks the fact that judicial review remains available via Rule 75. In short, DOC's process appears to afford more process than the *Lowery* court determined was due.

In this case, the administrative record makes clear that DOC's Central Case Staffing Committee based its decision to revoke Mr. Trudeau's furlough, at least in part, on the finding that he had furnished alcohol to minors. This is clearly conduct "that constitutes a new crime." It matters not that other violations were "technical"—or even, that some of those may not have been supported either by the hearing officer's findings or by competent evidence. Rather, the finding of criminal conduct was sufficient to support the revocation of furlough, and to insulate that action from review for abuse of discretion under 28 V.S.A. § 724(c). Mr. Trudeau not having sought review under Rule 75, the court declines to consider whether certiorari would lie. Accordingly, the case staffing decision is affirmed.

Electronically signed pursuant to V.R.E.F. 9(d): 12/18/2023 1:29 PM

Samuel Hoar, Jr.
Superior Court Judge