STATE OF VERMONT

SUPERIOR COURT
Caledonia Unit

CIVIL DIVISION
Docket No. 146-11-20 Cacv

TYLER WHITE

v.

JAMES BAKER

DECISION
Petition for Writ of Habeas Corpus

Petitioner seeks habeas corpus relief from prison confinement on the grounds that he was not afforded the required due process following his return to prison from furlough. A final hearing on his petition was held on December 7, 2020 by Webex. Petitioner was represented by Attorney Jill P. Martin. Respondent, who is Commissioner of the Department of Corrections, was represented by Attorney Patrick T. Gaudet. The parties had submitted a written stipulation to the facts and stipulated to the admission of exhibits. The court heard oral argument.

Based on the facts, the evidence and the arguments, the court makes the following Findings of Fact and Conclusions of Law.

Findings of Fact

In early October of 2020, Tyler White was serving a sentence in prison in St. Johnsbury. On October 5th, he was released into the community on furlough, subject to conditions. On Friday, October 16th, he was arrested and taken back to the prison in St. Johnsbury on suspicion of having violated his furlough conditions. He remained in prison for a week without a hearing and without receiving any notice of a hearing on whether his furlough would be revoked.

One week after his return to prison, on Friday October 23rd, he was given a Notice of Hearing which stated that his hearing would take place the previous day, October 22nd, at 8:00 am. DOC Directive 410.02 requires that a hearing on furlough suspension take place within 4 business days of return to prison, and October 22nd would have been the fourth business day after Mr. White's return to prison. No hearing had taken place on October 22nd, and no hearing was held on October 23rd.

The following Monday, October 26th, at 10:12 pm, he was given a Notice of Hearing that indicated his hearing was continued until the following day, October 27th, at noon. The hearing was held on October 27th and he was found guilty of violating his furlough conditions and his furlough was revoked. The next day, he filed an appeal claiming violation of due process and specifically citing DOC Directive 410.02 that required a hearing to take place within 4 business days and stating that his hearing did not take place until 5 days after a hearing should have been held, or 11 days after return to prison, including two weekends. After exhausting administrative remedies, he filed the petition in this case on November 25th, seeking habeas corpus relief in the form of return to furlough status.

Conclusions of Law

Petitioner alleges that his reincarceration is unlawful because he was deprived of procedural due process upon his return to prison. The Commissioner of the Department of Corrections opposes habeas relief based on two arguments: (1) that Petitioner did not have a liberty interest in remaining on furlough, and (2) even if there is a liberty interest, the deviation was minor and Petitioner was not prejudiced by the delay in hearing.

The facts are clear that:

1. the first notice of hearing given to Mr. White on October 23rd was not only out of time (5 business days after return to prison) but provided for an impossibility—a hearing on a date that had already passed;
2. the hearing notice given to him on October 26th was given out of time and provided for a hearing further out of time:7 business days (11 actual days) after return to prison
3. the notice of hearing gave notice of a hearing in less than 24 hours (from 10:12 pm to noon the next day).

Liberty Interest and Due Process

It has long been recognized that while a prisoner serving a sentence does not have a liberty interest entitling him or her to a right to release from prison while under sentence, if an incarcerated person is released to the community on a furlough program such as that involved here, the person acquires a liberty interest protected by requirements of due process. This was established as a matter of constitutional law in the United States Supreme Court decisions of *Morrissey v. Brewer,* 408 U.S. 471 (1972) and *Young v. Harper,* 520 U.S. 143 (1997). While there is no specific Vermont Supreme Court decision, numerous trial court decisions over the last two decades have recognized the applicability of this liberty interest to Vermont's furlough program as a matter of federal constitutional due process.

The Court in *Morrissey* identified minimum requirements of due process for parolees, including a right to a hearing reasonably soon after the arrest, written notice of the alleged violations, and a number of other procedural protections. In *Young v. Harper,* the United States Supreme Court concluded that a prisoner released on a state conditional release program with the same characteristics as the Vermont furlough program is entitled to the same procedural due process protections identified in *Morrissey.*

Directive 410.02 of the Vermont Department of Corrections provides for the specific implementation of due process requirements for furloughees in Vermont. Pertinent to this case, it provides that a furlough revocation hearing shall be held within 4 business days of the person's return to prison.[1] The notice of hearing must be delivered at least 24 hours in advance of the

[1] "An administrative due process hearing (see Hearing Process) on the alleged furlough violation must be conducted, unless the offender waives the hearing. (See *Attachment 3.)* The hearing must be conducted at the receiving facility within four (4) business days. (Day one of four is the beginning of the first full business day from the time the accused is returned to a correctional facility.)" Directive 410.02, Section 1 (c).

