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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MADDEN Justice

PART 11

ELVIN LEGROW

- v -

SANDRA LEWIS SMITH

INDEX NO. 403679/02

MOTION DATE 11-27-03

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this ~~motion to~~ Petition/for Article 78 relief

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this ~~motion~~ petition is decided in accordance with the annexed Memorandum Decision and Judgment

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: April 3, 2003

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 11

…… x

In the Matter of the Application of ELVIN LEBRON,

Petitioner,

Index No. 403679/02

For A Judgment Pursuant to Article 78
Of the Civil Practice Laws and Rules.

SANDRA LEWIS SMITH, DEPUTY COMMISSIONER OF N.Y.D.O.C.,

Respondent.

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JOAN A. MADDEN, J.S.C.:

In this Article 78 proceeding, petitioner Elvin Lebron, who is pro se, seeks to compel respondent the Deputy Commissioner of the New York City Department of Corrections ("NYCDOC") to credit him with additional jail time served and to comply with New York's Freedom of Information Law ("FOIL"), Public Officers Law article 6. Respondent opposes the petition except to the extent that she admits that petitioner is entitled to some additional credit for jail time served. With respect to the FOIL request, respondent asserts that the petition should be dismissed as moot as her agency has conducted a diligent search for the requested records and has been unable to locate any responsive documents.

Credit for Jail Time While in the Custody of NYCDOC

Petitioner, who is an inmate in a state correctional facility, was convicted on December 14, 1994 of Manslaughter in the First Degree, Robbery in the First Degree and Criminal Possession of a Weapon in the Third Degree. Petitioner was discharged from NYCDOC custody on January 10, 1995 and began serving his state sentence on that date.

Petitioner now seeks additional credit for the jail time he served while in the custody of NYCDOC. In particular, while the NYCDOC credited petitioner with 461 days, the petition alleges that he is entitled to 487 days credit.' Following the submission of the petition, NYCDOC conducted an investigation and, as a result, recalculated petitioner's jail credit for time served in its custody at 468 days, and informed petitioner of the results of its investigation, and the manner in which it calculated his time. Petitioner responded by letter dated October 11, 2002, in which he admitted to erroneously calculating his time, but asserted that he was entitled to 474 days credit for his time in NYCDOC custody.' By letter dated November 18,2002, NYCDOC found that petitioner was entitled to one more day of jail credit, or 469 days, and stated the basis for recalculating his time, and copied petitioner on the letter. On that date, NYCDOC also certified that petitioner had served 469 days in NYCDOC custody.

Thus, the issue on this application is whether petitioner has shown that NYCDOC failed to credit him with five additional days of jail time. **As** a preliminary matter, petitioner, in his reply papers, seeks for the first time credit for time purportedly served in NYCDOC custody on October 19, 1992, October 20, 1992 and December 7, 1992. **As** these days were not included in the petition and thus respondent did not have **an** opportunity to respond, under controlling law, this request may not be considered. See, Zelnik v Bidermann Industries **U.S.A.**,Inc., 242 AD2d

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'The petition alleges that although respondent credited petitioner for time served in NYCDOC custody from 10/6/93-1/10/93 (or 461 days) he is also entitled credit for **an** additional 26 days as petitioner was also in custody on the following dates: 2115193-2/26/93; 4/1/93-4/7/93; 9/22/93-9/27/93; 10/5/93; and 1/10/95.

'In his letter, petitioner asserts that he is entitled to additional credit for time served in NYCDOC custody on the following dates: 2/23/93-2/24/93; 4/1/93-4/5/93; 9/22/93-9/25/93; 10/5/93; and 1/10/95.

227, 232 (1st Dept 1997)("a contention raised for the first time in reply papers is not cognizable"); Azzopardi v American Blower [redacted] 192 AD2d 453,454 (1st Dept 1993)("court should never have considered arguments making their initial appearance in reply papers"). Petitioner also is not entitled to credit for January 10, 1995, as respondent submits uncontroverted proof that petitioner began his state sentence that day. Accordingly, petitioner is not entitled to credit from **NYCDOC** for that day. See, Kwaski v Goord; Index No. 0030/00 (Supreme **Court,** Schoharie **Co.** June 2,2000); Penal Law section 70.30(3). Furthermore, with one exception, petitioner's arguments that he his entitled to credit for various other days not included in respondent's calculation of his time served in its custody are without merit as he provides no proof that he was in **NYCDOC** custody on those days.

Petitioner also contends that he was in **NYCDOC** custody from April 1,1993 to April 5, 1993 instead of from April 1, 1993 to April 3, 1993, as found by respondent. In particular, petitioner apparently argues that although he was arraigned on April 3, 1993 and bail was set on that day, his bail was not processed until April 4, 1993 and he was not released until April 5, 1993. This argument, unlike the others made by petitioner, is supported by evidence, including a mental health evaluation form from Rikers Island dated April 4, 1993 and a "progress and observation record" from Rikers Island Health Services dated April 5, 1993, which identify petitioner as a patient. Absent evidence controverting this proof, petitioner is entitled to credit for time served in **NYCDOC** custody on April 4, 1993 and April 5, 1993, and respondent should recalculate petitioner's jail credits accordingly.

