

STATE OF VERMONT

**SUPERIOR COURT
Orleans Unit**

**CIVIL DIVISION
Docket # 21CV1912**

**JULIO DAVILA,
Petitioner**

v.

**JAMES BAKER, Commissioner,
Vermont Department of Corrections,
Respondent**

DECISION: Petition for Habeas Corpus

Petitioner Julio Davila is presently in prison in Newport, Orleans County. He seeks habeas corpus relief in the form of release from prison. The petition came before the court for an evidentiary hearing on October 8, 2021 by Webex. Petitioner Julio Davila was present and represented by Attorney Kelly Green. Attorney Timothy P. Connors represented the Commissioner. The court heard evidence and oral argument and subsequently listened to the audio recording admitted as Exhibit 3. There are claims in the case in the nature of a Rule 75 Request for Review of Governmental Action in which Petitioner seeks judicial review of his furlough revocation hearing. The October 8 hearing was limited to the claims that showed a possible basis for habeas corpus relief. The court explained that if habeas corpus relief was denied, a subsequent hearing could be held for Rule 75 Review of Governmental Action.

Based on the credible evidence, the court makes the following findings of fact and conclusions of law.

Findings of Fact

Prior to January 2021, Julio Davila was in prison serving a sentence. In that month, he was released from prison on furlough, subject to furlough conditions, and Mr. Van Horn became his probation officer. On furlough, he lived in Brattleboro.

In May of 2021, he was arrested by the Brattleboro police and held overnight at the Brattleboro police station. In the morning, he was taken to the Springfield prison, from which he participated in a video arraignment for domestic assault and unlawful mischief based on an affidavit from a police officer who had spoken with Cassidy Grover, a former partner, who claimed he had punched her in the face. Mr. Davila was represented at the arraignment by Attorney Dan Stevens. He told Attorney Stevens that the charges were false and that there was a surveillance video of his home that would show that she had invaded his home uninvited, would not leave, and that any contact with her was unintentional on his part and instigated by her. At the arraignment, he was released on conditions on the new charges, but the Department of Corrections took him into custody in order to seek furlough revocation.

He was taken into custody on May 26, 2021. Pursuant to the terms of DOC Directive 410.02, he was entitled to a hearing within 4 business days, which was June 2, on whether furlough would be revoked and he would remain in prison. On May 29, Corrections Officer Chaffee came to his cell and brought him two NOS (Notice of Suspension) Reports and a Notice of Hearing form. NOS Reports give notice of the reason(s) that DOC is seeking to suspend furlough and reincarcerate a furlougee. The Notice of Hearing provides notice of the date and time of the hearing to be held on whether a furlough violation occurred, and informs the furlougee of his rights and opportunities with respect to the hearing.

The rights and opportunities set forth on the Notice of Hearing include the right to present evidence and call the Reporting Officer and other witnesses, to request the assistance of a Hearing Assistant, to seek a continuance, and to have 24 hour notice of the hearing. The Notice of Hearing form stated that his hearing would be held on June 1 at noon. The boxes on the form are checked stating that Mr. Davila wished to be assisted by a Hearing Assistant, that he did not wish to have the Reporting Officer present, that he requested a continuance to speak to a Hearing Assistant, and that he refused to sign. He did not waive 24 hour notice. He testified that he did not request a continuance or refuse to sign, but that Mr. Chaffee must have interpreted his request for a Hearing Assistant to constitute a request for continuance. He asked to have Jack Parda as his Hearing Assistant.

The first of the 2 NOS Reports charges Mr. Davila of violating three of his conditions: that he (1) Not be cited or charged with a crime, (2) Not engage in threatening, violent, or assaultive behavior, and (3) Not associate with a person identified by his supervising officer, and it specifically states that includes Cassidy Grover. The NOS form stated that he was entitled to a hearing to be held no later than June 2 at 4:30 pm. There is an apparent electronic signature of Reporting Officer Lorenzo Van Horn, who was Mr. Davila's Probation Officer. Below the signature there is a section labeled "Part III – Completed by Investigating Officer." There are several questions and boxes for the investigating officer to complete and then a place for the Investigating Officer's signature. The entire section (Part III) is blank.