hearing and must be on a prescribed form that gives the date and time of the hearing.[2] Once notice of such a hearing is given, the hearing may be continued by the hearing officer for one additional business day for documented good cause. Any continuances longer than that must also be for good cause and documented, and must be approved by the Superintendent.[3]

The court concludes that based on *Morrissey* and *Young v. Harper,* Mr. White had a constitutionally protected liberty interest while he was out on furlough that required that he be provided with procedural due process protections prior to being reimprisoned for more than a brief period of immediate suspension, which is defined in Vermont in Directive 410.02 as 4 business days long for receiving a notice of hearing for a hearing to occur with 24 hours notice within that period of 4 business days, subject to specific requirements for continuances.[4]

It is undeniable that the procedures provided to Mr. White did not comply with these standards established by the Vermont Department of Corrections to implement the requirements of due process established by the United States Supreme Court.

Prejudice

The Commissioner argues that there was only a slight delay of 2 business days beyond the required hearing time (the hearing was required to be held by Oct 22, the Policy permitted an extension of one day to Friday Oct 23, and the hearing was held on Tues, Oct 27, which is 2 business days later). He argues that Petitioner has not shown facts demonstrating that he was prejudiced by the delay. He highlights the decision of a three-justice panel in *Heim v. Touchette* 2020 WL 1695406 that failure to meticulously comply with the Directive does not compel vacating a furlough violation determination. In that case, Mr. Heim had received prompt notice of a hearing for his fourth day and on the evening of the fourth day he received a notice that the hearing was continued to the next business day due to the lack of an available hearing officer. The length of the postponement resulted in a hearing that was still within the bounds of a reasonable time set forth in the Directive, and Mr. Heim had received timely notice and full

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[2] "An administrative hearing may not be held sooner than 24 hours after the *Notice of Hearing* is served upon the offender unless they waive this time period by signing the *Notice of Hearing/Waiver of 24 Hour Notice of Hearing (Attachment 2).* The hearing will be held no later than four (4) business days from the return to the facility." Directive 410.02, Section 4 (a).

[3] "Continuances: *Requested by the Department:* The Hearing Officer may postpone a violation hearing for one (1) business day for good cause. The Superintendent's approval is required for continuances of greater than one (1) business day. The Hearing Officer will document the basis for such good cause on the *Hearing Report Form (Attachment 6).* Good cause for a continuance of a violation hearing, includes, but is not necessarily limited to (1) facility emergencies and/or other unusual operational occurrences; (2) work schedules, transfers and other circumstances that limit witness availability for the specific hearing date; and (3) absence of the offender." Directive 410.02, Section 4 (b).

[4] While there are other due process procedural requirements identified in *Morrissey* and additional details in Directive 410.02, they are not at issue in this case.

opportunity to prepare. In this case, Mr. White did not even receive a notice of hearing within the required 4 business days.

Certainly, there can be departures from the Directive that are minimal and do not undermine the essence of procedural protections of liberty, and the *Heim* case represents an example. That does not mean, however, that every furloughee returned to prison automatically acquires a burden of proving specific prejudice even when serious due process violations occur. This would shift responsibility for ensuring due process away from the state, and place the burden of enforcement on individual furloughees, requiring them to remain in prison while they attempt to assert their due process rights. (Mr. White was in prison approximately a month before filing the petition in this case.) This is contrary to both the United States Constitution and DOC's own recognition of its responsibility: "The Department is responsible for providing due process procedures in each case where the offender is incarcerated." Directive 410.02, page 1.

Exhibit F, the document showing the results of Mr. Tyler's initial appeal, gives as a reason for denial that "issues appealed do not indicate that you were unable to adequately defend yourself." At oral argument, the Commissioner's attorney argued that Mr. White had the burden of showing how he was prejudiced at the hearing.

However, if procedures occur that are so fundamentally at odds with the purpose and spirit of the protection of the liberty interest, and they result in time in prison without a hearing or a notice of hearing or sufficient time to prepare, the fundamental requirements of due process as defined in *Morrissey* are lacking. It is not sufficient to say that when Mr. White finally had his hearing, he was found guilty so he cannot show prejudice, or that it is his job to show that proper due process would have resulted in a different outcome. Nor is it sufficient to say that the DOC's own standards for due process do not matter, or that DOC can depart from its own rules and shift to the furloughee the burden to show that noncompliance with due process requirements resulted in prejudice above and beyond extra time in prison.

The Commissioner argues that the faulty October 23rd Notice of Hearing was clearly in error and was thus a nullity. That does not mean it should be ignored. It was part of the process experienced by Mr. White. It was, on its face, a mockery of due process by conveying a message to Mr. White that any hearing right he may have may be manipulated by the Department of Corrections through meaningless documentation to pretend compliance with its own rules. By the time Mr. White received this notice, he should have already had his initial hearing, not to mention a notice of hearing with 24 hour lead time before such a hearing. He did not get a notice of hearing until three days later, and even then, the Notice of Hearing was labeled a "continuance," as if the original notice had been valid, which it was not. Moreover, the notice gave him less than the 24 hours advance notice required by the Directive, leaving him a foreshortened time to prepare for hearing. He got the notice late in the evening, so he had only a few hours in the morning before noon to prepare, including making decisions about witnesses and presentation of evidence.

This series of events represents not just a minor delay in an otherwise fair process of notice and preparation for a significant hearing that could result in incarceration. What occurred was a serious compromise of required due process protections of a recognized liberty interest.

Justice Burger wrote in the *Morrissey* decision, "And society has a further interest in treating the parolee with basic fairness: fair treatment in parole revocations will enhance the chance of rehabilitation by avoiding reactions to arbitrariness." *Morrissey* at 484.[5] People who are entitled to a prompt hearing that could result in imprisonment and who are entitled to notice of that hearing with a reasonable time to prepare are also entitled to have that right enforced. If we expect furloughees to comply with the rules of society rather than experience such rules as arbitrarily applied or ignored or meaningless, those rules must be enforced in their favor when they are entitled to the protection of them.

Due process protections vary with the level of the interest involved. In this case, *Morrissey* has established that as a matter of law, the difference between being in and out of prison is a constitutionally significant liberty interest. Thus the importance of compliance with the fundamental elements of required due process is high. For a case such as this, the fundamental elements are a timely hearing with proper advance notice, including a reasonable amount of time to prepare. DOC has defined for itself the specific number of days and times for implementation. (See the language of Directive 410.02: "must" in footnote 1 and mandatory language footnotes 2 and 3.) Furloughees are entitled to the protection of those rights without having to meet an additional burden of showing in specific ways that there was specific harm from lack of compliance. When fundamental rights have not been respected, several extra days spent in prison without a notice of hearing, without a hearing, and then without sufficient time to prepare for a hearing is sufficient prejudice without having to show additional prejudice.

Mr. White did not receive the constitutional due process protections to which he was entitled under *Morrissey* and *Young v. Harper.* The circumstances of this case include (a) a period of initial suspension that lasted longer than defined standards without notice of hearing or a hearing, (b) an original notice of hearing that was not just meaningless but demonstrated a lack of respect for and commitment to due process requirements and DOC's own rule, and (c) a notice of hearing that did not provide the required amount of time to prepare. What occurred was not an inadvertent error but a fundamental lack of implementation of important protections of a liberty interest that continued over a period of almost a full week (Oct 21, when he should have received an initial notice of hearing, to October 27, when his hearing was held.[6]

Mr. White is entitled to relief that is commensurate with the seriousness of the violations of due process, which rendered his suspension of furlough constitutionally improper.

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[5] As previously noted, *Young v. Harper* extended the impact of the *Morrissey* decision to pre-parole conditional release programs in states.

[6] Exhibit F, which is the result of Mr. White's initial appeal, indicates that the "hearing was delayed due to a Covid lockdown." While there may have been such a lockdown, Mr. White was not given timely notice of an initial hearing and documented good cause reason for delay. The after-the-fact explanation of a Covid lockdown does not explain why he was given no notice of hearing within the first 4 days for a hearing to be held initially by October 22nd, even if it might have had to be continued due to a lockdown. See requirements of Directive 410.02 in footnote 2.

Thus, he is entitled to the relief available to those who are unlawfully detained, which is a writ of habeas corpus.

ORDER

For the foregoing reasons, the Commissioner of the Department of Corrections shall release Tyler White from confinement in prison and return him to serve his sentence on furlough status, and shall expunge the finding of furlough violation that occurred on October 27, 2020.

The Commissioner is not precluded from initiating a new furlough revocation process based on the same charges of furlough violation previously made.

Dated this _____ day of December, 2020.

Mary Miles Teachout
Mary Miles Teachout
Superior Court Judge

John S. Hall (as to facts)
Assistant Judge

Merle Haskins (as to facts)
Assistant Judge