FOIL Request

Petitioner made a FOIL request to respondent seeking (i) copies of log book pages from a

May 24, 1994 meeting with his lawyers, (ii) records of any telephone calls made by petitioner from the adolescent "bing" (punitive segregation unit) at the Manhattan House of Detention from January 1994 through July 1994, (iii) records regarding all telephone calls made from a particular phone line (C-74-3' supper line) from October 1994 through January 1995, (iv) records showing the names and addresses of individuals who visited petitioner at the Manhattan House of Detention from January 1994 through July 1994, and (v) the names, badge numbers, and present posts of steady officers assigned to A.R.D.C. (Adolescent Reception and Detention Center) 3 upper housing between October 1994 and January 1995.[3] Petitioner alleges that respondent has not responded to his request, and that he is therefore seeking Article 78 relief.

In response, respondent concedes that she failed to timely respond to petitioner's FOIL request. Respondent argues, however, that the petition should be denied as the agency has conducted a diligent search for the records and has been unable to locate any of them. In support of this position, respondent submits the affirmation of an Associate Attorney in the Office of the General Counsel and the Legal Division of NYCDOC who specifically states that as to each category of documents, a thorough and diligent search was made but that the documents sought could not be located. With respect to petitioner's request for the names, badge numbers, and present posts of steady officers assigned to A.R.D.C., respondent asserts that this request is not proper as it is in the form of an interrogatory and that, in any event, it does not possess any

[3]Petitioner does not submit the FOIL request he sent to respondent. Instead, he submits a FOIL request apparently sent to the Manhattan District Attorneys' Office seeking documents related to the three indictments resulting in his conviction, which was apparently denied based on petitioner's purported failure to adequately show that he had requested the documents sought from his former counsel. As the Manhattan District Attorney's Office is not a respondent in this proceeding, this court will not address any issues arising from its apparent denial of petitioner's FOIL.

documents responsive to the request.

Respondent is correct that she is not required to respond to a FOIL request to the extent it requires the agency to compile information not already in the its possession or control. See, Brown v New York Citv Police Department, 264 AD2d 558,562 (1st Dept 1999)("an agency has no duty to create documents that are not in existence... .")(citations omitted); see, also, Public Officer's Law § 89(3)(providing that '[n]othing in this Article shall be construed to require any entity to prepare any record not possessed or maintained by such entity").

Moreover, the affirmation from respondent's counsel stating that the requested documents could not be located after a through and diligent search renders petitioner's application moot. See, Rattlev v New York Citv Police Department, 96 NY2d 873 (2001). In Rattley, the petitioner, who had been convicted of second degree murder, requested police department documents relevant to his case, and the NYPD responded by a letter stating that although certain documents would be produced, other documents could not be located. Subsequently, in opposition to petitioner's request for Article 78 relief, the NYPD submitted an affirmation of its counsel stating that despite a "'thorough and diligent search' certain documents could not be found," id at 874.

Although the Appellate Division, First Department held that a counsel's affirmation and letter stating that the documents requested could not be located did not provide a sufficient basis for the court to determine without a hearing whether the respondent conducted a diligent search (Rattley v New York Citv Police Department, 270 AD2d 170, 171 (1st Dept 2000)), the Court of Appeals disagreed. In its decision reversing the First Department and dismissing the petition, the Court of Appeals wrote that:

> When an agency is unable to locate documents properly requested under FOIL, Public Officers Law § 89(3) requires the agency to "certify that is does not have possession of [a requested] record or that such record cannot be found after diligent search." The statute does not specify the manner in which an agency must certify that the documents cannot be located. Neither a detailed description of the search nor a personal statement from the person who actually conducted the search is required.

Rattley v New York City Police Department, 96 NY2d, at 875 ; see also, Alicea v New York City Police Department, 287 AD2d 286 (1st Dept 2001). As Rattley v New York City Police Department controls here, the court is constrained to find that the attorney's affirmation is sufficient to certify that documents sought by petitioner cannot be located with due diligence.

Conclusion

In view of the above, it is

ORDERED and ADJUDGED that the petition is granted to the extent that, within 60 days of the date of this decision, order and judgment, respondent is directed to recalculate petitioner's jail credits to give petitioner credit for time served in NYCDOC custody on April 4, 1993 and April 5, 1993; and it is further

ORDERED and ADJUDGED that with respect to the relief request under FOIL the petition is denied and dismissed.

A copy of this decision, order and judgment is being mailed by my chambers to the pro se petitioner and counsel for the respondent.

DATED: April 3,2003

J.S.C.