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****** Please note that this Investigative Report has been amended to remove portions that addressed allegations regarding which the Human Rights Commissioners found there were no reasonable grounds to believe there was a violation of Vermont law or in which the Human Rights Commissioners deferred making a final determination. ******

INVESTIGATIVE REPORT

Complainant: Kenneth Thissell - **Vermont HRC Case E16-0004**

Respondent: Vermont Department of Corrections

Charge: Violation of the Parental and Family Leave Act (PFLA)

Background and Summary of Complaint:

Ken Thissell, a third shift Corrections Officer II (COII) at Northeast Regional Correctional Facility (NERCF), filed a complaint with the Human Rights Commission, alleging that the Department of Corrections violated the State's version of the Family Medical Leave Act (FMLA) -- the Parental and Family Leave Act (PFLA) by denying his request to be exempt from "order-ins" (mandatory overtime) on July 28, 2015.

Summary of Response:

The DOC responded by stating that Mr. Thissell's July 28, 2015 request was properly denied because it was a request for "child care" which was not covered by Mr. Thissell's November 29, 2014 PFLA request. In a supplemental response filed in December of 2015, the State also contends the HRC does not have jurisdiction over Mr. Thissell's case and that the PFLA does not apply because Mr. Thissell does not fall into any protected category. In addition, the State also claims that Mr. Thissell did not experience any retaliation for taking PFLA leave. Finally, the State also claims that the union, and not the HRC, has exclusive jurisdiction to hear Mr. Thissell's complaints about DOC's decisions regarding his PFLA usage.

Preliminary Recommendations:

This investigation makes a preliminary recommendation to the Human Rights Commission to find that:

1) There are **reasonable grounds** to believe that the Respondent violated Vermont's PFLA rights by not allowing Mr. Thissell to be exempt from order-ins on July 28, 2015.

Documents

- HRC Complaint
- State's Responses – 10/16/15 and 12/18/15
- Pay Charts, Timesheets, Order-In Logs, and Emails
- Ken Thissell's Applications for PFLA leave in November of 2014 and August of 2015, including Medical Certifications and Employer Responses

Interviews

- Human Resources Administrator Anna Firliet –11/16/15
- Business Manager Meroa Benjamin – 11/16/15
- Ken Thissell – 11/12/15
- Chief of Security (SOS) Doug Hanrahan – 11/16/15
- Assistant Superintendent Norah Quinn – 12/22/15
- Superintendent Al Cormier – 12/22/15

Timeline of Events

- **November 29, 2014** – Mr. Thissell files PFLA paperwork requesting intermittent leave for an unspecified period to help with his disabled foster son and his father-in-law who was being treated for cancer. Mr. Thissell makes no election as to whether he wants to use paid or unpaid leave. He also attaches a medical certification.

- **January 9, 2015** – Assistant Superintendent Norah Quinn signs and approves Mr. Thissell's paperwork. At the bottom of her approval, there is a typed note showing how much time Mr. Thissell has available for use.

- **January-July 21, 2015** – Mr. Thissell is approved for PFLA time for individual days and requests to be exempt from "order-ins" for consecutive days.

- **July 21, 2015** – Mr. Thissell asks for and is **granted** an exemption from order-ins while he and his wife seek a sitter for A.T. – Mr. Thissell still works his eight hour shifts

- **July 28, 2015** – Mr. Thissell asks for and is **denied** a continued exemption from order-ins.

- **August 3, 2015** – Mr. Thissell files new PFLA paperwork for a three-week period of continuous leave. The leave is granted and he uses vacation, sick and compensatory time while off.

Definitions

- **Accrued Time** – Annual, sick, personal and/or compensatory time as earned per pay period. Time may not accrue if an employee takes unpaid leave, but can accrue of the employer takes paid leave.

- **Corrections Contract**: The contract is the product of negotiations between the State and the corrections bargaining unit. The negotiations between the parties with respect to family or parental leave flesh out the statute and provide guidance procedurally and substantively.

- **Family Medical Leave Act**, (FMLA) 29 U.S.C. §2601 et seq., - the federal statute which establishes the rights and obligations of employees and employers pertaining to such leaves.

- **Intermittent Leave** - leave taken in separate blocks of time due to a single qualifying reason.

- "**Order-Ins**" – A form of mandatory overtime, on top of the regular 8-hour shift. Defined in the Corrections Contract at Article 28 §3(f)(1) – a term used when correctional officers are "ordered in to perform overtime work if

there are insufficient volunteers." Order-ins are typically limited to 4 hours per shift per the contract Article 28 §3(f)(3).

- **Vermont's Parental and Family Leave Act**, (PFLA) 21 V.S.A. §470 et seq., Vermont's version of the federal Family Medical Leave Act (FMLA). 29 U.S.C. §2601 et seq. Article 39 of the Corrections Contract sets forth the provision of the Vermont PFLA. **Note**: States can provide greater protections than the federal act, but not less. Additionally, Vermont's statute states: "An employer may adopt a leave policy more generous than the leave policy provided by this subchapter. Nothing in this subchapter shall be construed to diminish an employer's obligation to comply with any collective bargaining agreement or any employment benefit program or plan which provides greater leave rights than the rights provided by this subchapter. A collective bargaining agreement or employment benefit program or plan may not diminish rights provided by this subchapter." 21 V.S.A. §472(g).

A PRELIMINARY NOTE

Prior to setting forth the applicable legal framework, this investigation will address the supplemental responses and affirmative defenses filed by the State on December 18, 2015. The State's first contention is that the HRC lacks jurisdiction to review the complaint. In fact, the Legislature gave the HRC jurisdiction over PFLA/FMLA matters where the party complained of is a state agency, as it is here, (DOC).[1] The State's second contention is that "There is no allegation that Complainant is a member of a suspect category, or that DOC discriminated against Complainant in any manner."[2] However the PFLA does not require that a party seeking relief fall into a protected category as long as the person is a statutorily eligible "employee"[3] and does not operate in the same way anti-discrimination laws such as Title VII of the Civil Rights Act work, although one can certainly claim an interference with PFLA rights and discrimination by the employer based on a protected category in the same lawsuit if that were also the case.

Third, the State claims Mr. Thissell has suffered no discrimination or retaliation. Mr. Thissell has not alleged any retaliation and as noted, the FMLA/ PFLA is not an anti-discrimination statute. Fourth, the State claims that if Mr. Thissell was dissatisfied with DOC's decisions, he should have filed a grievance with the union and proceeded to the Labor Board if necessary and not the HRC. Again, Mr. Thissell can choose either forum, however he cannot have the same issue adjudicated in two different forums at the same time. Mr. Thissell had the option to file a union grievance, <u>or</u> to file a complaint with the HRC per the aforementioned statutory section giving the HRC jurisdiction over PFLA matters when the employer is the State.

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[1] 9 V.S.A §4552(b).

[2] In other words, race, color, national origin, etc.

[3] 21 V.S.A. §471(2): "Employee" means a person who, in consideration of direct or indirect gain or profit, has been continuously employed by the same employer for a period of one year for an average of at least 30 hours per week. Per the contract in Article 39 §2(a): (a) "Eligible Employee" for the purposes of the statutory leaves, means an employee who has successfully completed original probation or has worked for one (1) year, whichever occurs first, and has worked for at least an average of twenty (20) hours per week. All references to employees in this Article are references to eligible employees. In addition, 29 CFR 825.702 - Interaction with Federal and State anti-discrimination laws states: "...The purpose of the FMLA is to make leave available to eligible employees and employers within its coverage, and not to limit already existing rights and protection."

This investigation would also like to make it clear at the outset that this is a challenging case in several respects. First of all, there are no truly "bad actors" in the sense of malicious intent. The driving force behind denying Mr. Thissell his PFLA rights was the need for mandatory overtime coverage. Facility supervisors felt they could not spare Mr. Thissell more exemptions from overtime, however they did not seem to realize that they needed to make sure that any denial of the right to take the PFLA time for order-ins was permissible under the Act. Second, this investigation found it difficult to find a good "paper trail." Everyone – from Mr. Thissell – to all those in the supervisory chain and business office failed in this regard. Mr. Thissell failed to submit properly completed paperwork, albeit in more minor ways than the Respondents allege. The business office (which is essentially an arm of human resources on-site), did not carefully review the paperwork and thus did not catch or chose to overlook some of his omissions. The person who approved his first PFLA request did not review it before she signed it believing someone else had done so. However, from Mr. Thissell's perspective, since no one noticed or flagged any of these issues, he reasonably believed his request was sufficient since it had been approved. From the time of approval on, his requests to use PFLA time for days off or exemptions from overtime were granted, without question or requests for further information, even though the employer certainly would have been within its rights to do this as long as it followed the strictures of the contract and the law.

All said and done, from January 25, 2015 to July 29, 2015, Mr. Thissell only used two weeks and three days of PFLA leave, using accrued leave of four annual days and nine sick days. He received no complaints that he abused his PFLA leave. When called in for overtime, he showed up. The DOC *allowed* all his PFLA leave requests between January 25-July 21, 2015. However, on July 28, 2015, they refused his leave request based on facility needs and they did this without following the proper procedures. This investigation is reminded of the classic example of two parties who enter into a contract, agree on the terms, then one party changes them when the terms no longer suit that party's needs. The aggrieved party's usual response is that they relied on the contract as created and that the now dissatisfied party cannot change terms that do not suit them and should be estopped from doing so. This situation is analogous in many respects to that fact pattern.

Finally, the State has questioned Mr. Thissell's veracity in several respects. While these will be discussed below, the questions they raise are speculative in

nature and are more appropriately addressed with respect to the issue of damages, and that is not within the purview of this report. The central and very narrow issue is whether the DOC violated Mr. Thissell's PFLA rights by not allowing him to be exempt from mandatory overtime for the week of July 28, 2015. This investigation's inquiry looks only at how the DOC responded to his specific request for that week, as the facts existed at the time of his request.

I. LEGAL FRAMEWORK

Mr. Thissell has alleged DOC "interference"[4] with his PFLA rights:

1) He alleges that the Respondent interfered with his PFLA rights by not allowing him to be exempt from order-ins on July 28, 2015.

In order to prevail on an interference theory with respect to his complaint, Mr. Thissell must prove five (5) elements by a preponderance of the evidence:

1. He was an "eligible employee;"
2. The DOC was an employer subject to the requirements of PFLA;
3. That he is entitled to leave under the PFLA;
4. That he gave notice to the employer of his intention to take PFLA leave; and
5. That the employer denied him the benefits to which he was entitled under the PFLA.[5]

PART I- DID THE DOC VIOLATE THE PFLA BY NOT ALLOWING MR. THISSELL TO BE EXEMPT FROM ORDER-INS ON JULY 28, 2015?

