**STATE OF VERMONT**



**SUPERIOR COURT**
**Washington Unit**

**CIVIL DIVISION**
**Docket No. 633-11-17 Wncv**

**DOMINICK HOUGH**
**Plaintiff**

**v.**

**LISA MENARD**
**Defendant**

**DECISION and ORDER**
**Cross-Motions for Summary Judgment**

Dominick Hough, an inmate in the custody of the Commissioner of the Department of Corrections, seeks review of the Vermont Department of Corrections' determination, following an evidentiary hearing, to revoke Mr. Hough's furlough. The hearing officer found that he violated furlough conditions proscribing threatening or assaultive behavior and the consumption of regulated drugs without a prescription.

The parties have filed cross-motions for summary judgment. Mr. Hough argues that his confrontation rights were violated at the hearing and the evidence of drug use was insufficient as a matter of law. The State argues that Mr. Hough failed to preserve these issues for review here by failing to raise them in his administrative appeal and that, in any event, the evidence presented against him at the hearing satisfies the "some evidence" standard applicable in ordinary prison disciplinary cases and otherwise the court should defer to the DOC.

The State's reliance on the "some evidence" standard, among other things, caused the court to seek additional briefing on the proper standard of review applicable to this case. Mr. Hough responded at length, explaining in detail that the "some evidence" standard does not apply to review of a furlough revocation decision. The State pointed to Rule 75 and otherwise declined to address the matter or revise its summary judgment arguments in response to Mr. Hough's supplemental briefing.

*The proper standard of review*

Many types of furlough, including Mr. Hough's extended, conditional release, are the functional equivalent of parole for due process purposes. See *Young v. Harper*, 520 U.S. 143, 149 (1997); *Holcomb v. Lykens*, 337 F.3d 217, 222 n.5 (2d Cir. 2003) (juxtaposing *Young* and *Conway v. Cumming*, 161 Vt. 113 (1993)); *Wood v Pallito*, No. 102-2-10 Wncv, 2010 WL 4567692, at *6 (Vt. Super. Ct. Nov. 3, 2010) (noting that "contemporary authority . . . rejects formalistic distinctions between furlough and parole in favor of a comparative analysis of the actual rights and obligations involved").

Because Mr. Hough's liberty interest in furlough is functionally equivalent to a parolee's, the court applies the same review standards to the furlough revocation decision in this case as it would to a parole revocation decision. See generally *Rodriguez v. Pallito*, 2014 VT 18, 195 Vt. 612 (discussing review standards applicable to parole revocation in detail); see also *Relation v. Vermont Parole Board*, 163 Vt. 534 (1995) (discussing preponderance standard of proof for revocation decision itself).

Accordingly, the court generally defers to the DOC's factfinding and reviews "the sufficiency of the evidence . . . [to] determine only whether there is any competent evidence to justify the adjudication." *Rodriquez*, 2014 VT 18, ¶ 16. Competent evidence means "credible evidence [that] supports the conclusion" to the requisite extent. *Id.* (citation omitted). The court does not defer to the DOC on matters beyond the DOC's expertise, including constitutional questions. *Id.* ¶ 18.

*Preservation*

There is no dispute that Mr. Hough had an opportunity to appeal the hearing officer's decision administratively and he in fact did so. See Directive 410.02, Procedural Guidelines § 6. The State argues, however, that he did not preserve the issues that he raises here by also raising them in his administrative appeal. See generally *Pratt v. Pallito*, 2017 VT 22, 204 Vt. 313 (distinguishing preservation from exhaustion and analyzing preservation in prisoner grievance case in depth).

The court is not persuaded that there is any defect in preservation in this case. The purpose of the preservation requirement, which is not jurisdictional, is to ensure that the agency has a fair chance to address an issue before it is presented to the judicial branch for further review. *Pratt*, 2017 VT 22, ¶ 16. In arguing that Mr. Hough failed to preserve the two issues he raises here, the State looks exclusively at what Mr. Hough wrote on his administrative appeal form without considering the context in which he wrote it and the substance of the earlier revocation hearing it followed. While the court does not hesitate to enforce the preservation requirement when an agency did not have a fair opportunity to address an issue, that is simply not the case here: application of the preservation requirement in the circumstances of this case would be unfair.

At the revocation hearing, Mr. Hough clearly and in detail argued the issues he raises here: that evidence that he consumed marijuana *while on furlough* was insufficient for a variety of reasons and the sole witness against him regarding any assault was lying, and he insisted on confronting her. It is unfair to interpret his administrative appeal as somehow abandoning these issues. Preservation has a salutary purpose, but it is not intended to be a surprise trap for an unrepresented party that insulates an agency from review of an issue it had an opportunity to address in the first instance.

