

STATE OF VERMONT

SUPERIOR COURT  
Washington Unit

CIVIL DIVISION  
No. 21-CV-2303

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VERNE CAREY,  
Appellant,

v.

JAMES BAKER, COMMISSIONER,  
VERMONT DEP'T OF CORRECTIONS  
Appellee.

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DECISION ON THE MERITS

In this V.R.C.P. 74 appeal, Vermont inmate Verne Carey challenges a Department of Corrections (“DOC”) case-staffing decision pursuant to 28 V.S.A. § 724. The Court received the DOC’s furlough revocation record on August 23, 2021, and a hearing on the merits was held via Webex on November 2, 2021. Appellant was present at the hearing and was represented by Kelly Green, Esq. Appellee was represented by Robert C. Menzel, Esq. Based upon a de novo review of the record and the credible evidence admitted at the hearing, the Court makes the following findings, conclusions and orders.

Carey, who is 32 years of age, has been convicted of several offenses, most recently for DUI #1 and DLS #1 in 2018 (DOC Record, 1). In the late fall of 2020, DOC placed Carey on community supervision furlough. He was given five pages of conditions that he had to comply with while on furlough (Id., 8-12). One of his conditions was that he “not have any contact” with Bridgette Choiniere “unless approved, in advance and in writing” by his supervision officer (Id., 9).

On May 18, 2021, Carey gave his supervising officer permission to review his cell phone. The review revealed that Carey had been having ongoing contact with Bridgette Choiniere, the victim of his 2010 convictions for unlawful mischief (Id., 1-2). The review also revealed that Carey had attempted to hide his ongoing contact with Choiniere by listing her phone number under a pseudonym in his phone and initially lying to his supervising officer about his contact with her (Id., 2). DOC found Carey guilty of having violated the condition that he not have any contact with Choiniere, and his furlough was revoked (Id., 5-6). This was the only condition that Carey was found to have violated on this occasion.

Following the revocation, DOC performed a “case staffing” to determine what the consequence should be for Carey’s violation. DOC decided that he should receive “a four-year interrupt,” which meant that he would have to serve out the remainder of the

maximum sentence that he was serving in prison (Id., 2). DOC based its decision on Carey's history of convictions, his "high" risk of reoffending, and the fact that he had committed three other furlough violations in the previous year, for which he had received graduated sanctions (Id.). The three earlier violations had involved use of alcohol, a failure to wear his GPS unit, and a failure to complete required domestic violence programming and substance abuse treatment in the community (Id.). Carey contends that the 4-year interrupt was excessive.

DOC may release an inmate from prison and place him or her on community supervision furlough if the inmate has served his or her minimum sentence and agrees to comply with such conditions as DOC, in its sole discretion, deems appropriate. 28 V.S.A. § 723(a). The inmate's continuation on furlough is "conditioned on the offender's commitment to and satisfactory progress in his or her reentry program and on the offender's compliance with any terms and conditions identified by the Department." Id. §723(b). If the offender commits a "technical violation" (i.e., "a violation of conditions of furlough that does not constitute a new crime") that DOC believes warrant an "interruption" of the furlough, then DOC must hold "a Department Central Office case staffing review" to determine the length of the interrupt. Id. §724(b).

An offender whose community supervision furlough is revoked or interrupted for 90 days or longer has a right to appeal DOC's determination to the Superior Court under V.R.C.P. 74. The appeal must be "based on a de novo review of the record," the appellant "may offer testimony, and the Court, in its discretion and for good cause shown, "may accept additional evidence to supplement the record." Id. §724(c). Under the statute, "[t]he appellant shall have the burden of proving by a preponderance of the evidence that the Department abused its discretion in imposing a furlough revocation or interruption for 90 days or longer...." Id. Lastly, the statute provides:

It shall be abuse of the Department's discretion to revoke furlough or interrupt furlough status for 90 days or longer for a technical violation, unless:

- (A) the offender's risk to reoffend can no longer be adequately controlled in the community, and no other method to control noncompliance is suitable; or
- (B) the violation or pattern of violations indicate the offender poses a danger to others or to the community or poses a threat to abscond or escape from furlough.

Id. §724(d)(2).

The Court agrees with Carey that DOC abused its discretion in imposing a four-year interrupt of his furlough status for violating the condition that he not have any contact with Bridgette Choiniere. DOC did not revoke Carey's furlough for failing to make satisfactory progress in his or her reentry program or for any pattern of violations; he was revoked for the single violation noted above. Moreover, the circumstances of that violation did not warrant such a severe response.

Carey had known Choiniere for some 18 years, and they had remained friends

despite the events that had led to his 2010 convictions for unlawful mischief. Indeed, while he had been incarcerated in the correctional facility prior to his release on furlough, Carey had been permitted to have telephone contact with Choiniere. Moreover, there is no evidence in the record of this case that Ms. Choiniere complained to anyone about Carey's cell phone calls to her while he was on furlough, or that she found them threatening, abusive, controlling or annoying in any way. Indeed, there is nothing in the record to suggest that she did not welcome them,

Carey's interrupt has already lasted 5½ months. That is more than a sufficient sanction for this technical violation of his furlough conditions.

For the foregoing reasons, DOC's four-year interrupt of the Appellant's community supervision furlough is reversed. DOC shall reinstate the Appellant to his furlough status at the first opportunity.

SO ORDERED this 4<sup>th</sup> day of November, 2021.



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Robert A. Mello  
Superior Judge