The Incident Report attached to the NOS states that Mr. Van Horn was contacted by a Brattleboro police officer who recounted to him what Cassidy Grover told him. He relayed that information to a Supervisor, who called Mr. Van Horn back and told him that Mr. Davila would be held on a NOS suspension. After receiving a copy of the Brattleboro police officer's affidavit, Mr. Van Horn prepared the NOS Report with the three charges. (Incident Report, Page 3 of Exhibit 1). The Incident Report prepared by Mr. Van Horn does not state that he ever talked directly with Mr. Davila (or Ms. Grover), and there is no other evidence that Mr. Van Horn or any other person from the Department of Corrections ever spoke with Mr. Davila or Ms. Grover.

The second of the 2 NOS Reports charges Mr. Davila of violating furlough by being charged with a new crime. Other than that, it is not a completed form and is not signed or dated.

Despite the Notice of Hearing, no hearing took place on June 1 at noon. This is somewhat understandable given that Mr. Chaffee had interpreted Mr. Davila as wanting a continuance and had put that on the original NOH form. However, both June 1 at noon and June 2 at 4:30 passed

without Mr. Davila being given a new Notice of Hearing with a new date and time for hearing, or being provided with a Hearing Assistant.

The next thing that happened was just before 8:00 pm on the evening of June 2. Mr. Davila was awakened by Corrections Officer Berry, who came to Mr. Davila's cell to conduct the NOS hearing. Mr. Davila had not been given 24 hour notice (which he had not waived), and had not had a chance to meet with a Hearing Assistant. He objected to having a hearing right then without 24 hour notice to prepare for the hearing or an opportunity to have witnesses and gather evidence (specifically the surveillance video), and to avail himself of the help of a Hearing Assistant. He told Mr. Berry about the video that showed at least part of the incident and gave Mr. Berry the phone number of Attorney Stevens who knew about the video and also the phone number of his landlord from whom the video could be obtained. He also said that he wanted to call Mr. Van Horn as a witness and he wanted the help of a Hearing Assistant.

Mr. Berry took the phone numbers and agreed to call about the video. Mr. Berry also said that Jack Parda might not be available as the Hearing Assistant due to the coronavirus, but he would see what he could do. Mr. Berry then gave Mr. Davila a Continuance Notice of Hearing that specified a hearing on June 4 at 8:00 pm. Mr. Davila signed the form and boxes were checked showing that he wished to be assisted by a Hearing Assistant, he wished to have the Reporting Officer present—specifically named as Probation Officer Van Horn—and he did not waive 24 hour notice. He testified that although he did not want a delay in his hearing, he had no choice but to agree to a continuance because he had not had 24 hour notice, had not had a chance to try to get the video for evidence, had not met with a Hearing Assistant, wanted to have Mr. Van Horn present at the hearing as a witness, and in general had not had sufficient notice to prepare.

On June 4, prior to 8:00 pm, Corrections Officer Pavlovic came to Mr. Davila's cell and offered to be Mr. Davila's Hearing Assistant. When Mr. Davila requested help in preparing his case, CO Pavlovic declined to get involved in case preparation and said he was only there for due process. Mr. Davila did not get the impression that CO Pavlovic would be 'on his side' and declined his assistance.

CO Berry conducted the NOS hearing on June 4 at 8:00 pm. He read the 3 charges in the first NOS Report. He noted that Mr. Davila had requested a Hearing Assistant, that another prisoner could not be assigned due to Covid, that Corrections Officer Pavlovic had been offered but that Mr. Davila had declined his assistance, and that Mr. Berry himself would advise Mr. Davila if there were any due process violations. Mr. Berry also noted that Mr. Davila had requested the presence of Mr. Van Horn, but that Mr. Van Horn was unable to attend (no reason given) and the hearing would go forward without him.