*Confrontation*

The only evidence of any threatening or assaultive behavior presented at the revocation hearing was in the form of an affidavit from Mr. Hough's ex-girlfriend, which was hearsay, and the report of a probation officer which recounted the allegations in that affidavit or other statements the ex-girlfriend had made, which was double-hearsay. In opposition to that evidence, Mr. Hough testified in detail that the ex-girlfriend was emotionally unstable, had been threatening to make false allegations in reaction to learning that Mr. Hough had initiated an intimate relationship with another woman, that he had so warned the corrections officer who supervised him in the community, and that he had never assaulted or threatened the ex-girlfriend. He insisted on having her testify, indicating that he was confident that she would admit that her allegations were false.[1] Even if she did not, the hearing officer would have been better equipped to assess the credibility of her various statements through testimony.

At the hearing, the hearing officer, toward the end, said she would attempt to get the ex-girlfriend on the phone to testify. She then went off the record. When she came back on the record, she had not attempted to get the girlfriend on the phone, and instead—without explanation—spontaneously found Mr. Hough guilty of threatening and assaultive behavior based on the ex-girlfriend's affidavit alone. There was no other evidence of it. She later wrote on the Incident Hearing Report that she did "not feel comfortable" calling the ex-girlfriend because she is the victim of the alleged assault.

The hearing officer made no findings whatsoever to justify any good cause to deny Mr. Hough his right to confront his ex-girlfriend, whose affidavit was the only evidence against him. See *Rodriguez v. Pallito*, 2014 VT 18, ¶ 19, 195 Vt. 612 (explaining that the court has the authority to determine whether good cause existed to deny confrontation rights). Nor did anything in the record or occurring at the hearing suggest any obvious good cause. There was no corroborating evidence of any assault. Mr. Hough was not apparently acting in an intimidating or threatening manner at the hearing. There was no evidence in the record that the ex-girlfriend was known to suffer from any history of domestic violence by Mr. Hough (other than the isolated allegations in her affidavit). There was no evident risk of harm or harassment presented to the ex-girlfriend if she had testified. There simply was no reasonable basis for the hearing officer's decision to not permit Mr. Hough to confront the only witness against him and instead rely exclusively on a wholly uncorroborated affidavit. This was error of a constitutional dimension. At the hearing, Mr. Hough was not afforded the due process to which he was entitled.

*Marijuana use*

The hearing officer also found Mr. Hough guilty of marijuana use. The *only* evidence of marijuana use at all was a single hearsay statement in the report of a probation officer that Mr. Hough had come in for a urinalysis and had tested positive for THC only and not cocaine, which his ex-girlfriend had accused him of consuming and which presumably prompted the urinalysis.

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[1] He later produced an affidavit from her to that effect. On appeal, he also cites evidence of his ex-girlfriend's many criminal cases involving crimes calling into question her credibility and involving dishonesty. Although the State has not objected to it, the court does not consider any of this evidence on appeal.

Mr. Hough testified at the hearing that he had not consumed marijuana while on furlough but had consumed it prior to release on furlough. He represented that it was still in his system during furlough. He also explained that the DOC should have documentation of that, though no one presented any such documentation. He also argued that there was no drug test result in evidence, no chain of custody evidence in the record, no testimony of any witness to any marijuana use, and no corroborating evidence of any kind.

Without making any more detailed findings, the hearing officer simply found that Mr. Hough "[tested] positive for THC."

The hearing officer's finding is equivocal at most. To the extent that Mr. Hough tested positive, the issue was whether the positive test result reflected marijuana use while on furlough. At issue was a furlough condition that barred consumption of regulated drugs without a prescription *while on furlough*. He could not have violated a furlough condition by conduct predating the imposition of the condition. The hearing officer made no findings on these issues.

In any event, a single isolated hearsay statement reporting that there was a positive test result in the most general terms, without *any* contextual or corroborating evidence of any kind, and no chain of custody evidence or more detailed description of the test and result, can pass for "competent evidence" sufficient to support a finding of drug use at a particular time, particularly where there is competing evidence.

The DOC was supposed to conduct a detailed investigation once Mr. Hough made clear that he disputed the charges against him. That investigation was supposed to include, among other things, the following:

> a. Interview the offender and other parties who may have information about the incident as soon as is practical;
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> 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;
>
> . . .
>
> 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.

Directive 410.02, Procedural Guidelines § 3. There is no indication in the record of any such investigation in this case. Instead, the appearance is that the DOC relied exclusively on a hearsay affidavit and a largely double-hearsay report and made no effort to conduct any investigation or conduct the proceeding fairly. This is insufficient, particularly so with a substantial liberty interest at stake.

ORDER

For the foregoing reasons, Mr. Hough's motion for summary judgment is *granted*; the State's motion for summary judgment is *denied*.

The furlough violation finding is vacated and the matter is remanded to the Department of Corrections for a new hearing.

Dated at Montpelier, Vermont this 31st day of August 2018.

Mary Miles Teachout

Mary Miles Teachout
Superior Judge