



State of Vermont  
Department of Corrections  
280 State Drive  
Waterbury, VT 05671-1000

Agency of Human Services

To: Representative Maxine Grad, Chair, House Judiciary Committee  
Cc: Representative Alice Emmons Chair, House Corrections and Institutions Committee  
Senator Dick Sears, Chair, Senate Judiciary Committee  
From: James Baker, Commissioner, Department of Corrections  
Re: Input on S.338, Section 14  
Date: May 21, 2020

I have reviewed, along with my staff, the Committee's recommendations regarding S.338 and would like to provide some comments on the draft and its impact on the DOC.

#### Appeal of Furlough

The legislature has expressly delegated to the DOC Commissioner the authority to designate the place of confinement of those sentenced into his or her custody and to determine proper classification and correctional programs for those individuals. Furlough differs from probation or parole in that it is an extension of the place of confinement—a furloughed inmate is technically still incarcerated—and the Commissioner thus retains the authority and discretion to make furlough decisions.

Providing for Rule 74 review in statute will allow furlough interrupt/revocation decisions made by the DOC to be reviewed using the abuse of discretion standard. Rule 74 also provides for a review of the record. The addition of a *de novo* review of the record, however, applies a review standard for the DOC decisions that differs from that used for decisions made by other agencies in state government. Implementing *de novo* review will expend more state resources and would not afford deference to the DOC's furlough decision, in conflict with well-established administrative law.

Based on the above, I do not support creating a different review standard for our department on matters that fall within its expertise. It is my recommendation that the Committee delete the language related to a *de novo* review, and make the following revision to the draft:

(c) Appeal. An offender whose furlough status is ~~revoked or~~ interrupted for over 30 days or ~~revoked or longer~~ shall have the right to appeal the Department's determination to the Civil Division of the Superior Court in accordance with Rule 74 of the Vermont Rules of Civil Procedure. ~~The appeal shall be based on a de novo review of the record. The appellant may offer testimony and, in its discretion for good cause shown, the court may accept additional evidence to supplement the record.~~ The 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 interrupt that exceeds 30 days pursuant to subsection (d) of this section.

## Technical Violations

The Department of Corrections' staff are trained in evidence-based practices, effective practices in community supervision, and the administration of risk assessments, as outlined in DOC directive. DOC probation and parole officers, supervisors, caseworkers, and managers know the history of each individual on their caseload. The standards used in the furlough violation process are well-documented, monitored, and accessible to and followed by all DOC staff responsible for offender furlough supervision.

Furlough is also the primary mechanism for reintegrating individuals into the community. Restricting the DOC's discretion will impact who may be released on furlough, and how the DOC may utilize furlough to balance concerns of managing the prison population, with concerns for public safety. The language proposed by the House Judiciary Committee creates a barrier that could limit our ability to fully and successfully supervise individuals in the community so they can become productive community members.

I also recommend the following modification to the language concerning so-called technical violations. This proposed revision allows for a clear statutory standard while providing the DOC with the discretion it needs to supervise the population.

(d) Technical violations.

(1) As used in this section, "technical violation" shall mean a violation of conditions of furlough that does not constitute a new crime.

(2) It shall be an abuse of the Department's discretion to revoke furlough or interrupt furlough status for more than 30 days or longer for a technical violation, unless:

(A) the offender's risk to reoffend can no longer be adequately controlled in the community; ~~or~~ and

~~(B)~~ (B) no other method to control noncompliance is suitable; or ~~and~~

~~(B)~~ (C) the violation or pattern of violations indicate the offender poses a danger to the offender, to others, or to the community, or poses a threat to abscond or escape.