Mr. Berry stated that on June 2, Mr. Davila had given him the names and phone numbers of Dan Stevens and another person to call to obtain the video of the incident. Mr. Berry stated that he had left a voice mail for Mr. Stevens, who had not responded. When questioned by Mr. Davila, he acknowledged that he had not tried to call the landlord. Mr. Berry stated that the hearing would continue without the video. Mr. Davila objected that denying him the opportunity

to present the video, proceeding without Mr. Van Horn, and denying him a Hearing Assistant violated his right to due process. The hearing continued and Mr. Berry found Mr. Davila guilty of all three charges in the first NOS Report. Mr. Davila's appeals were denied.

Directive 410.02 defines the roles and responsibilities of various persons involved in the furlough revocation process as well as procedures for the due process hearing. Relevant sections are as follows (page numbers refer to Exhibit 2, Directive 410.02; "NA" means that provisions not pertinent to the issues in this case have been omitted):

Reporting Officer

Definition: "**Reporting Staff:** The staff member who recommends bringing a charge against an offender for an alleged furlough violation." (page 3)

Role: "b. Any staff with responsibility for supervision of offenders is authorized to initiate the furlough violation process and return the accused to a correctional facility. (i) At the time of return, field staff will complete and present the offender with a *Notice of Suspension Report form, Attachment 1.*" (page 4)

Investigating Officer

Definition: "**Investigating Officer:** A staff person selected by the Superintendent/District Manager or designee to investigate the charge against an offender and compile evidence for submission to the Superintendent. This person cannot have been involved in the violation incident." (page 3)

***Role:* "3. Investigation**

Investigations will take place on all cases when the offender does not waive the hearing. The Investigating Officer will:

- a. Interview the offender and other parties who may have information about the incident as soon as is practical;
- b. Make a record of the interviews for further review – records must include any accommodations needed;
- c. Take written statements from witnesses and, when appropriate, gather pertinent supplemental records prepared by others;
- d. [NA]
- e. [NA]
- f. [NA]
- g. Notify the offender not less than twenty-four (24) hours prior to the hearing (*Notice of Hearing form, Attachment 2*). The offender may waive the twenty-four hour notice by indicating so in writing using the *Waiver of 24 Hour Notice of Hearing* (bottom of *Notice of Hearing, Attachment 2*.) At this point the Department may hold the hearing any time within four (4) business days of the return. Day one (1) begins at the start of the first full business day after the return.

- h. Prepare a report of findings and a recommendation to be included with the violation packet. They will recommend to the Superintendent or their designee one of the following:
 - a. Refer for resolution of charge as reported
 - b. Dismiss the charge
- i. Provide the offender with a *Notice of Hearing (Attachment 2)* and copies of all non-confidential reports, including the Investigating Officer's report. The offender will have 24 hours prior to the hearing to review the violation packet. (pages 5-6)

Hearing Assistant

Definition: "**Hearing Assistant:** A person who assists an offender in preparing and presenting their case. It does not have to be a staff person, but cannot be an attorney." (page 3)

Role: "c. Hearing Assistant Role

- (i) An offender has the right to a hearing assistant to help them prepare their case; however, this cannot be an attorney.
- (ii) – (v) [NA] (pages 6-7)

Hearing Officer

Definition: "**Hearing Officer:** A person designated by the Commissioner of Corrections and assigned by the Superintendent or designee to conduct administrative due process hearings." (page 3)

Role: "e. Hearing Officer Role
[NA]

- (i) The Hearing Officer will conduct the hearing in a professional and fair manner. [NA]
- (ii) During the hearing, the Hearing Officer will explain to the offender the nature of the violation(s) and the offender's rights and opportunities as outlined on the *Notice of Hearing*.
- (iii) – (v) [NA] (page 7)

Note: The *Notice of Hearing* form includes, among other rights and responsibilities:

—"To present documentary evidence and call the Reporting Officer and/or other reasonably available witnesses who have relevant information, provided the witnesses are not unduly hazardous to facility security, order or discipline.

