

Matter of Gavin v Fischer
2012 NY Slip Op 30916(U)
January 9, 2012
Supreme Court, St. Lawrence County
Docket Number: 137047
Judge: S. Peter Feldstein
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**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF ST. LAWRENCE

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In the Matter of the Application of
HAQUAN GAVIN, #10-R-2870,

Petitioner,

for Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

**DECISION AND JUDGMENT
RJI #44-1-2011-0681.32
INDEX #137047
ORI # NY044015J**

-against-

BRIAN FISCHER, Commissioner, NYS
Department of Corrections and Community
Supervision,

Respondent.

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This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the petition of Haquan Gavin, verified on September 8, 2011 and filed in the St. Lawrence County Clerk’s office on September 14, 2011. Petitioner, who is an inmate at the Gouverneur Correctional Facility, is challenging the August 26, 2011 decision of the commissioner’s designee affirming the August 25, 2011 recommendation of the Time Allowance Committee (TAC) at the Gouverneur Correctional Facility that petitioner’s entire one year of potentially available good time be withheld. The Court issued a Order to Show Cause on September 20, 2011 and has received and reviewed respondent’s Answer and Return, including Confidential Exhibits B and C, verified on October 27, 2011. The Court has also received and reviewed petitioner’s Reply thereto, filed in the St. Lawrence County Clerk’s office on November 9, 2011.

On April 15, 2008 petitioner was sentenced in Supreme Court, Kings County, to a controlling indeterminate sentence of 1 to 3 years upon his convictions of the crimes of Robbery 3° and Bail Jumping 1°. After applying one year of potentially available good time petitioner’s conditional release date was originally calculated by DOCCS officials as

October 6, 2011. Petitioner had no good time recommended lost upon disposition of any Tier III Superintendent's Hearing.

On June 28, 2011 the TAC at the Riverview Correctional Facility met to consider petitioner's file and decide upon a recommendation as to the amount of good behavior allowance to be granted. *See* 7 NYCRR §261.3. Following that meeting, after noting petitioner's "[p]ositive programing with no disciplinary ticket," the Riverview TAC recommended that petitioner receive his entire one year of good time. That recommendation was confirmed by the facility superintendent on June 28, 2011 and affirmed by the commissioner's designee on July 11, 2011.

Three days later, on July 14, 2011, petitioner was issued three inmate misbehavior reports charging him with violations of inmate rules 105.13 (gangs), 113.15 (unauthorized exchange), 113.23 (exchange not authorized by superintendent), 113.15 (unauthorized exchange) and 113.23 (contraband). A single Tier III Superintendent's Hearing was held at the Riverview Correctional Facility on July 20, 2011 with respect to the charges set forth in the three inmate misbehavior reports. At the conclusion of the hearing petitioner was found guilty of all five charges and a disposition was imposed confining him to the special housing unit for three months and directing the loss of various privileges for a like period of time.¹

On August 18, 2011 petitioner was served with a notice "... that the [Gouverneur Correctional Facility] Time Allowance Committee has directed that a Formal Notice be filed and delivered to you to be considered and determined at a Time Allowance Committee Hearing on Monday, August 22, 2011 . . . before the Time Allowance Committee for the following conduct and that there may be sufficient reason not to recommend the granting of the total Good Time Allowance authorized you in accordance

¹ On October 19, 2011 - more than one month after this proceeding was commenced by filing on September 14, 2011 - the results and disposition of the Tier III Superintendent's Hearing of July 20, 2011 were affirmed on administrative appeal.

with the provisions of Title 7, NYCRR 261.4. The reason(s) which have required the facilitation of this hearing are: Since your review by the 6/11 Time Allowance Committee you received a tier three ticket for gangs which is considered a regression regarding ART [Aggression Replacement Training]. Your behavior and assignment participation indicate that you have failed to cooperate and participate with facility procedures and programs.”(Emphasis in original).

On August 25, 2011 the Gouverneur TAC recommended that all of petitioner’s potentially available good time be withheld. The stated reasons for this recommendation were as follows: “Since 6/11 TAC he [petitioner] regressed regarding ART upon receipt of a ticket for gangs. He may reapply for reconsideration after successful completion of the ART program.” The TAC recommendation was confirmed by the Superintendent of the Gouverneur Correctional Facility on August 25, 2011 and affirmed by the Commissioner’s designee on August 26, 2011. This proceeding ensued.

