STATE OF VERMONT

SUPERIOR COURT
Orleans Unit

CIVIL DIVISION
Docket No. 21-CV-157

LEVI DAVIS

v.

VERMONT DOC

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 for incarceration when he was returned to prison from furlough. Petitioner Levi Davis is represented by Attorney Kelly Green. Respondent, the Commissioner of the Department of Corrections, is represented by Attorney Patrick T. Gaudet. By agreement, the attorneys submitted the case on a written stipulation of facts and stipulated exhibits. The court heard oral argument on February 25, 2021 by Webex. During oral argument, Respondent's counsel asked the court to take judicial notice of many facts related to judicial proceedings in the Rutland Unit that were not part of the stipulated facts and exhibits. The court permitted Respondent's counsel to file a supplement specifically identifying those facts and exhibits, and permitted Petitioner's counsel to file a supplementary memo in response. Respondent's counsel filed a response to Petitioner's memo. The court has taken all material into account.

Based on the facts, the evidence and the arguments, the court makes the following Findings of Fact and Conclusions of Law, and grants habeas corpus relief to the Petitioner.

Facts

In July of 2020 Petitioner Levi Davis was on furlough from prison. He was arrested on July 28, taken to jail in Rutland, and given a Notice of Suspension Report stating that he was accused of violating his furlough conditions. It stated that his furlough violation hearing would be held no later than August 3, 2020 at 4:30 pm. This represented the maximum period of 4 business days in which a hearing must be held as required by DOC Directive 410.02. It is written on the form that he declined to discuss the incident and that he would "talk about it at the hearing." (Ex. 3)

On July 31 at 13:20 hours (1:20 pm), he was given a Notice of Hearing form. It stated that his hearing would be on "7/31/2020 at 12:00 hours." This was an impossibility, since he was given the form more than an hour after that time had already passed. Nonetheless, he completed the form acknowledging his rights and specifying that he wished to be assisted by a specifically named Hearing Assistant and that he wished to have the Reporting Officer, Jamie Dickey, present. He checked boxes signifying that he did not request a continuance and did not waive 24

hour notice.[1] He signed the form at 1:31 pm. Given the impossibility of the date and time, indicating that either the date of 7/31/2020 or the time of 12:00 hours or the entire Notice was in error, this Notice did not give proper notice of a hearing.[2] No hearing was held on July 31st. After the faulty Notice of Hearing form he received that day, he was not given any other Notice of Hearing for a hearing at any other date or time.

No hearing took place on August 3 (the 4th business day). At 2:01 that afternoon, an email was sent to the Reporting Officer, Jamie Dickey, stating that "Levi Davis has requested that you testify for his NOS hearing. Tomorrow is day 4 so we will need to hold it tomorrow," and asking for a phone number and good time to call so he could testify by phone. (Ex 7.) This was in error, as day 4 was actually August 3, the day the email was sent. The email shows that there was no intent to hold the hearing on August 3 by 4:30, the latest time identified for a hearing. Rather, DOC was planning a hearing for August 4, and no time had yet been established. Mr. Dickey responded with "1030" and a phone number. This was relayed by email to the Hearing Officer, Mr. Elwood. Mr. Davis was not given any notice that a hearing was planned for August 4. Directive 410.02 provides for a hearing to be continued for one day for good cause to be documented on the Hearing Report form.[3] The Incident Hearing Report (Ex. 6) does not document a reason that the hearing was continued beyond August 3.[4]

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[1] "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).

[2] It is noted that at the top of the form is a handwritten "8/03." That may be a notation as to the deadline date for a hearing, although that cannot be determined.

[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] At the hearing that was held on August 5, Mr. Elwood stated on the record that when he talked with Mr. Davis on August 4, he explained that the reason for delay was to get Mr. Davis's witness for the hearing. August 4, when that conversation took place, was already one day beyond the deadline without a good cause explanation for the delay from August 3 to August 4. There is no evidence that any attempt was made prior to 2:00 pm on August 3 to arrange for witness availability, or that any attempt was made to have a hearing on August 3.

On the morning of August 4, the Hearing Officer, James Elwood, approached Mr. Davis, who claims he was sleeping, and told Mr. Davis that his hearing would be held at 10:40 am that day. Mr. Elwood's approach to Mr. Davis was apparently close to 10:40 when that occurred (as indicated by signatures on Ex. 5 as described below, and considering that the Reporting Officer was scheduled to testify by phone at 10:30). According to Mr. Elwood's account the following day, Mr. Davis went on a "rant" and claimed that it (presumably the hearing) was a day late.