--To question or cross-examine witnesses at the hearing and to review factual evidence, if not hazardous to institutional security." (page 13)

Conclusions of Law

Petitioner claims that the Department violated Mr. Davila's rights to a pre-incarceration due process hearing in the following ways:

- (1) failing to assign an Investigating Officer to conduct interviews about the incident and obtain information and the surveillance video as evidence;
- (2) failing to assign a proper Hearing Assistant to help Mr. Davila prepare his case for hearing;
- (3) depriving Mr. Davila of an unbiased Hearing Officer;
- (4) providing a hearing that was delayed and, as a result, untimely; and
- (5) failing to have the Reporting Officer Mr. Van Horn, who had been requested by Mr. Davila as a witness, at the hearing for questioning or cross examination; and
- (6) failing to allow Mr. Davila to present his video evidence at the hearing.

The Department argues in response that:

- (1) an investigation was done by the Reporting Officer Mr. Van Horn;
- (2) Mr. Davila was provided with a Hearing Assistant, whose assistance he declined;
- (3) the Hearing Officer helped as he felt necessary;
- (4) any delays were caused by continuances requested by Mr. Davila;
- (5) the Reporting Officer's testimony was provided through alternative forms; and
- (6) the video was irrelevant to the fact of guilt or innocence of pending criminal charges.

The Department also argues that although there were some irregularities in the process, there was no prejudice to Mr. Davila, and that a habeas proceeding is not the proper forum for litigating the factual issues related to the charged crimes.

The Department does not challenge Petitioner's position that Mr. Davila had a liberty interest once he was released from prison and was entitled not to be reincarcerated without the due process protections established in *Morrissey v. Brewer*, 408 U.S. 471, 488-89 (1972), extended to furlough programs by *Young v. Harper*, 520 U.S. 143 (1997), and implemented in Vermont by the provisions of Directive 410.02.

The procedural protections established in *Morrissey* include, among others:

At the hearing the parolee may appear and speak in his own behalf; he may bring letters, documents, or individuals who can give relevant information to the hearing officer. On request of the parolee, person who has given adverse information on which parole revocation is to be based is to be made available for questioning in his presence. . . 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.

Morrissey at 487-488.

With these provisions in mind, each of the issues raised are addressed below.

Sufficiency of Investigation

The provisions quoted above from Directive 410.02 about investigations show that an Investigating Officer is to be appointed to interview the furlougee "as soon as practical" to gather information and take written statements and gather "records," and it may not be a person who was involved in the incident. The role is separate from that of the Reporting Officer. Mr. Van Horn signed as the Reporting Officer. Although apparently it was his Supervisor who made the revocation decision, it is unknown whether it was the Supervisor or Mr. Van Horn who determined to charge three separate violations. Mr. Van Horn did not write anything in the Investigation section, nor sign it. He was involved in the incident in that he received hearsay telephone information from the Brattleboro police officer over the phone and relayed it to a supervisor before the police officer had prepared a written affidavit. That information was used by the supervisor to tell Mr. Van Horn to initiate suspension. Whether he participated in the decision about what violations to charge is unknown. In any event, he was involved in the circumstances leading to the charges and identified himself as the Reporting Officer such that he was ineligible to be the Investigating Officer.

The Department argues that his investigation was adequate, but not only was he not eligible to be the Investigating Officer, he did not actually do any investigation. He did not "interview the offender [Mr. Davila]. . . as soon as practical" and there is no evidence that he ever interviewed Mr. Davila or anyone else or took any other action. He did not complete the Investigation section of the NOS form.

There were two charges in addition to the first charge of being cited for or charged with a crime: the additional charges were engaging in "threatening, violent, or assaultive behavior," and associating with Cassidy Grover in violation of his furlough conditions. There is no evidence that any one ever investigated those charges. The Investigation section (Part III) on the NOS form is blank. Mr. Davila actually knew of pertinent evidence related to those charges—the surveillance video—but because no investigation was conducted, there was no one to gather it.

The evidence shows that from May 26 to May 29, the Department did nothing to pursue an investigation or schedule a hearing. Mr. Davila apparently did not actually have the NOS notice of the three charges until May 29. It was not until Mr. Chaffee delivered the NOS Reports and Notice of Hearing on May 29 that the Department would have become aware that Mr. Davila wished to present evidence and have a Hearing Assistant and 24 hour notice.

