July 13, 2020

Mark Inch
Secretary, Florida Department of Corrections
501 South Calhoun Street
Tallahassee, FL 32399

VIA EMAIL: mark.inch@fdc.myflorida.com

Dear Secretary Inch,

In my letter to you dated May 6, 2020, I made the claim that the Florida Department of Corrections (FDC) has the legal authority under s. 945.091, F.S. (Furlough Statute), and Florida Administrative Code Rule 33-601.303 (Furlough Rule), to grant Type A furloughs for any reasons consistent with the public interest.

In a reply letter to me dated May 12, 2020, Interim FDC General Counsel Dorothy M. Burnsed rejected this claim. Specifically, Ms. Burnsed wrote:

> The authority to grant furloughs under the rule and the statute relates to individualized circumstances warranting brief and finite extensions of confinement with specific criteria for eligibility. Instead of serving an *individual* inmate's rehabilitative needs through *brief* extensions of confinement, your suggested interpretation of the furlough rule seeks to broaden the meaning and intent of the rule to authorize the release of entire *subpopulations* of inmates for an *indefinite* amount of time.

Ms. Burnsed's summary mischaracterizes our position. Nothing in our analysis suggests a single furlough can be used to release "entire subpopulations," and nothing in our analysis suggests furloughs may be granted for an "indefinite amount of time." Rather, our position – based entirely on a plain reading of the text of the furlough statute and the furlough rule – is that FDC has the legal authority to grant Type A furloughs on an individual basis, for finite periods of any duration, for any reason deemed consistent with the public interest. Given the confusion, I felt it worthwhile to more thoroughly explain our position, and the reasoning on which it is based.

The furlough statute reads, in relevant part:

> (1) The department may adopt rules permitting the extension of the limits of the place of confinement of an inmate as to whom there is reasonable cause to believe that the inmate will honor his or her trust by authorizing the inmate, under prescribed conditions and following investigation and approval by the secretary, or the secretary's designee, who

> shall maintain a written record of such action, to leave the confines of that place unaccompanied by a custodial agent for a prescribed period of time to:
>
> (a) Visit, for a specified period, a specifically designated place or places:
>
> 1. For the purpose of visiting a dying relative, attending the funeral of a relative, or arranging for employment or for a suitable residence for use when released;
> 2. To otherwise aid in the rehabilitation of the inmate and his or her successful transition into the community; or
> 3. For another compelling reason consistent with the public interest,
>
> and return to the same or another institution or facility designated by the Department of Corrections.

Under s. 945.091(1)(a)3., then, furloughs may be granted for any "compelling reason consistent with the public interest." The statute provides one geographic restriction on "the extension of the limits of the place of confinement." FDC may furlough a person anywhere, but the "place or places" a person may visit during the furlough must be "specifically designated." Similarly, the statute provides one temporal restriction on furloughs. Visits must be for "a specified period," and "a prescribed period of time." (The statute also requires that a prisoner granted a furlough "return" to the physical custody of the Department.)

A plain reading of the statute that grants FDC authority to develop rules relating to furloughs places the following restrictions on furlough power:

1. Furloughs must fit within one of the stated statutory purposes;
2. Furloughs must be limited to a specifically designated place or places; and
3. Furloughs must have a definite ending date, after which the furloughed prisoner must return to the physical custody of an FDC facility.

Under the authority granted to it in the statute above – and subject to its restrictions – FDC developed the furlough rule, which "sets forth guidelines for the utilization of type A and B furloughs." For purposes of this analysis, we're concerned only with "Type A furloughs," which are covered by subsection (6) of the furlough rule.

Subsection 6(a) of the furlough rule describes the purposes for which Type A furloughs may be granted. It reads:

> (a) Type A furloughs are granted for the following purposes:
>
> 1. To visit a dying relative.
>
> 2. To attend the funeral of a relative.
>
> 3. For any other reasons deemed consistent with the public interest, including medical or mental health treatment, attendance at civil hearings, or to otherwise aid in the rehabilitation of the inmate.

The canon of construction known as *expressio unius est exclusio alterius* stands for the idea that, "the mention of one thing implies the exclusion of another." However, this rule does not generally

apply when "including" is used before a list of particular items. Indeed, the Florida Supreme Court noted that, "Generally, it is improper to apply *expressio unius* to a statute in which the Legislature used the word 'include' . . . This follows the conventional rule in Florida that the Legislature uses the word 'including' in a statute as a word of expansion, not one of limitation." *White v. Mederi Caretenders Visiting Servs. of Se. Fla., LLC*, 226 So. 3d 774, 781 (Fla. 2017).