A Waiver/Refusal form was completed by two DOC personnel. (Ex. 5). Under the "Waiver" portion of the form, it is written that "The hearing has been scheduled for 10:40 hours on 8-4-20."[5] Although the box is checked that would signify a waiver and admission of guilt, Mr. Davis did not sign that portion of the form and the Department does not contend that he waived appearance. Under the "Refusal" section of the form, there is a printed line for a person to complete stating the time when he "saw" the person at issue and that he "advised the offender of the right to appear before the Hearing Officer on _____," but the blanks in this printed line are not completed. Below the blank lines is the preprinted sentence: "The offender declined to appear at the hearing but refused to sign *A Waiver of Appearance.*" Below that line are two illegible signatures. Next to both signatures is the date 8/4/20 and the time of 10:40.

Thus it appears that shortly before 10:40 on the morning of August 4, Mr. Elwood approached Mr. Davis about a hearing to take place right then unless he signed either a waiver (thereby admitting guilt) or a refusal to attend. There had been no notice to Mr. Davis of that date and time for a hearing. His response was interpreted as a refusal to attend a hearing, but there is no evidence that a hearing was held that day. There is no record that any attempt was made to commence a hearing.

That same day, August 4, Mr. Davis wrote an appeal to the DOC Commissioner in which he references the Notice of Hearing he received on July 31. He stated that he did not have a hearing on July 31 and did not get notification of a continuance or of a hearing set for August 4. "I was woken to officer stating I had a DR hearing to be held. To my knowledge and Directive this alleged N.O.S. hearing timed out on 8-3-20 and due to this scheduled hearing set on 7-31-20 was never held or was a continuance given or any notification of any continuance. . .Alleged set hearing on 8-4-2020 is a clear violation of my due process and in fact another way to continue wrongful imprisonment." (Respondent's Request for Judicial Review, Attachment B, page 24.)

A hearing was held the following day, August 5, but Mr. Davis did not know about it. He was not given any notice, either in writing or orally, of the date and time and was not present. Mr. Elwood, the Hearing Officer, began the hearing by stating on the record that he (Mr. Elwood) "attempted to do this [hearing] yesterday within its time frame."[6] Mr. Elwood continued by saying that Mr. Davis became disruptive and "made the determination that he no longer wanted to participate in the hearing." (Hearing Audio.) Mr. Elwood then continued by saying that he was going to "continue the hearing today," and treated Mr. Davis's comment the day

[5] There is no Notice of Hearing for that date and time.

[6] "Yesterday," August 4, was not within the time frame but one day beyond it.

before as a refusal to appear. Oddly, when a Notice of Hearing was presented and identified on the record, presumably to show that Mr. Davis had received notice of the hearing, the Notice of Hearing that was identified was the July 31st 1:20 pm Notice that stated that the hearing would take place an hour and 20 minutes earlier, a time that had already passed. There was no other identification of any written notice to Mr. Davis of any hearing date or time.

The facts are clear that the hearing was required to be held by August 3, but could be continued for one day for good cause or longer with the approval of the Superintendent. The only date and time for a hearing ever reasonably communicated to Mr. Davis was the "no later than" date and time of August 3 at 4:30. Although Mr. Davis received a Notice of Hearing on July 31st, it was clearly in error and did not communicate a date and time of hearing, and he never received anything else. He signed the statement on the form indicating that he did not waive 24 hour notice. He never received notice that a hearing would be held on August 5.

The hearing was held without notice to Mr. Davis and 6 business days after he was incarcerated, two days beyond the allowed window for hearing, with no approval from the Superintendent for a continuance for good cause and no waiver from Mr. Davis.

The Hearing Officer interpreted Mr. Davis's response to the surprise oral notification at 10:40 on August 4 of an immediate hearing as a refusal to attend any hearing at all, no matter when held, and relied on that "refusal" when he went ahead with a hearing on August 5 for which Mr. Davis received no notice. The hearing on August 5 was held at noon without Mr. Davis's knowledge. Mr. Davis was found guilty of violating furlough conditions and kept in prison.

Conclusions of Law

Petitioner alleges that his reincarceration is unlawful because he was deprived of procedural due process upon his return to prison when he was given no notice of the date and time of his furlough revocation hearing and when the hearing, of which he received no notice, occurred after the time required by the Department's own Directive had "timed out." He seeks habeas corpus relief for wrongful imprisonment based on lack of due process.