A. Background: Kenneth Thissell and his foster child "A.T."

Kenneth Thissell began working for the Department of Corrections (DOC) in May of 2009. He was (and is) assigned to third shift which typically runs from

[4] The term of usage for FMLA cases not involving a retaliation claim.

[5] *See* Di Giovanna v. Beth Israel Medical Center, 651 F.Supp.2d 193, 199 (S.D.N.Y. 2009).

10 p.m. to 6:00 a.m. He has been in long-term relationship with a woman he refers to as his wife and this report will also refer to her thusly. His wife has two grandchildren, both of whom have been placed in foster care with her and Mr. Thissell for two separate periods of time for the purposes of this report. One of the children, "A.T.," age five, is severely disabled. A.T. was born with Arthrogryposis. A.T. is in a wheelchair, is completely immobile and needs assistance with all activities of daily living. He will require specialized medical and therapeutic care for the rest of his life. He also requires constant supervision, and the Department for Children and Families, (DCF), requires that all caregivers receive training on how to care for his needs.

In November of 2014, Mr. Thissell filed PFLA paperwork for intermittent leave due to the fact that A.T. would be placed in the home. That leave was approved by the DOC in January of 2015, and Mr. Thissell began using PFLA leave without incident in January once A.T. arrived. A.T. stayed with Mr. Thissell and his wife until June of 2015 when he was returned to his mother. According to Mr. Thissell, a little over a month later, on approximately July 13, 2015, A.T. was again removed from his mother's home and placed with him and his wife with virtually no notice.

This left Mr. Thissell and his wife scrambling to find a trained caretaker for A.T. during the day. Until then, they were obligated to provide the care themselves while they also tried to work full time jobs. On an "ideal" day, A.T. would be either in regular or summer school, or there would be a trained caretaker. Those scenarios allowed Mr. Thissell and his wife the necessary latitude to work a regular shift and get rest. On an ideal day with A.T. in school, Mr. Thissell would get home around 6:30 a.m. after an eight-hour shift. He and his wife would get A.T. up, bathed, fed and on the school bus, at which point his wife left for her nine to five job. Mr. Thissell would then sleep, but would get up when the school bus arrived and get A.T. into the house. He and his wife would prepare dinner, get A.T. to bed and he would go back to bed for a few more hours of sleep before his shift started.

However, if A.T. was not in school, or was home sick, and there was no DCF trained caregiver, Mr. Thissell would have to supervise, work with and care for A.T. all day until his wife got home (or she would have to miss work), which while possible, was exhausting and not something that was sustainable in the long term. However, in the short term, it was doable if his work schedule was a

predictable one i.e. he was not subject to overtime. However overtime was mandatory essentially impossible to avoid unless one was exempt from them either through a provision in the contract that applied to the employee only,[6] or through a PFLA request. Mandatory overtime could mean Mr. Thissell would have to stay for four hours at the end of his shift or come in four hours earlier than his shift was supposed to begin.

Adding to this stress was the fact that A.T.'s summer school ended in late July. This left a three-week gap until the regular school year started back again in late August, meaning A.T. would be in the home twenty-four hours a day, seven days a week. According to Mr. Thissell, finding a trained caretaker that would be acceptable to DCF was not easy and could take time. While DCF paid for the caretaker, DCF did not find the caretaker for them.

As a result of this situation, Mr. Thissell made a request to be exempt from mandatory overtime for the week of July 21st. His request was granted and even though he was exempt he worked a regular eight-hour shift. He then made a request to be exempt from mandatory overtime the week of July 28th – while working his regular eight-hour shift – but this time, his request was denied.

The underlying reason for that denial was that the facility was experiencing a significant need for mandatory overtime coverage.[7] Pursuant to the corrections collective bargaining agreement (hereinafter "the contract"), this mandatory overtime, as already noted, is known as "order-ins" or "order-overs."[8] All correctional officers are subject to being ordered-in (or over) pursuant to the contract for an extra four hours of mandatory overtime on top of their normal eight

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[6] Article 29 §2(c) states that an employee can get a doctor's note to be exempt from overtime, however this provision applies to the employee him or herself, not to the family member. To deal with an eligible family member, the PFLA applies.

[7] Mr. Thissell was ordered-in on 6/9/15 and 6/10/15, in addition to his regular shift and on 6/16/15 and 6/17/15 in addition to his regular shift. In July, he was ordered-in on three days, back to back in addition to his shift.