Subsection (6)(a)3. of the furlough rule includes "including" before the list of particulars in subsection (6)(a)3. Therefore, under Florida law as interpreted by the Florida Supreme Court, that list is non-exhaustive. Under the furlough rule, then, FDC has the authority to grant a Type A furlough for any reasons "deemed consistent with the public interest." Therefore, FDC may deem protecting vulnerable prisoners from COVID-19 "consistent with the public interest," and then grant Type A furloughs under the power granted to it in subsection (6)(a)3.

Nevertheless, FDC's position appears to be that the furlough rule does not allow granting Type A furloughs because "The authority to grant furloughs under the rule and the statute relates to individualized circumstances warranting brief and finite extensions of confinement with specific criteria for eligibility." Part of this analysis is correct, but the conclusion is false, and restricts FDC's furlough authority unnecessarily.

FDC is correct that the statute and rule refer to "individualized circumstances." (See, e.g., Rule 33–601.603(6)(a)8: "Only one inmate will be released to a sponsor at a given time period for Type A furloughs"; 33–601.604(d)1: "An inmate who is furloughed to a sponsor shall remain in the company of that sponsor during the entire period of the furlough"; and 33–601.603((4)f: "Upon request of the inmate, community and minimum custody inmates will be considered . . .")

FDC is also correct that furloughs must be finite. (See, e.g., s. 945.091(1): ". . . to leave the confines of that place unaccompanied by a custodial agent for a prescribed period of time . . ."; Rule 33–601.603(3)(b): "The department will allow inmates to leave the principal places of their confinement unaccompanied by a custodial agent for a prescribed period of time"; and s. 945.091(1)a.: "Visit, for a specified period . . . and return to the same or another institution or facility designated by the Department of Corrections.") The one exception is the medical furlough, which can extend until the death of the furloughed prisoner.

Finally, FDC is correct that furloughs are subject to "specific criteria for eligibility." For example, Type A furloughs are limited to "community or minimum custody" prisoners (33–601.603(6)(b)1.), and prisoners must "abide by all conditions" in the Type A furlough agreement. Pregnancy furloughs, meanwhile, are available to (many) pregnant prisoners who are in the last trimester of a pregnancy and within 36 months of release. Medical furloughs and Type B furloughs have their own eligibility criteria, as well.

However, FDC's suggestion that the rule limits Type A furloughs to "*brief* extensions of confinement" (emphasis in original) is invented out of thin air. FDC provided no support for that claim in its May 12 letter, and likely for good reason: none exists. Neither the word "brief" nor any of its synonyms appears anywhere in the statute or in the rule. Nowhere in either is there any language that restricts, much less prohibits, FDC from granting Type A furloughs for any finite duration.

In making its claim that Type A furloughs must be "brief," FDC referenced neither the text of the statute or the rule, nor any controlling legal authority compelling such an interpretation, nor even any persuasive authority suggesting it. The entirety of FDC's position appears to rest on FDC lawyers' intuitions about what the "meaning and intent of the rule" should be. This, of course, is not an appropriate standard for interpreting a governing text.

The authors of the furlough statute could have written "brief and specified," or "brief and prescribed," but they chose to include only "specified" and "prescribed." Similarly, the authors of the furlough rule could have written into the rule an explicit temporal limit. They chose not to. They did, however, place such limits on other types of furloughs in the same rule. For example, under subsection (7)(a)(2)d., "The pregnancy furlough shall be terminated within 1 week after a satisfactory 6 week postpartum examination." Under subsection (9)(d)4., non-family visitation-related Type B furloughs are limited to three hours, while family visitation furloughs are limited to eight hours. (And (9)(d)2. restricts family visitation furloughs to one per week.) The rule also explicitly allows medical furloughs to end at death. In fact, of the four types of furloughs covered by the furlough rule, the rule's authors included temporal limits for three. For Type A furloughs, however, the authors were silent. FDC's activist interpretation simply wills a "brief" requirement into the rule. This position has no more textual support than the claim that Type A furloughs apply only to left-handed people, or those with brown eyes.

I hope this letter clears up any confusion about FAMM's position about FDC's furlough authority. Again, we do not believe the furlough rule allows for a single furlough of "entire subpopulations," and we do not believe it allows furloughs for an "indefinite amount of time." Again, our position has been, and remains, that a plain reading of the furlough statute and the furlough rule shows clearly that FDC has the legal authority the grant Type A furloughs to any individual who meets eligibility criteria, for any finite duration, for any reason deemed consistent with the public interest.

We urge you to reconsider FDC's position in light of the actual text of the rule, and then begin granting furloughs to individuals who are particularly vulnerable to COVID-19. However, if you remain unpersuaded, we urge you to seek an advisory opinion from the Florida Supreme Court. The Court's advisory opinion would answer this urgent question definitively, and provide clear guidance about the scope of FDC's current furlough authority.

As always, we appreciate your willingness to listen to our views, and we look forward to continuing to work with you and your staff.

Sincerely,

Greg Newburn
Florida Director, FAMM

cc: Governor Ron DeSantis