

Matter of Tucker v Fischer

2008 NY Slip Op 30684(U)

March 11, 2008

Supreme Court, St. Lawrence County

Docket Number: 0125739/2007

Judge: S. Peter Feldstein

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**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF ST. LAWRENCE

In the Matter of the Application of
SHAK-COR TUCKER, #05-A-4483,
Petitioner,

For a Judgment Pursuant to Article 78
Of the Civil Practice Law and Rules

-against-

BRIAN FISCHER, Commissioner,
New York State Department of Correctional Services,
and **LAWRENCE SEARS,** Superintendent,
Ogdensburg Correctional Facility,
Respondents.

DECISION AND JUDGMENT
RJI #44-1-2007-0656.042
INDEX #125739
ORI # NY044015J

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This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the petition of Shak-Cor Tucker, verified on September 13, 2007, and stamped as filed in the St. Lawrence County Clerk's office on September 27, 2007. Petitioner, who is an inmate at the Ogdensburg Correctional Facility, is challenging the July 12, 2007, decision of the commissioner's designee affirming the June 27, 2007, recommendation of the Time Allowance Committee (TAC) at the Ogdensburg Correctional Facility to withhold all of his potentially available good time. The Court issued an Order to Show Cause on October 9, 2007, and has received and reviewed respondents' Answer, verified on November 14, 2007. The Court has received no Reply thereto from the petitioner.

On January 30, 2003, the petitioner was sentenced in Supreme Court, Nassau County, as a second felony offender, to an indeterminate sentence of imprisonment of 3 to 6 years upon his conviction of the crime of Attempted Criminal Sale of a Controlled

Substance 3°. Although the record before the Court is less than clear, it would appear that on April 4, 2005, while at liberty from DOCS custody (temporary release/parole ?), the petitioner was arrested on new criminal charges. On August 4, 2005, the petitioner was sentenced in connection with the new charges, as a second felony offender, to a determinate term of 2 years (with 2 years of post-release supervision) upon his conviction of the crime of Criminal Possession of a Controlled Substance 5°. He was received back into DOCS custody on September 6, 2005. After applying 1 year, 5 months and 29 days of potentially available good time the petitioner's conditional release date was re-calculated as October 23, 2007. Forty-five days of petitioner's good time was recommended lost upon disposition of a Tier III Superintendent's Hearing conducted in November of 2006. At that hearing petitioner was found guilty of violating inmate rules 108.14 (temporary release violation), 113.25 (drug possession) and 114.10 (smuggling).

Approximately four months before petitioner's re-calculated conditional release date the TAC met to consider the petitioner's file and decide upon a recommendation as to the amount of good behavior allowance to be granted. On June 14, 2007, the petitioner was notified that the TAC had determined that there may be sufficient reason not to recommend the granting of all his potentially available good time, other than time lost as a result of the Superintendent's Hearing, and that a formal TAC hearing had been scheduled. 7 NYCRR §261.4. The stated reason for such hearing was as follows: "Disciplinary - recommended loss of good time; ASAT regression (drug possession)." Following the TAC hearing, on June 27, 2007, the TAC recommended the withholding of all of petitioner's potentially available good time. The stated reasons for the recommendation were as follows: "Loss of good time due to temporary release violation

and drug possession. ASAT program is a requirement. Will reconsider good time upon successful completion of the ASAT program.” The TAC recommendation was confirmed by the Superintendent of the Ogdensburg Correctional Facility on July 2, 2007, and ultimately affirmed by the Commissioner’s designee on July 12, 2007. This proceeding ensured.

Good time allowances “. . . may be granted for good behavior and efficient and willing performance of duties assigned or progress and achievement in an assigned treatment program, and may be withheld, forfeited or canceled in whole or in part for bad behavior, violation of institutional rules or failure to perform properly in the duties or program assigned.” Correction Law §803(1)(a). Inmates do not have the right to demand or require the good time allowances authorized under Correction Law §803 and “[t]he decision of the commissioner of correctional services as to the granting, withholding, forfeiture, cancellation or restoration of such allowances shall be final and shall not be reviewable if made in accordance with law.” Correction Law §803(4). *See Edwards v. Goord*, 26 AD3d 659, *lv den* 7 NY3d 710, *rearg den* 7 NY3d 992, *Benjamin v. New York State Department of Correctional Services*, 19 AD3d 832 and *McPherson v. Goord*, 17 AD3d 750. Case law suggests that a determination to withhold good time may be overturned if such determination is found to be irrational. *See Burke v. Goord*, 273 AD2d 575, *app. dis, lv den* 95 NY2d 898 and *Jones v. Coombe*, 269 AD2d 632, *lv den* 95 NY2d 755. “The committee shall not recommend the granting of the total allowance authorized by law or the withholding of any part of the allowance in accordance with any automatic rule, but shall appraise the entire institutional experience of the inmate and make its own determination.” 7 NYCRR §261.3(c). *See Amato v. Ward*, 41 NY2d 469.