The Department opposes the claim on three grounds: (1) that relief is available to Petitioner through a Rule 75 Review of Governmental Action case he filed in the Rutland Unit on September 10, 2020; (2) that he should be precluded from habeas relief in this case because he has a prior pending action in the Rutland Rule 75 case; and (3) that a furloughee has no liberty interest to which due process protections attach, and even if there were violations he cannot show prejudice.

Liberty Interest; Prejudice. As the Commissioner's counsel acknowledged, this court has repeatedly ruled that furloughees have a liberty interest that entitles them to the due process protections set forth in *Morrissey v. Brewer,* 408 U.S. 471 (1972) and made applicable to state pre-parole release programs in *Young v. Harper,* 520 U.S. 143 (1997). As a result, furloughees are entitled to due process protections prior to revocation of their furlough status and

imprisonment beyond a brief period of immediate suspension. Rather than repeat the analysis, reference is hereby made to *White v. Baker,* No. 146-11-20 Cacv (Caledonia Sup. Ct., December 10, 2020)(Teachout, J.) and *Paquette v. Baker,* No. 119-9-20 Cacv (Caledonia Sup. Ct., November 5, 2020)(Teachout, J.). While some departures from DOC procedural rules implementing due process requirements may be of such minimal impact that a showing of prejudice may be required, others are fundamental to protecting a furloughee's liberty interest.

Notice of a hearing is one of the essential components of the due process required for protection of a liberty interest. *Morrissey v. Brewer,* 408 U.S. 471, 486-487 (1972). The Vermont Department of Corrections Directive 410.02 requires notice of a furlough revocation hearing to be given on the Notice of Hearing form included in the Directive. While Mr. Davis received a copy of that form on July 31st and signed for it, the time for the hearing was clearly inapplicable as it had already passed, so it did not provide him with notice of an actual hearing. He never received another Notice of Hearing form with a date and time for hearing. He simply never received a Notice of Hearing form with notice of an accurate hearing date and time.

The apparent oral notice given to him at 10:30-10:40 am on August 4 of the possibility of an immediate hearing is not sufficient to provide adequate notice (and certainly not 24 hour notice), and it was not even accurate, as no hearing was held that day. He was never given any notice at all of the date and time when a real hearing would be held. While he did have notice as of July 28 that there would be a hearing some time no later than August 3, and he had notice of the charges against him, he had no notice of when a meaningful hearing would take place.

The purpose of a Notice of Hearing was defeated: he did not know when he would be called upon to present testimony and evidence in response to the charges. Then, when August 3 passed with no hearing, he had good reason to believe that the time for a hearing had "timed out." After the event on the morning of August 4, he immediately filed a written appeal to the Commissioner complaining of being imprisoned despite lack of notice and a timely hearing.

The Hearing Officer treated Mr. Davis's response on the morning of August 4 as a refusal to participate in any hearing at all, no matter when it was held, and thus dispensed with providing any notice of the hearing subsequently held. The court cannot accept the proposition that whatever Mr. Davis said on the morning of August 4, it constituted a knowing refusal to attend any hearing ever. He had specifically declined in writing to waive 24 hour notice prior to a hearing, yet he was being asked without warning to waive such notice and attend an immediate hearing without prior notice. Whatever he said may have been a refusal to participate in a hearing on the spot that was being held out of time and contrary to his right to 24 hour notice, but that should not be interpreted as a blanket refusal as to any future hearing. His spontaneous response, without prior warning, did not justify the conclusion that DOC was then free to convene a hearing at any time without giving any notice to him. Notice of a hearing is an essential component of due process when a person risks loss of liberty, and he never got any proper Notice of Hearing at all.

For the court to rely on a Hearing Officer's interpretation of what he believes that Mr. Davis "determined" during an unexpected conversation when he was requested to attend an

immediate unnoticed hearing would set a precedent that could easily result in the erosion for furloughees of the fundamental due process requirement of notice and an opportunity to be heard, especially when that interpretation is treated as a refusal to ever attend a hearing at which he might be imprisoned and results in elimination of notice. Mr. Davis should have been given an accurate Notice of Hearing about a hearing that carried the possibility of loss of liberty. There could be circumstances in which a furloughee, after being given a timely and proper Notice of Hearing, refuses to attend the hearing that takes place at the time and place for which notice was given (and also refuses to sign a Refusal form), but that is not what happened here. Mr. Davis did not receive a timely and accurate Notice of Hearing, and the hearing he was told about orally did not actually take place at the time he was told about, but rather a day later without notice to him.