[8] Article 28 §3(f)(1): "Order-in is the procedure by which correctional officers are ordered in to perform overtime work if there are insufficient volunteers...." Additionally, "Order-ins are normally limited to 4 hours." See Article 28 §3(f)(3). Mr. Thissell described the facility has having an "excessive" need for overtime due to insufficient personnel and high employee turn-over. This was confirmed by the NERCF personnel interviewed by this investigation. Their mandatory nature makes these hours subject to the FMLA. While the FMLA allows deductions for overtime, DOC (and perhaps no department or agency) does this. Therefore, when an exemption is given and the person would have been subject to mandatory overtime, the FMLA would allow a deduction for that overtime but that does not happen with this state employer. Thus, there is no penalty for the exemption if it turns out the employee would have been called in during the exempt period. 29 CFR 825.205 - Increments of FMLA leave for intermittent or reduced schedule leave. This section also applies only to mandatory overtime.

hour shift, either before it starts, or after it is supposed to end.[9] From January of 2015-August of 2015, DOC documents showed that Ken Thissell had been ordered in approximately seventeen (17) times. The State confirmed he complied with all of those mandatory order-ins.[10]

Mr. Thissell had good reason to believe that the PFLA leave request he filed in November of 2014 allowed him an exemption from order-ins for that July 28th week. The supervisors at the facility knew Mr. Thissell needed to provide a range of non-standard care for A.T. He had explicitly mentioned needing to provide care for A.T. in at least three emails prior to July 28, 2015, even dating back to January of 2015, and he had been allowed to be exempt for that very reason the week before. On January 8, 2015, he emailed Chief of Security (SOS) Doug Hanrahan: "Doug, The following days I would request to not be ordered in Jan 13,14,15,16 Jan 20, 21[.] The following days I need off to take [A.T.] to Philidelphia [sic] to the Shriners Hospital Jan 26, 27, 28." SOS Hanrahan granted his request and exempted him from order-ins for the requested days, however it should be clear that he worked his regular eight-hour shift on those days.

Mr. Thissell again mentioned needing to provide care for A.T. in March. On March 13, 2015, Thissell wrote SOS Hanrahan in response to a question from Hanrahan about training: "Yes [sic] this next pay period would be best [sic] what hours would you need me here so I can plan with my wife [A.T.'s] appointments and **care**...." (emphasis added). Again, on March 26, 2015, Thissell emailed SOS Hanrahan, writing: "Doug, We just had our DCF family meeting and I can be ordered in on Mondays [sic] So on 4/6[,] 4/20[,] 4/27 I can be ordered in[.] I am off 4/12 that's why that is not listed, I will have ***child care duties*** Tuesday thru Fridays thru April." The State provided no evidence that any of Mr. Thissell's supervisors questioned his requests or raised any red flags about the PFLA not covering "child-care" and they made no requests for more information.

Therefore, Mr. Thissell was upset when his request to be exempt for the week of July 28, 2015 was denied. He had been given an exemption for the week

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[9] For instance, on 6.29/15, Mr. Thissell was ordered-in on top of his third shift hours, and worked the second half of second shift. That would mean he came in four hours earlier than scheduled. Working the first half of first shift, as he did on 8/31/15, would mean staying over four hours after he was supposed to leave.

[10] In January of 2015 he was ordered in once, in February once, in March, once, in April, once and in May once. However order-ins picked up in June. In June he was ordered in 6 times. In July, prior to his exemption for the week of the 21st and his subsequent 3 week leave, he was ordered in 4 times. The order-ins in June had two back-to-back days (6/15 and, 6/16) and July had three back to back days (7/6, 7/7, 7/8).

of July 20 and at that time had given notice that he might need an exemption beyond the week of July 20th. On July 20, 2015, in the midst of adjusting to the sudden return of A.T. to the household, Mr. Thissell emailed SOS Hanrahan and Assistant Superintendent Norah Quinn to ask for the exemption from order-ins that week until a trained caregiver could be found:

> Hello,
>
> It is with great pain that I must ask you to continue to make myself exempt from ***over time*** [sic] ***this week <u>or until we can secure the proper DCF approved child care for [A.T.]</u>*** one of our foster children. Kelly and I contacted the DCF approved child care facility "Little Dippers" and were able to place [A.T.'s sister] with this Facility but they said that it wouldn't be until the school year that they could hire a 'One on One" attendant for [A.T.]. Kelly and I will be contacting Aris Solutions starting Monday and will be attempting to hire a DCF approved "One on One" attendant for care within our home. There is a ton of paperwork that is involved but we have two people who are possibilities that must have background checks completed and all necessary paperwork completed before they can start. Again I apologize for the timing of this I know we are running very thin and everyone is working a ton of overtime and I don't like to let down my fellow workers and make them take on more then [sic] they deserve. This situation came suddenly last Monday and has been very taxing on Kelly and I to all of a sudden have two children under 6 in our care in a matter of hours after being told they were coming. I will work hard at getting this taken care of as soon as I can [sic] That [sic] I promise. (Emphasis added).
>
> Yours truly
>
> Ken Thissell

His request was granted without any question or any evidence of concerns. Other than being exempt from being ordered-in that week, he worked his full eight-hour shifts and did not take any other days off.

The following week, on July 28, 2015, he and his wife had still not found a trained caretaker for A.T., and so he wrote SOS Hanrahan again:

> Doug,
>
> Again I apologize but we have not found a [sic] approved one on one [sic] sitter for [A.T.] for this week so I will need to be exempt from order ins [sic]

again this week. If I do not get someone approved before next week I will hire someone not approved by DCF so I can be ordered in. Also We [sic] were told on Monday that there is a doctors [sic] appointment in Boston on Wednesday [sic] I am not sure what or when it is [sic] we are trying to get the information from the mother but she has not been cooperating [sic] I will get back to you as soon as I can [sic] if it is a late appointment I might need to take Wednesday off If [sic] I am forced to be there all day. I apologize for the late notice but I feel the mother is trying to make us look bad that is why she is not getting back to us.

This time, however, his request for exemption was denied.

