STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of TUCKER DAVENPORT, 98-A-4144,

Petitioner,

-against-

BRIAN FISCHER, COMMISSIONER; EDWARD PEARLMAN, DEPUTY COMMISSIONER OF PROGRAMS, NYSDOCS; DALE ARTUS, SUPERINTENDENT, GOWANDA CORRECTIONAL FACILITY,

Respondents,

For A Judgment Pursuant to Article 78 of the Civil Practice Law and Rules.

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI #1-10-ST1794 Index No. 4284-10

Appearances: Tucker Davenport
Inmate No. 98-A-4144
Petitioner, Pro Se
Gowanda Correctional Facility
P.O. Box 311
South Road
Gowanda, NY 14070

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DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Gowanda Correctional Facility, commenced the instant CPLR Article 78 proceeding to review actions of the respondents in delaying and/or denying his entry into the Alcohol and Substance Abuse Treatment ("ASAT") Program. As a part of his argument, the petitioner maintains that the respondents improperly directed that he could not be admitted to the ASAT Program until ninety days after he was released from the Special Housing Unit, and improperly directed that his name would then be placed at the bottom of the ASAT Program waiting list. In addition, he asserts that he has not received proper credit for past participation in the ASAT Program from May 11, 2009 to November 2009. The foregoing allegedly resulted in the improper denial of good time credit by the Gowanda Correctional Facility Time Allowance Committee ("TAC") in a determination dated March 17, 2009, which was administratively affirmed on April 8, 2009.

The respondents made a motion to dismiss on grounds that the petitioner failed to exhaust his administrative remedies. The Court, by decision-order dated December 3, 2010 granted the motion with respect to that portion of the petition which sought review of his removal from the ASAT program and/or review of the conditions imposed with respect to his re-admission to the program. With respect to the foregoing claims, the Court found that the petitioner had not filed administrative appeals of the grievances. The Court denied the balance of respondents' motion, finding that the respondents had not satisfied their burden of demonstrating that the petitioner failed to exhaust his administrative remedies as they relate to the determination of The TAC. Incidental to the foregoing, the Court found that determinations of a time allowance committee are not subject to the grievance process (see 7 NYCRR 701.3 [e] [2]). The Court then directed the respondents to serve and file an

answer within twenty (20) days. The respondents elected, instead, to make a second motion for dismissal of the petition on grounds that the statute of limitations with respect to the determination of the TAC, dated April 8, 2009, had expired before commencement of the instant proceeding. The Court denied the motion without prejudice, in a decision-order dated April 13, 2011.

Respondents have now served an answer in which they again allege that the applicable statute of limitations had expired before the petition was filed, and therefore this matter must be dismissed. A CPLR Article 78 proceeding is commenced (as applicable here) through the filing of the order to show cause and petition (see CPLR 304; see also, Vetrone v. Macklin 216 AD2d 839, 841 [3d Dept., 1995]; Matter of Gershel v Porr, 89 NY2d 327, 330 [1996]). In order to be timely filed, the instant proceeding needed to be commenced no later than four months following receipt of the appeals determination (see, Hauver v New York State Division of Parole, 236 AD2d 751 [3d Dept., 1997], lv denied 89 NY2d 815; Matter of Hawkins v. Russi, 193 AD2d 1032 [3d Dept., 1993]; Matter of Joyce v. Mann, 190 AD2d 922 [3d Dept., 1993]; Matter of Carter v State of New York, 95 NY2d 267, 270-271 [2000]). It is well settled that a proceeding commenced more than four months after petitioner has been given notice of the final determination is time barred (see, Matter of Hauver v New York State Div. Of Parole, supra; Matter of Joyce v. Mann, supra; Matter of Di Rose v New York State Dept., of Corrections, 221 AD2d 736 [3d Dept., 1995]).

With their answer, respondents have submitted the affidavit of Candice Villa, the Inmate Records Coordinator II at Gowanda Correctional Facility. Ms. Villa indicates that it is the responsibility of her office to recalculate inmates' legal dates upon receipt of final

determinations from the TAC and notify the inmate of the revised dates, and that such notification is done within a week of her receipt of the TAC decisions. According to Ms. Villa, the determination of The TAC was rendered on March 17, 2009, and administratively affirmed on April 8, 2009. Ms. Villa avers that she searched the records maintained by her office and found that her office processed the final determination of petitioner's sentence on April 14, 2009. She asserts that the latest date that petitioner could have received notice of the TAC administrative appeal determination was April 21, 2009.

Petitioner, in his reply, does not controvert his receipt of notification on or by this date. The Court finds that the four month statute of limitations to review the March 27, 2009 determination of The TAC commenced to run on April 21, 2009. As such, the statute of limitations expired August 21, 2009. Inasmuch as the petition is dated July 21, 2010, and filed at the earliest on July 29, 2010 (the date of the order to show cause), the Court finds that the proceeding, to the extent that it seeks review of the April 8, 2009 determination of The TAC is barred by the statute of limitations.

One further point should be addressed. The petitioner places great reliance upon a letter dated May 21, 2010 of Kenneth S. Perlman, Deputy Commissioner of Program Services of the Department of Correctional Services. That letter is a response to a letter from the petitioner dated April 20, 2010 which apparently raised issues concerning his participation in the ASAT program. Again, the Court, in its decision-order dated December 3, 2010, dismissed the petition with respect to all issues concerning his participation in the ASAT program, by reason of petitioner's failure to exhaust his administrative remedies. To the extent that petitioner's May 21, 2010 letter sought review of the March 27, 2009 TAC

determination (received by the petitioner on April 21, 2009), the Court is of the view that this was a request for reconsideration of the prior agency determination. Requests for reconsideration do not, ordinarily, toll or revive the statute of limitations (see, Lubin v. Board of Educ. of City of New York, 60 NY2d 974; Matter of Yarbough v Franco, 95 NY2d 342, 347-348 [2000]; Matter of Finger Lakes Racing Association, Inc. v State of New York Racing and Wagering Board, 34 AD3d 895, 896-897 [3rd Dept., 2006]). "The statute of limitations runs from the initial determination "'unless the agency conducts a fresh and complete examination of the matter based on newly presented evidence'" (Matter of Finger Lakes Racing Association, Inc. v State of New York Racing and Wagering Board, supra, at 897, quoting Matter of Quantum Health Resources v DeBuono, 273 AD2d 730, 732 [2000], lv dismissed 95 NY2d 927 [2000]). There is no evidence here that Deputy Commissioner Perlman conducted a fresh and complete examination of the matter based on newly presented evidence. Thus the May 21, 2010 letter from Deputy Commissioner Perlman did not operate to extend the statute of limitations.

Moreover, and apart from the foregoing, it is well settled that good behavior allowances are a privilege not a right (see Matter of Reed v Fischer, 54 AD3d 1088, 1088 [3rd Dept., 2008]). Determinations with regard to good time allowances are not subject to review so long as they are made in accordance with the law (see, Correction Law § 803 [4]; see also, Matter of Staples v Goord, 263 AD2d 943, lv denied 94 NY2d 755)."TAC's function is to suggest the amount of good time allowance to be awarded based not upon the application of 'any automatic rule', but upon the inmate's entire institutional experience" (Matter of Staples v Goord, 263 AD2d 943, 944 lv denied 94 NY2d 755, quoting Matter of Amato v Ward, 41

NY2d 469, 473-474, quoting 7 NYCRR 261.3 [e]). Good time may be withheld by reason of an inmate's refusal and/or failure to participate in programming (see Matter of Torres v Dubray, 64 AD3d 1027, 1027-1028 [3rd Dept., 2009]; Matter of Staples v Goord, supra; Matter of Jones v Coombe, 269 AD2d 632, lv denied 95 NY2d 755[3rd Dept., 2000]; Matter of Benjamin v New York State Department of Correctional Services, 19 AD3d 832, 833 [3rd Dept., 2005]; People v Jones, 35 AD3d 951, 952 [3rd Dept., 2006]). The reason given for withholding good time was the following:

> "Must complete ASAT (regression due to drug ticket). Must also maintain clean disciplinary and participate positively in all programs. Hold to full max, may write for reconsideration upon completion of ASAT".

Were the Court to reach the merits of the March 17, 2009 determination of TAC the Court would find that it was not irrational, or in violation of lawful procedure, nor affected by an error of law, or arbitrary and capricious, and did not constitute an abuse of discretion. The fact that the petitioner was subsequently readmitted to the ASAT program, and successfully completed the program, is irrelevant with regard to whether the March 17, 2009 determination of the TAC was properly made.

The Court concludes that the petition must be dismissed.

Accordingly it is

ORDERED and ADJUDGED, that the petition be and hereby is dismissed.

This shall constitute the decision, order and judgment of the Court. The original decision/order/judgment is returned to the attorney for the respondents. All other papers are being delivered by the Court to the County Clerk for filing. The signing of this decision/order/judgment and delivery of this decision/order/judgment does not constitute

entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

ENTER

Dated: June 16, 2011
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated July 29, 2010, Petition, Supporting Papers and Exhibits
2. Respondent's Answer dated May 13, 2011, Supporting Papers and Exhibits
3. Petitioner's Reply dated May 24, 2010