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To: Representative Maxine Grad
Chair, House Judiciary Committee

From: Kate T. Gallagher, AAG
Chief, Civil Division, Office of the Attorney General

Cc: David Scherr, AAG

Date: May 7, 2020

Re: S. 338: Court Review of Decisions to Revoke or Interrupt Furlough

At your request, I have reviewed a draft of S. 338, which addresses, in part, community supervision furlough, to assess whether Court review of decisions to revoke or interrupt furlough should be reviewed pursuant to Rule 74 or Rule 75 of Vermont's Rules of Civil Procedure. It is my opinion that review should occur pursuant to Rule 74.

Initially, Rule 74 only permitted review of contested cases "where the Administrative Procedure Act applies." As the Reporters Notes indicate, however, the 1981 amendment to Rule 74 was designed to expand the types of cases subject to Rule 74 review. Now the Rule applies "whenever any party is entitled by statute to seek review" and applies, as the Reporters Notes indicate "whenever the agency develops a record for review, irrespective of whether a statutory hearing is required." "Because the Rule covers proceedings that are not under the APA," the 1981 amendment also amended the scope of the record on appeal. As a result, the record on review now "consists of all writing and exhibits in the agency proceeding and a transcript of any oral proceedings."

Under S. 338, the decision to revoke or interrupt furlough is done through a case staffing review. A case staffing review would be done by a group of Department of Corrections employees who would review documents and issue a final summary note that explains the rationale for the decision. Therefore, the documents reviewed as part of the case staffing review and the final summary decision issued by the staffing group would comprise the record on appeal for review by the Court.

The Reporter's Notes indicate the Legislature can state in legislation that review of a proceeding should occur under Rule 75, and the Legislature has done so in the current draft of S.338. But it is not clear that the Legislature can expand the type of cases considered under Rule 75, which usually applies to a narrower group of governmental actions. Moreover, the preponderance of the evidence standard in S.338 under which the offender may challenge the decision is in conflict with the standard of review under Rule 75, which requires the court to defer to the agency's judgment absent a compelling indication of error. Therefore, Rule 75 seems inconsistent with the intent of the Legislature as currently expressed in S. 338.

I hope this memorandum has been helpful. Please let me know if you have any questions concerning this analysis.