B. <u>The State's Reasons for denying the request for order-in exemption</u>

It was reasonable for Mr. Thissell to believe that he would be allowed the order-in exemption for the week of July 28th. He had filed for intermittent PFLA leave in November of 2014 and it had been approved. He had taken days of PFLA leave for doctor's appointments. He had requested and been allowed to be exempt from being ordered-in for a week or more at a time in January, perhaps in March[11] and definitely in July. His supervisors knew of A.T.'s sudden return to his and his wife's home. Superintendent Al Cormier had actually met A.T. and was aware of his condition and some of the issues which had landed him in foster care. During an interview, he acknowledged that the care A.T. needed was not standard childcare. While Assistant Superintendent Quinn had never met A.T., she had heard Mr. Thissell talk about him and knew enough that she agreed that the care he needed was not standard childcare. So in addition to his supervisors' knowledge, Mr. Thissell had been consistent about mentioning the necessity of providing care for A.T. No one had ever questioned or challenged him. No one had ever asked for further documentation. The underlying need for the exemption from order-ins for the week of July 28th was the same as the reason the exemption was needed on July 20th, so the DOC had notice of his need for the exemption.[12] On July 20th,

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[11] Records suggest there may have been requests for exemptions but the actual requests could not be found.

[12] See 21 V.S.A §472(e). "Notice" is an element of the prima facie case and Mr. Thissell must show he provided sufficient notice of the leave. The contract states that, "The employee must provide reasonable notice of intent to take a leave, the date of anticipated commencement and expected duration of the leave, or the State may deny the leave. The employee must provide reasonable advance notice to the State if the employee wishes to request an extension of the leave, ***to the extent available***." Article 39 §3(b)(emphasis added). However **intermittent leave**, which is the type of leave Mr. Thissell took, required only that the he "***attempt*** to schedule the intermittent leave...so it does not disrupt the State's operations." Article 39 §6. The Code of Federal Regulations (CFR) states:

Mr. Thissell had made it clear that there was a possibility it would take some time to find a trained caregiver (see bold and underlined portion of July 20th email above).

The State has offered two reasons for denying Mr. Thissell the July 28, 2015 order-in exemption request. The most recent contradicts its original response. In December of 2015, this investigation interviewed Superintendent Cormier and Assistant Superintendent Quinn. They stated that they did not actually realize Mr. Thissell was making an PFLA request when he asked for the continued order-in exemption on July 28th. Instead, they asserted that what they actually believed was that Mr. Thissell was requesting to use a purported informal facility-wide order-in exemption *gratis* policy, and that they denied his request because he was going over his allotment.

This argument makes no sense. First, this policy, (which as of this writing has not been produced for inspection by this investigation, although it was requested), can only be used once every pay period, i.e. *only* two days per month. Purportedly everyone can use it, but it is self-monitored and subject to an honor system. This policy has no record-keeping component. In addition, an employee need not give any reason for wanting the exemption. If this policy had been the real issue for Mr. Cormier and Ms. Quinn, they would have objected when he asked to be exempt from order-ins for a whole week of sequential days off on July 20th, but they did not. They granted his request. In light of these factors, this reason appears to be nothing more than a *post-hoc* effort to justify its decision to deny an exemption from order-ins.

The original and more legally complex reason for the denial of his exemption request was based on the notion that Mr. Thissell was suddenly asking for the exemption to provide "child care" and that the PFLA did not allow leave for that purpose. On July 28th, when Mr. Thissell requested a further exemption, SOS Hanrahan wrote Assistant Superintendent Quinn to ask if the exemption was allowable. Ms. Quinn wrote that the "FMLA only covers Doctor's [sic]

"All FMLA absences ***for the same qualifying reason are considered a single leave and employee eligibility as to that reason for leave does not change during the applicable 12–month period.***" 29 C.F.R. 825.300(b)(1)(emphasis added). The CFRs state that when the leave is unforeseeable, "an employee must provide notice to the employer ***as soon as practicable under the facts and circumstances of the particular case.*** It generally should be practicable for the employee to provide notice of leave that is unforeseeable within the time prescribed by the employer's usual and customary notice requirements applicable to such leave." 29 C.F.R. § 825.303(a). This second sentence returns the parties to the contract provision which essentially requires employees taking intermittent leave to do their best not to inconvenience the employer, but they are not prohibited from taking the leave if necessary.

appointments and NOT child care." Superintendent Cormier agreed with her and elaborated:

> That is correct. Thissell's FMLA paperwork specifically states intermittent use for doctors [sic] appointments only. This does not cover order in exemptions on a consistent basis. If there is a scheduled appointment and he needs an exemption for a specific date or time then we can accommodate but we will not give exemptions for an extended period of time due to the FMLA paperwork currently on file.

Mr. Cormier's response required a closer look at the paperwork submitted by Mr. Thissell and the approval from the facility.

C. Legal Analysis

a). *Mr. Thissell fills out an PFLA Employee Request Form for intermittent leave*

On November 29, 2014, Mr. Thissell filled out a request for PFLA leave on the State's "Employee Request Form." He requested "intermittent leave" under item #1 and in item #2 specified that the need for PFLA leave was due to a "serious health condition affecting my immediate family." A.T. qualified as "immediate family" per the statute and the contract.[13] It is important to note that the form *specifically refers* the applicant to the corrections contract for the definition of "serious health condition." The contract also defines other terms such as "intermittent leave" (leave taken in separate blocks of time due to a single qualifying reason).

Mr. Thissell's request for intermittent leave covered two types of time off. The first related to A.T.'s doctor's appointments, some of which were out of state. Those PFLA absences were taken as straight full or partial days off and were counted towards his total yearly PFLA leave allotment.[14] His time sheets show that

[13] 21 V.S.A. §472(a)(2). (a) During any 12-month period, an employee shall be entitled to take unpaid leave for a period not to exceed 12 weeks ...(2) for family leave, for the serious illness of the employee or the employee's child, stepchild or ward of the employee who lives with the employee, foster child, parent, spouse or parent of the employee's spouse.

[14] See 21 V.S.A. §472(a). Article 39 §(3)(a) of the corrections contract states that: "An eligible employee is entitled to a total of twelve (12) weeks of unpaid statutory Family Leave and/or statutory Parental Leave within a twelve (12) month period beginning the first day either Leave is used."

he used his accrued time per the statute and contract (vacation, sick, personal)[15] and did not take any unpaid PFLA leave. As already noted, A.T. also needed non-standard care in the home when not in regular school, summer school, or when ill. During times when no DCF cleared caretaker was available, Mr. Thissell and his wife had to assume 100% of those duties and adjust their work schedules to provide coverage.

Since he chose "intermittent leave," the form instructed Mr. Thissell to elect whether he wanted to be on paid or unpaid leave,[16] however he did not make an election. The form asked how frequently he would be absent due to treatments. For the number of treatments, he put "indefinite." For frequency of treatments he put "weekly." For dates of treatments he put "to [sic] many to write out." For length of post-treatment incapacitation, he wrote "until I am no longer [sic] foster parent or legal guardian of the child." He asked for the leave to start on November 29, 2014 but did not specify an end date.

b). *Certification of Medical Provider*

Mr. Thissell was also required to provide a "Certification of Medical Provider." On that form, Mr. Thissell specified that A.T. had "Chronic Conditions Requiring Treatments," – which again, like "serious health condition," is defined in the contract. He noted that A.T. had "***Permanent/Long-Term Conditions Requiring Supervision.***" On the back of the form, under "Care Provider," there was another question: "Would the employee's presence to provide **psychological comfort** be beneficial to the patient or assist in the patient's recovery?" (bold in the original). Mr. Thissell checked "Yes." At the bottom of the second page of the Certification Form, Mr. Thissell was instructed to "State the care to be provided by the employee and an estimate of the time period necessary to provide this care. If

[15] The contract sets out a certain order that different types of time may be taken according to when the leave is used. See Article 39 §5(b): "During Family Leave, at the employee's option, the employee may use up to six (6) weeks of any accrued paid leave, including, but not limited to, sick leave, annual leave and personal leave. Thereafter, employees may use only the following accrued paid leaves in the following order: compensatory time, personal time and annual leave. No combination of paid and unpaid leaves shall extend the statutory Family Leave beyond twelve (12) weeks. Notwithstanding the foregoing, even if statutory Family Leave is exhausted, this Agreement's sick leave, unpaid medical leave and administrative leave provisions are still applicable and may provide for additional leave consistent with these provisions."

[16] For the specific statutory provision in the statute, see 21 V.S.A. §472(a)-(c). Generally, paid FMLA leave would involve the use of any accrued leave, at least as much as the employee had, such as sick time, vacation time, personal time, and compensatory time. By using accrued time for FMLA leave, the employee would continue to accrue time while on leave. If the employee ran out of accrued leave, had no accrued leave, or elected to not use accrued leave, but rather to go on unpaid leave, they would be on unpaid FMLA leave. Employees on unpaid FMLA leave are required to pay their health insurance premiums and do not accrue leave.

an intermittent or reduced leave schedule is required, please include the schedule." Mr. Thissell provided no further information. The form was signed by a physician.

c). *Employer Response to Employee PFLA Request*

Assistant Superintendent Norah Quinn stated that she signed the approval for Mr. Thissell's request, but admitted during an interview that she had not read or reviewed the form herself. She stated that she had been given the form and simply been asked to sign it by now retired Business Manager Meroa Benjamin. She assumed Ms. Benjamin had vetted the contents and believed that Ms. Benjamin was competent and understood what was needed from the employee. Ms. Benjamin did not give the request to Ms. Quinn to sign until January 9, 2015, some forty-one (41) days after it was submitted, however she did so likely because of the email sent to SOS Hanrahan on January 8th informing him of the upcoming need for leave. Ms. Benjamin also added an incorrect end date to his request by having it run from November 29, 2014 to November 29, 2015. In fact it should have run from January 2015-January 2016 since Mr. Thissell did not take any PFLA leave until January of 2015 and it was approved in January by Ms. Quinn.

At the bottom of the Response form there was an unsigned[17] typed note which set forth the hours of sick, annual, personal and comp time Mr. Thissell had on the books. The note directed Mr. Thissell to let his supervisor(s) know when he was going to use PFLA leave. Mr. Thissell does not recall having any discussion with Ms. Quinn or Ms. Benjamin about the form or ever seeing the Employer Approval Form prior to this investigation showing it to him, however he assumed it had been approved when his requests for PFLA leave and order-in exemptions were approved.

d). *A Closer Look at the Language on the Employer Response Form*

One of the most significant sections of the Employer Response form appears on page two. There, Ms. Benjamin checked a box that Mr. Thissell **would not** be "required to furnish medical certification of a serious health condition." Therefore, for purposes of the one-year intermittent leave period, DOC indicated that it agreed that A.T. had a:

[17] Ms. Quinn believed the note was probably from Ms. Benjamin.