As of May 29, the Department still had 4 days (to June 2; an extended time due to the 3-day Memorial Day weekend) to conduct an investigation and provide a Hearing Assistant and provide a new Notice of Hearing with 24 hour notice. The evidence shows that not only did it not do any of those things, but the next event was Mr. Berry going to

Mr. Davila's cell to hold a hearing, so there was apparently no intent or effort to do an investigation or appoint a Hearing Assistant prior to a hearing.

Thus, when Mr. Berry arrived at Mr. Davila's cell at 8:00 pm on June 2 (with no advance notice to Mr. Davila) to conduct a hearing, there had still been no investigation and no attempt to provide a Hearing Assistant. This was actually past the deadline for DOC to have held a revocation hearing (June 2 at 4:30), but it had not met its obligations to provide Mr. Davila with the meaningful hearing opportunity specified in *Morrissey*, as it had not permitted Mr. Davila access to an Investigating Officer to gather information and evidence he could present. It had also not given Mr. Davila 24 hour notice of an actual hearing. In addition, it had not provided a Hearing Assistant as specified in Directive 410.02 and requested by Mr. Davila.

When Mr. Berry learned that Mr. Davila was seeking to present the surveillance video, he accepted the phone numbers of Attorney Stevens and the landlord and agreed to contact them. He was no doubt meaning to help. However, in doing so he stepped out of his role as the Hearing Officer obliged to conduct a fair, impartial, and professional hearing, and agreed to take on a task appropriate for an Investigating Officer. Although he made one phone call, he did not follow up but stepped back into his role as Hearing Officer without following through with an investigation or assuring that another person conducted an investigation, with the result that no proper investigation ever took place despite the fact that Mr. Davila had made it clear, prior to any hearing, that evidence existed that was appropriate for investigation.

As of June 2, DOC, having knowledge of the need for investigation and having given itself 2 more days,¹ still did nothing to conduct an investigation. No Investigating Officer interviewed Mr. Davila or Attorney Stevens or his landlord or took any steps to obtain the surveillance video. Mr. Berry's one phone call with no followup did not constitute an adequate investigation as defined in the Directive nor result in a Report to be submitted as part of the violation packet as called for in the Directive. As a result, Mr. Davila was deprived of the opportunity to offer any evidence at the hearing other than his own oral statement, despite his efforts to be able to offer the surveillance video and testimony from Mr. Van Horn.

Moreover, Mr. Berry, however well-meaning he had intended to be, now had partially undertaken an investigatory function, but did not step down as Hearing Officer. By indicating that he would take steps to get the video evidence, he compromised the independence and impartiality of the officer responsible for conducting the administrative due process hearing. He neither followed through as an Investigating Officer by investigating and ensuring that someone else become the Hearing Officer, nor did he

¹ While it is true that Mr. Davila requested the continuance, it was necessitated by the fact that the Department had not done the things it was obliged to do by then: investigate, give a new 24 hour Notice of Hearing, and assign a Hearing Assistant.

ensure that a proper investigation took place by a duly appointed Investigating Officer prior to a hearing.

In sum, the Department did not follow its own Directive, designed to provide furlougees potentially subject to reincarceration with the due process requirements to which they are constitutionally entitled. The Directive required it to name an Investigating Officer other than Mr. Van Horn to conduct an investigation, including interviewing Mr. Davila "as soon as practical" as well as interview others and gather pertinent information and evidence--in particular in this case, the surveillance video, and prepare a Report. The result of this failure was that Mr. Davila was not able to exercise the right defined in *Morrissey* to present evidence and seek to show that he had not violated furlough conditions. Thus his fundamental right to due process protections was compromised.