Even after a TAC recommendation granting an inmate a good behavior allowance is affirmed by the commissioner, or his designee, “[t]he grant of the good behavior allowance shall be contingent on the inmate’s continued good behavior, efficient and willing performance of duties assigned, and progress and achievement in an assigned treatment program.” 7 NYCRR §262.1(d). “If an inmate who has been granted a good behavior allowance subsequently acts in disregard of the statutory criteria for good behavior allowances (*i.e.*, good behavior, efficient and willing performance of duties assigned, and progress and achievement in an assigned treatment program), the superintendent may direct the time allowance committee to conduct a hearing in accordance with section 261.4 of this Title to reconsider the amount of good time to be granted.”² 7 NYCRR §263.2(b)(1).

² While there is nothing in the record to indicate that the Superintendent of the Gouverneur Correctional Facility directed the TAC to conduct the reconsideration hearing, that aspect of the hearing is not challenged in this proceeding. For what it is worth, the Court notes that the Superintendent did, in fact, confirm the recommendation of the TAC issued after the hearing was conducted.

Petitioner asserts that the Gouverneur TAC's August 22, 2011 hearing to reconsider the amount of good time to be granted was not conducted in accordance with the provisions of 7 NYCRR §261.4. More specifically, in paragraphs 7 through 10 of the petition the following is asserted:

“7. On August 22, 2011 Petitioner was seated in front of the [Time Allowance] Committee and even before he was informed to state his name for the record, the Chairman of the Committee told him that because of his [disciplinary] ticket petitioner would have to reduce [sic] the A.R.T. program to go home.

8. Petitioner was confused because the committee did not ask to hear his defense or if he had a statement to make on his own behalf. Petitioner then tried to present his defense but the Chairman of the Committee being to talk over petitioner until the point said chairman stated ‘we’re not here to reduce [sic] your hole [sic] hearing.’

9. Petitioner’s Hearing was not held in accordance with provisions of the Title 7, NYCRR 261.4 Sections (g) and (f) because Petitioner’s Hearing was predetermined, petitioner was not allowed to present a defense . . .

10. Petitioner’s Hearing was also in violation of provisions of Title 7, NYCRR 261.4 Section (f) because Petitioner’s entire file [sic] was not considered and because so petitioner’s hearing was based upon insufficient evidence.”

In his answering papers the respondent appears to confuse good behavior time allowances, authorized pursuant to Correction Law §803(1)(a), with merit time allowances, authorized pursuant to Correction Law §803(1)(d). Good behavior time allowances are applied against the term or maximum term of an inmate’s sentence and “. . . 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 duties or program assigned.” Correction Law §803(1)(a). The regulatory framework associated with good behavior time allowances is set forth in 7 NYCRR Parts 260-263. Merit time allowances, on the

other hand, are applied against the minimum periods of indeterminate sentences (Correction Law §803(1)(d)(iii)) and “. . . may be granted when an inmate successfully participates in the work and treatment program assigned pursuant to section eight hundred five of this article and when such inmate obtains a general equivalency diploma, an alcohol and substance abuse treatment certificate, a vocational trade certificate following at least six months of vocational programming or performs at least four hundred hours of service as part of a community work crew. Such allowance shall be withheld for any serious disciplinary infraction or upon a judicial determination that the person, while an inmate, commenced or continued a civil action, proceeding or claim that was found to be frivolous . . .” Correction Law §803(1)(d)(iv). The regulatory framework associated with merit time allowances is set forth in 7 NYCRR Part 280.

In the case at bar, respondent’s answering papers fail to address petitioner’s assertion that the August 22, 2011 TAC hearing, conducted to reconsider the amount of good time to be granted, did not conform with the regulatory provisions set forth in 7 NYCRR §261.4, as required pursuant to 7 NYCRR §263.2(b)(1). In this regard the Court notes that although Time Allowance Committees, established in each DOCCS facility pursuant to 7 NYCRR §261-1(a), play absolutely no role in the process in determining whether or not merit time allowances should be granted and/or whether or not previously granted merit time allowances should be revoked (*see* 7 NYCRR §280.4), a formal TAC hearing conducted pursuant to 7 NYCRR §261.4 is required under the DOCCS regulatory scheme as part of the process to reconsider the amount of good time previously granted to an inmate. *See* 7 NYCRR §263.2(b)(1).

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 or disbursements, but only to the extent that the August 26, 2011 decision of the Commissioner’s designee affirming the August 25, 2011 recommendation of the TAC at the Gouverneur Correctional

Facility that petitioner's entire one year potentially available good time be withheld is vacated and the matter remanded to the Gouverneur Correctional Facility TAC to forthwith conduct a new hearing in accordance with the provisions of 7 NYCRR §261.4; and it is further

ADJUDGED, that this judgment of the Court vacating the August 26, 2011 decision of the Commissioner's designee is stayed through February 17, 2012, pending completion of the new hearing process.

Dated: January 9, 2012 at
Indian Lake, New York

S. Peter Feldstein
Acting Justice, Supreme Court