> (e) **"Serious Illness"** ... **physical...condition** that: ...**requires continuing in-home care under the direction of a physician or health care provider**.

DOC also indicated that it agreed that A.T.'s "serious illness" required:

> (f) "**Continuing Treatment by a Health Care Provider**" [because A.T. had].... (4) **a period of incapacity which is *permanent* or long-term due to a condition for which treatment may not be effective, although the individual is under the continuing supervision of a health care provider**...(emphasis added).[18]

These two subsections of the contract are critical. Subsections (e) and (f) can be read separately or together, but the conclusion that follows is inescapable: caring for a child such as A.T. who has a "physical condition," which is "permanent" and requires "continuing treatment" will never be standard "child care." Mr. Thissell was not just meeting a child at the bus, or watching a child play in back yard. A.T. cannot be left alone. His disability requires that all caretakers be trained to know how to handle his medical issues. He must be watched for seizures and/or breathing problems, aspiration or choking. His muscles must be stretched during the day to work on range of motion. His braces must be taken on and off. He has to be bathed, dressed, toileted, shifted and moved throughout the day so as not to develop sores or experience discomfort. A.T. will be under the care of a bevy of specialists – from doctors to mental health providers for the rest of his life, and Mr. Thissell and his wife were contending with providing that type of care to A.T. in the home. Thus, when Mr. Thissell checked the box on the Request form stating that A.T. had "**Permanent/Long-Term Conditions Requiring Supervision**" he incorporated the definition of "serious illness" and "continuing treatment," and this was apparently understood, or at the very least not challenged in prior approvals for order-in exemptions he made, until July 28, 2015.

If Mr. Thissell's supervisors did not believe that they had adequate medical documentation to support his request for a continued exemption, they should have asked for additional documentation, not denied his request. When an employer finds that there is not sufficient medical evidence to support an employee's request

[18] See Corrections Contract Article 39. Note that the Code of Federal Regulations specifically discusses the care of an adopted or foster child with a "serious health condition." § 825.121(a)(4): Leave for adoption or foster care.

for PFLA leave, the employer has the duty to request documentation.[19] The employee only need give "notice of the need for FMLA leave:"

> Once an employee provides sufficient notice, the employer is on inquiry notice and bears the burden of ascertaining further details to determine whether the leave qualifies for FMLA protection.... The FMLA 'does not require that an employee give notice of a desire to invoke the FMLA. Rather it requires that the employee give notice of need for FMLA leave. This kind of notice is given when the employee requests leave for a covered reason. After a notice of this sort the employer can inquire further to determine if the FMLA applies.'... The activation of this duty of inquiry requires the employer to 'inquire further of the employee if it is necessary to have more information about whether FMLA leave is being sought by the employee, and obtain the necessary details of the leave to be taken.' [20] (Citations omitted).

While this investigation can appreciate the necessity of being able to safely run a correctional facility, the FMLA, unlike the American with Disabilities Act (ADA),[21] does not grant the employer the right to take away an employee's FMLA leave due to the "undue hardship" it would create: "By contrast [with the ADA], the FMLA does not include an "undue hardship" defense and an employer is required to provide the statutorily mandated 12 weeks of FMLA leave ***regardless of the hardship that results***."[22] (Emphasis added).

Ironically, by denying his request, the facility lost Mr. Thissell's services completely for three weeks. Mr. Thissell stated he felt he was between a rock and hard place and that he had no other choice but to fill out a new PFLA form and take three weeks of continuous leave to ensure he could cover the time until A.T.'s regular school resumed and in case a sitter could not be found. He could not risk

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[19] 29 C.F.R. § 825.305(c): "...The employer ***shall*** advise an employee whenever the employer finds a certification incomplete or insufficient, and shall state in writing what additional information is necessary to make the certification complete and sufficient...."

[20] Barnett v. Revere Smelting & Refining Corp., 67 F.Supp.2d 378, 387 (S.D.N.Y. 1999).

[21] *See* 42 U.S.C. § 12111(10)(A)-(B) for the definition of "undue hardship."

[22] Santiago v. Dept. of Transportation, 50 F.Supp.3d 136, 148 (D. Conn 2014). This a case involving the FMLA, however the court cited the contrast between the ADA and FMLA in discussing the hardship on the employer when an employee requests leave versus a reasonable accommodation. The ADA requires the employer to provide reasonable accommodations, including part-time or modified schedules, if the employee is a "qualified individual with a disability." *See* 42 U.S.C. § 12111(9)(B) and 29 C.F.R. § 1630.2(*o*). However unlike the FMLA, the employer subject to the ADA does not have to eliminate an "essential function" of the job, or offer a reasonable accommodation that would impose an "undue hardship" upon the employer.

being subject to order-ins and leave A.T. alone if his wife could not be there, or cause her to miss work if no sitter was available. The State has speculated about whether he had a sitter, planned to get a sitter, whether DCF knew whether he had a sitter, whether he could have worked long term even with the exemption without falling asleep on the job, but these questions do not matter for the purposes of determining whether or not he was eligible for the exemption from order-ins for the week of July 28th. Those issues are speculative and go to possible damages, if anything. They do not go to the issue of whether the denial was legal or not. Thus, on July 29, 2015, he wrote:

