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MEMORANDUM

FROM:	Matthew Valerio, Defender General Office of the Defender General & the Prisoners Rights Office
TO:	Senate Judiciary Committee
RE:	S.127 – Constitutionality of Proposed Amendment to Rule 74 Review of Furlough Discussion of "Clear Error Standard" (Review Process Enacted, 2021)
DATE:	March 10, 2022

CURRENT LAW SATISFIES CONSTITUTIONAL DUE PROCESS STANDARDS:

The recently passed Rule 74 appeal process brings Vermont into actual compliance with U.S. Supreme Court case Morrissey v. Brewer, 408 U.S. 471 (1972).

In Morrissey v. Brewer, 408 U.S. 471 (1972), the United States Supreme Court ruled that parolees have due process rights before being revoked and punished for a parole violation. This case has been extended to apply to pre-parole programs, including Vermont's furlough program. Morrissey states that a parolee (or ***furloughee) "must have an opportunity to be heard and to show, if he can, that he did not violate the conditions, or, if he did, that circumstances in mitigation suggest that the violation does not warrant revocation." Morrissey at 488 (emphasis added).***

Presently, Vermont furloughees get a hearing on whether they are guilty or not of alleged furlough violations but have no opportunity prior to the central office staff issuing a sanction to offer mitigating evidence. Nowhere in the DOC's furlough revocation policy, 410.02, does the DOC give furloughees this opportunity. In fact, the policy makes clear that the revocation hearing is exclusively "to determine if the offender is guilty of the charged violations" or not. 410.02 at page 8, section 5 ("Findings"). The policy is clear that once the hearing officer finds the furloughee "guilty," the furloughee may "enter a statement, if they wish, orally or in writing, regarding their agreement or disagreement with their guilt . . . ." Id. at section 5(f). The central office staff then issues a sanction ("interrupt").

The first time any offender gets to "show . . . that circumstances in mitigation suggest that the violation does not warrant revocation," or a lengthy interrupt, as promised by Morrissey, is at the offenders Rule 74 appeal to the Superior Court.

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The Morrissey mitigation issue has never been litigated in Vermont because prisoners without lawyers never knew to preserve this right at the time of the administrative hearing. The

administrative hearings are summary and perfunctory. The form provided has no place to put in mitigating evidence to preserve the issue for appeal.

The law as it is currently written puts Vermont law in compliance with what is actually required by Morrissey. The DOC policy and administrative hearing focuses on guilt or not. The Rule 74 appeal allows the consideration of mitigating evidence to impact the length of the interrupt.

The current Rule 74 appeal process in Court is the first time that the inmate has a meaningful opportunity to admit or deny the furlough violation, AND provide mitigating evidence; that is, the inmate can tell their story of why they were or were not in violation of their furlough. It is not only fair, it humanizes the process.

CLEAR ERROR STANDARD IS NOT A MIDDLE GROUND BETWEEN CURRENT LAW AND DOC'S PROPOSAL: It is just another way to prevent review of DOC decision-making.

Senator Sears asked Legislative Counsel for a "middle ground" between what DOC has asked for in the bill as introduced, and the law as it is currently written. Legislative counsel responded with a "clear error" or "clearly erroneous" standard. Clear error is in NO WAY a middle ground.

The "clear error/clearly erroneous" standard applies to findings of fact, and says that "findings . . . must be affirmed if there is any credible evidence to support them." *See State v. Amsden*, 2013 VT 51, para. 8 (quoting *State v. Godfrey*, 131 Vt. 629, 630 (1973). The clearly erroneous is a standard that applies to review of initial factual determinations.

There are generally two ways to apply this standard to overturn a fact finders (in this case DOC's decision):

1. There must be no support in the evidentiary record to support factual determinations made by the department (A nearly impossible standard to reach); OR
2. Even if there is some support in the record to uphold the initial factual decision by DOC, "the reviewing body must be left with a factually distinctly different impression that the factual conclusions are clearly erroneous." (NOTE: This version of the clear error or clearly erroneous standard is almost never used in law, but is just as impossible to meet.)

EFFECT OF CLEAR ERROR/CLEARLY ERRONEOUS STANDARD: Under a clearly erroneous standard, unless DOC confused the file or person with another file or person, or that decision is based upon an improper factor - race, religion, sexual orientation or some improper purpose – a DOC interrupt decision will be upheld in every single case.

Every single one of the cases that I provided where the Court reversed or modified the DOC decision to impose a particular interrupt.

CURRENT LAW IS THE MIDDLE GROUND:

What you have now in law IS THE MIDDLE GROUND. If the standard was full de novo review with ability to have full re-sentencing, that would be the most favorable to the Defendant. Abuse of discretion based upon de novo review of the record, with the ability of the Defendant to tell his/her story IS the constitutional middle ground. Otherwise, you fall back into merely rubber-stamping the DOC decision and deny the Defendant the right to tell his or her story or present mitigating evidence.