While it is arguable that there was no point in doing an investigation about the first of the three charges as an "investigation" had been done by the Brattleboro police and it was undisputed that he had been charged with a new crime, Mr. Davila still had the right to provide information and evidence and cross examine pertinent witnesses with respect to the second and third independent charges: whether he engaged in "threatening, violent, or assaultive behavior," and whether he associated with Cassidy Grover in violation of his furlough conditions. If he were found not guilty of those, that information would have been in the Hearing Report, and Mr. Davila could have made a statement that also would have been part of the Hearing Report (Directive 410.02, page 8) which would then go to Case Staffing and could have resulted in "circumstances in mitigation [that] suggest that the violation does not warrant revocation." *Morrissey* at 488. Thus, he missed the opportunity to present evidence showing that even if there were new criminal charges, they did not represent a reason for the most serious sanction of incarceration.

Another result of the way the process unfolded was that Mr. Berry became compromised in his role as an impartial Hearing Officer. He had departed from that role, and agreed to undertake an investigative task, which was not actually fully carried out but was inconsistent with his role as a professional and impartial Hearing Officer. He wound up ruling at the hearing that his own one uncompleted attempt to contact Attorney Stevens was sufficient investigation. This also contributed to a hearing lacking in fundamental fairness as the Hearing Officer had been involved in the case in another role, and then later ruled that what he had done as investigator was sufficient for a fair hearing.

Hearing Assistant

Petitioner claims a lack of due process in that he was not provided with a "proper" Hearing Assistant who could help him prepare for his hearing. The evidence is clear that he was, ultimately, prior to the hearing, provided with a Hearing Assistant. There was a difference between Mr. Davila's expectations about what a Hearing Assistant would do and Mr. Pavlovic's views about what he was willing to do. It is not necessary to explore this difference. It is clear that Mr. Davila declined any assistance.

The Hearing Assistant's role is simply and broadly defined in the Directive as helping "prepare the case" but it is not necessary that the person have the knowledge and expertise that an attorney would have. The Hearing Assistant was available and Mr. Davila declined all assistance. The *Morrissey* due process requirements do not include having the help of a hearing assistant, and even the Directive does not include any specified obligations for the role. The court cannot conclude that what happened concerning a Hearing Assistant constitutes a failure of due process protections.

Delay

The Department argues that the delay in the hearing (2 days beyond the deadline) was the result of two continuances requested by Mr. Davila as shown on the NOH documents. Mr. Davila disputes that he requested the first continuance and argues that he had no choice but to request the second one when the Department had not met its own due process obligations. The court agrees that the reasons for delay on both occasions were that the Department had not met its obligations to do a timely investigation that would result in his ability to have a fair and impartial hearing, and to provide timely notice of a hearing and a Hearing Assistant.

It was primarily the lack of investigation and lack of attention to Mr. Davila's rights that impeded his ability to be able to have a timely and meaningful hearing at which he could exercise the right to present his own evidence and challenge the evidence against him. The delay resulted from the lack of investigation and other procedural failures, including lack of timely notice of hearing. Although he was the one to request the second continuance, he was not responsible for the reason he had to request it.

Presence of Mr. Van Horn at hearing

On the June 2 Notice of Hearing form, Mr. Davila clearly requested the presence of Mr. Van Horn, his Probation Officer and the person on the phone involved in the process of the decision to take him into custody and the author of the Incident Report. At the hearing, Mr. Davila objected to going forward with the hearing without him and no specific reason was given by Mr. Berry as to why he was not there. However, this is an issue about a decision made at the hearing. The court is not presently engaged in a Rule 75 Review of the conduct of the furlough revocation hearing.

The court cannot conclude that the specific fact of the absence of Mr. Van Horn at the hearing amounted to a fundamental due process violation sufficient to invoke habeas corpus relief, even if a court reviewing the revocation hearing in a Rule 75 proceeding might consider that it warranted a new hearing. Rather, the failure of due process came from the overall series of actions demonstrating a lack of attention to Mr. Davila's right to be able to provide and present *any* evidence at the hearing (such as the video and perhaps questions to Mr. Van Horn), other than his own statement, to challenge the evidence against him. This was primarily due to the absence of the prehearing investigation activities and Investigation Report called for in Directive 410.02.