> Al, Norah, Doug, John,
> This frustrates me. I am willing to work my shifts, and not cause more overtime on a [sic] already heavily burdened employee base. However, Working [sic] any overtime at this point would cause a undue hardship for both my family and myself. Rest assured that I am exercising due diligence in resolving this matter as soon as possible. Until this is accomplished what options are available to me? Will it be necessary for me to take a leave of absence? If this is indeed the case, May [sic] I please have the necessary FMLA forms as soon as possible to expedite the process?
> Thank you very much!
> Ken Thissell

e). Re-Visiting the Prima Facie Case – Analysis of Part I

With this background in mind, this investigation re-examines the elements of the prima facie case to determine whether the DOC interfered with Mr. Thissell's PFLA right on July 28, 2015. Based on the evidence discussed, he has met his burden:

1. Mr. Thissell was an "eligible employee;"
2. The DOC is an employer subject to the requirements of PFLA;
3. Mr. Thissell was entitled to leave under the PFLA;
4. Mr. Thissell gave notice to the employer of his intention to take PFLA leave; and
5. The DOC denied him the benefits to which he was entitled under the PFLA.[23]

[23] *See supra* note 5.

DOC approved Mr. Thissell's November request for PFLA leave in January 2015. It allowed him to be exempt from order-ins for consecutive days on more than one occasion. Mr. Thissell was clear that he needed to provide non-standard care for A.T. Superintendent Cormier had personal knowledge of A.T.'s condition and knew and admitted that the care A.T. needed was not standard child care. Assistant Superintendent Quinn agreed with this based on what she had been told about A.T. Mr. Thissell took care to try and communicate with his employers and give them notice of his circumstances, although certain things -- such as the sudden placement of A.T. back in his home on July 13, 2015-- were out of his control. He gave notice on July 20, 2015, that he was looking for coverage but might need to be exempt beyond the week of July 20th.

The language in Article 39 of the corrections contract, as reflected in and as adopted by the form, clearly envisions the non-standard care of A.T. (and others like him), because A.T. had a **physical condition** that **required continuing in-home care under the direction of a physician or health care provider**. These provisions are expansive and cover a wide range of needs with respect to A.T. other than going to doctors' appointments. Furthermore, as already noted, employers cannot interfere with an employee's right to PFLA leave even if it causes hardship.[24] Prior to the week of July 28th, when it appears that the need for overtime became acute, not one of his supervisors challenged his right to take leave. If they felt they needed clarification, they were permitted to and could have asked for it,[25] but they did not and in addition, did little to nothing to offer guidance beyond the denial.[26]

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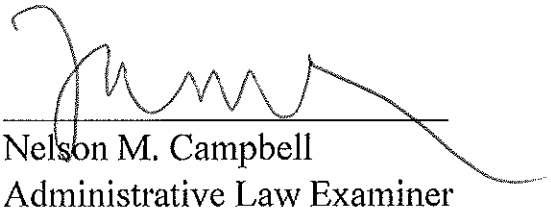
[24] *See supra* note 22.

[25] The CFRs offer guidance as to certification. 29 C.F.R. §825.305 (c) Complete and sufficient certification. The employee must provide a complete and sufficient certification to the employer if required by the employer in accordance with §§ 825.306, 825.309, and 825.310. **The employer shall advise an employee whenever the employer finds a certification incomplete or insufficient, and shall state in writing what additional information is necessary to make the certification complete and sufficient.** A certification is considered incomplete if the employer receives a certification, but one or more of the applicable entries have not been completed. **A certification is considered insufficient if the employer receives a complete certification, but the information provided is vague, ambiguous, or non-responsive.** The employer must provide the employee with seven calendar days (unless not practicable under the particular circumstances despite the employee's diligent good faith efforts) to cure any such deficiency. Essentially, the DOC waived this requirement by not following up.

[26] There is an argument that the theory of equitable estoppel should prevent the State from mounting a successful defense. Equitable estoppel, at its most basic is about fair dealing. The Second Circuit defined equitable estoppel as: "...imposed by law in the interest of fairness to prevent the enforcement of rights which would work fraud or injustice upon the person against whom enforcement is sought and who, in justifiable reliance upon the opposing

PRELIMINARY RECOMMENDATION: This investigative report makes a preliminary recommendation to the Human Rights Commission to find that there are **reasonable grounds** to believe that the Department of Corrections interfered with Kenneth Thissell's PFLA rights when it denied his requests for order-ins on July 28, 2015, in violation of 21 V.S.A. §470 et seq.



Nelson M. Campbell
Administrative Law Examiner

APPROVED AS REDACTED:

Karen Richards
Executive Director and Legal Counsel

party's words or conduct, has been misled into acting upon the belief that such enforcement would not be sought, is grounded on notions of fair dealing and good conscience and is designed to aid the law in the administration of justice where injustice would otherwise result." Readco, Inc. v. Marine Midland Bank, 81 F.3d 295, 301 (2d Cir.1996). The Vermont Supreme Court recognized its potential validity in Woolaver v. State, 175 Vt. 397, 405 (2003). The court made no ruling on the estoppel argument. It noted the plaintiff had pled all the elements but remanded for further fact-finding.