The court concludes that Mr. Davis was not afforded the necessary due process when (a) he was never provided with an accurate Notice of Hearing for a furlough revocation hearing, (b) he was not provided with a hearing during the period of 4 business days when he should have had a properly noticed hearing (or a proper Notice of Hearing and notice of continuance to a new specified date and time), and (c) he was not provided with a Notice of Hearing for the date and time of the actual hearing at which his furlough was revoked.

Rutland Rule 75 Proceeding; Prior Pending Action. The Commissioner argues that Mr. Davis chose the remedy of seeking Rule 75 Review of the furlough revocation hearing in the petition he filed in September of 2020 in the Rutland Unit that is proceeding according to a pretrial scheduling order to which the parties stipulated, and he should be held to proceeding only in that case and should not be entitled to simultaneously pursue habeas relief. He relies on *Shuttle v. Patrissi,* 158 Vt. 127 (1992).

It is true that in *Shuttle* the Court expressed concern about the use of habeas petitions as a substitute for direct appeal or for Rule 75 for petitions for review of "correctional center disciplinary proceedings."

> Mindful that inmates could intentionally forgo Rule 75 relief to qualify for habeas corpus review unless we place limits on the availability of the writ, we hold that habeas corpus shall be unavailable where an inmate intentionally avoids Rule 75, either entirely or relative to an individual issue, to gain habeas corpus review. We can envision circumstances in which a defendant could gain advantage by intentionally foregoing Rule 75 review, which is generally quite narrow when the superior court reviews prison disciplinary hearings [citations omitted] for the current broad scope that habeas corpus provides. Under such circumstances, the trial court could properly exercise its discretion to deny a habeas corpus petition if it appeared that the inmate deliberately sought to gain a tactical advantage.

Id. at 132.

In this passage, the Court was addressing "correctional center disciplinary proceedings," in which an inmate in prison serving a sentence is accused of violating a prison rule and a hearing is held to determine whether the violation occurred and what the administrative sanction will be. That is different from the circumstances of this case, in which Mr. Davis was out in the

community on furlough with a liberty interest that entitled him to due process protections prior to a determination that his furlough should be revoked and he should be reincarcerated.

Moreover, the Court affirmed the action of the trial court in converting what was originally filed as a Rule 75 action into a habeas proceeding and granting habeas relief because the challenge was to whether he should be incarcerated at all. "The court properly responded to the substance of his request for relief rather than its label." *Id.* The holding of the case is that habeas corpus relief is available if there is an improper restraint on liberty even if the case was originally filed as a Rule 75 petition. Thus, the case does not preclude this court from considering Petitioner's petition for habeas corpus relief despite the Rutland proceeding.

Mr. Davis could not have sought habeas relief in the Rutland proceeding in any event, because a request for habeas corpus relief must be filed in the county in which the Petitioner is being held. 12 V.S.A. § 3953. Mr. Davis is being held in the Northern State Correctional Complex in Orleans County.

The Commissioner also claims that this action, which is second in time to the Rutland Rule 75 case, should be abated based on *Stevens v. Essex Junction Zoning Board of Adjustment,* 139 Vt. 297 (1981). Abatement is described in that case as appropriate where two actions are filed between the same parties on the same subject matter. It is true that in the Rutland Rule 75 case, Mr. Davis claims violation of due process for failure to provide him with a notice of the hearing at which his furlough was revoked. However, Mr. Davis's two cases are not identical because in the Rule 75 case, Mr. Davis also addresses other issues concerning the substance of the alleged violations and any request for habeas relief is not available in the Rutland court. Moreover, *Shuttle v Patrissi* demonstrates that even when what is initially filed is a petition for Rule 75 review, the court can address a claim for habeas relief for unlawful restraint on liberty if that is what the facts of the case present.

For the foregoing reasons, the court concludes that Mr. Davis had not received the constitutional due process protection to which he was entitled under *Morrissey* and *Young v. Harper* at the time that his furlough was revoked at the hearing on August 5, 2020. The suspension of his furlough was constitutionally improper. He is entitled to be released from confinement, and the violation of furlough found at his August 5th hearing shall be expunged.

Petitioner's counsel argues that the Commissioner should be precluded from restarting the furlough suspension process with respect to the same alleged violations. No valid legal basis for such a ruling has been presented to the court, and the request is denied.

ORDER

For the foregoing reasons, the request for a writ of habeas corpus is granted. The Commissioner of the Department of Corrections shall release Levi Davis from confinement in prison and return him to furlough status, and shall expunge the finding of furlough violation that occurred on August 5, 2020.

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

Electronically signed pursuant to V.R.E.F. 9(d) on March 4, 2021 at 1:26 PM.

Mary Miles Teachout

Mary Miles Teachout
Superior Court Judge