Whether Mr. Davila was allowed to show the video at the revocation hearing

Petitioner cites the inability to show the video at the hearing as a due process violation. The Department says it is irrelevant to prove guilt or innocence. While it could be relevant to proof of guilt or innocence on the second and third charges, the court is not presently conducting a Rule 75 Review of Governmental Action review of the procedural fairness of the hearing itself. The fundamental reason that there was a failure of due process for Mr. Davila was that the DOC failed to provide the investigation and gathering of information and evidence that would have allowed him to present evidence responsive to the charges as he was entitled to do as a matter of due process.

Prejudice

The Department argues that despite irregularities, the process of Mr. Davila's hearing was not so fundamentally flawed as to constitute a lack of due process. In making this argument, the Department points to the fact that Mr. Davila was charged with two crimes, presumably suggesting that more procedural due process would not have made a difference—he still would have been found guilty of being charged with crimes. The fact that he was charged with two crimes was only one of the three charges. For the reasons previously stated, he was entitled to full due process concerning all three charges, and the fairness of the process must be observed with respect to all the charges, including the two that were not criminal charges. There could be a significant impact on consequences, for as stated in *Morrissey*, his hearing opportunity extends to providing evidence that could result in mitigation of consequences, including a subsequent case staffing decision for sanctions other than revocation of furlough and reincarceration in prison.

Summary

There are irregularities or departures from strict compliance with Directive 410.02 and due process procedure that have such a minimal impact that they do not constitute a meaningful denial of constitutional due process protections. In this case, Mr. Davila clearly wished to avail himself of the opportunities guaranteed by *Morrissey* to have a hearing at which he could “give relevant information to the hearing officer,” and “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.” *Id.* He did not waive any available opportunities to seek to exercise those rights.² In particular, he made it known that there existed a surveillance video with relevant information to the charges against him, and he provided information for obtaining that video.³

² While he declined the assistance of a Hearing Assistant, he continually sought to be able to show the video as countervailing evidence to the facts relied on in the material attached to the NOS.

³ This court did not admit the offered video into evidence at the October 8th hearing and has not viewed it and takes no position on the charges or defenses. The focus is on whether constitutional due process requirements were met.

The investigation required by Directive 410.02 provides the avenue that leads to the ability of the furlougee to exercise the right to respond to charges at a due process hearing. Specifically, if Mr. Davila had been interviewed in a timely manner, or even at all, he could have given the information about the surveillance video that could have been investigated and potentially made available for the hearing. As it was, there was no investigation at all, and he was denied the opportunity to meaningfully present evidence in response to the allegations of violations.

A secondary effect of the lack of investigation was delay. If DOC had named an Investigating Officer who had interviewed Mr. Davila "as soon as practical," it would have been immediately apparent that he had relevant evidence for the hearing, but because he was not interviewed at all, it was not until the June 2 improperly noticed 'hearing' that DOC learned he even had evidence that he wanted to present. This, together with the lack of 24 hour notice and provision of a Hearing Assistant, necessitated his request for a continuance that delayed the hearing beyond the short period of incarceration prior to a hearing allowed under *Morrissey* and the Directive.

Moreover, the fact that the Hearing Officer undertook an investigatory task and did not follow through with it or assure that an actual investigation was done by someone other than himself compromised his impartiality as a Hearing Officer, thereby denying Mr. Davila the impartial Hearing Officer to which he was entitled.

These are not minor irregularities; rather in combination they go to the fundamentals of due process to which a person facing potential incarceration is entitled. Simply providing a new hearing would not address the deficiencies in the process leading up to the hearing.

Therefore, the court concludes that Mr. Davila is entitled to habeas corpus relief.

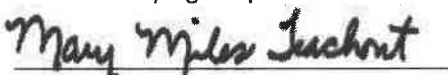
ORDER

For the foregoing reasons, the Commissioner of the Department of Corrections shall release Julio Davila from confinement in prison and return him to serve his sentence on furlough status, and shall expunge the finding of furlough violation previously made.

Based on this outcome, it is not necessary to conduct a Rule 75 review of the furlough revocation hearing, and the case is concluded.

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

Electronically signed pursuant to V.R.E.F. 9(d) on October 22, 2021 at 2:38 PM.


Mary Miles Teachout
Superior Court Judge