The petitioner asserts that on December 7, 2006, approximately one week after his arrival at the Ogdensburg Correctional Facility, he met with a corrections counselor for an initial interview. The DOCS form generated at that interview, which is signed by the corrections counselor and the petitioner, identified petitioner's need for academic, vocational and substance abuse programming. Although it was indicated on the form that the petitioner had completed Alcohol Substance Abuse Treatment (ASAT) programming in September of 2006, the following was also noted on the form: "WR [presumably, work release] removal drug possession and smuggling." The Court presumes that this notation referenced the incident or incidents underlying the Tier III Superintendent's Hearing conducted in November of 2006. Notwithstanding the foregoing, the petitioner alleges that he was never called to participate in the ASAT program at the Ogdensburg Correctional Facility. The petitioner further alleges that he never refused to participate in any recommended or assigned program. The petitioner therefore asserts that the decision to withhold all of his potentially available good time was ". . . arbitrary and capricious due to the fact that the Petitioner agreed to participate in the recommended programming and should not be held accountable for the facility's delay in placing the Petitioner in recommended programming."

The Appellate Division, Third Department, has expressed some sensitivity to the distinction between an inmate who refuses to participate in a treatment program and an inmate whose failure to participate in such a program was due to the limited availability of such program. *See Staples v. Goord*, 263 AD2d 943, *lv den* 94 NY2d 755, *rearg den* 94 NY2d 900. The *Staples* Court, however, found the inmate's argument with respect to the limited availability of a particular sex offender program, as evidenced by his waiting list

status, to be without merit inasmuch as the inmate's “. . . records reflect that twice he declined participation in a counseling program and, thus, must bear some responsibility for his delayed treatment.” *Id.* at 944. Similarly, in *Coleman v. Boyle*, 270 AD2d 739, *lv den* 95 NY2d 758, the Third Department, found that petitioner's “belated request” for transfer to a facility offering a particular sex offender therapy program unavailing, in view of his history of refusing to attend similar treatment programs. According to the *Coleman* Court, “[i]n view of petitioner's unwarranted delay in seeking treatment for the very problem that resulted in his incarceration TAC's decision to withhold petitioner's good time allowance after considering the relevant factors was neither unreasonable nor contrary to law.” *Id.* at 740 (citation omitted).

Although *Staples* and *Coleman* are not strictly on point with the situation in the case at bar, the Court does find these two cases instructive. DOCS did afford the petitioner an opportunity to address therapeutic programming needs well in advance of the original conditional release date as evidenced by his completion of the ASAT program in September of 2006. It was petitioner's own conduct that formed the basis of the finding of guilt following the November, 2006, Tier III Superintendent's Hearing. That finding of guilt, moreover, was clearly indicative of petitioner's regression from his prior ASAT programming and, therefore, the need for additional intervention. Notwithstanding the foregoing, however, the Court is unable to gauge the impact of petitioner's regression from ASAT programming in context since the record in the case at bar is devoid of any reference to the efforts of DOCS officials to place petitioner back into the ASAT program prior to the TAC hearing of June 27, 2007. It may well be that petitioner was appropriately placed on an ASAT waiting list but his name simply did not work his way to the head of such list in

time for him to re-enter and complete the ASAT program prior to the TAC hearing. If that were the case it would be abundantly clear that it was the petitioner who must bear the bulk of the responsibility for his failure to re-complete the ASAT program. In view of the state of the record in this proceeding, however, the Court can only speculate with regard to this point.

Based upon all of the above, it is, therefore, the decision of the Court and it is hereby

ADJUDGED, that the petition is granted, without costs of disbursements, but only to the extent that this matter is remanded to the TAC at the Ogdensburg Correctional Facility, or other appropriate facility, for reconsideration not inconsistent with this Decision and Judgment.

Dated: March 11 , 2008, at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice