Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2019-288

APRIL TERM, 2020

Joseph Heim* v. Mike Touchette	}	APPEALED FROM:
	}	
	}	Superior Court, Washington Unit,
	}	Civil Division
	}	
	}	DOCKET NO. 359-7-19 Wncv
		Trial Judge: Mary Miles Teachout

In the above-entitled cause, the Clerk will enter:

Petitioner appeals the civil division's denial of his petition for a writ of habeas corpus, in which he argued that his furlough status was wrongfully suspended, in violation of his due process rights, because his administrative suspension hearing was not held within the timeframe set forth in the applicable administrative directive. We affirm.

Petitioner is an inmate in the custody of the Department of Corrections (DOC). His minimum release date was May 8, 2019, and his maximum release date is June 26, 2022. On June 13, 2019, petitioner was released on furlough to participate in a treatment program at an addiction treatment center. On Friday, June 21, 2019, he left the treatment center without completing the program and against medical advice, resulting in the issuance of an arrest warrant. On Monday, June 24, 2019, petitioner reported to Burlington Parole and Probation and was returned to custody. That same day, he received notice of a suspension hearing to be held no later than Friday, June 28, 2019, which was consistent with a DOC Department Directive requiring a hearing to be conducted within four business days of when the inmate was returned to the correctional facility. At approximately 10:00 p.m. on June 28, a corrections officer interviewed petitioner and provided him with an investigation report. Thirty minutes later, the corrections officer gave petitioner a second notice of hearing indicating that the suspension hearing would be held on the next business day, Monday, July 1, 2019. The notice indicated that a continuance was being requested, as allowed by the Department Directive, because no hearing officer was available until July 1. The hearing was held on July 1, and the hearing officer found petitioner guilty of two of the four alleged furlough violations.

After his administrative appeal was denied, petitioner filed a habeas petition, as well as a complaint under Vermont Rule of Civil Procedure 75. On July 23, 2019, the civil division held a non-evidentiary hearing on the habeas petition based on stipulated facts. Following the hearing, the court denied the petition. The court rejected the State's arguments that petitioner did not have a liberty interest in continued furlough status and that a petition for habeas corpus could not be used to challenge the suspension of furlough status, but it concluded that there was no due process violation because DOC had followed the applicable Department Directive by seeking a one-day continuance.

On appeal, petitioner argues that because the applicable Department Directive defines a business day as 8:00 a.m. to 4:00 p.m., DOC did not obtain a continuance of the suspension hearing before the four-day time period for holding the hearing expired. The State responds that: (1) habeas relief is not available to challenge a change in furlough status; (2) habeas relief was not available to petitioner because he intentionally evaded review under Rule 75; (3) habeas relief was not statutorily authorized in the county where petitioner filed his petition[1]; (4) the furlough violation process in this case was consistent with the applicable administrative directive, which was directory rather than mandatory; and (5) even if there was a de minimis deviation from the process set forth in the Department Directive, petitioner failed to demonstrate that he was prejudiced in a manner that violated his right to due process.[2]

We find no due process violation under the circumstances of this case. As an initial matter, we agree with the State that a violation of the applicable Department Directive, standing alone, does not compel vacating the furlough violation determination. "The determination of whether statutory language is mandatory or directory is one of legislative intent." In re Mullestein, 148 Vt. 170, 174 (1987); see In re Williston Inn Grp., 2008 VT 47, ¶ 14, 183 Vt. 621 (mem.) (stating that administrative regulations are interpreted in same manner as statutes, with overall goal of discerning intent of drafters). A "time limit is directory when it directs the manner of doing a thing, and is not of the essence of the authority for doing it." State v. Singer, 170 Vt. 346, 348 (2000) (quotation omitted), superseded on other grounds, 1999, No. 160 (Adj. Sess.), § 18, as recognized in State v. Love, 2017 VT 75, ¶ 11, 205 Vt. 418; see also State v. Camolli, 156 Vt. 208, 214 (1991) (stating that when language is directory "compliance is not essential to a proceeding's validity"). "On the other hand, a statutory time limit is mandatory only if it contains both an express requirement that an action be undertaken within a particular amount of time and a specified consequence for failure to comply with the time limit." Singer, 170 Vt. at 348. The Department Directive in this case satisfies the first prong of the mandatory test and establishes a procedure for seeking a continuance based on just cause. See id. at 351 (noting that if Legislature had intended time limit to be directory, "it would not have included exceptions"). But the Department Directive does not meet the second prong of the mandatory test because it does not provide any consequences for a failure to comply with the Department Directive.

At the heart of petitioner's habeas petition is his claim that DOC's failure to meticulously comply with the Department Directive violated his right to due process. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (quotation omitted). State statutes or regulations do not, in and of themselves, "create federally protected due process entitlements to specific state-mandated procedures." Holcomb v. Lykens, 337 F.3d 217, 224-25 (2d Cir. 2003) (explaining any federally protected entitlement to extended furlough would not necessarily extend to specific Vermont DOC directives, but rather would be protected by Fourteenth Amendment law). Assuming, without deciding, a liberty interest in furlough status, petitioner has made no

[1] We do not address the State's argument, raised for the first time on appeal, that petitioner's failure to file his petition "in the county where such person is imprisoned," 12 V.S.A. § 3953, warrants dismissal of the appeal on jurisdictional grounds.

[2] During the pendency of this appeal, the State filed a motion to dismiss, arguing that the appeal is moot because petitioner had been released on furlough again. We decline to address the question of mootness because we have no information as to whether the disciplinary violations on petitioner's prison record would be sufficient to satisfy the mootness exception for "negative collateral consequences." In re P.S., 167 Vt. 63, 67 (1997); see also LaFaso v. Patrissi, 161 Vt. 46, 51-52 (1993) (noting possible direct and indirect consequences of inmate disciplinary record).

showing that DOC failed to afford him notice of the claimed violations and the evidence against him, an opportunity to be heard and to present evidence, the right to confront any witnesses, a neutral adjudicator, or a written statement as to the basis for the status change. See id. (listing procedural due process required to revoke parole). Due process does not demand "inflexible procedures applicable to every conceivable situation"; rather, the question is whether the petitioner's interests were sufficiently protected so that he was not prejudiced by the alleged procedural violation. Rutz v. Essex Junction Prudential Comm., 142 Vt. 400, 408-09 (1983); see also State v. Mott, 166 Vt. 188, 193 (1997) ("Due process claims must be resolved on the facts before the court, and we must look to whether the individual asserting a denial of due process can show prejudice from the asserted denial."); State v. Ellis, 149 Vt. 264, 267 (1988) ("[I]n order to make out a constitutional [due process] claim, defendant must show that a delay was both unreasonable and prejudicial to his rights."). In this case, petitioner has failed to demonstrate how the minimal delay in holding the suspension hearing prejudiced him in a manner that impacted his due process rights.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice